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THE PRIVACY OF POLICE INVESTIGATIONS IN NEW ZEALAND

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Abstract

English Authority has held that the subject of a pre-charge police investigation has a reasonable expectation of privacy in relation to that information. The central reasoning in these decisions seems to focus on the stigma of the investigation and the impact on reputation and the New Zealand case Driver v Radio New Zealand is consistent with this reasoning. This essay argues New Zealand case law should not follow the English cases. The development is open to challenge due to New Zealand case law which does not treat stigma as a main factor in a privacy claim. The pre-charge, post-charge distinction is based on the stigma created by a police investigation and shows that the concern is not the privacy of the information but the potential falsity of the allegations. A distinction can be drawn between video footage and the mere fact of a police investigation, the former attracting a reasonable expectation of privacy. The fact of a police investigation however can not satisfy the reasonable expectation of privacy test because the conduct subject to the investigation is not inherently private. Finally, this essay suggests defamation and breach of confidence as the way forward to address the underlying wrongs which the police disclosure claims have been trying to address.

Key Words:

"Reasonable Expectation of Privacy", "Police Investigation", "Tort".

Contents

I Introduction

The scope of a breach of privacy claim in the context of police investigations in undefined in New Zealand. Recent English authority provides that, at pre-charge stage, there is a general reasonable expectation of privacy in relation to the fact of a police investigation.[1] There are, however, conceptual difficulties with this principle which suggest New Zealand should not follow the same route. There should be no general reasonable expectation of privacy in respect of the fact of a police investigation in New Zealand. In this essay, I consider the recent New Zealand High Court strike out decision, *Driver v Radio New Zealand*.[2] I will firstly unpack the reasonable expectation of privacy test and discuss its application in Driver. I will then discuss why the principle set out by English authorities is open to challenge. The New Zealand cases *Rogers v Television New Zealand*[3] and *Brown v Attorney-General*[4] raise questions regarding the pre-charge, post-charge distinction, and highlight a distinction between the mere fact of an investigation versus video footage. The mere fact of an investigation does not satisfy the reasonable expectation of privacy test because it is not inherently private. The English position is also open to challenge by reason of general principle, and I will discuss the underlying wrongs which claimants in police disclosure cases have been trying to address through privacy claims. These underlying wrongs can be better addressed through other causes of action, namely defamation and breach of confidence.

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[1] *Richard v British Broadcasting Corporation* [2018] EWHC 1837 (Ch), [2018] 3 WLR 1715; *ZXC v Bloomberg* [2020] EWCA Civ 611; *ZXC v Bloomberg LP* [2019] EWHC 970 (QB).
[2] *Driver v Radio New Zealand Ltd* [2019] NZHC 3275.
[3] *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277.
[4] *Brown v Attorney-General* [2006] DCR 630, [2006] NZAR 552.

II The Reasonable Expectation of Privacy Test

A The test

The tort of invasion of privacy was confirmed in New Zealand by the Court of Appeal in *Hosking v Runting*.[5] The elements which must be satisfied to establish a breach of privacy are:[6]

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

If these elements are established, the defendant may raise a defence that the publication was in the public interest.[7] The focus of this essay is the first element of the tort, the reasonable expectation of privacy enquiry.

The concern of the enquiry, as formulated in *Hosking*, is publicity given to private and personal matters.[8] The enquiry of the court is to consider whether the information concerns private facts, and whether the circumstances are such that warrant a reasonable expectation of privacy. It is a "contextual, normative enquiry".[9] *In Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[10] the High Court of Australia held private facts were those which concerned "certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved". As explained by Professor Moreham, the reference to "applying contemporary

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[5] *Hosking v Runting* [2005] 1 NZLR 1 (CA).
[6] At [117] per Gault P and Blanchard J.
[7] At [129] per Gault P and Blanchard J.
[8] At [125].
[9] Nicole Moreham "Unpacking the Reasonable Expectation of Privacy Test" (2018) 134 Law Quarterly Review 652 at 656.
[10] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199 at [42].

standards of morals and behaviour" describes the normative nature of the reasonable expectation of privacy test. The High Court in *Henderson v Walker*[11] noted Professor Moreham's argument has been approved by Winkelman CJ in an extra judicial capacity.[12] Moreham outlines English case law which demonstrate that the focus of the enquiry is whether the information should be private in the circumstances.[13] For example, in *Murray*[14] the Court of Appeal said when addressing whether the child had a reasonable expectation of privacy the court considers it "in the sense that a reasonable person in his position would feel that the photograph should not be published."[15]

Societal attitudes influence what the reasonable person would deem to have a reasonable expectation of privacy. In *Hosking*, Tipping J said "What expectations of privacy are reasonable will be a reflection of contemporary societal values".[16] In the recent case of *Peters v Bennett*, societal attitudes were reflected as a consideration in the High Court's judgment:[17]

> Most reasonable New Zealanders would regard the fact the MSD was looking into their application for a benefit or NZS as a private matter and not one that could be disclosed to the media or made public.

As noted in *Henderson*, Winkelmann CJ has recommended "when applying the reasonable expectations test, the courts establish and protect "minimum standards needed to secure the community and individual benefits of privacy.""[18] This statement can help guide the enquiry as to what should be private. Evidence of potential wrongdoing in society does not clearly

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[11] *Henderson v Walker* [2019] NZHC 2184 at [202].
[12] Helen Winkelmann, Judge of the Court of Appeal of New Zealand Sir Bruce Slane Memorial Lecture (Victoria University of Wellington, 30 October 2018) at 18–19, citing Nicole Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 LQR 651.
[13] Moreham, above n 9, at 653.
[14] *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481.
[15] At [39].
[16] At [250].
[17] *Peters v Bennett* [2020] NZHC 761 at [107].
[18] At 18–19.

fall under this standard. Information which evidences wrongdoing is not the type of information which society protects as private. It can not be said that information regarding potential wrongdoing is not the concern of society. As said by Professor Moreham, "[s]ociety does not allow people accused of such things [wrongdoing] to tell their neighbours or concerned members of the public that it is none of their business."[19]

The question the courts have failed to answer is: what makes something inherently private? It seems intuitive, but what is the reasoning underlying this intuition? As stated by Gault P and Blanchard J in *Hosking*, "[t]here is no simple test for what constitutes a private fact."[20] *Australian Broadcasting Corporation v Lenah Game Meats*,[21] was cited with approval in *Hosking v Runting*:[22]

> There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measures of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.

In *X & Y v Persons Unknown* Eady J asked whether the case involved "the sort of information which most people would reasonably expect to be able to keep to themselves".[23]

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[19] Nicole Moreham "Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private" (2019) 11 Journal of Media Law 142 at 160.
[20] At [119] per Gault P and Blanchard J.
[21] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, above n 10.
[22] *Hosking v Runting* at [119].
[23] *X & Y v Persons Unknown* [2006] EWHC 2783 (QB); [2007] E.M.L.R. 290 at [23].

We can reconcile this question with the commonly understood private matters such as "health, personal relationships or finances".[24] Furthermore, cases in New Zealand have found a reasonable expectation of privacy exists in relation to photographs of a celebrity's children,[25] private emails and documents stored on a computer,[26] and the fact of MSD looking into a benefit application.[27] These findings sit well with the examples in *Australian Broadcasting Corporation.* The similarity is found in there being no prima facie public interest in the information being known. Establishing a reasonable expectation of privacy "essentially means that the information in question belongs to an aspect of the claimant's life which is no one else's concern"[28].

There is a difference between public interest and the public being interested. The conceptual underpinnings for establishing whether something is inherently private is not the same as asking whether the public is interested in the information. If this were the case, then very few things would be private to celebrities as the public is interested in many aspects of their life. Information about a person's health is of no consequence to the public interest, neither are people's personal relationships or finances. "[29] The examples are analogous to each as there is no legitimate reason why they should be anyone else's business. Inherently, these types of information are of no consequence to anyone else. This is a part of our life where we are free to conduct ourselves without impacting other people. To become the concern of the wider community, information must pertain to the effective operation of society. When someone's conduct is causing harm, it is inhibiting society from functioning in the proper manner. Society therefore become concerned when crimes are committed. For example: the way you bring up your children is entirely your business unless you cause harm to your

[24] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, above n 10, at [42].
[25] *Hosking v Runting,* above n 5.
[26] *Henderson v Walker,* above n 11.
[27] *Peters v Bennett*, above n 17.
[28] Moreham "Unpacking the Reasonable Expectation of Privacy Test", above n 9, at 659.
[29] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, above n 10, at [42].

family. At that stage, it becomes the business of society. The way you conduct your financial affairs is your business unless you are defrauding the benefit system, then it becomes the business of society. The list in *Australian Broadcasting Corporation* is not intended to be a closed list, but the examples clearly illustrate the intuitive nature of the result when one asks the question of "whether it is the sort of information people would reasonably expect to be able to keep to themselves." The answer to this question is 'yes' when the information has a bearing on society, and thus public will have a legitimate reason to know it.

B The test as applied in Driver v Radio New Zealand

The recent case of *Driver* was an application by Radio New Zealand Ltd (RNZ) to the High Court to strike out claims in privacy and defamation. Ms Driver was arrested in India on 'cheating' charges and for being part of an illegal money circulation scheme. Subsequently, the Bangalore Police issued a statement to the media regarding the arrest. Within the week of the arrest, RNZ published a report of her arrest, which contained video footage showing Ms Driver being arrested in her hotel room. She was eventually acquitted of the charges. Ms Driver pleaded invasion of privacy regarding four matters. Firstly, in relation to the fact of her arrest and allegations of fraud against her; her passport details and residential address; the reactions of her family members to the news she had been arrested; and video footage of her reaction to being confronted with the allegations in her hotel room. Her Honour held it was reasonably arguable there was a breach of privacy concerning firstly: publication of the fact of Ms Driver's arrest, and secondly: the video footage of her being confronted in her hotel room. The other two claims were struck out. Due to differences in the Indian justice system, Clark J treated the arrest as analogous to a police investigation in New

Zealand.[30] *Driver,* therefore, raises questions about the privacy of police investigations in New Zealand.

In concluding there was arguably a reasonable expectation of privacy in relation to the fact of Ms Driver's arrest her Honour considered the circumstances of the arrest. The allegations were serious and thus a matter of public interest, however as Ms Driver did not have a high profile in society, she was not a person of public interest. Her honour considered publication of her identity was therefore arguably "unnecessary to service the public interest in the allegations against her."[31] Furthermore, her honour noted there was no evidence of operational reasons by the Indian police to identify her to the public. During her judgment, her Honour seemed to place emphasis on the stigma arising from the publication of the information as a reason which creates a reasonable expectation of privacy. Indeed, she said this could be a factor considered alongside those identified in *Murray*. For the same reasons as the first claim, her Honour was satisfied that it was also reasonably arguable there was a reasonable expectation of privacy in relation to the second claim, the video footage. Clark J noted the second claim was arguably stronger as it showed Ms Driver's actual reaction in the moment, the nature of which being intensely personal.

Later in my essay I will discuss why this does not sit well with the reasonable expectation of privacy test I set out above. Firstly, I will discuss how the reasoning of *Driver* sits with English law.

C Driver and English authorities

The reasoning in *Driver* is consistent with English authorities. The position in English law is that there is a general reasonable expectation of privacy in respect of police investigations.

[30] At [107].
[31] At [114].

The two leading cases on the subject are *Richard v British Broadcasting Corporation* and another[32] and *ZXC v Bloomberg LP*[33].

The crux of Mann J's reasoning in Richard for finding there is a general reasonable expectation of privacy in relation to police investigations was the fact of the stigma which is attached to police investigations.[34] His Honour explained that since the presumption of innocence is not properly given effect to the public is generally unable of viewing the fact of an investigation without creating an implication of guilt. This equation of suspicion with guilt can do irremediable damage to an innocent party. His Honour gave the example of a case where a Mr Jeffreys was named as a suspect in a murder inquiry and was subject to a number of accusations of guilt by the public despite another person being convicted.[35] Mann J said that due to these consequences it is generally not necessary for anyone outside the investigating force to know of the investigation. Just like in *Driver*, Mann J rejected counsel's arguments that the claims were concerning reputation which was the scope of defamation, not privacy. Both cases held reputational harm is within the scope of privacy and placed particular emphasis on stigma in their reasoning.

Nicklin J in *ZXC* Queens Bench decision (which has recently been upheld on appeal) also supported a general reasonable expectation of privacy in the fact of a police investigation. His Honour noted that public policy reflected in the College of Policing Guidelines supported his conclusion.[36] Further, the documents were highly confidential, contained sensitive information and were obtained in a breach of confidence.[37] His Honour also held that public disclosure of this type harmed the public interest due to the potential reputational

[32] *Richard v British Broadcasting Corporation and another,* above n 1.
[33] *ZXC v Bloomberg LP,* above n 1.
[34] At [248].
[35] At [241].
[36] At 512.
[37] At 512.

harm to innocent suspects, and the risk posed of jeopardising the investigation.[38] Just as in *Driver, ZXC* held that there can be compensation for hurt and distress resulting from the publication, but 'purely reputational damages' are precluded by the tort.[39] Nevertheless, there was still an emphasis on the role that stigma plays in the existence of a reasonable expectation of privacy.

Information which is private may cause reputational damage, but this is not the reason it is private.[40] Recent academic articles have argued there should not be a general reasonable expectation of privacy in respect of police investigations. In particular, Professor Moreham's article "Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private". *ZXC* has recently been upheld on appeal, and the Court of Appeal acknowledged Moreham's arguments however decided contrary to them.[41] However, stigma and the impact on reputation seems to be at the heart of both of these English decisions. This is open to challenge because we have other case law in New Zealand which does not treat stigma as a determinative/ main factor. There are underlying conceptual problems with the general rule in the English jurisdiction, and arguably other causes of action are better placed to deal with the wrongs which arise in these privacy cases.

III Why this is open to Challenge

Although *Driver* is consistent with English authorities, this is not the case with previous New Zealand cases. *Rogers, Clague*[42] and *Brown* raise questions regarding the distinction

[38] At 512.
[39] *Driver v Radio New Zealand,* above n 2 at [113]; *ZXC v Bloomberg LP,* above n 1, at [522].
[40] Moreham "Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private", above n 19, at 153.
[41] *ZXC v Bloomberg LP,* above n 1.
[42] *Clague v APN News and Media Ltd* [2012] NZHC 2898, [2013] NZAR 99.

which is prevalent in the English authorities, and regarding the underlying principles of the reasonable expectation of privacy test and how it was applied in Driver.

Rogers was a claim for breach of privacy in relation to publication of a person's previous criminal charges of which they were acquitted. The majority of the Supreme Court held Mr Rogers had no reasonable expectation of privacy in relation to video footage which showed him walking detectives through how he killed Ms Sheffield. This footage was taken after he had been charged with murder. The judges considered all surrounding circumstances in assessing whether there was a reasonable expectation of privacy. McGrath J accepted that actions and demeanour are not disqualified from being private facts.[43] However, the circumstances were such that the footage was always going to be shown in a public courtroom, thus becoming known to the public. Furthermore, there was already public knowledge of the confession. Therefore, the circumstances show the facts were not private and there was no reasonable expectation of privacy. Blanchard J went a step further and said a reasonable expectation of privacy will not exist when a person agrees to be interviewed for the purpose of a criminal investigation.[44] When doing a high level comparison between *Rogers* to *Driver*, it is difficult to reconcile that the mere fact of an arrest can have a reasonable expectation of privacy, while a video tape which casts doubts on the innocence of a man who was acquitted does not have a reasonable expectation of privacy. Neither claimant in *Rogers* or *Driver* was found to be guilty of the conduct they were investigated of, however one has a reasonable expectation of privacy in relation to the investigation while the other does not. Although the stage of the process was different, the real point of difference to take away from *Rogers* is that the media is casting aspersions about someone

[43] *Rogers v Television New Zealand*, above n 3, at [99] per McGrath J.
[44] At [48] per Blanchard J.

who has been judged as innocent by the system, which is arguably more serious and deserving of protection than a report about someone who merely had their charges dropped.

Counsel for (RNZ) in *Driver* argued that the case was analogous to *Clague.* In that case the High Court held the plaintiff, who was the principle of a high-profile private school, had no reasonable expectation of privacy in relation to an allegation that his past conduct was being investigated by the police. Clark J in *Driver* distinguished the case on the basis the plaintiff was a high-profile figure in his community, while Ms Driver was not. This reasoning relies on the general rule is that those who seek fame (have a high profile) will have a reduced expectation of privacy. However, this may not always be the case. Arguably, publication of private information will cause more harm to those with a higher profile because they have more of a reputation to lose which is an indication that the argument for privacy protection is relatively stronger for individuals with a high profile. Clark J should not have distinguished *Driver* from *Clague* on the high versus low profile basis. Ms Driver, a woman of low profile, had less to lose through the publication that she is subject to a police investigation than the high profile principle in *Clague.* There was no reasonable expectation of privacy in *Clague* and the argument for one being found in *Driver* is weaker due to Ms Driver's lower profile which indicates that there should not have been a reasonable expectation of privacy in *Driver*.

Brown was a claim for breach of privacy in relation to publication of a person's previous criminal conviction. Mr Brown was a convicted paedophile who was at high risk of reoffending. The local police published a round of flyers to the local community identifying Mr Brown as a convicted paedophile. The flyer included his name, general address, his conviction, and his photo. The District Court held there was a reasonable expectation of privacy in relation to the photograph and street address in the publication as that information was not already in the public domain. *Brown* reinforces the idea that wrongdoing is not

something that society views as private because the concern of the privacy claim was not the conviction, but the photo and street address. On first glance, it may seem to support *Driver*, but upon closer analysis we see the name and conviction were not the problem of the publication.

These cases raise questions regarding the soundness of the reasoning in *Driver* and the reasonable expectation of privacy test generally. Specifically, in relation to the distinction between pre-charge and post-charge, and the distinction between video footage and the fact of an arrest.

A Pre-Charge and Post-Charge Distinction

The main distinction in English misuse of private information is pre-charge and post-charge information. *Rogers* could be distinguished by the fact it is information post-conviction, however when we evaluate the reasoning at the heart of these cases, this distinction is immaterial.

"The police arrest many people who are never charged."[45] The main difference in pre charge and post charge information is how much suspicion there is surrounding the suspect. In New Zealand, the police have powers to arrest a person without a warrant when they have "good cause to suspect of having committed a breach of the peace or any offence punishable by imprisonment".[46] A criminal charge is a formal allegation that the individual has committed the crime. As a general premise, the police have a much higher level of suspicion regarding the individual's guilt once a person has been charged. The English courts have created this distinction due to the level of stigma created by a police investigation. Society easily associates an investigation with guilt, and the concern is the "irremediable damage to the

[45] Treacy LJ and Tugendhat J 'Contempt of Court. A Judicial Response to the Law Commission Consultation Paper No 209" at [5].
[46] Crimes Act 1961, s 315.

person's reputation".[47] in the case of innocent individuals. Due to the underlying principles in *Rogers*, I am not convinced by this distinction.

Rogers does not touch on the distinction between pre-charge, post-charge, and post-conviction when this would have been a prime opportunity to. In *Rogers*, there was no reasonable expectation of privacy because it was known there was a possibility the footage was going to be shown in a public courtroom. The footage was Mr Rogers walking the detectives through how he killed Ms Sheffield. It was a confession video taken post-charge. The Supreme Court could have taken the view that since the interview was taken post-charge, there could not have been a reasonable expectation of privacy in the information. However, the focus was not on the stage of the criminal process - instead, seems to be immaterial. The decisive factor was at the time the footage was taken; it was understood it would enter the public domain. Blanchard J held:[48]

> Anyone who agrees to be interviewed for the purpose of a criminal investigation, and in that connection elects to make a statement to the police, cannot persuasively claim to have had a reasonable expectation of privacy concerning that occasion.

Rogers also shows us stigma is not a consideration of the reasonable expectation of privacy test. At the time the footage was to be published, Mr Rogers had been acquitted and declared an innocent man. Publishing the video footage of his confession to police would cast an immense amount of doubt about the truth of his innocence, and arguably "irremediable damage to [his] reputation".[49]. Nevertheless, the Supreme Court held Mr Rogers did not have a reasonable expectation of privacy, even though the information not already in the public domain. The stigma which would be cast upon an 'innocent' man did not play into the

[47] Treacy LJ and Tugendhat J, above n 45, at [5].
[48] At [48].
[49] Treacy LJ and Tugendhat J, above n 45, at [5].

majority judges' considerations of whether he had a reasonable expectation of privacy. Regarding the doubts around Mr Roger's innocence which the video footage would inevitably raise, Blanchard and Tipping JJ merely noted anyone who asserted he was guilty would be open to a claim in defamation unless they could prove the truth of their assertion.[50] The reasoning of the majority is sound. If a person takes part in a reconstruction, it can not be said they have a reasonable expectation of privacy in relation to the footage because there is a more than remote possibility the footage will be used as evidence in a public courtroom, and would therefore no longer be private knowledge. Whether Mr Rogers was innocent, and the stigma the publication could create, has no bearing on those circumstances: the fact is the footage was destined to be shown in a public hearing.

Other New Zealand cases have also not considered the stigma the publication would cause. In *Brown*, Mr Brown was convicted on paedophile charges however, publication of this fact this was not the focus of the claim in privacy. This carries a huge stigma and would cause more hurt and distress than the publication in *Driver* as Mr Brown was trying to re-integrate himself into society. In the case of *Clague* a high school principle was held to not have a reasonable expectation of privacy in relation to an investigation into domestic abuse (pre-charge). There was no focus on the harm the stigma would cause the principle if the claims were unsubstantiated. The publications in *Rogers*, *Brown* and *Clague* were all related to serious crimes with stigma attached. The stigma was not a justification for a reasonable expectation of privacy in any of the cases, therefore the stigma associated with the publication in *Driver* does not provide a justification. Therefore, the English distinction between pre-charge and post-charge investigation need not be followed by New Zealand

[50] At [47] per Blanchard J and at [66] per Tipping J.

courts, as New Zealand cases have shown the existence of stigma is not enough reason in of itself to create a reasonable expectation of privacy.

The pre-charge, post-charge distinction speaks to the idea that police are more likely to be correct about the guilt of the suspect once they have been charged, and therefore the stigma regarding the police investigation is no longer a strong consideration as the criminal allegations are less likely to be false. The concern seems to be falsity of the allegation, rather than the private nature of the information.[51] The focus in *Driver* was on Ms Driver's low profile, and a lack of reason to identify her to the public. Due to the charges being dropped and the stigma she would thereby unjustly face, the Court considered there were not convincing reasons in favour of publication which outweighed the harm caused by the stigma. *Rogers* does not reconcile with this reasoning in *Driver. Rogers* shows us the focus needs to be on whether the information is inherently private, and whether the circumstances lead to a reasonable expectation of privacy. If a man who was found to be innocent does not have a reasonable expectation of privacy regarding footage which makes him look guilty, then it can not be said that Ms Driver can have a reasonable expectation of privacy in relation to something which carries far less stigma, merely because the stage of the process was a pre-charge investigation.

Brown shows us that there is no reasonable expectation of privacy in relation to wrongdoing generally. There was no reasonable expectation of privacy in relation to the conviction, just his photo and address. Therefore, if Ms Driver had been charged and convicted of the alleged crimes, there likely would have been a different outcome in *Driver.*

[51] Jacob Rowbottom "Reporting police investigations, privacy rights and social stigma: *Richard v BBC*" (2019) 11 JML 115 at 124.

B Mere fact of an investigation versus video footage.

No matter what we conclude regarding whether the fact of a pre-charge investigation has a reasonable expectation of privacy, there is certainly a distinction to be drawn regarding video footage of pre-charge investigations. Clark J in *Driver* identified this distinction when her Honour noted that even if Ms Driver had no reasonable expectation of privacy in relation to the fact of her arrest, she may still have a reasonable expectation of privacy in relation to the video footage of her arrest.

Visual images expose more intimate details about a person than a mere statement. McGrath J in *Rogers* said:[52]

> It is well recognised that, in general, photographic images may contain significantly more information than textual description. This is especially so with sequential images on a videotape which will often portray graphically intimate and personal details of someone's personality and demeanour.

The nature of visual images is therefore very different to the mere statement of a fact of an investigation, and claimants may have a reasonable expectation of privacy in relation to them.

Visual images however will not always carry a reasonable expectation of privacy, and *Rogers* and *Brown* are useful cases to show when images will or will not have a reasonable expectation of privacy. When information is an integral part of a police investigation, there can be no reasonable expectation of privacy in the information. However, mere peripheral information can be subject to a reasonable expectation of privacy.

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[52] At [101].

The European Court of Human Rights has made a similar distinction in *Von Hannover v Germany*.[53] The absence of the photographs' contribution to a debate of general interest was held to be the decisive factor for six of the judges in balancing privacy and freedom of expression interests

Information which is an integral part of a police investigation will be an important contribution to public debates regarding the crime. This was highlighted in the judgment in *Rogers*. Tipping J said:[54]

> I do not consider that legitimate public debate about the admissibility ruling and the circumstances of the case generally can take place effectively without the public being fully informed by access to the video itself.

In *Rogers*, the video footage was an integral part of the investigation. Therefore, Mr Rogers could not have a reasonable expectation of privacy in respect of the video footage. In *Brown,* the District Court held information regarding the place of residence and photo of Mr Brown did have a reasonable expectation of privacy. There was no reasonable expectation of privacy in relation to the publication connecting his name with the crime. This was because the fact of the crime itself was not private, however his place of residence and photo were information not already in the public domain.

Both *Rogers* and *Brown* show that there is no reasonable expectation of privacy in the fact of an investigation whether there is conviction or acquittal. These two cases can be used to draw a distinction between information which is an integral part of a police investigation and peripheral information. Peripheral information, information which is not related to the investigation, can have a reasonable expectation of privacy, while integral information does not. Mr Brown's place of residence and photo were not part of the police investigation, while

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[53] *Von Hannover v Germany* [2004] 6 WLUK 538; [2004] E.M.L.R 21.
[54] At [72] per Tipping J.

the fact of the conviction was linked, and Mr Roger's confession was also part of the investigation. Therefore, there is no reasonable expectation of privacy regarding the fact of the investigation into Ms Driver, but there could be regarding the video footage as it was not materially part of the investigation. The purpose of the footage of Ms Driver was more similar to that of the photo of Mr Brown than the footage of Mr Rogers.

C The Reasonable Expectation of Privacy Test is not Satisfied

Taking a step outside of these distinctions and back to the reasonable expectation of privacy test itself, the reasoning in *Driver* justifying a reasonable expectation of privacy is hard to reconcile with the test I have set out earlier in this essay. The fact of a police investigation is not inherently private, nor "the sort of information which most people would reasonably expect to be able to keep to themselves."[55] This is because the nature of a police investigation precludes it from being a private fact. The police have a reason to think that the suspect is causing harm, and when an individual is engaging in harmful behaviour that becomes the business of society. As explained earlier, a fact is not private merely because the individual wants to keep the information to themselves.

The nature of a police investigation means it can not be a private fact. A police investigation is about investigating past or present conduct which may uncover wrongdoing. Potential wrongdoing is of concern to the public for a multitude of reasons. Individuals have a need for security, open justice, the ability to monitor societal morality. Wrongdoing affects other people in society merely by the fact they are a part of that society, thus the fact of a police investigation is of concern to the public. So, since conduct which is the subject of a police investigation is wrongdoing and causing harm to society – it can not be a private fact. For example, if the police are investigating someone manufacturing meth in their home – this is

[55] *X & Y v Persons Unknown* [2006] EWHC 2783 (QB); [2007] E.M.L.R. 290 at [23].

clearly of concern to the public as meth causes great harm to communities. The interests of open justice, and general societal morality and interest in wrongdoing create a public interest in the information.

Societal attitudes show the fact of a police investigation should not have a reasonable expectation of privacy. Clark J noted that there was a public interest in the fact of Ms Driver's arrest because it was serious offending, however as she was not of a high profile her privacy interests could be protected. It is established that individuals who seek fame may have a lowered expectation of privacy,[56] however Clark J placed too much weight on Ms Driver's profile. The finding of a reasonable expectation of privacy, despite the public interest, portrays the idea that society has less of an interest in the wrongdoing of an ordinary member of the public than a person with a high profile. Further, this suggests that wrongdoing by an ordinary person does less harm to society. Both ideas are untrue portrayals of societal attitudes. One way through which society disincentivises crime is by casting judgment on those who are seen to be wrongdoing. This tool of society does not discriminate between those with a high or low profile.

Furthermore, society does not see police investigations as private because societal reactions to such things are needed for society to regulate itself. One of the ways it does this is through persona non grata. Society casts a judgment on individuals whose actions do not align with societal values and shuns them. Stigma is created by police investigations however this stigma is a useful tool of society to regulate wrongdoing, it is part of the punishment. We should not protect individuals who receive stigma for wrongdoings. The concern here is that individuals will be wrongfully stigmatised when they are innocent. However, this did not play into the concern of the judges in *Rogers*. For this reason, the fact of a police

[56] *Hosking v Runting,* above n 5, at [121].

investigation is not the sort of information people would reasonably expect to be able to keep to themselves.

D Principle – the underlying wrongs claimants are trying to address

This section addresses the underlying wrongs which claimants are trying to address with a privacy claim for publication of the fact of a police investigation. Privacy is not the appropriate tort for addressing the harm which claimants seek to reconcile with claims regarding publication of the fact they are a subject of a police investigation. The underlying reasons why individuals bring such a claim are twofold. Firstly, the claimant does not want people to think they are a criminal. Secondly, a state authority took information off them by compulsion and misused that information. These underlying wrongs can be better addressed by the torts of defamation and breach of confidence, respectively.

1 Defamation

The real problem at the heart of the police investigation publication cases is the stigma created by the publication. As already discussed, this stigma can cause immense damage to the subject's reputation. The harm is sourced not in the fact that the subject has been investigated by the police, but the assumption of guilt which is associated with it. The focus on this stigma in recent police investigation cases has blurred the line between defamation and privacy. Defamation is the more natural place to deal with these claims as it is where the law addresses false allegations which cause reputational damage.

Privacy and defamation have a close relationship which is discussed in many cases. The intermingling of the two torts is "real and substantial".[57] The heart of both torts is human dignity, but they protect them in different ways. For a privacy claim, the true intention needs

[57] Ursula Cheer "Divining the dignity torts: a possible future for defamation and privacy" in Andrew T. Kenyon *Comparative Defamation and Privacy Law* (Cambridge University Press, Cambridge, 2016) 309 at 310.

to be to protect privacy, not reputation.[58] That is where the difficulty arises with claims regarding publication of the fact of a police investigation. Professor Ursula Cheer refers to "'complex damaging speech' claims – cases where both reputational and privacy interests appear to have been breached and need to be untangled."[59] Police investigation claims fall into this category. Often, it seems that the claimant is trying to protect their reputation, rather than their privacy. In *Terry v Persons Unknown*,[60] the claimant was a footballer seeking to prevent publication of an article regarding his extra-martial affair. The privacy claim failed because the court held the claim was based on an attempt to protect his reputation rather than his private life.

The stigma created by the reporting of the police investigation was at the forefront of the Court's decision in *Richard*.[61] This emphasis on social stigma "blurs one of the distinctions between privacy and defamation".[62] Professor Rowbottom argues this emphasis may have the consequence of conflating privacy with defamation law.[63] This is problematic, as described above, the two torts have different purposes, and while reputation can be protected indirectly in a privacy claim, *Richard* has brought it to the forefront. Moreham argues that information should not be treated as private simply because its revelation has a detrimental impact on the claimant's reputation.[64] Privacy can only protect reputation incidentally when private information effects the claimant's reputation. The information is protected because "the information in question belongs to an aspect of the claimant's life which is no one else's

[58] Ursula Cheer, above n 57, at 313.
[59] At 310.
[60] *Terry v Persons Unknown* [2010] EWHC 119 (QB); [2010] EMLR 16.
[61] *Richard v British Broadcasting Corporation,* above n 1, at [248].
[62] Jacob Rowbottom, above n 51, at 124.
[63] At 124.
[64] Nicole Moreham "Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private", above n 19, at 149.

concern".[65] Moreham notes it is unclear how the fact of an investigation belongs to "intimate spheres of life" as I analysed earlier in this essay.

Once we say that the fact of a police investigation is private, circumstances will be caught in this scope which we do not want to catch. For example, if the victim decides to publish the fact that someone who has harmed them is now subject to a police investigation this may be held to be a breach of privacy. Dealing with this problem through the tort of privacy assumes the innocence of the person – because if the person is guilty, then it is unlikely a court would find they have a reasonable expectation of privacy in relation to the conduct because conduct which is harmful is the concern of society. If the subject causes harm, then their privacy is not something society wants to protect. These claims therefore are possibly awarding damages to the perpetrators of crimes and allowing them to keep the suspicion about their wrongdoing secret. As I touched on earlier, the concern is the falsity of the allegation, rather than the private nature of the information.[66] We do not want innocent people being slurred, but equally we do not want to allow criminals to keep their wrongdoing secret. Defamation can account for the innocence of the party.

In *Driver,* Clark J provided the distinction between defamation and privacy lies in the relative truth and falsity of the information. In privacy, "reputational harm (and resultant distress) occurs because of its truth."[67] Defamation, on the other hand, seeks to give a remedy for harm caused by publication of false information. The contention is that fact of a police investigation is true, therefore no claim can lie in defamation as the defence of truth will be available to the defendant. Therefore, privacy must intervene to fill this gap in the law. This need not be the case. When deriving the meaning of the publication for the

[65] At 156.
[66] Jacob Rowbottom, above n 51, at 124.
[67] *Driver v Radio New Zealand*, above n 2, at [113].

purposes of a defamation claim, the test is what the ordinary, reasonable person would interpret the publication to mean in the circumstances.[68] Much case law speaks to the fact that the harm in these cases is the assumption of guilt which the publications cause.[69] The sting of the publication is not the truth of the investigation, but the equation of suspicion with guilt. The wrong that many claimants are trying to address with these breach of privacy claims is that they have been made to look like a criminal, their reputation has been lowered in the eyes of others. As the sting of the publication as the implication of guilt, the publication of police investigations can be within the scope of defamation. The defence of truth will not be a barrier to a claim where the subject of the police investigation is innocent, or where there is insufficient evidence to prove guilt. Thus, the concern that these publications will lead to innocent individuals being wrongly labelled a criminal can be addressed via defamation.

A further reason why these situations should not be dealt with through privacy, is that *Times Newspapers Ltd v Flood*[70] provides protection against a defamation claim for media outlets. The UKSC held if the publication is in the public interest this can be a defence to a defamation claim. By allowing a claim in privacy, the courts are allowing claimants to circumvent this protection in *Flood.* Rather than uncomfortably circumventing defamation using a tort which does not address the underlying wrong of the situation, a solution should instead be found in defamation rather than privacy. The cases are about reputational harm therefore defamation is the area of law which is best placed to address this wrong.

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[68] *Charleston v News Group Newspapers* [1995] 2 AC 65; [1995] 2 All ER 313 at 71 per Lord Bridge.
[69] *Richard v British Broadcasting Corporation,* above n 1, at [248]; *Khuja v Times Newspapers Ltd* [2019] AC 161 at [32]; *PNM v Times Newspapers Ltd* [2014] EWCA Civ 1132 at [41]; *Driver v Radio New Zealand,* above n 2, at [109].
[70] *Times Newspapers Ltd v Flood* [2012] UKSC 11.

2 Breach of Confidence

The second underlying wrong which claimants seek to address in an action for breach of privacy relating to publication of the fact of a police investigation is that a state authority took information off them and misused that information. The focus of the breach of confidence tort makes this cause of action much more applicable to address this wrong than a claim in privacy.

In a recent article, Professor Moreham has argued a more targeted action for breach of confidence is a better way of addressing the wrongful disclosure of police information than the general principle in *Richard* and *ZXC*.[71] The breach of confidence tort is closely related to the privacy tort: the privacy tort developed out of breach of confidence. While privacy focusses on the nature of the information published, the focus in a claim for breach of confidence is the context in which the information was imparted. As Moreham discusses, it is this distinction which makes a claim in breach of confidence more appropriate than a claim in privacy to deal with publication of the fact of police investigation.[72] The problem in police disclosure cases is that the police wrongfully allowed this information to get to the media. A breach of confidence claim places the two parts central to the wrong at the forefront of the claim: the relationship of state and citizen, and the context of a police investigation.[73]

Moreham argues "the "Marcell principle" in breach of confidence provides a more targeted … avenue for redress."[74] The Marcell principle was derived from the English Court of Appeal case of *Marcel v Commissioner of Police of the Metropolis*, and provides that where

[71] N A Moreham "Police Investigations, Privacy and the Marcel Principle in Breach of Confidence" (2020) JML.
[72] At 2.
[73] At 3.
[74] At 5.

information is obtained by exercise of a legal power, the recipient will owe a duty to "treat the documents and the contents as confidential, save to the extent that it might use them for purposes contemplated by the relevant legislation."[75] The Marcel principle has been recently affirmed in the United Kingdom Supreme Court.[76]

Unless the police have operational reasons for releasing information regarding an investigation, there will be an actionable claim in breach of confidence as the police would have used the information for purposes outside that which it was gathered for (the investigation). Furthermore, *Attorney General v Guardian Newspapers Ltd (No 2)* shows the Marcel principle can extend liability to media outlets who obtain information from the police.[77]

In *Brown*, while the Court did not deal with the breach of confidence claim in detail, the Judge held the claim would be made out.[78] The main reasoning was that the photograph was taken in circumstances where it was understood it would only be used for legitimate Police purposes. Furthermore, since Police resources were used to identify Mr Brown's address there is an expectation the address would not be made public without good cause, or within the principle of community policing.

In *Rogers*, Elias CJ noted the circumstances in which the video footage came into the hands of TVNZ. A copy of the police video was given by an Inspector to TVNZ. Her Honour noted that "the video would seem to have been confidential information in the hands of the police" and that "some explanation for the action seems necessary if it is to be reconciled with the Police Regulations 1992".[79] The Police Regulations her Honour subsequently refers to

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[75] *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 at 262.
[76] *R (on the application of Media Holdings) v Commissioners for Her Majesty's Revenue and Customs* [2016] UKSC 54.
[77] *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 268.
[78] *Brown v Attorney General,* above n 4, at [97].
[79] *Rogers v Television New Zealand,* above n 3, at [15].

reflect the Marcel principle. Elias CJ goes on to note that "the proposed broadcast could arguably be restrained as a breach of confidence, at least by the police and probably Mr Rogers."[80] Due to the preliminary stage of the proceedings there was a lack of evidence to substantiate any such claim, however the circumstances as described show that Mr Rogers may have had a chance at succeeding on a breach of confidence claim by virtue of the Marcel principle.

If the plaintiff's complaint is that the police are giving out their information which was obtained by compulsion, then breach of confidence is a good way to address this wrong. This tort looks to the relationship between the parties and the circumstances under which the information was gathered which is directly relevant to the underlying wrong complained of.

IV Conclusion

There should not be a reasonable expectation of privacy in the fact of a police investigation. The pre-charge versus post-charge distinction is based on the stigma created by a police investigation, however the stigma created by information does not indicate whether that information is private. Video footage regarding a police investigation can be distinguished from the mere fact of an investigation. Visual images expose more intimate detail, and if such information is not integral to the police investigation or important to public debate, then it can carry a reasonable expectation of privacy. The fact of a police investigation however is not inherently private, it is not analogous to other things considered private such as finances or sexual relationships, and it is not something which can be said to not be the concern of society. The underlying wrongs which police disclosure privacy claims have been trying to address would be better addressed through alternative causes of action. Firstly, the

[80] *Rogers v Television New Zealand,* above n 3, at [16].

claimant does not want society to view them as a criminal. This wrong is better addressed by the tort of defamation. The sting lies not in the fact of the police investigation, but in the assumption of guilt which inevitably accompanies the investigation. Rather than circumvent defamation through the tort of privacy, defamation should evolve to accommodate these types of claims. Secondly, claimants are trying to address the fact the information has been collected by a state authority and used for purposes outside the purpose for which it was collected. This underlying wrong engages breach of confidence as this tort focusses on the context of the disclosure and the relationship of the parties. These questions and conceptual problems show that New Zealand should not follow English authority: there should not be a reasonable expectation of privacy in the fact of a police investigation.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7741 words.

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