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TOWARDS A SINGULAR TORT OF PRIVACY: ARE THE JUSTIFICATIONS FOR SEPARATE PRIVACY TORTS EVAPORATING?

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Abstract

The New Zealand common law has been hesitant to recognise the multifaceted nature of modern privacy invasions. In an attempt to maintain certainty and conceptual clarity, the courts have developed two privacy actions. These torts protect distinct types of wrongful conduct and different privacy interests, despite sharing almost identical analytical requirements. However, the categorisation of privacy actions seems increasingly artificial when scrutinised against their purpose. In practice, both informational and physical privacy interests may be relevant to a singular claim. Furthermore, in light of recent developments to the publicity requirement, the wrongful conduct distinguishing between the actions have brought the torts to near alignment. Privacy interests should instead be seen on a spectrum, whereby all aspects of a plaintiff's claim are treated with fluidity. This paper argues the existence of separate torts is not only illogical and prevents fluidity, but will inhibit the common law from recognising the complexity of emerging privacy threats. If the privacy framework is to adapt to the modern world, discussions of a singular tort ought to be re-ignited. This paper examines where courts are already embracing a normatively loaded action, and how the analytical tools currently deployed by courts to contain the torts can be transferred to a singular tort. By configuring these analytical tools, a singular tort can re-invigorate the privacy framework without the accompanying fears of an amorphous action initially feared.

Keywords: *'Privacy', 'Tort', 'Intrusion Upon Seclusion', 'Wrongful Publication of Private Facts', 'Singular Tort of Privacy'.*

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I Introduction

Discussion of a singular common law tort of privacy has floated around for decades but never picked up any real traction by senior courts.[1] In New Zealand, the privacy framework consists of two separate and overlapping torts: the tort of wrongful publication of private facts, and the tort of intrusion upon seclusion. Conceptually, these are categorised as attacking distinctly different wrongful conduct and privacy interests. However, the Court of Appeal has recently noted their willingness to cover a broad spectrum of privacy invasions by confirming limited disclosures can be actionable under the publicity tort.[2] This development exposes the question of whether the privacy categories are being upheld by the torts in practice, and if it is time to re-evaluate the possibility of a singular tort of privacy?

Part II provides an overview of the torts and why courts find it desirable to keep them distinct. Despite sharing key structural characteristics and analytical tools, the categorical approach is seen as necessary to contain the inherently ambiguous notion of privacy. However, Part III questions whether the existence of separate privacy torts can be justified in light of modern privacy jurisprudence. By viewing privacy interests on a spectrum, and acknowledging the overlapping privacy interests at stake, the boundaries separating the torts seem increasingly artificial. This reveals issues of fluidity within the privacy framework where it would be desirable.

Lastly, Part IV examines three options for how the tort can develop. First, it discusses why expanding the boundaries of each tort, and maintaining the categorical approach, will lead to incoherent jurisprudence. Second, it explores how certainty can be derived from a general tort of privacy, and why fears of containment may be overstated. The final option can be conceptualised as a middle-ground, whereby the two actions are merged. It seeks to

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[1] See *Grosse v Purvis* [2003] QDC 151 at [144]; and Chris Hunt and Nikta Shirazian "Canada's Statutory Privacy Torts in Commonwealth Perspective" (2016) Oxford U Comparative L Forum 3 at <ouclf.law.ox.ac>, after note 24; and *Australia Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; see also *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 at [18] per Lord Hoffman; and *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [110].

[2] *Hyndman v Walker* [2021] NZCA 25 at [50].

derive lessons from the former options and encourage courts to re-evaluate the plausibility of a singular tort.

II Why the torts are kept separate

A Overview of the privacy framework

Protecting an individual's zone of privacy is not only imperative to human dignity and autonomy, but essential within a civilised society.[3] The New Zealand common law distinguishes between the torts of wrongful publication to private facts (publicity tort) and intrusion upon seclusion (intrusion tort). This section provides an overview of how these torts interact to provide relief for two broad categories of privacy invasion. Interestingly, they are driven by essentially the same normative structural elements. Nonetheless, descriptive requirements are seen as necessary to categorise the actions, creating clear prescriptive boundaries for when the courts will intervene.

1 Publicity tort

The publicity tort was established by the Court of Appeal in *Hosking v Runting*.[4] The Court recognised the need for a specific privacy tort to "protect against the publication of private information where that is harmful and is not outweighed by public interest or freedom of expression values".[5] In *Hosking*, it was held not to be an invasion of privacy where the celebrity's children were photographed and published in a magazine.[6]

The tort is generally seen as protecting informational privacy, recognising the individual's choice to control information about themselves.[7] An individual's privacy is therefore infringed to the extent that information is passed on to others against that individual's

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[3] *Brooker v Police* [2007] 3 NZLR 91 at [123]; and *C v Holland* [2012] NZHC 2155 at [86]; and *Campbell v MGN Ltd* [2004] UKHL 22 at [50] per Lord Nicholls; and *Hosking v Runting*, above n 1, at [239] per Tipping J; and *Hyndman v Walker*, above n 2, at [31].
[4] *Hosking v Runting*, above n 1, at [117].
[5] At [7].
[6] At [163].
[7] Nicole Moreham "A Conceptual Framework for the New Zealand Tort of Intrusion" (2016) 47 VUWLR 283 at 294.

wishes.[8] Gault and Blanchard JJ provided a two-staged test, coupled with a public interest defence.[9] The circumstances giving rise to an actionable invasion of privacy are:[10]

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

This paper will refer to the first limb as the *reasonable expectation of privacy* (REP) test. It involves a normative inquiry into whether the plaintiff can reasonably expect to have their privacy protected in the circumstances.[11] This is an inherently contextual assessment based on societal norms.[12] Reference is frequently given to the England and Wales Court of Appeal decision of *Murray v Express Newspapers plc* by New Zealand courts when explaining the operation of the REP test. Sir Anthony Clarke MR explained:[13]

> As we see it, the question of whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the Claimant, the nature of the activity in which the Claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the Claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.

This paper will refer to the second limb as the *highly offensive* (HO) test. The test was included by Gault and Blanchard JJ to ensure the tort is only concerned with "publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned".[14]

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[8] William Parent "Privacy, Morality, and the Law" (1983) 12(4) Philosophy and Public Affairs 269 at 269.
[9] *Hosking v Runting*, above n 1, at [117].
[10] At [117].
[11] Nicole Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 LQR 651; and *Henderson v Walker* [2021] 2 NZLR 630 (HC) at [202].
[12] Nicole Moreham "Abandoning the Highly Offensive Test" (2018) 4 CJCCL 1 at 17.
[13] *Murray v Express Newspapers plc* [2008] EWCA Civ 446 at [36]; and *Hyndman v Walker,* above n 2, at [66]; and *Peters v Attorney General (on behalf of Ministry of Social Development)* [202] NZCA 355 at [109].
[14] *Hosking v Runting,* above n 1, at [126].

Elsewhere, introduction of the test has been subject to extensive criticism, and expressly rejected by the House of Lords in *Campbell*.[15] Nonetheless, the HO test remains part of the New Zealand privacy framework.

2 Intrusion tort

The intrusion tort was established by Whata J in *C v Holland*.[16] The action was brought after the plaintiff discovered her boyfriend's flatmate had been recording her showering and storing the videos on a laptop. In absence of any publication, the plaintiff's circumstances did not fall under the *Hosking* tort. Thus, Whata J thought it necessary to establish an action which recognises intrusions into the "victim's private space or affairs", even where no disclosure has occurred.[17]

The tort is often seen as protecting spatial or physical privacy.[18] Having a private space for retreat is central to the autonomy of individuals and protects the areas where deeply intimate aspects of oneself are otherwise vulnerable.[19] The elements of the action are:[20]

a) An intentional and unauthorised intrusion;
b) Into seclusion (namely intimate personal activity, space or affairs);
c) Involving infringement of a reasonable expectation of privacy; and
d) That is highly offensive to a reasonable person

In *C v Holland,* Whata J provided little guidance when applying the new framework, leaving it uncertain as to exactly how the tort will operate.[21] Although, it is generally accepted the plaintiff's REP involves a "subjective expectation of solitude or seclusion, and for this expectation to be objectively reasonable".[22] Whata J took guidance from

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[15] *Campbell v MGN Ltd,* above n 3, at [22] per Lord Nicholls; see also Moreham, above n 12.
[16] *C v Holland*, above n 3, at [94].
[17] Stephen Todd "Tortious Intrusions upon Solitude and Seclusion" (2015) 27 SAcLJ 731 at 744.
[18] *C v Holland,* above n 3, at [87].
[19] *Campbell v MGN Ltd,* above n 3, at [12].
[20] *C v Holland,* above n 3, at [94].
[21] At [99].
[22] At [17].

Canada, where factors guiding the HO limb include: "the degree of intrusion, the context, conduct and circumstances of the intrusion, the tortfeasor's motives and objectives and the expectations of those who's privacy is invaded".[23]

B Use of normative and descriptive terms

The publicity and intrusion torts recognise privacy interests through a combination of descriptive and normative terms. Descriptive terms identify a *state or condition* where privacy exists and certain conduct or circumstances that may infringe on that state of privacy.[24] Normative terms are moral obligations and standards that ask whether the circumstances *should* give rise to privacy protection.[25] Analytically, the torts driven by the same normative assessments: whether the plaintiff was entitled to a REP, and the defendant's conduct was HO to the reasonable person. However, the descriptive terms act as a gateway to each action, creating what this paper refers to as the *categorical approach*.

1 Descriptive terms

The publication tort is descriptive in that it addresses the particular mischief of disclosing private material.[26] The intrusion tort is descriptive in requiring any intrusion to be upon sensory experiences.[27] These descriptive terms provide the primary difference between the torts. They enable the courts to take an approach, as put by Brennan J in *Sutherland Shire Council v Heyman,* that ensures the law develops "incrementally and by analogy with established categories".[28]

In this way, descriptive requirements establish clear categories by making each tort address "particular, defined [privacy] interests", and the wrongful conduct that intrudes upon those

[23] *Jones v Tsige* [2012] ONCA 32, (2012) 108 OR (3d) 241 at [58].
[24] Adam Moore "Defining Privacy" (2008) 39(3) Journal of Social Philosophy 411 at 412-413; for discussion of descriptive framework of privacy, see Daniel Solove "A Taxonomy of Privacy" (2006) 154(3) University of Pennsylvania Law Review 477 at 484.
[25] Moore, above n 24, at 413.
[26] *Hosking v Runting,* above n 1, at [117].
[27] *Graham v R* [2015] NZCA 568 at [26].
[28] *Sutherland v Shire Council v Heyman and Another* [1985] 60 ALR 1 (HCA) at 43.

interests.[29] The intrusion tort deals with the conduct of intrusions into sensory experiences, and recognises physical privacy interests.[30] The publication tort deals with the conduct of disclosures of private material, and recognises informational privacy interests.[31] Consequently, this also presumes a link between the wrongful conduct and privacy interest at stake. Penk and Tobin noted:[32]

> …territorial, or spatial or local, privacy is conceptually different form information or data privacy. The two claims, although often related, are better addressed by separate torts.

Furthermore, descriptive requirements function as a *gateway*, either barring claims that fall outside the conceptual boundaries or determining which tort should deal with the complaint. For example, the descriptive requirements of the publicity tort bar all claims not dealing with disclosures. The descriptive requirements of the intrusion tort ensure the tort only considers circumstances relating to plaintiff's state of seclusion being intruded upon. Thus, where a plaintiff has been subject to an intrusion and publication, both torts will need to be argued if the plaintiff's full circumstances are to be considered.[33]

2 Normative terms

Whilst there are distinct descriptive differences, the normative terms driving the torts are essentially the same. This is reflected in the strikingly similar structural elements intended by Whata J when formulating the intrusion tort, noting it as a "logical extension or adjunct" to the publication tort formed in *Hosking*.[34] Asher J articulated the two common elements in *Faesenkloet v Jenkin*:[35]

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[29] Paula Giliker "A Common Law Tort of Privacy? The challenges of developing a human rights tort" (2019) 27 SALJ 761 at 774.

[30] *C v Holland*, above n 3, at [87]; and *Brooker v Police*, above n 3, at [124].

[31] Moreham, above n 7, at 294.

[32] Stephen Penk and Rosemary Tobin "The New Zealand Tort of Invasion of Privacy: Future Directions" (2011) 19 TLJ 191 at 204.

[33] Thomas Levy McKenzie "The New Intrusion Tort: The News Media Exposed?" (2014) 45 VUWLR 79 at 101.

[34] *C v Holland,* above n 3, at [86].

[35] *Faesenkloet v Jenkin* [2014] NZHC 1637 at [38].

1) Existence of facts or circumstances in respect of which there is a reasonable expectation of privacy; and
2) Publicity of, or intention and unauthorised intrusion into, those private facts or circumstances that would be considered highly offensive to an objective reasonable person.

These normative elements function as the primary analytical tools used by courts. Under both torts, whether a situation of privacy was infringed is ultimately dependent on the defendant justifying their conduct in light of societal expectations and reactions to the circumstances in question.[36] Whata J even noted the torts "logically attack the same underlying wrong, namely unwanted intrusion into a reasonable expectation of privacy".[37] Consequently, the REP tests operate in the same manner.

The operation of the HO tests differs slightly. Under the publicity tort, it is the *publicity* of which must be HO to the reasonable person.[38] Conversely, Whata J's judgment in *C v Holland* suggests a more contextual approach is taken under the intrusion tort.[39] Therefore, whilst almost any relevant factor will be considered in assessing offensiveness under the intrusion tort, the publicity tort will only consider the effect of the publicity. This unalignment is perhaps merely due to the poor treatment of the HO limb by Courts. Furthermore, given its widespread criticism, the HO test is far from solidified in New Zealand privacy law.[40]

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[36] Jonathan Mintz "The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain" (1996) 55(2) Maryland Law Review 425 at 439.
[37] *C v Holland,* above n 3, at [75].
[38] *Hosking v Runting*, above n 1, at [127]; see also Robert Post "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77(5) California Law Review 957.
[39] See *C v Holland*, above n 3, at [93].
[40] Moreham, above n 12, at 14.

C Justifications for the categorical approach

1 Definitional issues

The above illustrated how the torts are driven by essentially the same normative assessments. It must then be asked, what justifications are there for the categorical approach? Why the fear of a singular tort of privacy when the only distinguishing feature is the presence of publication?

One of the stronger justifications for keeping the intrusion and publicity torts separate is that a singular tort can create definitional issues.[41] Consequently, what would be covered by the tort is uncertain because there is no universally accepted definition of privacy.[42] By addressing privacy in distinct categories, there are clear boundaries for when the courts may intervene. Whata J, when framing the intrusion tort, expressed his preference for a prescriptive approach.[43] Lisa Austin describes this as "containment anxiety", an effort to contain the tort in fears of an ambiguous and amorphous action.[44]

This definitional difficulty should not be understated. Privacy can be informational, spatial, and even physical. It has also been "variously conceptualised as a right, an interest, an area of life, a psychological state and a form of control".[45] Penk and Tobin argue that in absence of a universally agreed definition, any attempt to consolidate the multifaceted privacy concerns in a single tort is likely to be futile.[46] A formulation would be either lengthy and confusing, or so generalised it would be incapable of sound application.

This concern has been reflected by Courts such as *Wainwright* when expressing distrust in any high-level principle of privacy.[47] In *Wainwright,* Lord Hoffman drew a distinction

[41] See Penk and Tobin, above n 32, at 212.
[42] Moore, above n 24, at 411; and Solove, above n 24, at 477.
[43] *C v Holland*, above n 3, at [97].
[44] Lisa Austin "Privacy and Private Law: The Dilemma of Justification" (2010) 55 McGill LJ 165 at 165.
[45] Jillian Caldwell "Protecting Privacy Post *Lenah*: Should the Courts Establish a New Tort or Develop Breach of Confidence" (2003) 26(1) UNSW Law Journal 90 at 93.
[46] Penk and Tobin, above n 32, at 212.
[47] *Wainwright and another v Home Office,* above n 1, at [35].

between privacy as a principle of law in itself, and as an underlying value.[48] Privacy was thought to be incapable of finding a sufficient definition to be applied as a specific rule and should instead be seen as an underlying principle.[49] Too general a tort could create an action for almost any undesirable conduct with privacy as an underlying interest. In *Wainwright,* this was the unnecessary and invasive, albeit non-actionable, strip search by prison officers. The Court preferred any gaps in the law to instead be covered by existing causes of action such as defamation, breach of confidence, trespass, or battery.[50]

2 Clear development of privacy principles

In a practical sense, the lack of definition could undermine one of the key functions of the common law to provide a set of rules and values society ought to live by.[51] Daniel Solove sees "privacy" as a broad umbrella term.[52] Whilst it can be helpful in some cases, it can also result in the conflation of different privacy issues, distracting policymakers and courts from addressing the particular problem before them.[53] Roderick Bagshaw questions whether the function of the common law to regulate behaviour can be achieved by a singular cause of action which simply balances competing rights.[54] Such a contextual assessment will be difficult for individuals to find this balance. For example, the threat of litigation using such an ambiguous action could be detrimental to the key role investigative journalism plays in society.[55] The news media run a fine line between justified or actionable conduct, and the desire for certainty is understandable. By distinguishing between the torts, courts can establish clear rules and principles when individuals engage

[48] At [18].
[49] At [18].
[50] At [18].
[51] Peter Cane *The Anatomy of Tort Law* (Hart Publishing, Oxford, 1997).
[52] Solove, above n 24, at 486.
[53] At 486.
[54] Giliker, above n 29, at 783 citing Roderick Bagshaw "Tort Design and Human Rights Thinking" in *The Impact of the UK Human Rights Act on Private Law* (David Hoffman ed) (Cambridge University Press, Cambridge, 2011) at 128.
[55] Moreham, above n 7, at 293.

in the different conduct. A singular tort would thus undermine the stability currently offered by the legal position.[56] Penk and Tobin have noted:[57]

> Intrusions and disclosures are different concepts, and it would be confusing to press every privacy case involving intrusion into seclusion or solitude into a tort having at its foundation unwarranted exposure of information about the private lives of individuals.

In *Shulman*, the Court illustrated this desire to keep the values derived from each tort separate.[58] The defendant was a news media company who recorded the aftermath of a car accident the plaintiffs were involved in. Subsequently, the defendant published the audio recording and video tape on television. Actions were brought in respect of the intrusion and publicity tort. Interestingly, the plaintiff was successful in the former but not the latter.[59] Presumably, the Court was trying to keep separate the principles developed by each tort in accordance with the distinct wrongful conduct.

This line of reasoning is supported by Robert Post.[60] Post argues that each tort guides different social standards.[61] The intrusion tort focuses on spatial territories and the dyadic relationship between the plaintiff and defendant.[62] In *Shulman*, that was between the news media company and the plaintiff. The judgement acknowledged the plaintiff's privacy was infringed when someone surreptitiously recorded the plaintiff in an intimate moment without their consent.[63] The publicity tort controls the flow of information within the triadic relationship between the plaintiff, defendant, and third-party recipients.[64] Thus, the triadic relationship requires an additional layer of analysis characterised as a tension

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[56] Giliker, above n 29, at 774.
[57] Penk and Tobin, above n 32, at 209.
[58] *Shulman v Group W Productions Inc* 955 P 2d 469 (Cal 1998).
[59] At 497.
[60] Post, above n 38.
[61] At 986.
[62] At 986.
[63] *Shulman v Group W Productions Inc,* above n 55, at 490.
[64] Post, above n 38, at 986.

between the plaintiff's right to privacy, and the defendant's freedom of expression. In *Shulman*, the third-party public's interest in the information supressed the plaintiff's right to privacy.[65] Therefore, the categorical approach enables the different social standards to be addressed by a specific stream of jurisprudence, enhancing clarity in the law.

III Dismantling the categorical approach

In *Faesenkloet*, Asher J noted "it is far from clear there needs to be different torts".[66] However, no comment was given to whether departing from the status quo was necessary. This section attempts to do just that. It argues the existence of separate torts cannot be justified on the proposition that they address completely different privacy interests, and substantially different conduct. Thus, the function of descriptive requirements to categorise privacy actions is becoming increasingly artificial. Firstly, the actions cannot be distinguished on the basis they protect different privacy interests. There is an infinite variety of how both informational and physical privacy harms may be triggered in a single action. Secondly, in light of *Henderson v Walker,* the boundaries of distinct wrongful conduct are moving closer together. Now, just a singular publication can trigger a different tort. Courts should instead see privacy interests on a spectrum, where fluidity between the torts is desirable.

A Overlapping privacy interests

This section highlights the illogicality of holding strong to the categorical approach by showing why the privacy interests, which in theory are categorised, overlap in practice. The distinction between informational and physical privacy is useful but once broken down, should not justify the separation of privacy torts.[67]

Professor Moreham usefully describes the torts as only "loosely" following the informational and physical privacy interest distinction.[68] The publicity tort is typically

[65] *Shulman v Group W Productions Inc,* above n 55, at 497.
[66] *Faesenkloet v Jenkin*, above n 34, at [38].
[67] Hunt and Shirazian, above n 1, after note 25.
[68] Moreham, above n 7, at 294.

equated with protecting informational privacy because it deals with communication. When disclosure is of text or speech, this presumption may well be appropriate. However, technology has allowed for the seamless communication of sensory experiences. Disclosures of private material may take form as a photo, video, or audio recording. In these circumstances, it is too narrow to categorise the privacy interests as purely informational. The following examples of disclosures using a photo, video and audio recording illustrate this misconception:

1) A doctor sharing a story about a patient with a strange body deformity at a dinner party can be categorised as informational harm. However, the privacy interest would also be physical if accompanied with a photo. The photo will communicate a sensory experience, the plaintiff, in a state they wished not to share to anyone except the doctor.

2) Suppose the defendant in *C v Holland* who secretly recorded the plaintiff showing also shared the videos with a friend.[69] It would be strange to say the privacy interests changed from physical to informational once the video was disclosed, or that a separate stream of jurisprudence applies. In both scenarios, the complaint is that the plaintiff was exposed in an intimate state of seclusion.

3) An eavesdropper who writes an article detailing an argument of a celebrity couple in their home can be categorised as informational harm. However, if that argument was surreptitiously recorded, and the article was accompanied with the audio file, it would be described as a physical privacy interest. The intimate moment inside the couples' home can now be experienced and scrutinised by the public at large.

In all these circumstances, the impact of the photo or recording device introduces a key physical element to the disclosure. To categorise the privacy interests as informational

[69] *C v Holland* at [2].

would be to ignore a "major objection" of the complaint.[70] Furthermore, to deal with the issue through a different tort would be artificial and based off the presumption that publication of private material causes only informational harm.

The intrusion tort is typically seen as protecting physical privacy.[71] This may take form of a wrongdoer surreptitiously viewing someone in a state of seclusion or searching through the things kept in a private space. For example, when a wrongdoer reads someone's diary, there is a sense of indignity we feel regardless of the information conveyed. However, this should not discredit the role the intrusion tort has in protecting informational privacy. The things we keep in our private spaces often hold information we wish others not to come across. Examples include the information kept in our bedroom draws, diaries, or wallets.

Hunt has recognised the fluidity between physical and informational privacy in practice suggests it is not sensible to have distinct torts.[72] To categorise the harm caused by the intruder obtaining material as different to the harm caused by disclosure adds little analytical value to the question of whether the plaintiff is entitled to privacy protection. As Professor Moreham explained, a person who surreptitiously records a video of a women giving birth will obtain medical information and capture a very intimate sensory experience.[73] Focusing on either the information conveyed, or the physical aspect, would "only tell half the story".[74]

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[70] Raymond Wacks *Personal Information: Privacy and the Law* (Oxford University Press, Oxford,1989) at 248.
[71] Moreham, above n 7, at 294.
[72] Chris Hunt "Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal's Decision in *Jones v Tsige*" (2012) 37 Queens LJ 665 at 673.
[73] Nicole Moreham "Beyond Information: Physical Privacy in English Law" (2014) 73 CLJ 1 at 5.
[74] At 5.

B Lack of fluidity

1 The need for fluidity in light of Henderson v Walker

The Court of Appeal has recently affirmed a significant development made in the High Court of *Henderson v Walker*.[75] In *Henderson*, a liquidator shared the personal documents held on a company director's laptop to the Official Assignee.[76] These included family photographs, business emails, and personal emails relating to "marital breakdowns, health, weight loss, and fitness".[77] Under *Hosking*, the claim would not have been actionable, as Gault and Blanchard preferred to restrict the action to widespread publicity.[78] However, *Henderson* and subsequent Courts have confirmed the tort may be established by disclosure to a limited or small class of persons.[79]

Prior to *Henderson*, the notion of fluidity was less relevant because it was easier to conceptually distinguish between the wrongful conduct at the heart of each tort. A plaintiff could either establish an intrusion upon their seclusion or bring an action under the publicity tort if they were subject to a widespread disclosure. *Henderson* was by no means an indication to favour a singular tort of privacy, but it did show a willingness of the courts to capture a continuum of scenarios under the privacy framework. The intrusion tort applies to situations with no disclosures and the publication tort now covers situations of limited or widespread disclosures.

This paper argues privacy interests should be seen on a spectrum, where the two types of privacy invasion operate with fluidity. The privacy categories made sense at the time *Hosking* and *C v Holland* were decided, but in light of *Henderson*, it is questionable whether they are being upheld. Given the overlap of physical and informational privacy

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[75] *Hyndman v Walker,* above n 2, at [50] affirming *Henderson v Walker,* above, n 11.
[76] *Henderson v Walker,* above, n 11.
[77] At [41].
[78] *Hosking v Runting,* above n 1, at [125].
[79] *Henderson v Walker*, above n 11, at [216]; and *Hyndman v Walker,* above n 2, at [50]; and *Peters v Attorney General*, above n 13, at [118].

interests, the spectrum of misconduct now covered, and the strikingly similar structural elements, holding tightly to the categorical approach seems artificial.

Fluidity refers to the need for the plaintiff's circumstances to be considered in an appropriate manner, without obstruction of unnecessary structural barriers. The following section outlines why the current use of descriptive requirements as a gateway to the torts prevent fluidity. They inappropriately break up privacy complaints despite being driven by the same normative assessments and the potential circumstances giving rise to a separate tort being as little as a disclosure to a singular individual.

2 Why the categorical approach prevents fluidity

Once privacy interests are seen on a spectrum, issues of fluidity are exposed. Despite sharing structural elements, descriptive terms work to prevent some contextual factors from being considered under each tort. The intrusion and publication are treated separately, even if the wrongdoer had a singular objective. A plaintiff subject to both an intrusion and subsequent disclosure would thus have to bring forward both actions or meet the requirements of one tort without their circumstances considered as a whole.[80] This hinders fluidity by artificially isolating the invasion of privacy to distinct moments in time. Thus, rather than working as aggravating factors to strengthen a claim, the existence of separate torts creates structural barriers.

The High Court judgment of *Andrews* can illustrate how the plaintiffs' action may have been weakened by the existence of separate torts.[81] Whilst being a publicity action, conceptually, it could have been argued through the intrusion tort.[82] The plaintiffs were filmed and recorded in the aftermath of a car accident which was then broadcasted on national television.[83] In addition to the publicity, the complaints were also of the surreptitious filming, recording and photographing. The intrusion tort was not argued because *C v Holland* had yet to be heard. However, the success of the intrusion tort is

[80] McKenzie, above n 33 at 101.

[81] *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC).

[82] Todd, above n 17, at 755.

[83] *Andrews v Television New Zealand Ltd*, above n 81, at [3].

questionable given the existence of subsequent publication would not be considered in establishing its elements. Thus, the tort lacks fluidity by requiring the plaintiff to show they were entitled to a REP, and the infringement of that was HO, without relying on the existence of disclosure. In *Andrews*, the plaintiffs would have had to show the recording in and of itself was actionable, ignoring the fact it was broadcast on national television.

Under the publicity tort, fluidity is recognised in the assessment of REP, but not HO. In *Andrews*, this meant the plaintiffs were not successful under the publicity tort despite findings of a REP.[84] The REP limb illustrates fluidity by treating the test as a broad and contextual assessment. In *Murray*, one of the factors guiding the test is the "circumstances of which, and purposes the information came into the hands of the defendant".[85] Thus, the effect of an intrusion can be considered in the REP limb of the publicity tort. In *Andrews*, weight was placed on the intrusive means of filming and recording the plaintiffs where they could reasonably have expected their privacy to be respected.[86] Thus, by considering the intrusion and publication in this limb, the plaintiffs were not limited by structural barriers.

The plaintiffs' claim failed when they had to prove the effect of the *publication* was HO.[87] Some commentators have argued this illustrates a need to abandon the HO test.[88] This paper views the issue in terms of fluidity. Fluidity is hindered because the HO test narrowly focuses on the effect of the publication, ignoring other factors that ought to be relevant. Previous cases suggest the tort does not directly consider the offensiveness of a prior intrusion.[89] Furthermore, cases have suggested the plaintiff needs to experience feelings of humiliation or shame that is not required under the intrusion tort.[90] The plaintiffs' success under the fluid REP test illustrates how fluidity could have changed the judgment. Rather

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[84] At [67].
[85] At [36].
[86] At [65].
[87] At [68].
[88] See Moreham, above n 12.
[89] See *Hosking v Runting,* above n 1, at [126]; and *Andrews v Television New Zealand Ltd*, above n 75, at [48].
[90] Tim Bain "The Wrong Tort in the Right Place: Avenues for the Development of Civil Privacy Protections in New Zealand" (2016) 22 Canterbury Law Review 297 at 317.

than the intrusion strengthening the plaintiff's claim, as it did under the REP limb, the HO test created an additional hurdle by narrowly focusing on the effect of the publicity. In *Andrews*, the assessment of HO was concentrated on whether the plaintiffs were broadcast in a bad light.[91] The judgment has been criticised for ignoring factors such as the failure to obtain consent and notify the plaintiffs prior to the broadcast.[92] If the HO test enabled a more contextual approach that captured the offensiveness of an intrusion, perhaps the deserving plaintiffs in *Andrews* would have received a favourable judgment.

Therefore, in cases of an intrusion and publication, the existence of a disclosure may not assist the plaintiff under the intrusion tort. Alternatively, if the action is brought under the publicity tort, the offensiveness of the intrusion may not be considered under the HO test.

C A fluid defence

Whilst this paper is directed towards liability, the notion of fluidity also extends to defences. When viewing privacy interests on a spectrum, it makes sense for the torts to have aligning defences. Prior to *Henderson,* the publicity tort's public interest defence was understandable because the action was only concerned with claims of widespread disclosure. Thus, the courts generally ask whether the disclosed information was "newsworthy".[93] However, the concept of public interest does not fit well with limited disclosures. In *Peters v Attorney-General*, the Court noted that in light of *Henderson*, the defence would need to be reframed to "encompass the scenario where there is a disclosure of *private* information, and a legitimate *private* concern in relation to that information".[94]

The Court stated such a defence could operate with analogy to that of qualified privilege in the defamation tort.[95] A person will be justified in making disclosures where they have an "interest or duty, legal, social or moral, to make it to the person to whom it is made, and

[91] *Andrews v Television New Zealand Ltd*, above n 75, at [67].
[92] At [69]-[70]; for criticism see Moreham, above n 12, at 25.
[93] Bain, above n 90, at 323.
[94] *Peters v Attorney General*, above n 13, at [119].
[95] At [120].

the person to whom it is made has a corresponding interest or duty to receive it".[96] The occupation of privilege will not be protected where it can be established the defendant was motivated by ill will or took improper advantage of the occasion.[97]

Whilst not discussed in *Peters*, this concept can apply to the spectrum of privacy interests now covered under the privacy framework. In the event of widespread publicity, notions of reciprocal duties can be extended to the public at large, such as was done in the tort of defamation in England and Wales.[98] This can also apply to intrusions without subsequent publication. In *C v Holland,* it was suggested the defence would ask whether the public had an interest in any information obtained.[99] However, like the publicity tort, there ought to be situations where an intrusion is justified without the matter being in the public interest. Instead, a singular tort, dealing with a claim without disclosure, could ask whether the defendant's infringement of privacy was justified by any "interest or duty, legal, social or moral".[100] The exception of ill-will or improper advantage would be of particular relevance. Therefore, it is plausible that a singular coherent defence could operate across a spectrum of privacy claims.

IV Options for a fluid tort

The remainder of this paper will examine three ways in which the tort can move forward. First, this paper argues why expanding the boundaries of the privacy categories will lead to further confusion and will not adequately deal with new emerging privacy threats. The paper then considers what form a singular tort of privacy could take. It seeks to derive which characteristics of a general tort of privacy are already present, and whether the concerns of certainty are overstated. Lastly, this paper shows why descriptive terms can still have a role in a singular tort. Whilst not providing a precise formulation, the section attempts to show how a re-configuration of the descriptive and normative terms can create a workable singular tort.

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[96] At [120].

[97] At [120].

[98] *Reynolds v Times Newspapers Ltd and Others* [1999] UKHL 45.

[99] Moreham, above n 7, at 301.

[100] *Peters v Attorney General*, above n 13, at [120].

A Expanding the existing privacy categories

A natural expansion of the privacy categories may allow for new kinds of claims to be captured under the privacy framework but will not address the issues discussed in Part III. The primary reason to maintain the categorical approach rests on the notion that distinct streams of jurisprudence are necessary to develop clear privacy principles and social guidelines.[101] However, this paper argues the existence of separate torts leads to inconsistent principles, and that nuanced privacy issues require a re-invigorated approach currently limited by the role of descriptive requirements.

1 Discordant privacy principles

The existence of separate and overlapping torts has contributed to "discordant [privacy] principles".[102] They have developed differing conceptions of privacy based on the type of wrongful conduct, despite courts accepting they address the same underlying interests. For example, Tim Bain has noted that by "choosing publication of facts as the primary wrong, it downplays the role of autonomy and elevates reputational concerns".[103] It does this by "perpetuating" the notion that privacy is grounded in the secrecy of information.[104] The intrusion tort recognises spatial privacy but separates this from subsequent uses of any obtained information. A useful quote by Tim Bain supports a singular stream of privacy jurisprudence:[105]

> "Bodily privacy, informational privacy, spatial privacy, privacy of attention, and communications privacy are all founded on a desire to restrict public access to specific elements of an individual's life. Recognising the interconnectedness of these different aspects of privacy allows them to be treated more coherently."

Where coherent privacy principles have developed, they often apply to both torts, illustrating why separate torts are not needed for clear jurisprudence. Whata J in *C v*

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[101] See Penk and Tobin, above n 32, at 212.
[102] Hunt, above n 72, at 673; see also Hunt and Shirazian, above n 1, after note 25.
[103] Bain, above n 90, at 325.
[104] At 322.
[105] At 324.

Holland even noted the "boundaries of the privacy tort articulated in *Hosking* apply where relevant".[106] Such principles include those relating to the location of an intrusion, whether the individual was a public figure and what information is of "newsworthiness". This reflects the notion that the torts address the same underlying interests of autonomy and dignity. The difference is merely what conduct caused the invasion.

Furthermore, distinguishing between types of conduct isolates breaches of privacy to a specific moment in time. Whilst this may support principled development within each siloed tort, it can have the opposite result when viewed as a contribution to the overall privacy framework. This is particularly relevant in situations where an intrusion is followed by disclosure. For example, the effect of *Shulman* was that the defendant committed an actionable wrong in obtaining the information but was justified in disclosing it.[107] This provides a confusing statement of law,[108] inconsistent with its function of guiding social norms. The true mischief of the defendant was to obtain private information through intrusive means and publish it to the wider public. However, we are left unsure as to whether the defendants' behaviour was actually justified. If the actions were merged, the incidents of intrusion and disclosure would be treated together. This may result in clearer privacy principles by reflecting the wrongdoer's singular motive in the legal response.

To break up invasions and disclosures also takes the common law out of sync with other New Zealand privacy laws such as surveillance and harassment. For example, s 3 of the Harassment Act provides that harassment must be a "pattern of behaviour".[109] Under s 3(2)(a), the conduct can be "the same type of specified act on each separate occasion, or different types of specified acts".[110] Treating an intrusion and publication as "different types of specified acts" supports the notion that they can form part of the same wrong. Furthermore, Skoien J in *Grosse* expressed his preference for a tort of privacy to cover

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[106] *C v Holland*, above n 3, at [96].
[107] *Shulman v Group W Productions Inc,* above n 58, at 200.
[108] McKenzie, above n 33, at 101.
[109] Harassment Act 1997, s 3.
[110] Section 3(2)(a).

such conduct and regarded harassment as "merely an aggravated form of invasion of privacy".[111]

2 Flexibility to deal with nuanced privacy interests

New Zealand's privacy categories reflect two of Prosser's influential four privacy torts,[112] followed in the United States.[113] Prosser's categories have been criticised as fossilizing the law and eliminating its capacity to adapt to new privacy problems.[114] Courts hold strong to a narrow conception of what each tort addresses and the common law has consequently "struggled in recognising more nuanced understandings of privacy in terms of levels of accessibility of information".[115] Currently, where the law does protect privacy outside of the specific categories of intrusion upon seclusion and publication of private material, it is incidental. However, this paper argues it would make little sense to simply expand the boundaries of the existing privacy torts. Doing so would cause further blurring of the privacy categories and make any distinction between the torts increasingly artificial.

A common observation is that the privacy torts are not well-suited to deal with modern technology.[116] In Canada, Sharpe J recognised that "internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information" and this needs to be weighed against the privacy risks that "cry out for a remedy".[117] In *Jones v Tsige*, that was the frequent and unconsented accessing of an individual's banking information for personal reasons.[118] Abril argues this issue arises because the torts are grounded in conceptions of privacy in relation to physical

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[111] *Grosse v Purvis,* above n 1, at [451].
[112] *Hosking v Runting*, above n 1, at [68]; see also *C v Holland,* above n 3, at [12].
[113] William Prosser "Privacy" (1960) 48 California Law Review 383 at 389; and American Law Institute *Restatement of Torts* (2nd ed, St Paul, Minnesota, 1977) § 652A [*Restatement*].
[114] Daniel Solove "Prosser's Privacy Law: A Mixed Legacy" (2010) 98 California Law Review 1887 at 1904.
[115] At 1920.
[116] Danielle Citron "Mainstreaming Privacy Torts" (2010) 98 California Law Review 1805 at 1809.
[117] *Jones v Tsige,* above n 23, at [67]-[69], per Sharpe J.
[118] At [4].

space.[119] Where privacy is non-sensory, particularly in the online sphere, a flexible approach to privacy complaints is desirable.

Professor Moreham has discussed these issues in relation to hacking.[120] Hacking "which involves the intrusion of a telephone or video call" or, that reveals intimate images or recordings, could fall into the intrusion tort.[121] However, if the hacking reveals something non-sensory in nature, such as the content of an email, the claim would fall outside its conceptual boundaries.[122] The obstacle seems to arise with the reference to *seclusion*. In *Graham v R*, Fogarty J commented that "seclusion as a concept…. connotates an invasion of physical privacy, impinging on personal autonomy".[123] Thus, the court was hesitant to interpret "seclusion" as including the looking into the appellants phone and personal data.[124]

Furthermore, the publicity tort does not capture ill-intentioned uses of material that is not a disclosure. An example articulated by Richard Parker is of the astronaut in space with all their bodily functions monitored.[125] An abuse of the intimately detailed data profile may not be actionable. Yet, there are persuasive grounds to allow a privacy tort to capture unauthorised uses of private information outside publication. As Daniel Solove argues, privacy "involves more than avoiding disclosure; it also involves the individual's ability to ensure that personal information is used for the purpose she desires".[126]

These issues could be somewhat dealt with by loosening the boundaries of each privacy category. For example, the concept of *seclusion* could extend to *private affairs* and the

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[119] Patricia Abril "Recasting Privacy Torts in a Spaceless World" (2007) 21 Harvard Journal of Law and Technology 1 at 12.
[120] Moreham, above n 7, at 299.
[121] At 299.
[122] At 299.
[123] At 299 citing *Graham v R*, above n 27, at [26].
[124] *Graham v R,* above n 27, at [26].
[125] Richard Parker "A Definition of Privacy" (1974) 27(2) Rutgers Law Review 274 at 281.
[126] Daniel Solove "Conceptualizing Privacy" (2002) 90 California Law Review 1087 at 1108.

publicity tort could be expanded to include *misuse of information*.[127] However, this does not support the flexibility called for in this paper. There remain issues of fluidity from artificially breaking up the act of hacking and subsequent misuse. Furthermore, this would exacerbate the already overlapping privacy categories.

3 Letting go of the categorical approach

Fluidity is unlikely to be achieved whilst holding strong to the categorical approach. This paper suggests a singular tort can re-invigorate the privacy framework, enabling a more expansive understanding of emerging privacy issues.[128] It would support a more contextual approach to privacy without the restriction of descriptive barriers imposed by the privacy categories.

The normative tools currently driving the torts are capable of adapting to a fluid action. Hunt and Shirazain noted the REP inquiry considers privacy rights to exist on a spectrum and the strength of any claim depends conceptually on the totality of the circumstances.[129] A plaintiff subject to an intrusion and publication should have their claim treated as a singular wrong with the disclosure working as an exacerbating factor.[130] A singular tort, for example, could ask whether, in light of all the circumstances, the plaintiff should be entitled to have their privacy respected. Harms sourced from both intrusions and publication will contribute to the same claim. Similarly, the HO requirement would take a contextual approach, looking to whether the situation as a whole was offensive to the ordinary person. Thus, the plaintiff's claim would not be weakened by separating the incidents of intrusion and publication.

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[127] For examples using the framing of "private affairs" instead of "seclusion", see Australian Law Report Commission (ALRC Discussion Paper 80, March 2014) at 66; and *Jones v Tsige,* above n 23, at [70]; for example of applying "misuse of private information" tort to phone hacking, see *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch).
[128] Citron, above n 116, at 1851.
[129] Hunt Shirazian, above n 1, after note 188.
[130] Andrew McClurg "Bringing Privacy out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73 NCL Review 989 at 107; see also McKenzie, above n 33, at 102.

B Towards a singular tort: lessons from a general tort of privacy

The following sections consider the plausibility of a singular action by first examining what lessons can be derived from a general tort of privacy. A general tort would mean largely abandoning descriptive requirements and their function as a definitional anchor. Instead, the tort would be almost entirely contained and guided by application of normative terms. This section does not see a general tort as an end-goal but seeks to highlight why courts are already relying less on concrete descriptive requirements, and that a re-invigorated privacy tort should not shy away from normatively loaded assessments.

1 Current ambiguity in the torts

Within the categories of privacy interests currently recognised, there exists a significant potential for the torts to infringe on fundamental rights. The publicity tort has the potential to infringe on the highly valued freedom of speech.[131] The intrusion tort, whilst thought to be "articulated in such a way as to maintain coherence",[132] arguably contains a large degree of ambiguity.[133] It challenges the autonomy of individuals to look, listen, touch, and experience the world. For example, in the United States, the structurally analogous tort has been used to protect against sexual harassment in the workplace.[134]

It is questionable whether descriptive terms are necessary in preventing infringements on these fundamental values. Presumably, if definitional uncertainty was to create chaos, it already would have done so. In practice, courts are equipped to balance competing interests in the circumstances and are cautious of making developments in a factual vacuum.[135] In *Hosking*, Blanchard and Gault JJ even stated:[136]

[131] *Hosking v Runting*, above n 1, at [112].
[132] *C v Holland,* above n 3, at [92].
[133] Todd, above n 17, at 14.
[134] Moreham, above n 7, at 292; see, for example, *Phillips v Smalley Maintenance Services Inc* 435 So 2d 705 (Ala 1983) at 711.
[135] *Peters v Attorney General*, above n 13, at [115].
[136] *Hosking v Runting*, above n 1, at [116]; also note this practice is common under the New Zealand Bill of Rights Act 1990, s 5: "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

> "Just as a balance appropriate to contemporary values has been struck in the law as it relates to defamation, trade secrets, censorship and suppression powers in the criminal and family fields, so the competing interests must be accommodated in respect of personal and private information."

International actions show this task can be successful in regards to a general privacy tort.[137] For example, in British Colombia, the statutory tort provides: "It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another".[138] The tort provides a "sweeping right of privacy and left it to the courts to define the contours of that right",[139] determined by what is "reasonable in the circumstances".[140]

2 Finding certainty in normative terms

Whilst a test grounded in reasonableness will lack an exhaustive definition of privacy, Bloustein argues this is not "an indication of a failure of thought or of an inadequate theory of liability. It is merely a reflection of the complexity and variety of the circumstances" privacy can be invaded.[141] As Gligorijevic points out, "definitional ambiguity is inherent in sundry torts".[142] Actions such as battery, assault and false imprisonment all have notions of reasonableness at their heart.[143] In *Brooker*, Thomas J stated that arguments against a general tort of privacy which focus on the ever-developing nature of the action and its uncertain boundaries, are taking a "parochial" view.[144] She then expressed:[145]

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[137] See comments by Thomas J in *Brooker v Police*, above n 3, at [226].
[138] Privacy Act RSBC c 373, s 1(1).
[139] *Jones v Tsige,* above n 23, at [54].
[140] Privacy Act RSBC c 373, s 1(2).
[141] Edward Bloustein "Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?" (1967) 46 Texas Law Review 611 at 615.
[142] Jelena Gligorijevic "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABV c Lenah Game Meats*" (2021) 44(2) UNSW Law Journal 673 at 696.
[143] At 696.
[144] *Brooker v Police,* above n 3, at [226].
[145] At [226].

> Sight has apparently been lost of the fact that, however broad and diverse the concept of privacy and the values underlying privacy, it is the circumstances of an individual case which will serve to identify the value in issue and delimit the scope of the right in the particular circumstances. Indeed, this process occurs whenever abstract rights are applied in concrete situations.

The courts primary focus should be to provide a workable framework to address privacy complaints. Jillian Caldwell noted that "definitional uncertainties may largely be avoided if the essential *interests* giving rise to privacy claims are identified".[146] This paper argues the central interests of autonomy and dignity can be identified through application of the REP test. Consequently, a growing body of case law will develop predictability and a clearer understanding of privacy.

Courts commonly take a factor-based approach to the REP test. However, a distinction must be made between descriptive terms that serve as a concrete rule, and descriptive factors that merely indicate an invasion of privacy. The former function as a gateway to the tort, preventing a claim where certain descriptive circumstances arise. Patricia Abril notes descriptive privacy principles in this form are "intellectual shortcuts" courts use as benchmarks of privacy in their analysis of concepts such as secrecy, space, subject matter and location.[147] Hunt describes them as "fraught and overly simplistic empirical distinctions".[148] Over time, these have had a decreasing influence because they do not account for the inherently contextual nature of a privacy invasion.

This trend seems to arise naturally through application of the normative REP test and recognition of the fundamental interests at the heart of privacy. For example, this can be illustrated by the *Henderson* judgement's relaxation of descriptive requirements regarding the nature of publication. It was not until cases of limited disclosures reached the higher courts that it was established there was no principled basis to restrict the tort to widespread

[146] Caldwell, above n 45, at 93.
[147] Abril, above n 119, at 4.
[148] Hunt, above n 72, at 683.

publicity.[149] Rather, a limited disclosure will merely make it harder to meet the two analytical limbs of the tort.[150] Similarly, a locational approach to privacy describes the locations where a plaintiff will not be entitled to privacy protection. That was even seen in the High Court of *Hosking*.[151] The Court placed weight on the fact that the photographs were taken in public and thus did not reveal any private information.[152] Courts have since rejected this approach, instead treating descriptive indicators of privacy as matters of fact and degree.[153]

This illustrates a shift in judicial thinking. Not only are the courts confident the tort could be adequately contained by the REP and HO limbs, but privacy interests are better served without viewing descriptive factors as gateway requirements. Instead, descriptive factors should serve as "readily understandable guidance" about what is generally regarded as private.[154] From caselaw, Professor Moreham derived where courts have attempted to categorise activities or information that strongly indicate an expectation of privacy such as sexual activity and the intimate details of personal relationships.[155] Other factors are less indicative, but commonly applied by courts such as location and the way in which material is stored or communicated.[156] When accompanied with a careful explanation of their applicability to a set of circumstances, Moreham notes the use of privacy factors can provide considerable value.[157]

Furthermore, scholars have commonly argued that certainty can be improved with more principled approaches to the REP test grounded in notions of privacy signals, or control

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[149] *Peters v Attorney General*, above n 13, at [117].
[150] *Henderson v Walker,* above n 11, at [217].
[151] *Hosking v Runting* [2003] 3 NZLR 385 (HC).
[152] At [137]; note this is also the view of Prosser, followed in United States jurisprudence, see Prosser, above n 112, at 394-395.
[153] *Faesenkloet v Jenkin*, above n 35, at [37]; and for discussion of the distinction between private and public facts see *Television New Zealand Ltd v Rodgers* [2008] 2 NZLR 277 (SC) at [50]-[59].
[154] Moreham, above n 11, at 659.
[155] At 659.
[156] At 665-674.
[157] At 660.

and access.[158] These provide clear conceptual rationale for the factor-based approach commonly deployed by courts.[159] For example, under a privacy signals, or "barriers", approach, an individual will experience privacy where they create or rely on social barriers that indicate they wish to be let alone.[160] Altman suggests there are three types of privacy barriers: physical, behavioural, and normative.[161] Physical and behavioural barriers can be erected to signal subjective privacy, whereas normative barriers recognise social norms that indicate privacy.[162] An unreasonable disregard for these barriers will be actionable. This approach conceptualises privacy without dependence on descriptive terms, the nature of privacy interest (physical or informational), or a specific type of wrongful conduct by the defendant (intrusion or publication).

The inherently contextual and normatively loaded assessments discussed in this section should be central to any re-invigoration of the privacy torts. They allow a flexible assessment of privacy claims without necessarily lacking predictability or clear conceptual frameworks.

C Towards a singular tort: re-configuring the role of descriptive terms

A singular action does not need to reflect the general tort feared in *Wainwright*. Instead, this section examines a third option whereby the function of descriptive and normative requirements can be re-configurated to provide a more plausible singular action. Descriptive requirements may have a role in a singular tort without functioning as a gateway to distinct privacy categories. First, as discussed in detail above, they can be used as analytical tools by indicating whether the normative elements are met. Courts will naturally categorise situations that are generally regarded as private, and by explaining their applicability to the particular case, useful guidance will start to emerge. Secondly, they can

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[158] See Kirsty Hughes "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012) 75(5) The Modern Law Review 806 at 812; and Moreham, above n 141; see also Jae Kim "The Case for Reform: A Right to (Access-Based) Privacy in the New Zealand Bill of Rights of Act 1990" (2019) 6 PILJNZ 137 at 149.

[159] Moreham, above n 11, at 9.

[160] Hughes, above n 158, at 812.

[161] At 812.

[162] At 813.

establish the boundaries of a singular tort. The purpose of this is to allow the scope of the action to develop incrementally and ensure the tort does not upset New Zealand's unique legal landscape.

An example of this second function can be seen by the Australian Law Reform Commission's recommendation of a "hybrid" statutory action that fuses together the intrusion and publication torts.[163] The first element uses descriptive terms to set the boundaries of the action:[164]

a) Intrusion upon the plaintiff's seclusion or private affairs (including unlawful surveillance); or
b) Misuse or disclosure of private information about the plaintiff (whether true or not).

These descriptive requirements ensure the boundaries are not as broad as a general tort, but wide enough to capture threats caused by emerging technologies at the heart of the report.[165] The REP test is then used as the primary analytical tool for the statutory tort.[166]

The function of normative terms will slightly change by virtue of the REP and HO tests covering all aspects of a privacy claim, provided they fall within the descriptive boundaries. An example of how this may operate was provided earlier in Part IV.[167] This paper noted the normative analytical tools can largely be applied in the same manner, not presenting too drastic a change for courts. In some respects, courts are already doing this. Under the

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[163] Australian Law Report Commission, above n 127, at 66; note the similarities to the singular tort proposed by Skoien J in *Grosse v Pruvis*, above n 1, at [444], where the essential requirements would be: a) a willed act by the defendant, b) which intrudes upon the privacy or seclusion of the plaintiff, c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities, d) and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.
[164] Australian Law Report Commission, above n 127, at 66.
[165] At 19.
[166] At 87.
[167] See heading "Letting go of the categorical approach".

publicity tort, the REP considers the effect of both intrusions and disclosures.[168] Furthermore, where clear privacy principles have emerged, they often apply to both torts. The task will also be assisted by the first function of descriptive terms, building certainty into the normative assessments as a body of case law develops.

Thus, re-configuring the functions of normative and descriptive terms can be a logical step in the direction towards a re-invigorated privacy framework. It provides flexibility to grapple with unforeseen privacy problems,[169] whilst allowing courts to incrementally broaden the scope of the action.

V Conclusion

The inherently nebulous characteristics of privacy have led to courts finding certainty where they can. Consequently, a categorical approach to privacy was thought to be necessary. This paper first provided a case for why the existence of distinct torts is no longer justified. Given the spectrum of claims covered under the privacy framework, and overlapping interests, the need for distinct torts is far from clear. *Henderson* also illustrated a shift in judicial treatment of descriptive and normative requirements. Loosening the descriptive boundaries shows the courts are more confident in letting normative assessments contain the torts. However, continuing to expand the tort boundaries will limit the privacy framework when faced with threats from emerging technologies.

This paper argues a departure from the categorical approach is needed. Rather than descriptive terms acting as a gateway to distinct privacy categories, they can set the boundaries for a singular tort. Furthermore, descriptive indicators of privacy create considerable value in retaining certainty in the contextual REP test. By re-configuring the place of descriptive and normative terms, a singular tort of privacy can provide an important step towards a robust privacy framework.

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[168] *Murray v Express Newspapers plc*, above n 13, at [36].

[169] Hunt and Shirazian, above n 1, after note 29.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 8,128 words.

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