The Case for Negligence as the Mental Element of an Australian Statutory Privacy Tort

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This article explores the appropriate mental element of a future statutory Australian privacy tort. While the Attorney-General's Department proposed in its recent Privacy Act Review a new statutory tort that should be confined to intentional and reckless invasions of privacy, this article advocates a fault standard that includes negligence. The more restrictive position currently favoured by the Australian Government sets the bar too high and would exclude some deserving claimants from redress. The article argues that adopting negligence as the requisite mental element would better align the privacy tort with other wrongs that protect dignitary interests and with the Privacy Act 1998 (Cth). In support of its position, the article also engages in a detailed comparative analysis of the position in other common law jurisdictions.

I. Introduction: Moving towards an Australian Privacy Tort

Australian legal scholars and law reformers have for many years fruitlessly debated whether a privacy tort should be introduced. The High Court has indicated on several occasions that there are no fundamental obstacles to recognising a common law right to privacy.[1] Yet, to date, no appellate court has seen fit to take this step. Instead, claimants still need to rely on the incidental protection provided by other causes of action in the common law, equity and under statute if their privacy interests are unlawfully interfered with.

Given the imperfection of this piecemeal protection and the judicial reticence to recognise a common law privacy tort, numerous law reform reports have over the years recommended the introduction of a statutory cause of action. This includes law reform bodies in New South Wales,[2] South Australia,[3] Victoria[4] and the Commonwealth.[5] The most detailed, and most influential, report is that of the Australian Law Reform Commission (ALRC) from 2014,[6] which carefully considered the elements of a potential statutory privacy tort. Similar calls for statutory law reform were also made by a range of parliamentary and other official enquiries at federal level. These include, most recently, the Australian Competition and Consumer Commission's Digital Platforms Inquiry,[7] a broad-ranging review into the impact of digital platforms on media and advertising markets, and the Australian Human Rights Commission's project on

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[1] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [41] (Gleeson CJ), [132] (Gummow and Hayne JJ), [189] Kirby J; [2001] HCA 63; referred to in *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177, [86]–[90] (Kiefel CJ, Bell and Keane JJ), [129] (Gageler J), [197] (Gordon J), [241]–[244] (Edelman J); [2020] HCA 14.

[2] New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009) 8–9 [3.3].

[3] South Australian Law Reform Institute, *Too Much Information: A Statutory Cause of Action for Invasion of Privacy*, Final Report No 4 (2016).

[4] Victorian Law Reform Commission, *Surveillance in Public Places*, Final Report No 18 (2010). See also Law Reform Committee of the Victorian Parliament, *Report of Inquiry into Sexting* (2013), which endorsed the recommendation of the VLRC.

[5] Australian Law Reform Commission (ALRC), *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Ch 74.

[6] Australian Law Reform Commission (ALRC), *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014).

[7] Productivity Commission, *Digital Platforms Inquiry*, Final Report (2019).

Technology and Human Rights.[8] The reports of both inquiries recommended adopting the design of a statutory tort put forward by the ALRC.

In its 2014 Report, the ALRC recommended that the new tort should be confined to intentional and reckless invasions of privacy, thus excluding negligent invasions of privacy and a strict liability tort.[9] However, this proposed fault standard has not received universal support,[10] because its stringency has the potential to deny protection to some deserving claimants. Nonetheless, the ALRC recommendations have been adopted by the Attorney-General's Department when it concluded a two-year review into the *Privacy Act 1998* (Cth) in late 2022 (the Review).[11] The Privacy Act Review Report proposes that a statutory tort for serious interferences with privacy, as designed by the ALRC, be introduced. It envisages that the states will introduce legislation to implement a statutory privacy tort and has called for consultations with the states and territories to ensure a consistent national approach.[12] At the time of writing, the federal government is seeking feedback to inform its response to the Privacy Act Review Report. This provides perhaps the final opportunity to examine the design of the cause of action and specifically to explore how a fault standard of intention and recklessness would operate in practice. Should efforts towards a national approach run into obstacles, the question of the requisite mental element would also become relevant for state or territory governments that preferred to forge their own way ahead. The analysis in this article therefore seeks to inform these further discussions on the implementation of a privacy tort. Even if a statutory tort does not come into fruition, the findings of this article may assist courts in future when they are called upon to decide whether to recognise a common law tort of privacy.

In exploring the question of the appropriate mental element for a future Australian privacy tort, this article argues that a defendant should become liable for invasions of privacy that were negligent, reckless or intended. The argument is structured as follows: Part II sets out an overview of the proposed Australian statutory tort, and analyses the policy and doctrinal questions that require consideration in determining the appropriate mental element. Part III discusses the relevant laws on this issue in the United Kingdom (UK), New Zealand (NZ) and Canada. This analysis identifies a wide array of approaches to a privacy tort, reaching from the strict liability approach adopted in the United Kingdom to a requirement for wilful conduct as required in certain Canadian statutory torts. Part IV of the article concludes that adopting a general negligence standard would most closely align with the purpose of a privacy tort, be doctrinally coherent and sit comfortably in the middle of approaches adopted overseas.

II. Doctrinal and Policy Analysis

The appropriate starting point for an analysis of the proper design of an Australian privacy tort is the 2014 ALRC Report on Serious Invasions of Privacy in the Digital Era. All law reform discussions since that report, including the AGD Review of the *Privacy Act*, centre around the question of whether the tort, as designed by the ALRC, should be introduced into Australian law.[13] The tort of serious invasion of privacy, as recommended by the ALRC, would be actionable only where a person in the position of the plaintiff had a reasonable expectation of privacy, in all the circumstances.[14] Although conceptualised as a single tort, it would only apply to the two major forms of privacy invasion: (1) an "intrusion into seclusion", for example the surreptitious use of spy cams; and (2) a "misuse of private information", for

[8] Australian Human Rights Commission, *Human Rights and Technology*, Final Report (2021).

[9] ALRC, n 6, rec 7-1.

[10] See, eg, Parliament of New South Wales, Legislative Council, Standing Committee on Law and Justice, *Remedies for the Serious Invasion of Privacy in New South Wales*, Report No 57 (2015) rec 5.

[11] Australian Attorney-General's Department, *Privacy Act Review* (Report, 2022) Proposal 27.1.

[12] Australian Attorney-General's Department, n 11, 287.

[13] For an overview, see Normann Witzleb, "Another Push for an Australian Privacy Tort: Context, Evaluation and Prospects" (2020) 94 ALJ 765. The case for a common law tort of privacy invasion is made by Jelena Gligorijevic, "A Common Law Tort of Interference with Privacy in Australia: Reaffirming ABC v Lenah Game Meats" (2021) 44 *University of New South Wales Law Journal* 673.

[14] ALRC, n 6, rec 6-1.

example the online dissemination of intimate photos.[15] The scope of the tort would be further confined by introducing a threshold requirement that the invasion must be serious.[16] Additionally, an action could only succeed if the court was satisfied that the public interest in privacy outweighs any countervailing public interests, in particular freedom of speech, the freedom of the media, and public health and safety.[17]

As explained above, the ALRC recommended that its statutory cause of action should be limited to intentional and reckless invasions of privacy.[18] In contrast, neither the Victorian Law Reform Commission[19] nor the New South Wales Law Reform Commission[20] recommended in their earlier reports on privacy a fault standard that excluded negligence.[21] While both state commissions anticipated that most actionable invasions of privacy would be committed intentionally or recklessly, they preferred to retain the possibility that, in exceptional cases, a negligent invasion of privacy could also be actionable. For the causes of action proposed by the New South Wales and Victorian Law Reform Commissions, the court would be required to take the degree of fault into account in the overall assessment of whether there was an actionable invasion of privacy.[22] Such an approach allows actions to be brought where a negligent invasion of privacy has serious consequences. It also gives the court the flexibility to deny relief where the defendant's invasion of the plaintiff's privacy was merely the result of inadvertence and did not cause particularly harmful consequences.

This part of the article will first engage with the definitions of intention, recklessness and negligence, as proposed by the ALRC. It will then explain why a mental element of intention or recklessness would raise the bar too high and create incoherence with the protection of personal information available under the *Privacy Act* as well as with non-statutory wrongs protecting interests that are related to privacy.

A. Intention, Recklessness and Negligence: Definitions and Proof

It is important at the outset to have conceptual clarity with regard to the terms *intention*, *recklessness* and *negligence*, in particular which elements of the cause of action these mental states need to relate to. The ALRC defined an invasion as "intentional" if it was one where the defendant "deliberately or wilfully invades the plaintiff's privacy".[23] The ALRC suggested that intention encompassed cases where the defendant had "subjective desire or purpose" of invading the plaintiff's privacy and cases where intent may be imputed. This latter situation would cover situations where the relevant privacy invasion – "the intrusion, misuse or disclosure – objectively assessed, [was] obviously or substantially certain to follow" from the defendant's conduct.[24] An example of *imputed intention* would be a defendant who sends a nude photo he received from a person he had met online to some of his friends when he does so not because he seeks to invade the other person's privacy but to brag. *Recklessness* refers to awareness of a risk that privacy may be infringed, but indifference to such risk.[25] The ALRC proposed that "recklessness"

[15] ALRC, n 6, rec 5-1.

[16] ALRC, n 6, rec 8-1.

[17] ALRC, n 6, rec 9-1.

[18] ALRC, n 6, rec 7-1.

[19] Victorian Law Reform Commission, n 4.

[20] New South Wales Law Reform Commission, n 2, [6.9].

[21] The issue was also left open in one of the few Australian decisions that recognised a privacy tort: In the stalking case of *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706; [2003] QDC 151, Senior Judge Skoien held that the tort of invasion of privacy required a "willed act by the defendant" ([444]) that intrudes upon the privacy or seclusion of the plaintiff, expressly leaving open whether a negligent act might also give rise to liability ([446]).

[22] New South Wales Law Reform Commission, n 2; Victorian Law Reform Commission, n 4. In support: Kit Barker et al, *The Law of Torts in Australia* (OUP, 5th ed, 2012) 416.

[23] ALRC, n 5, [76.161]; followed in ALRC, n 6, [7.10].

[24] ALRC, n 6, [7.15].

[25] Compare Peter Cane, *Anatomy of Torts Law* (Hart Publishing, 1997) 33.

should have the same meaning as in s 5.4 of the *Criminal Code* (Cth).[26] In the *Criminal Code*, a person is considered reckless "with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk". An example of *recklessnesss* would be a doctor who studies a patient's medical records during morning rush hour on a busy train knowing that passengers around him could also read the file if they chose to. In contrast, the ALRC recommended that a negligent privacy invasion should not be actionable. *Negligence* sets an objective standard of reasonableness. In the law of torts, a person is negligent if they fail to exercise the care that a reasonable person in their position would do in the circumstances.[27] This may impose liability on a defendant who is subjectively unaware of a privacy risk although a reasonable person would have appreciated that risk and therefore taken precautions against that risk.

While the ALRC has responded to criticisms made during the consultation process that its proposals needed clearer recommendations regarding what elements of the cause of action the intention and recklessness requirements relate to,[28] the application of both fault standards is still likely to cause difficulty in borderline cases. The ALRC Report states in this regard:

> The ALRC considers that the new tort should only be actionable where the defendant intended to invade the plaintiff's privacy in one of the ways set out in the legislation or was reckless as to that invasion. It should not be actionable where there is merely an intention to do an act that has the consequence of invading a person's privacy.[29]

An initial problem with requiring an intention (or recklessness) to invade the plaintiff's privacy by intrusion upon seclusion or by misusing the plaintiff's private information is that both of these terms, "intrude" and "misuse", are evaluative and connote a transgression. This raises the question of how defendants who felt justified in publishing the plaintiff's private information – because they positively believed to be doing so in the public interest or otherwise under a defence – can be said to have intended an "intrusion" or "misuse" or have been reckless in this regard.

Proof of such awareness may be onerous if the defendant believed that the plaintiff's legitimate privacy concerns were not affected or that any privacy interest was outweighed by public interest considerations. As the UK case law demonstrates, defendants frequently argue that they believed that the plaintiff did not have a reasonable expectation of privacy in relation to the information in question,[30] or they considered that publication was justified in light of overriding interests,[31] or – in many cases – both.[32] The ALRC proposes to sidestep these concerns with the following consideration:

> The requirement does not mean that the defendant needs to intend to commit a legal wrong, or that he or she intends to fulfil the other ingredients for liability (seriousness, lack of public interest justification or defence). This would be too stringent a hurdle for the plaintiff to overcome. It does mean that the defendant needs to have been aware of the facts from which it can be objectively assessed whether or not the plaintiff had a reasonable expectation of privacy and of the facts that an intrusion or disclosure would (or in the case of recklessness, may) occur.[33]

[26] ALRC, n 5, [76.161]; ALRC, n 6, [7.9], [7.27].

[27] *Rogers v Whitaker* (1992) 175 CLR 479. See also *Civil Law (Wrongs) Act 2002* (ACT) s 43; *Civil Liability Act 2002* (NSW) ss 5, 5B; *Civil Liability Act 2003* (Qld) ss 9, 10; *Civil Liability Act 1936* (SA) ss 31, 32; *Civil Liability Act 2002* (Tas) s 11; *Wrongs Act 1958* (Vic) ss 43, 48; *Civil Liability Act 2002* (WA) s 43. See also Harold Luntz et al, *Luntz & Hambly's Torts: Cases, Legislation and Commentary* (LexisNexis, 9th ed, 2021) Ch 3; David Rolph et al, *Balkin & Davis Law of Torts* (LexisNexis, 6th ed, 2021) Ch 7.

[28] ALRC, n 6, [7.31]–[7.40].

[29] ALRC, n 6, [7.31].

[30] *Murray v Express Newspapers plc* [2009] Ch 481; [2008] EWCA Civ 446.

[31] *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB).

[32] *Campbell v MGN Ltd* [2004] 2 AC 457; [2004] UKHL 22; *McKennitt v Ash* [2008] QB 73; [2006] EWCA Civ 1714; *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439.

[33] ALRC, n 6, [7.35] (citations omitted).

While the above excerpt suggests that the plaintiff does not need to prove the defendant's knowledge or awareness of countervailing interests, this ameliorates the plaintiff's difficulties only to some extent.[34] This is because an assessment of whether there was a reasonable expectation of privacy is highly fact-specific and depends on a range of factors. It is easy to come to differing assessments in relation to these issues, as evidenced in numerous cases emanating from the United Kingdom where courts were divided[35] or in which first instance decisions were reversed on appeal.[36] These difficulties will be compounded if a plaintiff is not only required to demonstrate that a reasonable expectation of privacy objectively existed in light of all the circumstances, but – unlike in the United Kingdom – also needs to show that the defendant had (subjective) knowledge or awareness that their conduct would invade the plaintiff's privacy. For example, it may be difficult to show subjective awareness in the above example of a doctor who studies a patient's medical records during the morning commute if she assumed that all surrounding train passengers were looking into their mobile phones. Nonetheless, this conduct would clearly be negligent.

However, this article opposes the view that the statutory tort of privacy should be confined to intentional or reckless invasions of privacy not only because of the practical problems arising from applying intention and recklessness standards to a complex cause of action. It puts forward that, as a matter of principle, this fault standard would set the *bar too high* because, contrary to the argument put forward by the ALRC, it would leave plaintiffs without redress in some circumstances where they deserve protection. The limitation to intentional and reckless privacy invasions would furthermore create problems of *coherence with the Privacy Act* as well as *with wrongs protecting dignitary interests*. Each of these issues will be addressed in turn.

B. Intention and Recklessness: A Bar Too High

The case of *Doe v Australian Broadcasting Corporation*[37] provides a striking example of why limiting liability to intentional and reckless acts would exclude some situations in which plaintiffs merit protection. In that case, the Australian Broadcasting Corporation reported in three radio news broadcasts that the plaintiff's husband had been convicted of raping her. In two of these broadcasts, Jane Doe's estranged husband was identified by name and the offences were described as rapes within marriage. In another broadcast, Jane Doe was additionally identified by name. In all three broadcasts, the journalist and sub-editor breached the *Judicial Proceedings Act 1958* (Vic), which makes it an offence to publish information identifying the victim of a sexual offence. Expert evidence established that the plaintiff, who had a post-traumatic stress disorder, was particularly vulnerable at the time of the broadcasts and that the reporting exacerbated her trauma symptoms and delayed her recovery. The defendants were thus guilty of a serious invasion of privacy with grave and long-lasting consequences for the plaintiff. Yet the trial judge, Hampel J, found that the breach of the plaintiff's privacy was the result of the defendants' failure to exercise reasonable care "rather than [being] wilful".[38]

If the ALRC requirement for intentional or reckless conduct was enacted in a new statutory tort, a plaintiff in Jane Doe's position would not be able to rely on the statutory cause of action. This is because there was no evidence that the journalist and the sub-editor were aware of "facts from which it can be objectively assessed [that] the plaintiff had a reasonable expectation of privacy and of the facts that an

[34] It is also peculiar to require a plaintiff to demonstrate that a defendant have knowledge or awareness of facts relevant to the plaintiff's reasonable expectation of privacy, whereas the defendant's knowledge or awareness of facts relevant to the public interest justification is irrelevant. In a typical case, a defendant may have less awareness of the circumstances of the claimant and the effect that an intrusion or disclosure may have on the claimant (matters relevant to a reasonable expectation of privacy), yet a defendant has typically awareness of the rationale and justifications for their own conduct.

[35] *Campbell v MGN Ltd* [2004] 2 AC 457; [2004] UKHL 22.

[36] *Murray v Express Newspapers plc* [2009] Ch 481; [2008] EWCA Civ 446; *ETK v News Group Newspapers Ltd* [2011] WLR 1827; [2011] EWCA Civ 439.

[37] *Doe v Australian Broadcasting Corporation* [2007] VCC 281. Hampel J found nonetheless in favour of the plaintiff because her Honour formulated the cause of action as an "unjustified, rather than wilful" ([163]) publication of private facts.

[38] *Doe v Australian Broadcasting Corporation* [2007] VCC 281, [163].

intrusion or disclosure would (or in the case of recklessness, may) occur".[39] Excluding liability where a defendant was negligent would severely curtail the protection for privacy that the law should provide for.

It could be argued that there are other avenues for redress that would avoid a laguna in the law, given that Hampel J held that the ABC was also liable also for breach of confidence, breach of statutory duty, and for breach of a duty of care. However, all these alternative bases for liability are, to some extent, controversial.[40] Moreover, even if they were available, they would require the plaintiff to rely on one or more cause of actions that are not designed to protect privacy interests. Yet, it should be the aim of the Australian government's proposed law reform to create a privacy tort that corresponds to, and is co-extensive with, the plaintiff's need for protection.

Other examples of negligent invasions of privacy that can cause significant harm are data breaches. A data breach occurs, according to the definition used by the Office of the Australian Information Commissioner (OAIC),[41] when personal information that an entity holds is subject to unauthorised access or disclosure, or is lost. In the latest Notifiable Data Breaches Report for January–June 2022, the OAIC noted that human error data breaches accounted for 33% of notifications.[42] While data breaches may in future also be actionable under the proposed direct right of action under the *Privacy Act*, should it be introduced,[43] there may be circumstances where negligent handling of personal information is not actionable under the *Privacy Act*. As acknowledged by the 2014 ALRC Report, the *Privacy Act* is subject to a range of broad exemptions, in particular the small business exemption. As a result, the Privacy Commissioner does not generally have jurisdiction over breaches of the *Privacy Act* committed by private sector organisations with an annual turnover of $3 million or less or that fall within one of the exemptions, such as those granted for journalism,[44] registered political parties,[45] political acts and practices,[46] individuals acting in a non-business capacity[47] or in relation to employee records.[48]

Although the Attorney-General's Department proposes to cut back the exemptions,[49] they demonstrate that existing remedies under the *Privacy Act* can leave some real gaps in the protection against negligent data breaches. These should be addressed through a combination of a direct right of action, coupled with the removal of exemptions, and a cause of action against serious invasions of privacy based on *simple fault*, rather than one requiring intention or recklessness.

C. Coherence with the Privacy Act

Overseas experiences demonstrate a tendency to provide concurrent liability, under both data protections laws and the privacy tort, where a privacy breach satisfies the constituent elements of both regimes and causes compensable loss.[50] There are many examples from the United Kingdom in which claimants

[39] This is the definition of the mental element used by ALRC, n 6, [7.35].

[40] For example, the decision in relation to breach of statutory duty has been doubted in *Doe v Fairfax Media Publications Pty Ltd* [2018] NSWSC 1996, [137] (Fullerton J). See also Des A Butler, "Jane Doe v ABC and Media Liability for Disclosing Personal Information: Four More Bold Steps?" in *Proceedings 62nd Annual ALTA Conference – Law and Public Policy: Taming the Unruly Horse?* (University of Western Australia, Perth, Western Australia, 2007).

[41] Office of the Australian Information Commissioner, *Data Breach Preparation and Response: A Guide to Managing Data Breaches in Accordance with the Privacy Act 1988 (Cth)* (2018) 7.

[42] Office of the Australian Information Commissioner, *Notifiable Data Breaches Report* (2022) <https://www.oaic.gov.au/privacy/notifiable-data-breaches/notifiable-data-breaches-statistics/notifiable-data-breaches-report-january-june-2022>.

[43] Australian Attorney-General's Department, n 11, Proposal 26.1.

[44] *Privacy Act 1988* (Cth) s 7B(4).

[45] *Privacy Act 1988* (Cth) s 6C.

[46] *Privacy Act 1988* (Cth) s 7C.

[47] *Privacy Act 1988* (Cth) s 7B(1); see also *Privacy Act* s 16E.

[48] *Privacy Act 1988* (Cth) s 7B(3).

[49] Australian Attorney-General's Department, n 11, Proposals 6–9.

[50] *Secretary of State for the Home Department v TLU* [2018] 4 WLR 101; [2018] EWCA Civ 2217.

brought actions under the tort of misuse of private information as well as the relevant data protection legislation.[51] A pertinent case is *TLT v Secretary of State for the Home Department*,[52] in which the Home Department committed a negligent data breach that disclosed private information of unsuccessful asylum seekers. The Department was held liable to pay damages under both the torts of misuse of private information and the applicable data protection laws.[53] Such concurrent liability would ensure that there are no inadvertent gaps of protection.[54]

It would be difficult to justify requiring intention or recklessness for liability under the privacy tort when the obligations under the *Privacy Act* do not impose such a fault requirement. Regulatory action by the Australian Privacy Commissioner under the *Privacy Act* is available for an "interference with the privacy of an individual". Section 13(1)(a) of the *Privacy Act* defines such an interference as an "act or practice [that] breaches an Australian Privacy Principle in relation to personal information about the individual", regardless of the respondent's state of mind and culpability. However, quite commonly, the Australian Privacy Principles (APPs) impose obligations that are akin to a negligence standard, such as that conduct must be "reasonable",[55] "reasonably necessary",[56] or based on a "reasonable belief".[57] It is not apparent why a much higher bar of intention or recklessness should apply in the context of a private law action.

The ALRC justified its recommendations by reasoning that "[if] the new tort extended to negligent invasions of privacy, [this might expose] a wide range of people to face liability for invading privacy by common human errors".[58] However, it is somewhat misleading to assert that negligence liability arises simply from human error. Liability arises *only* for those errors that are the result of a failure to take precautions against a risk of harm that a reasonable person would have taken in the circumstances.[59] Liability for a failure to take reasonable care is pervasive in the law of torts. It is an expression of the community expectation that everyone should generally conduct their affairs with due regard for the rights and interests of others. Privacy is a core value in Western societies[60] and based on fundamental human interests such as respect for dignity and autonomy.[61] This suggests that privacy should enjoy the same measure of protection as other fundamental interests, such as the property and physical integrity, which the law of trespass protects also against negligent invasion.

The concern that this might extend liability too wide can be countered with the specific restrictions built into the privacy tort. Unlike most other interests protected by torts law, privacy invasions are only actionable if it is found that the defendant's and public interests do not outweigh the privacy interest of the plaintiff.[62] This provides a sufficient protection to defendants against undue encroachment of their rights and liberties. It would be extending these protections too far if negligent invasions of privacy were excluded from the ambit of a privacy tort.

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[51] They include *Weller v Associated Newspapers Ltd* [2016] 1 WLR 1541; [2015] EWCA Civ 1176; *Crook v Chief Constable of Essex Police* [2015] EWHC 988 (QB).

[52] *TLT v Secretary of State for the Home Department* [2016] EWHC 2217 (QB).

[53] In *TLT v Secretary of State for the Home Department* [2016] EWHC 2217 (QB), this was the *Data Protection Act 1998* (UK) s 13. Currently the relevant UK provision is UK General Data Protection Regulation (GDPR-UK), s 82.

[54] It is important to note, though, that the tort of misuse of personal information only applies to data breaches through positive conduct. Omissions to secure data against third-party interference are not actionable as a misuse of personal information; instead, remedies need to be sought under data protection legislation. See *Warren v DSG Retail Ltd* [2021] EWHC 2168 (QB), [27] (Saini J): "'[M]isuse' may include unintentional use, but it still requires a 'use': that is, a positive action".

[55] For example, *Privacy Act 1988* (Cth) Sch 1, APP 1, APP 4, APP 5, APP 8, APP 10, APP 11.

[56] For example, *Privacy Act 1988* (Cth) Sch 1, APP 3, APP 6, APP 8, APP 9.

[57] For example, *Privacy Act 1988* (Cth) Sch 1, APP 3, APP 6, APP 8, APP 12.

[58] ALRC, n 6, [7.63].

[59] See n 27.

[60] See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976) Art 17.

[61] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63.

[62] ALRC, n 6, rec 9-1.

D. Coherence with Related Non-statutory Wrongs

A statutory privacy tort is intended to fill the gaps left by the current incidental protection of privacy through other civil wrongs. One of the benefits of a statutory action is that the legislature is not bound to mimic, or replicate, existing causes of action but is free, in principle, to define the elements of the new tort as appears appropriate. Yet, it is also important to consider the fabric of pre-existing laws and to ensure that a new statutory wrong does not create unnecessary tension or incoherence.

The question arises of whether existing wrongs suggest a preference for a particular mental element. The structure of existing torts contains, in many cases, the wisdom of generations of common law lawyers as to the proper limits of liability. The privacy tort would operate at the interstitial space between several common law and equitable wrongs, which diverge in their mental elements, as the following discussion illustrates.

1. Trespass

Territorial and bodily privacy is primarily protected through the tort of trespass. This tort, which has a long history, protects against direct interferences with a person's body, land or goods.[63] Historically, trespass did not have a mental element; the requirement of directness was seen as a sufficient hurdle against undue expansion of liability.[64] While the tort is often labelled as an intentional tort,[65] it is only the defendant's act that needs to be intentional. There is no requirement that the consequence of interference with the plaintiff's protected interest needs to have been intended. From the 19th century onwards, as liability under the tort of negligence developed, the issue of fault became more prominent. Excluding the special category of highway cases,[66] a defendant could avoid liability by establishing that the interference was "utterly without fault".[67] From the middle of the 20th century, English and Australian law started to diverge. While Australia maintained the orthodox position that trespass required a direct interference and thus retained the possibility of a negligent trespass,[68] English law preferred to divide liability by reference to the defendant's state of mind, thereby excluding overlap between negligence and trespass liability. Whereas the tort of negligence is available for careless conduct, trespass in English law now requires an intentional interference with the plaintiff's interest, with intention to be proven by the plaintiff.[69]

It could be argued that privacy invasion through intrusion is most closely related to trespass[70] and should therefore have a similar fault element. This is correct as far as many forms of intrusion involve the invasion of a physical space that the plaintiff could reasonably expect to remain respected. In Australia, this argument could be used to suggest that the privacy tort should likewise require negligence or intention. However, the argument for an analogy is weakened by the fact that the right to an inviolate body or property is stronger than the right to privacy. While the former is absolute unless a defence applies, the latter is context-specific and only recognised to the extent that it outweighs countervailing interests. Nonetheless, setting the mental element for a privacy tort at "intentional or reckless invasion" would set a standard that has no parallel in trespass liability. This is not only because a negligent trespass

[63] Burns et al, n 27, Chs 12 13.

[64] See *Williams v Milotin* (1957) 97 CLR 465; *McHale v Watson* (1964) 111 CLR 384.

[65] See, eg, *Irlam v Byrnes* [2022] NSWCA 81.

[66] Where a plaintiff suffered injury on a public highway, they were required to demonstrate that the defendant acted at least negligently.

[67] *Weaver v Ward* (1616) Hob 134, 80 ER 284; cf *Stanley v Powell* [1891] 1 QB 86, 91 (Denman J).

[68] *Croucher v Cachia* (2016) 95 NSWLR 117 (Leeming JA), [21] (Beazley P and Ward JA agreeing); [2016] NSWCA 132.

[69] *Fowler v Lanning* [1959] 1 QB 426, 440 (Diplock J).

[70] Cases in which trespass was relied upon to obtain redress against an invasion of privacy include: *New South Wales v Ibbett* (2001) 229 CLR 638; [2006] HCA 57; *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 (both concerning trespass to land); *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177; [2020] HCA 14 (trespass to chattels).

remains a possibility in Australia[71] but also because in trespass the burden of establishing the absence of fault is on the defendant.[72]

2. Defamation

The law of defamation protects a person's reputation against unfounded allegations, which is, like privacy, a dignitary interest.[73] Indeed, European human rights jurisprudence recognises that the right to reputation falls under the right to respect for private life.[74] Like trespass, the law of defamation has a long history,[75] with the consequence that some of its unique characteristics appear archaic and are not easily reconciled with modern principles of tort liability.

Broadly speaking, a defamation is committed where a defendant disseminates a matter that could damage the plaintiff's reputation in the mind of a third party.[76] This creates some connection to privacy invasions by wrongful disclosure of private facts,[77] as both are concerned with the publication of matters that affect the plaintiff's reputation or personality interests. Defamation is widely regarded as a strict liability tort[78] because the plaintiff neither need to prove that the defendant intended to defame the plaintiff[79] nor that the defendant intended to refer to the plaintiff.[80] Given that liability for defamation is strict, that tort cannot be used as support for advocating a fault standard of intention or recklessness.

There have been several statutory reforms that affected, among other things, the introduction of a series harm threshold, the scope of defamation defences and the assessment of damages – yet none of these reforms introduced a fault requirement into the tort.[81] This can be taken to suggest that the Australian parliaments saw no pressing need for such a reform. A privacy tort that requires intention would therefore be in stark contrast to defamation, which operates predominantly as a strict liability wrong. It is true that a negligence standard is also difficult to justify with an analogy to defamation, yet there are at least some instances where reasonableness has relevance for liability in defamation. This will most often be

[71] *Williams v Milotin* (1957) 97 CLR 465; *New South Wales v Ouhammi* (2019) 101 NSWLR 160; [2019] NSWCA 225. The ALRC suggested that claims for negligent trespass relate to "direct physical impact and injury" (ALRC, n 6, [7.57]), thus limiting the action to battery and excluding assault and false imprisonment. However, Australian case law does not support this differentiation and accepts the existence of negligent false imprisonment: see eg. *Williams v Milotin* (1957) 97 CLR 465, 474; *Campbell v Northern Territory of Australia (No 3)* (2021) 295 A Crim R 1, [228] (White J); [2021] FCA 1089.

[72] *McHale v Watson* (1964) 111 CLR 384; *Croucher v Cachia* (2016) 95 NSWLR 117; [2016] NSWCA 132; *New South Wales v Ouhammi* (2019) 101 NSWLR 160; [2019] NSWCA 225.

[73] For a detailed analysis of the relationship between defamation and privacy, see Andrew T Kenyon, "Defamation, Privacy and Aspects of Reputation" (2018) 56 *Osgoode Hall Law Journal* 59. It has also been remarked that the common law likens a person's reputation to a property right: see, eg, Cane, n 25, 73, 143, which goes some way to explain why liability is strict and does not require proof of damage.

[74] *Pfeifer v Austria* (ECHR, Application No 12556/03, 15 November 2007); Tanya Aplin and Jason Bosland, "The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right?" in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP, 2016) 265.

[75] David Rolph (ed), *Landmark Cases in Defamation Law* (Hart Publishing, 2019).

[76] See, eg, *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, [1]–[3] (French CJ, Gummow, Kiefel and Bell JJ); [2009] HCA 16.

[77] *Australian Consolidated Press v Ettingshausen* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Kirby P and Clarke JA, 13 October 1993) 26–27.

[78] For example, David Rolph, *Defamation Law* (Thompson Reuters, 2015) [6.90]; Christian Witting, *Street on Torts* (OUP, 16th ed, 2021) 506.

[79] *E Hulton & Co v Jones* [1920] AC 20, 23.

[80] *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239. Plaintiffs can liable even where they were not aware of the existence of the plaintiff: *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331, 340–341 (Scrutton LJ), 353 (Russell LJ).

[81] Standing Committee of Attorneys-General, Working Group of State and Territory Officers, *Proposal for Uniform Defamation Laws* (2004); the model laws are outlined in Standing Committee of Attorneys-General, *Model Defamation Provisions* (2005). For the latest reforms, see Council of Attorneys-General, *Review of Model Defamation Provisions* (2019) <https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/Final-CAG-Defamation-Discussion-Paper-Feb-2019.pdf>; the model laws are contained in Parliamentary Council's Committee, *Model Defamation Amendment Provisions 2020* (27 July 2020).

the case in the context of statutory defences. For example, the public interest defence is available to a defendant who reasonably believes the publication to be in the public interest,[82] and the statutory defence of qualified privilege requires, among other things, that the defendant's conduct was reasonable.[83]

3. Breach of confidence

In Australia, breach of confidence continues to be the stand-in cause of action for privacy invasions that arise from the wrongful disclosure of private information. For example, it has been relied upon in cases involving the publication of intimate images online, as in *Wilson v Ferguson*.[84] Liability for a breach of confidence can arise even if a defendant is not conscious of the fact that their conduct amounts to misuse of confidential information.[85] However, a defendant's failure to take care has some relevance for liability. Under English authority, confidentiality obligations can arise where a defendant "adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy".[86] Similarly, the High Court has held in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, which involved surreptitious filming of the plaintiff's commercial operations, that a party obtaining confidential information can be subject to an obligation of confidence if the party "knew, or ought to have known, the manner" in which confidential information has been obtained.[87] As a result, breach of confidence also does not serve as an exemplar or model for introducing a privacy tort that requires intention or recklessness.

4. Intentional Infliction of Harm

The action for intentional infliction of harm is relevant for privacy invasion because both wrongs are concerned with the protection from mental harm that results from invasions of dignity and personal autonomy. The action for infliction of harm has a long and complicated history but has recently been clarified and re-defined by the UK Supreme Court in *O (A Child) v Rhodes* (*Rhodes*).[88] Under older authorities, intention to cause psychological harm could be imputed by law, and the defendant held liable, where such harm was the natural and probable consequences of the defendant's conduct. Abolishing imputed intent, Lady Hale and Lord Toulson JJSC held in their joint judgment for the majority in *Rhodes* that the necessary mental element is a subjective intent to cause physical harm or at least severe emotional distress.[89] Lord Neuberger JSC, in a judgment endorsed by the minority, agreed that the bar should be set at intentionality,[90] although his Lordship differed in relation to the damage element of the tort. Whereas the majority held that the claimant must have actually suffered a recognisable psychiatric illness or physical harm, the minority considered that there was a "powerful case"[91] for liability if the claimant suffered at least mental distress as intended by the defendant. Given the high hurdles imposed by *Rhodes* of proving both subjective intention and psychiatric or physical injury, the tort has limited potential as a means of protecting against privacy invasion, where the plaintiff's harm will commonly comprise of distress, embarrassment or humiliation.

Importantly for the present argument, the new requirement of subjective intention should not be regarded as an indication that a similar mental element should become part of a future privacy tort. First, as detailed above, despite requiring subjective intent for the *Rhodes* tort, UK law does not require any fault element

[82] See, eg, *Defamation Act 2005* (NSW, Qld, Vic, Tas, WA) s 29A(1)(b).

[83] See, eg, *Defamation Act 2005* (NSW, Qld, Vic, Tas, WA) s 30(1)(c).

[84] *Wilson v Ferguson* [2015] WASC 15.

[85] *Seager v Copydex Ltd* [1967] 1 WLR 923.

[86] *Imerman v Tchenguiz* [2011] Fam 116; [2010] EWCA Civ 908.

[87] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [34] (Gleeson CJ); [2001] HCA 63.

[88] *O (A Child) v Rhodes* [2016] AC 219; [2015] UKSC 32.

[89] *O (A Child) v Rhodes* [2016] AC 219, [87] (Lord Clarke and Lord Wilson JJSC agreeing); [2015] UKSC 32, which was to exclude "recklessness".

[90] *O (A Child) v Rhodes* [2016] AC 219, [112]–[113] (Lord Wilson JSC also agreed with this judgment); [2015] UKSC 32.

[91] *O (A Child) v Rhodes* [2016] AC 219, [119]; [2015] UKSC 32.

for the tort of misuse of private information, let alone a requirement for subjective intention. Second, the Supreme Court linked the intention requirement to the consideration that the tort of intentional infliction of harm has a potentially wide ambit because it imposes potential liability for any "words or conduct directed towards the claimant for which there is no justification or reasonable excuse".[92] This has potential to interfere with the defendant's freedoms in a broad range of social contexts. In other words, the potential wide scope of the *Rhodes* tort was an argument for defining the elements of the tort narrowly. In contrast, a privacy tort is a priori more limited given the court must find that the defendant(s) interfered with a reasonable expectation of privacy without a sufficient public interest justification. This undermines any arguments that the tort of intentional infliction of harm provides a strong justification for a similar mental element in the law of privacy.

5. Negligence

The 2014 ALRC Report suggested that "if actual damage is suffered beyond 'mere' emotional distress, it may well be the case that the plaintiff would have a tort action in negligence".[93] However, there are multiple reasons why negligence liability cannot be relied upon to "plug gaps" in the protection of privacy interests that may arise if intention or recklessness was imposed as the fault element. First, there are now strict limitations in the civil liability legislation of most Australian States and Territories on the recoverability of damages arising from negligently caused mental harm.[94] Plaintiffs pursuing a cause of action for breach of privacy would only be able to overcome the relevant injury thresholds in exceptional circumstances. Even in cases where intimate images of the plaintiff were released, such as in *Giller v Procopets*[95] and *Wilson v Ferguson*,[96] the courts held that the plaintiffs suffered "mere" emotional distress not amounting to a recognised psychiatric injury.

Second, it must be doubted whether any privacy invasion would remain actionable under the tort of negligence if a statutory privacy tort were enacted. In *Sullivan v Moody*,[97] the High Court rejected the invitation to apply the law of negligence to a case where the "core of the complaint" was that the plaintiff was "injured as a result of what he, and others, were told".[98] It considered that "the law of defamation … resolves the competing interests of the parties through well-developed principles about privilege and the like. To apply the law of negligence in the present case would resolve that competition on an altogether different basis".[99] It is likely that the High Court would express similar concerns about legal coherence[100] in the intersection between a statutory privacy tort and negligence law. The proposed privacy tort resolves the conflicting interests of plaintiff and defendant likewise on a basis that is altogether different than the tort of negligence. If the defendant's conduct did not satisfy the elements of the statutory privacy tort (eg, because it was not intentional or reckless), it would be unlikely that a plaintiff could proceed on the basis of negligence. Similar to *Sullivan v Moody*, this would be likely to be seen as an attempt to circumvent the requirements of the statutory tort, which provides its own set of guiding principles, elements, defences and remedies.

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[92] *O (A Child) v Rhodes* [2016] AC 219, [88]; [2015] UKSC 32.

[93] ALRC, n 6, [7.50].

[94] See, eg, *Civil Law (Wrongs) Act 2002* (ACT) Pt 3.2; *Civil Liability Act 2002* (NSW) Pt 3; *Civil Liability Act 1936* (SA) ss 33, 53; *Civil Liability Act 2002* (Tas) Pt 8; *Wrongs Act 1958* (Vic) Pts VBA, XI; *Civil Liability Act 2002* (WA) Pt 1B; *Russell v Murrindindi Shire Council* [2019] VSC 560.

[95] *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236.

[96] *Wilson v Ferguson* [2015] WASC 15.

[97] *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59; see also *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35.

[98] *Sullivan v Moody* (2001) 207 CLR 562, [54] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); [2001] HCA 59.

[99] *Sullivan v Moody* (2001) 207 CLR 562, [54] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ); [2001] HCA 59.

[100] On the importance of legal coherence as a salient feature in the duty of care analysis: *Minister for the Environment v Sharma* (2022) 291 FCR 311, [239]–[245] (Allsop CJ, Beach and Wheelahan JJ); [2022] FCAFC 35. See generally Andrew Fell, "The Concept of Coherence in Australian Private Law" (2018) 41 *Melbourne University Law Review* 1160.

6. Conclusion: Intention and Recklessness Standard Out of Step with Other Wrongs

This part of the article explored the extent to which a requirement for intention or recklessness in a future privacy tort would exist in harmony with existing liability requirements in similar causes of action. The analysis has demonstrated that such a mental element would differ substantially from the standards imposed by the *Privacy Act* as well as the general law. An interference with individual privacy under the Act, which can be enforced by a complaint to the Privacy Commissioner, requires merely objective non-compliance with the legislative requirements, in particular the APPs. For reasons of legal coherence, the elements of a privacy tort should also be broadly compatible with the requirements of other legal wrongs protecting dignitary interests. However, a requirement of intention or recklessness would not be consistent with common law policy to allow recovery for negligently caused emotional distress in trespass and defamation, and also does not form part of the equitable cause of action for breach of confidence. Only the action for intentional infliction of harm requires, since its 2015 re-interpretation by the UK Supreme Court, subjective intention (to cause severe emotional distress). However, this limitation is due to the fact that this tort protects against unjustifiably harmful words or conducts of any kind, and therefore has a potentially wider ambit than a privacy tort, which protects a specific legal interest. Contrary to the view expressed in the 2014 ALRC report, the tort of negligence cannot be expected to protect victims of privacy invasion, other than in extreme and limited circumstances where the plaintiff sustains recognisable psychiatric harm. There are thus no compelling doctrinal reasons in support of imposing a requirement of intention or recklessness. Instead, as this part has shown, introduction of this mental requirement would risk creating a gap in protection of deserving plaintiffs in meritorious claims.

III. The Mental Element of Privacy Torts in International Jurisdictions

The following part will address privacy torts in overseas jurisdictions, with the aim of demonstrating a lack of uniformity regarding the mental element of the privacy torts in the United Kingdom, New Zealand and Canada. Over the last two decades, the United Kingdom has developed a new, single cause of action at common law termed "the tort of misuse of private information". This is a strict liability tort that does not have a mental element. However, UK courts regularly consider all factual circumstances and the defendant's knowledge (or absence thereof) is a relevant consideration both for liability and the issue of remedies. The common law in New Zealand and Canada has been strongly influenced by privacy jurisprudence emanating from the United States (US), which recognises two distinct privacy torts: (1) a disclosure tort that does not have a mental element, and (2) an intrusion tort that requires intentional conduct. Several Canadian provinces have enacted statutory privacy torts that predominantly, but not uniformly, require "wilful" conduct. It appears there is relatively little policy discussion in these jurisdictions of what would constitute the most appropriate mental element. The tapestry of adopted solutions makes it difficult to discern a compelling, or even a consistent, approach in common law jurisdictions that are usually influential in Australia. For this reason, the following discussion of the international approaches to privacy torts provides an overview of the variety of possible models and their practical implications, and highlights their respective advantages and disadvantages in guiding the development of the mental element of a future Australian privacy tort.

A. The UK Tort of Misuse of Private Information

In the United Kingdom, privacy invasions have been actionable since the early 2000s when the *Human Rights Act 1998* (UK) came into effect. This Act incorporated the rights set out in the European Convention on Human Rights (ECHR) into UK domestic law. Initially, the courts sought to protect privacy interests by extending the equitable cause of action for breach of confidence.[101] However, it soon became apparent that this cautious approach was doctrinally problematic because privacy and confidentiality, albeit related interests, do not coincide. The House of Lords endorsed in *Campbell v MGN Ltd* (*Campbell*)[102] a separate cause of action for the misuse of private information. Since then, this

[101] *Douglas v Hello! Ltd (No 1)* [2001] QB 967; [2000] EWCA Civ 353.

[102] *Campbell v MGN Ltd* [2004] 2 AC 457; [2004] UKHL 22.

action has developed very dynamically and its independent existence as a tort has now been recognised for some time.[103] In essence, the tort of misuse of private information gives appropriate effect to the right to respect for private and family life set out in Art 8 of the ECHR, while also protecting the conflicting right to free expression under Art 10 of that Convention.[104]

This tort does not have a "fault" requirement.[105] In *Campbell*, their Lordships agreed that conduct in breach of a reasonable expectation of privacy was the touchstone of liability.[106] However, the origin of the tort in the action for breach of confidence has left its mark on the extent to which the defendant's knowledge or intention are relevant. An unresolved tension remains at the heart of this action, evidenced in two leading speeches in *Campbell*. Whereas Lord Nicholls did not identify any mental element of the tort, Baroness Hale suggested the starting point for the inquiry was whether "the person publishing the information *knows or ought to know* that there is a reasonable expectation that the information in question will be kept confidential".[107] Baroness Hale's formulation is reminiscent of the law of confidentiality, which also attaches liability to a person with actual or constructive knowledge of the duty of confidence.[108] Subsequent case law continued to grapple with addressing the weight to be attributed (if any) to the defendant's state of mind.

1. The "Murray Factors"

The decision in *Campbell* was carefully reviewed by the Court of Appeal in *Murray v Express Newspapers plc* (*Murray*).[109] The Court confirmed the two elements of the tort of misuse of personal information that had been established in *McKennitt v Ash*.[110] The liability analysis involves a two-step approach focused on the following questions: First, does the claim arise in a context where the claimant has a reasonable expectation of privacy (per Art 8 of the ECHR)? Second, is the claimant's expectation of privacy outweighed by legitimate interests of the defendant, in particular their freedom of expression under Art 10 of the ECHR? The courts stress that this balancing exercise requires an intense focus on the facts and involves a proportionality assessment of the strength of the respective human rights claims.[111]

In *Murray*, the Court of Appeal identified "no difference" between their Lordships' opinions in *Campbell* that the "first question is whether there is a reasonable expectation of privacy".[112] The statement that "[t]his is of course an objective question"[113] could be taken to suggest that Lord Nicholls' approach, which did not identify the defendant's actual or constructive knowledge as a relevant factor, has been adopted. However, the Court of Appeal in *Murray* explained further that:

> [T]he question 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

[103] *Vidal-Hall v Google Inc* [2016] QB 1 (Lord Dyson MR and Sharp LJ), [21] (McFarlane LJ agreeing); [2015] EWCA Civ 311. In *PJS v News Group Newspapers Ltd* [2016] AC 1081; [2016] UKSC 26, the Supreme Court acknowledged that the tort protects not only confidentiality but also against intrusion into the private life: Lord Neuberger of Abbotsbury PSC at [58].

[104] *McKennitt v Ash* [2008] QB 73; [2006] EWCA Civ 1714.

[105] In *Lloyd v Google LLC* [2022] AC 1217; [2021] UKSC 50 Lord Leggatt said ([133]) when contrasting the tort of misuse of personal information with data protection regimes: "The privacy tort, like other torts for which damages may be awarded without proof of material damage or distress, is a tort involving strict liability for deliberate acts, not a tort based on a want of care." *Deliberate acts* should be read as a reference to voluntary acts, not acts intended to invade a privacy interest. For further discussion, see John Hartshorne, "The Standard of Liability in Claims for Misuse of Private Information" (2021) 13 *Journal of Media Law* 211.

[106] *Campbell v MGN Ltd* [2004] 2 AC 457, [21] (Lord Nicholls), [134] (Baroness Hale); [2004] UKHL 22.

[107] *Campbell v MGN Ltd* [2004] 2 AC 457, [134] (Baroness Hale); [2004] UKHL 22, similarly, Lord Hope at [85].

[108] *Seager v Copydex Ltd* [1967] 1 WLR 923.

[109] *Murray v Express Newspapers plc* [2009] Ch 481; [2008] EWCA Civ 446.

[110] *McKennitt v Ash* [2008] QB 73; [2006] EWCA Civ 1714.

[111] *McKennitt v Ash* [2008] QB 73; [2006] EWCA Civ 1714; *Bloomberg LP v ZXC* [2022] 2 Cr App R 2 (Lord Hamblen and Lord Stephens JJSC), [47] (Lord Reed, Lord Lloyd-Jones and Lord Sales JJSC agreeing); [2022] UKSC 5.

[112] *Murray v Express Newspapers plc* [2009] QB 481, [30] (Sir Anthony Clarke MR for the Court); [2008] EWCA 446.

[113] *Murray v Express Newspapers plc* [2009] QB 481, [35]; [2008] EWCA 446.

> 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.[114]

The "*Murray* factors" have been endorsed in several decisions of the Supreme Court and their consideration now forms the backbone of analysis in English privacy decisions.[115] The first step of the liability inquiry is concerned with identifying the expectation of privacy held by a "reasonable person of ordinary sensibilities placed in the same position as the claimant and faced with the same publicity".[116]

Despite the inquiry being identified as "objective", the subjective circumstances of the plaintiff and the defendant are not to be disregarded. In her analysis of the reasonable expectation of privacy test, leading privacy academic Nicole Moreham builds on Baroness Hale's approach and considers the relevance of the plaintiff's subjective preferences and the defendant's actual or constructive knowledge of these preferences. Moreham distinguishes between situations where the activity and information in question is socially considered to be private and other situations where the claimants signalled their desire for privacy. Regarding the first scenario, she suggests that the defendant's knowledge of the plaintiff's privacy expectation should be assumed given that a reasonable person would regard the activity or information in question as private. The second scenario concerns situations where the activity or information is not socially recognised to be private but the claimant has signalled that she wishes to keep an activity or information private and social norms would usually require respect for such signals. In that latter case, Moreham suggests the defendant should be held liable "only if he or she actually knew, or should have found out, about the signals in question".[117] This approach protects the defendant's interest to a greater degree than a strict liability approach. It can be likened to a negligence standard because it imposes liability where the defendant failed "to make appropriate enquiries".[118]

Despite its usefulness in setting appropriate expectations and behavioural boundaries, this approach is yet to be explicitly endorsed by the courts. The few decisions that consider the relevance of the defendant's knowledge in detail will be discussed next.

2. Weller v Associated Newspapers Ltd

The most thorough consideration of whether the circumstances giving rise to the expectation of privacy need or ought to be known to the publisher can be found in Dingemans J's decision in *Weller v Associated Newspapers Ltd* (*Weller*).[119] The case concerned the publication of an article in the *MailOnline* about the musician Paul Weller and his teenage children. The article contained photographs showing the family while they were out shopping in Los Angeles, California. The *MailOnline* had purchased the photographs from a picture agency, which had offered them for sale with a caption that suggested they had been taken without consent. However, the *MailOnline*'s deputy UK editor gave evidence at trial, which was accepted, that she "did not think that there were issues of privacy engaged",[120] partly because Californian law permits the taking and publication of photographs of people depicting them in public places more widely than in the United Kingdom and partly because she considered the photographs not to contain anything which the claimants would wish to keep private.

Paul Weller's children succeeded in their action against the publishers of *MailOnline* for misuse of private information and for breach of the *Data Protection Act 1998* (UK). In line with existing authority,

[114] *Murray v Express Newspapers plc* [2009] QB 481, [36]; [2008] EWCA 446.

[115] *Bloomberg LP v ZXC* [2022] 2 Cr App R 2, [51] (Lord Hamblen and Lord Stephens JJSC); [2022] UKSC 5; *Re JR38* [2016] AC 1131, [88], [98] (Lord Toulson JSC) (Lord Hodge JSC agreeing), [113]–[114] (Lord Clarke JSC) (Lord Hodge JSC agreeing); [2015] UKSC 42.

[116] See *Campbell v MGN Ltd* [2004] 2 AC 457, [99] (Lord Hope); *Murray v Express Newspapers plc* [2009] QB 481, [35] (Sir Anthony Clarke MR); [2008] EWCA 446.

[117] NA Moreham, "Unpacking the Reasonable Expectation of Privacy Test" (2018) 134 LQR 651, 671.

[118] Moreham, n 117, 672.

[119] *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB).

[120] *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) [148].

Dingemans J described the analysis of whether the claimants had a reasonable expectation of privacy, the first step of liability under MOPI, as "a broad test which takes into account all the circumstances of the case".[121] His Lordship held that this test "allows the Court to assess what the publishers knew, and what they ought to have known".[122] This first stage could thus be said to include the consideration of the publisher's state of mind at the time of action.

The publisher's knowledge (or lack thereof) can be considered relevant at least in relation to three factors specifically enumerated in *Murray*. The publisher's state of mind, when committing the privacy breach, can affect the "nature and purpose of the intrusion".[123] This is because nature and purpose may differ depending on whether an intrusion was accidental, negligent or intended. Even more explicitly referring to the publisher's actual or constructive knowledge is the factor that relates to the "absence of consent and whether it was known or could be inferred".[124] If the defendant knew that the claimant did not consent and acted regardless, an intention to invade the claimant's privacy can be inferred. If the publisher ought to have known that there was no consent but did not actually know, the publisher's conduct may be regarded as negligent. Lastly, the court will also assess "the circumstances in which and the purposes for which the information came into the hands of the publisher".[125] Here again, it can be said that the publisher's knowledge of how the information came into their hands may be a relevant factor in the determination of whether a privacy expectation was reasonably held.

3. Duchess of Sussex v Associated Newspapers Ltd

The relevance, if any, of the defendant's state of mind was also discussed in the recent case of *Duchess of Sussex v Associated Newspapers Ltd*.[126] The action concerned the publication by the *Mail on Sunday* and by *MailOnline* of long extracts of a letter that the claimant, Meghan Markle, had written to her father. The claimant pleaded that the defendant was guilty of dishonesty, malice and bad faith. On application by the defendant, Warby J struck out the part of the pleadings that related to the defendant's state of mind. In his Lordship's view, the defendant's state of mind had no bearing on the first nor the second limb of the tort of misuse of private information. Warby J referred both to the decision of the House of Lords in *Campbell* and its subsequent interpretation in *Murray*. Notwithstanding the fact that the first stage inquiry allows all the circumstances of the case to be considered, Warby J understood this as excluding evidence regarding the defendant's state of mind.[127] This was on the basis that the state of mind involved subjective considerations, whereas the first stage inquiry was to be an objective one.

Although Warby J acknowledged that the list of *Murray* factors was non-exhaustive, his Lordship considered that the defendant's state of mind was not relevant to the objective inquiry into whether the claimant had a reasonable expectation of privacy. Specifically, Warby J stated that "purpose" of the intrusion was not to be equated with "motive" or "intention", as these concepts were distinct from one another. His Lordship went further and concluded that "dishonesty, malice, or bad faith are irrelevant to liability for misuse of personal information".[128] Warby J's interpretation of the first stage inquiry, particularly that the defendant's state of mind had no relevance and was therefore to be excluded from the inquiry, was not challenged on appeal. However, with respect, it is overstating the matter to contend that such subjective states of mind have "no role to play as an ingredient of the claim".[129] This is because it is generally acknowledged that the first step inquiry can take account of all circumstances of the case.

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[121] *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) [27]; see also [37].

[122] *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) [37], [38].

[123] *Murray v Express Newspapers plc* [2009] QB 481, [36] (Sir Anthony Clarke MR); [2008] EWCA 446. This factor was not addressed in *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB).

[124] *Murray v Express Newspapers plc* [2009] QB 481, [36] (Sir Anthony Clarke MR); [2008] EWCA 446.

[125] *Murray v Express Newspapers plc* [2009] QB 481, [36] (Sir Anthony Clarke MR); [2008] EWCA 446.

[126] *Duchess of Sussex v Associated Newspapers Ltd* [2020] EMLR 21; [2020] EWHC 1058 (Ch).

[127] *Duchess of Sussex v Associated Newspapers Ltd* [2020] EMLR 21, [36]; [2020] EWHC 1058 (Ch).

[128] *Duchess of Sussex v Associated Newspapers Ltd* [2020] EMLR 21, [45]; [2020] EWHC 1058 (Ch).

[129] *Duchess of Sussex v Associated Newspapers Ltd* [2020] EMLR 21, [45]; [2020] EWHC 1058 (Ch).

There is no reason why evidence as to what the defendant knew or – especially – what they ought to have known, cannot form part of an objective inquiry.

4. Summary of the UK Position

The UK tort of misuse of private information does not contain an explicit mental element. It is concerned with an objective inquiry into whether the claimant could have reasonably expected privacy and, if so, balances the weight of this interest with the defendant's countervailing interests in free expression. Under the first stage inquiry, the court is free to consider all relevant circumstances. The so-called *Murray* factors expressly include the defendant's knowledge (if any) of the absence of consent. Although these listed factors are not exhaustive, courts hesitate to consider other aspects of the defendant's knowledge of the plaintiff's expectations of privacy, because they regard the inquiry as limited to objective factors. If the defendant's actual or constructive knowledge of the plaintiff's privacy expectation is considered at all, that knowledge forms part of the contextual inquiry into whether the plaintiff's expectation of privacy deserves recognition as a protected interest.

Knowledge of the plaintiff's privacy expectation makes conduct that disregards that expectation more invasive and therefore strengthens the plaintiff's claim for protection. In many cases, it is beyond question that the defendant acted with knowledge of the plaintiff's privacy interest. However, even where the defendant had no such knowledge, the courts are not concerned that strict liability may expand liability too widely. The highly fact-specific inquiry into the relative weight of the parties' human rights positions ensures that the respective interests of plaintiffs and defendants are both given appropriate weight. In the literature, a clearer limitation has been developed that favours the adoption of a negligence standard where the plaintiff's activity was not self-evidently private.

B. The Position in New Zealand

In New Zealand, the common law also recognises privacy as a distinct legal interest. New Zealand law has recognised two separate privacy torts: (1) the tort of giving publicity to private facts (disclosure tort); and (2) the tort of intrusion into seclusion (seclusion tort). These torts have originated in the United States, where the *Restatement (Second) of Torts* recognises these torts alongside two further privacy torts – portraying a person in a false light and appropriation of a person's likeness or identity.[130] In *Hosking v Runting* (*Hosking*),[131] a majority of the Court of Appeal recognised the existence of a disclosure tort. Like the English *Weller* case, the decision concerned the privacy rights of children of celebrity parents in circumstances where the media published photos without consent showing the family engaged in private activities in a public space. In outlining the new tort, Gault P and Blanchard J's joint judgment identified two fundamental requirements for a successful claim: first, the "existence of facts in respect of which there is a reasonable expectation of privacy"; and, second, that "publicity given to those private facts would be considered highly offensive to an objective reasonable person".[132] In a separate judgment, Tipping J agreed that there should be a disclosure tort, but considered the "highly offensive" test too restrictive.

In their judgment, Gault P and Blanchard J emphasised that their formulation of the tort did not purport to resolve all issues relating to the scope of the tort.[133] Relevantly, neither of the majority judgments in *Hosking* raised the issue of whether the defendant must have acted with a particular state of mind. In later decisions, the NZ Supreme Court reserved its judgment on the exact scope and elements of the tort,[134] and none of the few lower court decisions on the tort has specifically explored the issue of a mental element. The focus of the judicial considerations remains the question of whether the "highly offensive" requirement should be removed from the elements of the tort. In the recent decision of *Hyndman v*

[130] American Law Institute, *Restatement (Second) of Torts* (1977) § 652B.

[131] *Hosking v Runting* [2005] 1 NZLR 1; [2004] NZCA 34.

[132] *Hosking v Runting* [2005] 1 NZLR 1, [117]; [2004] NZCA 34.

[133] *Hosking v Runting* [2005] 1 NZLR 1, [118]; [2004] NZCA 34.

[134] *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277; [2007] NZSC 91.

Walker,[135] the Court of Appeal accepted that there was a "good deal of force" in criticisms directed at this element of the tort. Yet, the Court pointed out that the plaintiff would not have succeeded even if the tort was reformulated as submitted. It did not consider the case to be a suitable vehicle for substantial reform of the tort,[136] which means that the matter should be regarded as remaining open.[137]

In *Hosking*, Tipping J held that the test of reasonable expectation of privacy introduces an objective element that requires a value judgment in light of societal values.[138] In the recent decision of *Peters v Attorney-General Sued on Behalf of Ministry of Social Development* (*Peters*), the Court of Appeal has confirmed that it is a "normative inquiry".[139] As it currently stands, liability therefore continues to depend on whether the "publicity determined objectively, by reference to its extent and nature, [is] offensive by causing real hurt or harm".[140] This suggests that there is little room for consideration of the defendant's state of mind for the threshold question of liability. However, as in the United Kingdom, it could be argued that the defendant's knowledge or intention may affect the "extent and nature" of the publication, given that a deliberate breach of privacy will often be more hurtful and offensive than a careless or accidental one. The link between the degree of fault and the extent of harm is accepted in NZ case law, albeit in the context of quantum rather than liability. In *Peters*, the Court of Appeal held the fact that the breach was deliberate, and was committed with the intention of publicly embarrassing the plaintiff and causing him harm, to be relevant for the assessment of damages.[141]

In 2012, the NZ High Court further developed the law when it accepted in *C v Holland*, for the first time, the existence of a tort of intrusion into seclusion,[142] to supplement the *Hosking* disclosure tort. Mr Holland was sued by his housemate's girlfriend, C, who suffered great distress upon finding out that Mr Holland had surreptitiously filmed her while she was using a shared bathroom. After considering the state of the law overseas and acknowledging the need to protect the values of privacy and autonomy, Whata J held that a tort of intrusion into seclusion is part of the NZ common law. Reflecting the requirements of the privacy tort in *Hosking*, Whata J held that the intrusion into seclusion must infringe the plaintiff's reasonable expectation of privacy and be highly offensive to the objective reasonable person.

However, importantly, while the disclosure tort does not have an intention requirement, it was held that the intrusion tort does. The judgment specifically drew on the equivalent tort recognised in the United States and articulated in the *Restatement (Second) of Torts*. In this context, Whata J explained that "[i]ntentional connotes an affirmative act, not an unwitting or simply careless intrusion".[143] This formulation is somewhat ambiguous because an "intrusion" could refer either to the defendant's act or to its effect on the plaintiff's privacy interest. Given the surreptitious nature of the defendant's conduct in *C v Holland*, which had made the invasion clearly intentional, this required no further consideration. There is no further case law in New Zealand that examines the question of how the mental element in the intrusion tort should be understood.

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[135] *Hyndman v Walker* [2021] NZCA 25; see also *Peters v Attorney-General Sued on Behalf of Ministry of Social Development* [2021] NZCA 355.

[136] Leave to appeal against this decision was denied in *Hyndman v Walker* [2021] NZSC 58.

[137] Similar for the situation pre-*Hyndman*: Rosemary Tobin, "The Common Law Tort of Invasion of Privacy in New Zealand" in Stephen Penk and Rosemary Tobin (eds), *Privacy Law in New Zealand* (Thomson Reuters, 2nd ed, 2016) [4.3.7].

[138] *Hosking v Runting* [2005] 1 NZLR 1, [250] (Tipping J); [2004] NZCA 34.

[139] *Peters v Attorney-General Sued on Behalf of Ministry of Social Development* [2021] NZCA 355, [107]–[108] (Goddard J) (for the Court).

[140] *Hosking v Runting* [2005] 1 NZLR 1, [117] (Gault P and Blanchard J); [2004] NZCA 34, cited in *Peters v Attorney-General Sued on Behalf of Ministry of Social Development* [2021] NZCA 355, [100] (Goddard J) (for the Court).

[141] *Peters v Attorney-General Sued on Behalf of Ministry of Social Development* [2021] NZCA 355, [73] (Goddard J) (for the Court).

[142] *C v Holland* [2012] 3 NZLR 672; [2012] NZHC 2155.

[143] *C v Holland* [2012] 3 NZLR 672, [95]; [2012] NZHC 2155.

C. The Position in Canada

Considering the relevance of fault for privacy wrongs in Canada is complicated by the fact that some Canadian provinces have statutory privacy torts, whereas others are in various stages of recognising privacy claims at common law.

Four Canadian provinces have enacted legislation to establish a statutory tort for invasion of privacy.[144] In British Columbia, Newfoundland and Saskatchewan, this tort has a requirement that the defendant's violation of privacy be done "wilfully".[145] For example, under the *Privacy Act* of British Columbia, "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".[146] In contrast, there is no fault element in the *Privacy Act* of Manitoba, which makes it a tort to "substantially, unreasonably, and without claim of right" violate the privacy of another person.[147] However, an absence of fault remains relevant also in Manitoba. Reversing the burden of proof, the defendant can escape liability by showing that he or she "neither knew or should reasonably have known" that his or her actions would violate the plaintiff's privacy.[148]

More recently, a number of provinces have also enacted special protection against the non-consensual distribution of intimate images.[149] For example, the *Intimate Image Protection Act*[150] of Manitoba creates a tort where a person who distributes an intimate image of another *knowing* that the person depicted did not consent to the distribution, or *being reckless* as to whether or not that person consented to the distribution.[151] The requirement of "knowing" distribution has been criticised as making it difficult for plaintiffs to litigate the tort,[152] which is, however, tempered to some extent by the fact that recklessness about the existence of consent is also sufficient.

Under the general Privacy Acts, jurisdictions have diverged in their interpretation of the wilfulness requirement. In *Hollinsworth v BCTV* (*Hollinsworth*), the Court of Appeal of British Columbia has held that not only a deliberate act, but also actual or constructive knowledge of a privacy invasion is required. Lambert JA stated (for the Court):

> In my opinion the word "wilfully" does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person.[153]

Following the Saskatchewan decision of *Peters-Brown v Regional District Health Board* (*Peters-Brown*),[154] other decisions have interpreted "wilfully" as meaning "deliberately, intentionally or purposefully", thereby excluding accidental intrusions, that is intrusions in which the defendant was unaware that the plaintiff's privacy was breached.[155] It may be questioned whether these two interpretations will often

[144] *Privacy Act*, RSBC 1996, c 373; *Privacy Act*, CCSM 1987, c P125; *Privacy Act*, RSS 1978, c P-24; *Privacy Act*, RSNL 1990, c P-22.

[145] *Privacy Act*, RSBC 1996, c 373, s 1(1). The Saskatchewan and Newfoundland and Labrador Acts also use the word "wilfully": *Privacy Act*, RSS 1978, c P-24, s 2; *Privacy Act*, RSNL 1990, c P-22, s 3(1).

[146] *Privacy Act*, RSBC 1996, c 373, s1(1).

[147] *Privacy Act*, CCSM 1987, c P125, s2(1).

[148] *Privacy Act*, CCSM 1987, c P125, s 5(b).

[149] Hilary Young and Emily Laidlaw, *Nonconsensual Disclosure of Intimate Images (NCDII) Tort* (2019) <https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meetings/Nonconsensual-Disclosure-of-Intimate-Images-Images_1.pdf>.

[150] *Intimate Image Protection Act*, CCSM 2015, c I87. See also *Protecting Victims of Non-Consensual Distribution of Intimate Images Act*, RSA 2017, c P-26.9.

[151] *Intimate Image Protection Act*, CCSM 2015, c I87, s 11(1) (emphasis added).

[152] Hilary Young and Emily Laidlaw, "Creating a Revenge Porn Tort for Canada" (2020) 96 *Supreme Court Law Review* 149, 156.

[153] *Hollinsworth v BCTV*, 1998 CanLII 6527 (BCCA), 59 BCLR (3d) 121, [29] (127); followed in *Getejanc v Brentwood College Association* [2001] BCSC 822; *Milner v Manufacturers Life Insurance Co* [2005] BCSC 1661; *St Pierre v Pacific Newspaper Group Inc and Skulsky* [2006] BCWLD 2759, [49] (Rice J); [2006] BCSC 241; *Watts v Klaemt* (2007) 71 BCLR (4th) 362, [16] (Bruce J); [2007] BCSC 662.

[154] *Peters-Brown v Regina District Health Board* (1995) 136 Sask R 126 (QB), affd (1996) 148 Sask R 248 (CA).

[155] *Duncan v Lessing* (2018) 420 DLR (4th) 99, [86] (Hunter JA); [2018] BCCA 9; followed in *Agnew-Americano v Equifax Canada Co* [2019] ONSC 7110, [236] (Glustein J).

lead to different outcomes in practice, given that one way of establishing that an invasion is "intentional" or "purposeful" is by demonstrating that the defendant knew that it would affect the plaintiff's privacy.[156] In *Peters-Brown*, a hospital managed by the defendant carelessly disclosed the plaintiff's medical information to her employer, when it had meant to disclose it only within the hospital. The court found that the "distribution of the … information was wilful in the sense that it was done intentionally" but that "there was never an intention to violate the plaintiff's privacy". Because of the lack of intent, the plaintiff's privacy claim was dismissed, although a claim under negligence liability was successful. Under the *Peters-Brown* approach, an invasion cannot be regarded as wilful where the defendant was merely careless regarding the plaintiff's privacy. This is a stricter approach than *Hollinsworth* because it seems to bar liability only where the defendant had neither actual nor constructive knowledge – in other words, the defendant may be liable also where they did not know but ought to have known of the risk of a privacy invasion.

In jurisdictions without statutory privacy tort, courts are moving towards recognising the two privacy torts of public disclosure of private facts and intrusion into seclusion known from US jurisprudence. In the decision of *Jones v Tsige*, the Ontario Court of Appeal declared the existence of a common law action of intrusion upon seclusion. In that decision, the defendant used her position as a bank employee to access and view the financial records of her partner's former spouse. Adopting the four-torts classification proposed by US scholar William Prosser,[157] and adopted by the US Supreme Court[158] and in the *Restatement (Second) of Torts*,[159] Sharpe JA identified the following elements of the tort:

> first, that the defendant's conduct must be *intentional, within which I would include reckless*; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.[160]

While the clarification that intentional conduct includes reckless conduct is helpful, the decision does not contain any justification or rationale for the mental element it adopted (other than to say that it is familiar from US law). Since this landmark decision in Ontario, other provinces have likewise recognised the tort of public disclosure of embarrassing private facts,[161] with essentially the same elements.

In line with the US model, while the intrusion tort requires intention or recklessness on the defendant's part, there is no fault element in the disclosure tort. The disclosure tort was first recognised by the Ontario Superior Court in a case in which a man posted on a website an intimate video of a former girlfriend.[162] While the wrongful disclosure of private facts is actionable regardless of whether the defendant acted with intention or recklessness, this tort is subject to a "highly offensive" test, just as the intrusion tort. As stated above, it could be argued that this allows for consideration of the D's fault. However, it would create some inconsistencies if the D's fault was considered separately in the context of the intrusion tort, but if it was to be considered as part of "highly offensive" for the disclosure tort. In any event, even if the D's fault would become a relevant factor for whether a disclosure was "highly offensive" it would not create a threshold consideration, but merely a factor in the overall assessment. It is important to note, as well, that – as was the case in *Peters* – accidental disclosures can be actionable in the tort of negligence. To that extent, Canadian law differs from the position in other jurisdictions, which limit negligence liability to publications that cause psychiatric injury.

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[156] *Peters-Brown v Regina District Health Board* (1995) 136 Sask R 126 (QB), affd (1996) 148 Sask R 248 (CA), [35] (Jackson JA).

[157] William L Prosser, "Privacy" (1960) 48 *California Law Review* 383, 389.

[158] *Cox Broadcasting Corporation v Cohn*, 420 US 469, 493–494 (1975).

[159] American Law Institute, n 130, § 652B.

[160] *Jones v Tsige* (2012) 108 OR (3d) 241, [71] (Sharpe JA) (with whom Winkler CJO and Cunningham ACJ agreed); [2012] ONCA 32 (emphasis added).

[161] For example, *Racki v Racki* (2012) 52 RFL (8th) 1; [2021] NSSC 46; *ES v Shillington* [2021] ABQB 739.

[162] *Doe 464533 v D* (2016) 128 OR (3d) 352; [2016] ONSC 541.

D. Conclusion: Diverse Overseas Approaches

In summary, comparable jurisdictions in the common law world show a mixed picture regarding the mental element of a privacy tort.

The tort of misuse of private information in the United Kingdom is closest to applying a strict liability standard. There is no explicit fault requirement for this tort, and the assessment of whether there is a reasonable expectation of privacy is said to be wholly objective. The determination of whether the claimant had a privacy interest that is deserving of recognition is a normative and contextual inquiry that, in principle, can take into account all the circumstances of the case. This means that the defendant's knowledge of the plaintiff's reasonable expectation of privacy could in theory be considered as a relevant factor. However, in the decided cases, the defendant's knowledge (or absence thereof) has rarely been considered relevant, let alone decisive. In any event, fault is not a threshold (or liability) requirement, but merely a potential consideration. There are no cases in which the defendant's lack of knowledge has been the basis for denying liability.

The majority of the Canadian statutory privacy torts stipulate a wilfulness requirement. The prevailing view is that this requires more than willed conduct, although courts are divided on whether actual knowledge or constructive knowledge of the privacy invasion is needed as an additional element. The common law torts in Canada and New Zealand apply different mental elements, depending on whether the wrongful conduct consists of a disclosure of private facts or an intrusion into the plaintiff's sphere without any public disclosure. Following the US model, the disclosure tort is a strict liability wrong, whereas intention is required for the intrusion tort.

V. Conclusion: Negligence Is a More Appropriate Mental Element

This article considered the appropriate mental element for a future Australian privacy tort through a detailed doctrinal, policy and comparative analysis. It concludes that a tort that required intentional and reckless conduct, as recommended by the 2014 ALRC Report, would not align well with other wrongs protecting dignitary or privacy interests, would set the bar too high and would only have limited international support.

Based on policy and doctrinal analysis, the article proposes that any new privacy tort should also provide redress against a negligent invasion of privacy, which often cause serious harm for the plaintiff. Apart from enhancing protection, the adoption of a fault standard that includes negligence would also better align the privacy tort with other wrongs that protect dignitary interests and with the Australian Privacy Principles under the *Privacy Act*. The interests of defendants are sufficiently protected by other elements of the cause of action, in particular the requirement for balancing privacy with competing interests and the defences.

Comparative analysis into the statutory or common law torts in the United Kingdom, New Zealand and Canada identifies a mixed picture regarding the requisite fault element. The tort of misuse of private information in the United Kingdom comes close to applying a no-fault liability standard, whereas the majority of the Canadian statutory privacy torts stipulate a wilfulness requirement. The common law torts in some Canadian provinces and in New Zealand differentiate the wrongful disclosure of private facts or an intrusion into the plaintiff's sphere. While the disclosure tort does not have a fault element, an intrusion is only actionable if it is intentional. Overseas experience therefore does not disclose compelling reasons to adopt a standard of intention or recklessness.

Moreover, there is some conceptual difficulty with requiring the plaintiff, as the ALRC suggests, to establish that the defendant "intended to invade the plaintiff's privacy" (or was reckless about it) but not requiring intention about the other liability elements (seriousness, lack of public interest justification) or defences. The term "invasion of privacy" can be understood as relating to the plaintiff's "conduct" and its "consequence". Furthermore, semantically, both forms of privacy invasion, that is "intrusion" or "misuse", connote an evaluative element and are therefore difficult to dissociate from the wrongfulness of the conduct. If, contrary to the proposal made here, the limitation to intentional and reckless conduct was adopted, its operation should be clarified further.