Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal's Decision in *Jones v. Tsige*

*Chris DL Hunt**

Introduction

In *Jones v. Tsige*,[1] the Ontario Court of Appeal recognized a common law tort of invasion of privacy. The Court was surely correct to do so. However, it borrowed uncritically from American law and did not elucidate a number of doctrinal issues, ushering in several problems that threaten to undermine the tort's effectiveness.

Invasion of privacy has been a tortious wrong in the United States for more than a century. Most states recognize four related but distinct forms of invasion. As set out in the *Restatement of Torts (Second)*, they

* The author is a PhD Candidate in law and WM Tapp Scholar at Gonville & Caius College, University of Cambridge. His doctoral research concerns the judicial development of privacy torts in common law countries.

1. 2012 ONCA 32, 108 OR (3d) 214.

are: (i) an unreasonable intrusion upon the seclusion of another; (ii) an appropriation of the other's name or likeness; (iii) an unreasonable publicity given to the other's private life; and (iv) a publicity that unreasonably places the other in a false light before the public.[2]

The Commonwealth courts have been far slower in their recognition of the tort of invasion of privacy, and more cautious in its development. The New Zealand Court of Appeal limited its tort to a disclosure-based action, modelling it on the *Restatement* publicity tort.[3] Although two of the justices suggested back in 2004 that the action might evolve to protect against bare intrusions,[4] at present the plaintiff must show that his private information has been published by the defendant. Similarly, when the House of Lords extended the common law to provide a remedy for the wrongful disclosure of private information,[5] it limited its cause of action[6] to disclosures of information or activities in which the plaintiff had a reasonable expectation of privacy. Several years later, one decision suggested that the English court might, too, recognize bare intrusions under the privacy umbrella.[7] For its part, the High Court of

2. *Restatement (Second) of the Law of Torts* § 652A (1977), and for the requirements of each, see: §§ 652B, 652C, 652D, 652E.

3. *Hosking v Runting*, [2004] NZCA 34, 1 NZLR 1.

4. *Ibid* at para 118 (per Gault P and Blanchard JJ).

5. See *Campbell v MGN Ltd*, [2004] UKHL 22, [2004] 2 AC 457. Since *Campbell* there have been a number of important decisions elucidating the elements of the cause of action. See especially *McKennitt v Ash*, [2006] EWCA Civ 1714, [2008] QB 73; *Mosley v News Group*, [2008] EWHC 1777 (available on QL) (QB); *Murray v Express Newspapers plc*, [2008] EWCA Civ 446, [2009] Ch 481; *LNS v Persons Unknown*, [2010] EWHC 119, [2010] 1 FCR 659 (QB).

6. Technically, the English action is not a tort; it is a modified form of equitable breach of confidence. See Chris DL Hunt, "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011) 37:1 Queen's LJ 167 at 170, n 13 [Hunt, "Conceptualizing"]. I have argued elsewhere that protecting privacy through breach of confidence is conceptually flawed, and that the law of tort provides a better doctrinal foundation for the civil wrong of invasion of privacy: see Chris DL Hunt, "Rethinking Surreptitious Takings in the Law of Confidence" (2011) Intellectual Prop Quarterly 66 [Hunt, "Rethinking"].

7. In *Wainwright and Another v Home Office*, [2003] UKHL 53, [2004] 4 LRC 154, the House of Lords rejected protecting physical intrusions into privacy, but in *Regina ex rel Wood v Metropolitan Police Commissioner*, [2009] EWCA Civ 414 at para 34, [2010] 2 LRC 184, the Court of Appeal suggested bare intrusions could be actionable. There is

Australia[8] signalled its willingness to recognize a similar cause of action, one that would cover both bare intrusions and disclosures, a few years prior to the New Zealand and English courts.[9] Meanwhile, Canadian courts followed only more recently. A handful of trial level decisions[10] in Ontario and Nova Scotia tentatively recognized the invasion of privacy as a common law wrong, all implying that the tort extends to intrusions as much as disclosures.

Given Canada's late entry into the privacy tort domain, it has the benefit—and the challenge—of crafting its privacy tort in light of those that have come before it. In this comment, I argue that Canadian jurists' efforts would be better served by following the influence of the newer, more principled developments in England than by attaching itself to the bifurcated and categorized approach associated with the American model. The comment is divided into two parts. In the first, I summarize

---

little doubt that the English action will evolve to capture bare intrusions. The English action is grounded in the right to "respect for private life" guaranteed by article 8 of the *European Convention on Human Rights*, which is incorporated into English law by the *Human Rights Act*. In deciding the minimum content of article 8, English courts follow the jurisprudence of the European Court of Human Rights in Strasbourg (see *McKennitt*, *supra* note 5 at para 11). The Strasbourg court recently held that article 8 can be violated by bare intrusions into privacy not involving the subsequent disclosure of information in *Reklos v Greece*, No 1234/05, [2009] Eur Ct Hr 200 at paras 34–40, [2009] EMLR 290.

8. *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*, [2001] HCA 63, 208 CLR 199, (Gummow and Hayne JJ, quoting Sedley LJ in *Douglas v Hello! Ltd (No 3)*, [2005] EWCA Civ 595, [2006] QB 125, said the torts of intrusion upon seclusion and disclosure of private facts together "come closest to reflecting a concern for privacy as a legal principle drawn from the fundamental value of personal autonomy" at para 125).

9. *Australian Broadcasting Corp*, *supra* note 8. Two subsequent trial level decisions recognized invasions of privacy as tortious wrongs. *Grosse v Purvis*, [2003] QDC 151 (available on QL); *Doe v ABC & Ors*, [2007] VCC 281 (available on QL).

10. See especially *Somwar v MacDonald's Restaurants of Canada Ltd* (2006), 79 OR (3d) 172, 263 DLR (4th) 752 (Sup Ct J); *Caltagirone v Scozzari-Cloutier*, [2007] OJ no 4003 (QL) (Sup Ct J); *MacDonnell v Halifax Herald Ltd*, 2009 NSSC 187, 279 NSR (2d) 217. For a review of the Canadian cases, see Alex Cameron and Mimi Palmer, "Invasion of Privacy as a Common Law Tort in Canada" (2009) 6:11 Canadian Privacy Law Review 105. The following provinces have statutory privacy torts: British Columbia (*Privacy Act*, RSBC 1996, c 373); Saskatchewan (*The Privacy Act*, RSS 1978, c P-24); Manitoba (*The Privacy Act*, CCSM c P125); Newfoundland and Labrador (*Privacy Act*, RSNL 1990, c P-22).

Jones v. Tsige, outlining how the Court identified the need for the new tort and how it subsequently structured the action. In the second, I criticize several aspects of the decision, which I then suggest can be corrected by taking guidance from the modern approach to common law privacy operating in England.

I. Summary of *Jones v. Tsige*

A. The Facts

Ms. Jones (the plaintiff) and Ms. Tsige (the defendant) worked at different branches of the Bank of Montreal (BMO). The defendant was living in a common-law relationship with the plaintiff's former husband, but the parties did not know each other personally. The plaintiff suspected that the defendant was surreptitiously accessing her personal banking records (which contained details of her financial transactions) on BMO's computers. BMO confronted the defendant, who admitted that she accessed these records without justification at least 174 times. The defendant did not copy or disseminate any of the plaintiff's information. The plaintiff sued for invasion of privacy. The defendant then sought to have the action dismissed on a motion for summary judgment on the basis that invasion of privacy is not a tortious wrong in Ontario. The motions judge agreed,[11] citing a Court of Appeal decision[12] that appeared to express this view. The plaintiff appealed.

B. The Need for and the Authority to Create a Common Law Privacy Tort

On appeal, Sharpe J.A., writing for the Court, held that the common law should evolve to recognize a tort of invasion of privacy.[13] He anchored this determination in principle, emphasizing the importance of privacy as an aspect of "physical and moral autonomy" that is "essential

11. *Jones, supra* note 1.
12. *Euteneier v Lee* (2005), 77 OR (3d) 621 at para 63, 260 DLR (4th) 123 (CA).
13. *Jones, supra* note 1 at para 65.

for the well-being of the individual".[14] He also relied on precedent, by drawing upon the line of Supreme Court of Canada cases that recommend developing the common law in a manner consistent with *Charter* values.[15] Furthermore, he emphasized the practical need for a discrete privacy tort, noting the threat that rapid technological development poses to privacy.[16] He then concluded that the case in issue "cr[ied] out for a remedy".[17] Justice Sharpe rejected the defendant's argument that creating a privacy tort called for a sensitive balancing of policy issues and was thus better left to the legislature. Where legislatures have acted in Canadian provinces "they have simply proclaimed a sweeping right to privacy and left it to the courts to define the contours of that right".[18]

C. The Nature of Privacy and the Shape of Ontario's New Tort

Justice Sharpe noted that three distinct privacy interests have been recognized in the Supreme Court of Canada's *Charter* jurisprudence. First, there is personal privacy, grounded in the right to bodily integrity, which protects a person's right not to be "touched or explored to disclose objects or matters [he wishes] to conceal".[19] Second, there is territorial privacy, which protects "spaces where the individual enjoys a reasonable expectation of privacy".[20] The third category, informational privacy, concerns "information about ourselves and activities we are entitled to shield from curious eyes"; its protection is "predicated on the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain".[21] Informational privacy

---

14. *Ibid* at para 40, citing *R v Dyment*, [1988] 2 SCR 417 at 427, among others. For a discussion of the various deontological and instrumentalist values underpinning privacy, see Hunt, "Conceptualizing", *supra* note 6.
15. *Jones*, *supra* note 1 at para 45, citing *Dolphin Delivery Ltd v RWDSU*, [1986] 2 SCR 573 at para 46, among others.
16. *Jones*, *supra* note 1 at para 67.
17. *Ibid* at para 69.
18. *Ibid* at para 54.
19. *Ibid* at para 41.
20. *Ibid.*
21. *Ibid.*

was the interest at stake in *Jones v. Tsige*. Justice Sharpe held that such an interest would "certainly include [the plaintiff's] claim to privacy in her banking records".[22]

Turning to the elements of the new tort, Sharpe J.A. "essentially adopt[ed]" the action for "intrusion upon seclusion"[23] codified in the *Restatement* which is followed in most American states.[24] He restated the key features of this tort as follows:

1. The defendant's conduct "must be intentional, within which I would include reckless";
2. The "defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns";
3. A "reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish".[25]

There is no requirement that any publicity come to the complainant's private affairs or concerns. Neither is proof of harm to a "recognized economic interest" a necessary component to making out the action.[26] Justice Sharpe emphasized that this formulation will "not open the floodgates":

> A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.[27]

---

22. *Ibid* at paras 41–42.
23. *Ibid* at para 70.
24. *Restatement*, *supra* note 2, § 652B provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person".
25. *Jones*, *supra* note 1 at para 70.
26. *Ibid* at para 71
27. *Ibid* at para 72.

Finally, he made several remarks about remedies. First, aggravated and punitive damages will only be available in "exceptional cases".[28] Second, while proving pecuniary loss is not required, it appears that such loss is recoverable.[29] Third, general damages are awarded as "moral damages" serving a "symbolic" purpose; and they should generally be "modest but sufficient to mark the wrong that has been done".[30] Only in "truly exceptional circumstances" should these damages exceed $20 000.[31]

D. Application to the Facts

Justice Sharpe held that the defendant's acts were an "intentional . . . invasion of Jones's private affairs" that would be "viewed as highly offensive to a reasonable person and caused distress, humiliation or anguish". Accordingly, the defendant was liable for committing "the tort of intrusion upon seclusion when she repeatedly examined the private bank records" of the plaintiff.[32] Damages were set at the "mid-point range" of $10 000, bearing in mind the very real distress the plaintiff suffered, but also the facts that no public embarrassment or injury to health or welfare was otherwise proved, and that the defendant had apologized.[33]

II. Problems with the Court's Framing of the Tort of Invasion of Privacy

While the Court's decision to recognize a common law privacy tort is welcome, and its application to the facts is sound, there are three difficulties with this judgment which threaten to undermine the tort's effectiveness in the future. These are: (i) the Court's repeated references to "seclusion", (ii) the definitional restriction to "private affairs and concerns", and (iii) the requirement that intrusions be "highly

28. *Ibid* at para 88.
29. *Ibid* at para 87.
30. *Ibid* at paras 87–88.
31. *Ibid.*
32. *Ibid* at para 89.
33. *Ibid* at para 90.

offensive". Below, I discuss each issue in turn, arguing that the problems these requirements impose on the fledgling action flow from the American approach to the tort. I conclude by suggesting that the development of Ontario's privacy tort would be better served by turning away from the categorical American approach, and instead orienting itself towards the English model, which embraces a multi-factoral, reasonable expectation of privacy (REP) test.

Before moving to this discussion, two points should be emphasized. First, although *Jones v. Tsige* is strictly speaking only concerned with the tort of intrusion,[34] there is little doubt that the Court would treat the wrongful disclosure of private information as actionable, even where there was no intrusion during the acquisition of the information in question.[35] In other words, the tort of invasion of privacy should not be—nor is it likely to be—limited to intrusions. It is important that informational privacy be protected from all vantage points, because we can easily imagine situations where privacy is seriously invaded in the absence of any wrongdoing in the acquisition of the information—for example, X finds a diary in the street and circulates copies to all of his friends, or Y's boyfriend posts nude photos of her that she gave him on his Facebook page without her permission.

Second, although privacy can be invaded by disclosures not involving intrusions, and (as *Jones v. Tsige* shows) the reverse is true, in many cases these issues will overlap—for instance, if Jones had posted Tsige's bank statements on the internet. The fluidity between the physical and informational aspects of privacy suggests that, contrary to Sharpe J.A.'s

34. *Ibid* ("as a court of law, we should restrict ourselves to the particular issues posed by the facts of the case before us and not attempt to decide more than is strictly necessary to decide that case" at para 21).

35. Recall that informational privacy was one of the three dimensions of privacy Sharpe JA identified as emerging from the Supreme Court of Canada's *Charter* jurisprudence. Furthermore, in the course of discussing the rationale for creating a new tort, he emphasized that the "right to informational privacy closely tracks the same interest" that is being protected under Ontario's new "intrusion" tort. *Ibid* at para 66. As mentioned above, the common law privacy torts operating in Australia, New Zealand, England and the United States each protect informational privacy, as do the statutory privacy torts operating in British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador.

view,[36] it is not sensible to have two separate torts—one to protect against intrusions and one for disclosures. Rather, one tort should capture both scenarios.[37] Accordingly, as I discuss below, making out a prima facie case should depend on the plaintiff showing an REP in relation to the subject matter of the claim. Having a single action avoids the problem of discordant principles emerging between the two actions, which would be undesirable since they protect the same interest. Where privacy is violated by both an intrusion and a disclosure, only one tort has been committed, and the disclosure should be taken into account as a factor exacerbating the initial intrusion, thus increasing the damages.[38] Double recovery should not, however, be permitted.[39]

A. The Problem with Seclusion

Although not an explicit requirement, Sharpe J.A.'s references to "seclusion" are numerous and seemingly significant in the analysis. Furthermore, as noted earlier, he makes explicit reference to the influence the American *Restatement* exerts over Ontario's tort, and it *does* explicitly outline the requirement in its first form of privacy invasion. In light of those facts, the theoretical underpinnings of "seclusion" bear further scrutiny.

The American *Restatement* tort known as "intrusion upon seclusion" protects two different aspects of privacy. First, it protects a person's privacy interest in his *person* and his private *affairs*. For instance, an actionable intrusion occurs where the defendant intrudes upon these by barging into the plaintiff's hotel room or by using binoculars to spy on him in his home.[40] Second, it protects a person's privacy interest in his

---

36. See *ibid* at para 21.

37. Such an approach was recently recommended in the following report: *Report 120: Invasion of Privacy* (New South Wales Law Reform Commission, 2009) at para 5.4.

38. See Andrew Jay McClurg, "Bringing Privacy Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73:3 NCL Rev 989 at 1072–73.

39. Note that the *Restatement*'s tort overlaps between intrusions and disclosures, and the conclusion that while the claimant may argue both, there is no double recovery as he "may have only one recovery of his damages" for invasion of privacy. *Restatement, supra* note 2, § 652A(d).

40. *Restatement, supra* note 2, §§ 652B(a),(b).

private *concerns*. An actionable intrusion occurs where the defendant intrudes upon the plaintiff by reading his mail, searching his safe or examining his bank records.[41] The former category speaks to the intangible elements of a person's privacy interest; the latter refers to the tangible. Crucially, the plaintiff's privacy interests under both categories depend on these interests being secluded.[42] Accordingly, there is generally no liability for intruding upon the plaintiff's *person* or *affairs* while he is in a public place, or for intruding upon his *concerns* if these are not shielded from the public.[43] In these respects the *Restatement* intrusion tort mirrors the *Restatement* publicity tort[44] under which no claim will arise where publicity is given to personal facts already in the public domain, located in public records, or gathered in a public place—however deeply personal they may be.[45]

---

41. *Ibid*, § 652B(b).

42. *Ibid*, §§ 652B(a),(c).

43. *Ibid*, § 652B(c); *Fogel v Forbes, Inc*, 500 F Supp 1081 (ED Pa 1980) ("this tort does not apply to matters which occur in a public place or a place otherwise open to the public eye" at 1087). For a discussion of American cases that have rejected intrusions into public places and into publically accessible documents, see: McClurg, *supra* note 38; Elizabeth Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000) 50:3 UTLJ 305 [Paton-Simpson, "Paranoid"]; Elizabeth Paton-Simpson, "Private Circles and Public Squares: Invasion of Privacy by the Publication of 'Private Facts'" (1998) 61:3 Mod L Rev 318 [Paton-Simpson, "Circles"]. Note that the *Restatement* states that it is possible to have a privacy interest in some matters, despite being in a public place, where this information is not open to public gaze (such as one's underwear). *Restatement*, *supra* note 2, § 652B(c). This exception has spawned several exceptional cases where public place privacy has been protected (see both Paton-Simpson articles for a discussion).

44. *Ibid*, § 652D: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public".

45. *Ibid* § 652D(b) (no liability where publicity is given to information already public, including public records or gathered in a public place); and see *Gill v Hearst Publishing Co*, 40 Cal (2d) 224 (1953) (intrusion and disclosure torts failed because photos were taken while the claimants sat together affectionately on a bench in a public market). Note that there have been several exceptional cases where information gathered in a public place or from documents in the public domain can still be private, but these are rare. See Paton-Simpson, "Paranoid" and "Circles", *supra* note 43 for a discussion.

Above, we saw that Sharpe J.A. was explicit that Ontario's tort is modelled on the *Restatement*,[46] and throughout the judgment he refers to this new cause of action as the "tort of intrusion upon seclusion".[47] Curiously, however, when it comes to identifying the tort's key features, he omits any reference to the plaintiff's seclusion and says the second element requires only that the plaintiff's private affairs or concerns be intruded upon.[48] This begs an obvious question: does Ontario's tort protect a person or his concerns only if they are secluded? Justice Sharpe's endorsement of the *Restatement* model, coupled with his repeated references to seclusion, suggests the answer is yes; but his omission of this requirement when setting the tort's key features implies otherwise.

In my view, a seclusion requirement should not be incorporated into Ontario's privacy tort. Such a requirement is based on two unconvincing premises, the first implicit and the second explicit. The implicit premise is that people voluntarily waive any right to privacy when venturing into public. The explicit one is that there is no principled distinction between simply looking at someone and taking their photograph.[49] McClurg has traced both of these assumptions back to Dean Prosser,[50] whose views to this effect were first set out in an influential 1960 article[51] and subsequently incorporated into the *Restatement*, for which he was the reporter and principal draftsman.[52]

The implicit waiver premise is often tied to notions of consent and voluntary assumption of risk, each of which is used interchangeably in the cases.[53] Prosser's (and the *Restatement*'s) position stems from the

---

46. *Jones*, *supra* note 1 at para 70.

47. *Ibid* at paras 65, 70, 72, 89.

48. *Ibid* at para 71.

49. McClurg, *supra* note 38 at 1036. See also *Restatement*, *supra* note 2 (which states that there is no liability for "observing [a person] or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye", § 652B(c)).

50. McClurg, *supra* note 38 at 1025–26, 36–37.

51. William L Prosser, "Privacy" (1960) 48:3 Cal L R 389 at 391–92.

52. McClurg, *supra* note 38 at 1036, n 208; See *Restatement*, *supra* note 2, § 652B(c).

53. Paton-Simpson, "Paranoid", *supra* note 43 at 332 and *Gill*, *supra* note 45, where the court intermixes these terms throughout.

famous case of *Gill v. Hearst Publishing Co.*[54] The case involved a claim for intrusion and disclosure in relation to photographs taken of a couple sitting on a bench at a market and subsequently published in a magazine. The California Supreme Court rejected the claim on the basis that the couple had "voluntarily exposed themselves to public gaze", and had thereby "waived their right of privacy".[55] The underlying reasoning here, and in similar cases,[56] is what Craig has labelled the "knowledge equals consent approach".[57] The idea is that because people are aware their photograph may be taken while out in public, they thereby assume this risk and are deemed to have consented to this documentation or to have waived any right to keep the information or activity private.[58]

There are several problems with this reasoning. First, it is a non sequitur: "While one cannot consent to an invasion of privacy without having knowledge of it, one can certainly have knowledge of it without consenting to it".[59] Second, the "knowledge equals consent" approach

---

54. *Ibid.* See also McClurg, *supra* note 38, 1036–41.

55. *Gill*, *supra* note 45 at 444.

56. See *Edwards v State Farm Insurance Co*, 833 F (2d) 535 (5th Cir 1987), in which the plaintiff's telephone conversation with his lawyer was intercepted by John Doe on a radio scanner, who then disclosed its contents to the District Attorney because he thought it concerned a criminal plot. The privacy claim was rejected because the conversation was material in the public's view, and privacy rights were waived because the claimant could foresee the possibility of such scanning. In *McNamara v Freedom Newspapers Inc*, 802 SW (2d) 901 (13th D Tex 1991) a local newspaper published a photograph of a participant in a high school football game that depicted his genitalia, which had slipped out of his shorts while chasing the ball. The court rejected the privacy claim because the claimant voluntarily participated in a spectator sport in a publicly accessible place.

57. John DR Craig, "Invasion of Privacy and Charter Values: The Common Law Tort Awakens" (1997) 42:2 McGill LJ 355 at 396.

58. *Ibid.* See also McClurg, *supra* note 38 ("[t]he assumption of risk is grounded in the notion of consent" at 1039). Paton-Simpson, "Paranoid", *supra* note 43 ("[t]he courts have deduced from this awareness (i.e. that the possibility of a privacy invasion is much greater outside the home than inside it) that the failure to stay indoors or take other effective precautions impliedly signifies waiver of the right to privacy and consent to any intrusions or publicity, however unlikely" at 332).

59. Craig, *supra* note 57 at 396. See also David Feldman, "Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty" (1994) 47:2 Curr Legal Probs 41 ("[t]o hold that one loses privacy rights when using a telephone (because they could foresee the

cannot be squared with existing tort doctrine. Although the cases mix the language of voluntary assumption of risk and consent, in Anglo-Canadian law there is a distinction in principle between the two. The former, known as *volenti non fit injuria*, applies to negligence; the latter applies to intentional torts.[60] Consent is a narrow doctrine. Although it can be implied, courts will not do so simply because the claimant was aware of the risk that her rights may be violated.[61] Consent is implied only when the victim can be said to have agreed "to the very conduct which constituted the tort".[62] The Court's approach in *Gill* is simply not consistent with these principles. It

> fail[s] to distinguish between merely voluntarily appearing in a public place and voluntarily consenting to be stared at, photographed, and publicized. It is not enough that the plaintiffs voluntarily engaged in some conduct. They must have voluntarily consented to the specific risk at issue.[63]

Another problem with the "knowledge equals consent" approach is that it rests on the faulty empirical assumption that people have a completely free choice about whether to venture into public.[64] Going about our daily business—whether it be commuting to work, getting our hair cut, mailing parcels or shopping for groceries—requires exposing ourselves to public view.[65] To hold that by doing so we thereby consent to all

---

possibility of tapping) is analogous to saying that one loses rights of property [to]... one's baggage when one takes it on an aeroplane, because we all know that bags are sometimes lost or stolen in transit" at 67).

60. See John Murphy, *Street on Torts*, 12th ed (New York: Oxford University Press, 2007) at 295.

61. See RFV Heuston & RA Buckley, *Salmond and Heuston on the Law of Torts*, 20th ed (London: Sweet & Maxwell, 1996) ("[m]ere knowledge of an impending wrongful act, or of the existence of a wrongfully caused danger, does not in itself amount to consent, even though no attempt is made by the plaintiff to prevent or avoid that act or danger" at 489).

62. See Paton-Simpson, "Paranoid" *supra* note 43 at 333.

63. McClurg, *supra* note 38 at 1039–40. See also Paton-Simpson, "Paranoid", *supra* note 43.

64. *Ibid* at 337–38 (the common law doctrines of waiver and consent are grounded in autonomy and voluntariness. It follows they should be sensitive to whether the claimant actually had any viable alternative open to him when deciding to act as he did).

65. See McClurg, *supra* note 38 at 1040.

foreseeable invasions of privacy is, as one author puts it, "ridiculous".[66] Finally, the approach is undesirable in its own terms. If taken to its logical conclusion, it means that as surveillance technologies improve, privacy rights erode to the point of extinction. As Craig notes, on this reasoning the characters in Orwell's dystopia would have suffered no violations of privacy since "technological development had reduced their privacy expectations to nil".[67] Surely it is not desirable to equate their knowledge of Big Brother's watching with consent to it.

Prosser's second premise, which is explicitly incorporated into the *Restatement*,[68] is that there is no principled distinction between looking at someone and taking their photograph—so, if we cannot object to a casual glance, we should not be able to sue over unwanted photos. This assumption plays a significant role given how many intrusion claims involve photographs. In rejecting the premise, McClurg notes three ways in which photographs intensify privacy violations,[69] and so should not be equated to a casual glance. First, because they create a permanent record, photos enable "scrutiny to be extended indefinitely"[70] in a manner not possible with casual observance. While the couple in *Gill* could expect to be seen by passersby, social norms would protect them against prolonged staring. Furthermore, if the couple was being stared at, they could simply move along and the intrusion would terminate.[71] Second, because photos can be analyzed in detail, they enable us to detect "subtleties not otherwise discernable" from a casual glance,[72] which increases their potential intrusiveness—a point emphasized by the English Court of Appeal in *Douglas v. Hello! (No. 3)*,[73] and repeatedly by

66. Paton-Simpson, "Paranoid", *supra* note 43 at 338.

67. *Supra* note 57 at 396.

68. *Restatement*, *supra* note 2 at § 652B(c).

69. McClurg, *supra* note 38 at 1041. See also Paton-Simpson, "Paranoid", *supra* note 43 at 328; Jennifer Moore, "Traumatised Bodies: Towards Corporeality in New Zealand's Privacy Tort Law Involving Accident Survivors" (2011) 24:3 NZUL Rev 386 at 395.

70. McClurg, *supra* note 38 at 1042.

71. *Ibid.*

72. *Ibid* ("[w]e know the Mona Lisa smiles with her eyes because we can study her famous portrait" at 1042).

73. *Douglas*, *supra* note 8.

the European Court of Human Rights (ECtHR).[74] Finally, photos can multiply the impact of the initial intrusion through subsequent dissemination to much larger and differently constituted audiences.[75] People tailor their behaviour based on context and conduct appropriate in one situation may be embarrassing in others. A woman may be content to sunbathe topless on a beach, but whatever minor annoyance she feels at attracting casual glances is not comparable to the distress she may suffer if a picture is taken and circulated on the internet.[76] For these reasons, taking a photograph cannot be equated with a casual glance, or even a prolonged stare.

In addition to being based on dubious premises, the *Restatement's* seclusion requirement may undermine deserving claims. Consider the notorious California case of *Shulman v. Group W Productions*,[77] in which the victim of a road accident that left her a paraplegic was secretly recorded by paramedics at the scene of the accident, first on the roadside and then in a transport helicopter. These recordings, which showed her moaning in agony and asking to die, were subsequently broadcast without her consent on a reality TV program. The Court's analysis shows the weaknesses inherent in a descriptive locational analysis. It held that the victim's intrusion action did not extend to the roadside filming, since she was not secluded at that point. The Court allowed her claim only in relation to the recording in the helicopter, reasoning that this was a relatively secluded space. Unlike being on the roadside, social norms and customs do not permit filming in medical helicopters. The problem, of course, is that were it not for the helicopter evacuation, the

74. See *Mosley v United Kingdom*, [2011] Eur Ct Hr 48009/08 at para 115, and cases cited therein.

75. McClurg, *supra* note 38 at 1042–43. See also *Reklos*, *supra* note 7 (the court held that article 8 (which mandates respect for "private life" and is incorporated into English law by virtue of the *Human Rights Act*) was engaged by the simple taking of a photograph without consent, because doing so deprived the subject of the ability to *control* the subsequent dissemination of this image, which it held was an "essential attribute of personality" at paras 38–40). This reflects McClurg's argument that photographs are offensive to one's personality because they "[allow] . . . the invader to, in effect, take part of the subject with him" and potentially disclose it in the future. *Supra* note 38 at 1041.

76. See NA Moreham, "Privacy in Public Places" (2006) 65:3 Cambridge LJ 606 at 619–20 [Moreham, "Privacy in Public"].

77. 955 P (2d) 469 (Cal 1998).

seclusion requirement would have left the victim without any redress.[78] It is hard to see why, from a normative perspective, the Court's finding that the camera crew acted with "highly offensive disrespect"[79] in the helicopter does not apply equally to the same activities on the roadside. Reasonable people surely do regard such scenes as quintessentially private moments, regardless of their location.[80] Likewise, it is hard to reconcile the Court's conclusion that the victim's "fundamental human dignity"[81] was not violated on the roadside, yet found that it was in the helicopter. The affront to dignity arises by virtue of the filming and publicizing of the traumatic event, irrespective of its location. Filming turns private grief into public spectacle and is thus inherently humiliating.[82]

Finally, it is worth emphasizing that the Supreme Court of Canada,[83] the New Zealand Court of Appeal,[84] the House of Lords,[85] the English

78. *Ibid.* Note that she also sued under the disclosure branch of the tort because the scene was broadcasted on television. This aspect of her claim failed because it was deemed newsworthy and hence protected under the First Amendment.

79. *Shulman, supra* note 77 at 494–95.

80. See *Andrews v TVNZ* (2006), Auckland CIV 2004-404-3536 (HC) (the trial judge held that the claimant had an REP where he was filmed at the scene of a car crash). The action ultimately failed, however, because the footage was found not to be highly offensive, as required under New Zealand law, on the basis that it did not depict the person in a bad light. *Ibid.* For a criticism of this aspect of the case see: NA Moreham, "Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort" in J Finn & S Todd (eds), *Law, Liberty and Legislation* (Wellington, NZ: Lexis Nexis, 2008) at 241–43 [Moreham, "Important"]; Moore, *supra* note 69 at 404.

81. *Shulman, supra* note 77 at 494.

82. See Moore, *supra* note 69 at 404, 418 (arguing this is true even if the information is not published, since the bare intrusion is both degrading and distressing to the victim); Moreham, "Important", *supra* note 80 at 242.

83. See *Aubry v Éditions Vice Versa Inc*, [1998] 1 SCR 591 (an actionable invasion of privacy was found where a photograph was taken and published of a woman sitting in a public place; the action was grounded in the right to privacy under the Quebec *Charter* and the *Civil Code of Quebec*).

84. *Hosking, supra* note 3.

85. *Campbell, supra* note 5 (photographs taken of a supermodel exiting Narcotics Anonymous and published in tabloid violated an REP).

Court of Appeal[86] and the ECtHR[87] all have rejected a strict seclusion requirement, holding that privacy may be invaded where photographs are taken of a person in a public place and subsequently published. Recent decisions from the English Court of Appeal[88] and the ECtHR[89] suggest that privacy can be invaded by bare intrusions into privacy (those not involving the subsequent publication of information) despite the plaintiff being in a public place. Ontario courts would be wise to follow this principled approach to privacy problems. Instead of insisting on a seclusion requirement, treat the plaintiff's location as one non-determinative factor relevant to whether he enjoys an REP. Consideration of this REP in relation to the plaintiff's activities and concerns should be judged in light of the overall context of the case. I return to this point below.

B. Identifying Private Affairs and Concerns

Unlike the "seclusion" references, the qualifier of "private affairs and concerns" is an explicit requirement to proving an action in Ontario's tort of privacy. Recall that it is the second element of the tort. It requires the plaintiff to show that her "private affairs or concerns" have been intruded upon.[90] This formulation, which is borrowed from the *Restatement* intrusion tort,[91] mirrors the *Restatement* publicity tort, which requires that "publicity" be given to a "matter concerning the *private life* of another".[92] The gravamen of the latter action is that the information at issue is a private fact, and the tort is known as "invasion

86. *Murray*, *supra* note 5 (anodyne photographs taken of JK Rowling's toddler in a public street violated her REP on behalf of her children).

87. *Peck v United Kingdom*, [2003] Eur Ct Hr 44647/98, [2003] All ER (D) 255 (Jan) (REP existed where the applicant had been filmed by a CCTV camera wandering the street after attempting to commit suicide; privacy was invaded when a news channel subsequently broadcasted this information). See also *Von Hannover v Germany*, [2004] Eur Ct Hr 59320/00, [2004] EMLR 379 (publishing various photographs of Princess Caroline taken of her in the street violated her right to privacy).

88. *Regina*, *supra* note 7 at para 34.

89. *Reklos*, *supra* note 7 at paras 34–40.

90. *Jones*, *supra* note 1 at para 70.

91. *Restatement*, *supra* note 2, § 652B.

92. *Ibid*, § 652D.

of privacy by publication of private facts".[93] The private facts requirement operates as a definitional filter; and is typically contrasted with public facts. This reflects the bifurcated rationale underlying the test: "What is public is not private and what is private is not public".[94] The same bifurcated rationale operates under the *Restatement* intrusion tort, insofar as activities and information already in the public domain are generally deemed public (not private) affairs and concerns.[95]

Given the broad similarities between the *Restatement* torts and Ontario's new privacy action, Canadian jurists should bear in mind that a split approach, particularly as laid out in *Restatement*, suffers from conceptual and practical shortcomings. One significant conceptual problem is that when the test is used descriptively, it is not illuminating: defining private by contrasting it with public assumes that the dividing line between the two concepts is clear, when in reality they are not "mutually exclusive categories but matters of degree, existing on a continuum".[96] Chief Justice Gleeson of the High Court of Australia observed:

> There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private.[97]

The assumed dichotomy between public and private reflects a logical mistake known as the "fallacy of bifurcation".[98] Paton-Simpson illustrates this

---

93. Paton-Simpson, "Circles", *supra* note 43 at 318, citing Prosser, *supra* note 51 at 389, who coined this phrase and whose formulation is currently reflected in the *Restatement*, *supra* note 2, § 652D.

94. Paton-Simpson, "Circles", *supra* note 43 at 320, citing *Patton v Royal Industries Inc*, 70 Cal Rptr 44 at 48 (Crt App 1968). See also *Restatement*, *supra* note 2 (noting that the tort only applies to publicity given to "the private, as distinguished from the public, life of an individual" thus reflecting the bifurcated approach of this test, § 652D (b)).

95. *Ibid*, § 652B(c).

96. Paton-Simpson, "Circles", *supra* note 43 at 324 and McClurg, *supra* note 38 at 1041.

97. *Australian Broadcasting Corp*, *supra* note 8 at para 42.

98. See S Morris Engel, *With Good Reason: An Introduction to Informal Fallacies*, 3d ed (New York: St Martin's Press, 1986) ("[b]ecause our language is full of opposites, the tendency to bifurcate is common. We are prone to people the world with 'haves' and 'have-nots,' the 'good' and the 'bad,' the 'normal' and the 'abnormal'—forgetting that

with the example of public records. These are public in the sense that many records—such as birth and death certificates—are available for public inspection. However, they may also be private, since in reality most are never accessed, and remain hidden from public view.[99] The simple but important point is that defining private in opposition to public is conceptually flawed, since a "fact can be public to some extent and private to some extent".[100]

There is a deeper criticism still. Asking whether a fact is a private one as opposed to a public one appears to be an empirical question calling for an empirical answer.[101] But, as commentators have emphasized, the real issue in privacy cases is normative, not empirical:[102] the law should concern itself with whether the plaintiff *ought* to have a prima facie privacy claim in the circumstances of the case. This is a question to be answered by considering the values underpinning the right to privacy, not by invoking fraught and overly simplistic empirical distinctions. As mentioned, the "private facts" test has encouraged an empirical approach in the US—no claim will generally arise where publicity is given to information already in the public domain or gathered in a public place.[103] This contrasts with the more principled approach taken in England, where courts have found that a right to privacy can exist in both circumstances on the basis that further disclosures cause distress and are offensive to the values of dignity, autonomy and the control of

---

between these extremes lie numerous gradations, any of which could serve as further alternatives to an either/or polarity" at 135).

99. See Paton-Simpson, "Circles", *supra* note 43 at 327.

100. *Ibid* at 324. *C.f.* Daniel J Solove, "Conceptualizing Privacy" (2002) 90:4 Cal L Rev 1087 at 1109.

101. See John Burrows, "Invasion of Privacy—*Hosking* and Beyond" (2006) 3 NZL Rev 389 at 392–94.

102. See David A Anderson, "The Failure of American Privacy Law" in Basil S Markesinis ed, *Protecting Privacy: The Clifford Chance Lectures* (New York: Oxford University Press, 1999) 139 at 150; Burrows, *supra* note 101 at 393; Hilary Delany & Eoin Carolan, *The Right to Privacy: A Doctrinal and Comparative Analysis* (Dublin: Thompson Round Hall, 2008) at 306–07.

103. *Restatement*, *supra* note 2, § 652D(b) (no liability where publicity is given to information already public, including public records or gathered in a public place). See also *Gill*, *supra* note 45 (intrusion and disclosure torts failed because photos were taken while the claimants sat together affectionately on a bench in a public market).

personal information which underpin the right to privacy.[104] It is worth emphasizing that these same values were identified by Sharpe J.A. as the normative underpinnings of Ontario's new tort.[105]

In *Jones v. Tsige*, Sharpe J.A. provided some additional guidance as to what qualifies as a private affair or concern. He listed "matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence".[106] This echoes the approach recommended in the High Court of Australia by Gleeson C.J., who said: "Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be *easy to identify as private*".[107] In *A v. B plc*, an early English privacy case, Woolf L.J. endorsed this approach, suggesting that "usually . . . whether there exists a private interest worthy of protection will be *obvious*".[108] This "obviously private" approach found some support from two members of the House of Lords in *Campbell v. MGN*, although two others expressed reservations about the test's utility.[109] As the English action for the misuse of private information has matured, the category-driven approach—the "obviously private" approach—has been dropped in favour of a normative "reasonable expectation of privacy" (REP) test.

Before discussing the REP test, it is worth highlighting two related shortcomings in the various iterations of the "obviously private"

---

104. See *OBG Ltd v Allan*, [2007] UKHL 21, [2008] 1 AC 1, per Lord Nicholls ("[p]rivacy can be invaded by further publication of information or photographs already disclosed to the public" at para 255). The House of Lords held that a right of privacy can exist in a public place. See *Campbell*, *supra* note 5.

105. *Jones*, *supra* note 1 at paras 39–46.

106. *Ibid* at para 72. Technically, Sharpe JA's list is not intended to demarcate examples of private affairs or concerns (under the second element of the test). Rather, his list is to be used as examples of the types of matters that are sufficiently sensitive to warrant a judicial conclusion that the intrusion was highly offensive to a reasonable person (under the third element of the test). However, given that both elements of the test must be satisfied to bring a successful claim, it seems inevitable that the examples under the third limb will influence the scope of the second limb.

107. *ABC & Ors*, *supra* note 9 at para 42 [emphasis added].

108. [2002] EWCA Civ 337, [2003] QB 195 at 206 [emphasis added].

109. *Supra* note 5 at paras 96, 166, 135, 166 (Lords Hope and Carswell supported Gleeson CJ's approach, yet Lord Nicholls and Baroness Hale expressed reservations about it).

approach. Each stems from the fact that the approach seemingly calls for a categorical analysis that focuses exclusively on the type of information or activity at stake. First, it fails to pay proper attention to the plaintiff's *own* expectations of privacy in relation to the material in question. This is problematic because, as many commentators have noted, privacy is essentially a subjective concept.[110] Professor Moreham, a leading New Zealand privacy scholar, explains:

> [W]hat is private to one person is not necessarily private to another: Y, the impecunious academic, might regard her annual income as an intensely private matter while X, the braying City banker, will boast about his to anyone who will listen. Conversely, X might regard the intimate details of his medical misadventures as intensely private while Y will recount hers enthusiastically to the barest of acquaintances. A comprehensive definition of privacy must therefore recognise that different people have different [subjective] reactions to different types of disclosure[s] [and intrusions].[111]

A second problem is that a categorical approach is overly simplistic and will likely produce distorted outcomes, because it is not possible to draw sharp or permanent lines between information that is "obviously private" and that which is not.[112] For example, most people would regard medical information as obviously private, but what about information that a celebrity has a cold?[113] Conversely, as Delany and Carolan note, "information which would not normally be regarded as 'obviously private' may become so as a result of the circumstances of the case", such as where it is communicated in the course of an intimate

---

110. See generally: Hunt, "Conceptualizing", *supra* note 6; Chris DL Hunt, "England's Common Law Action for the Misuse of Private Information: Some Negative and Positive Lessons for Canada" (2010) 7:10 Canadian Privacy Law Review 113 at 118 [Hunt, "Misuse"].

111. NA Moreham, "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 Law Q Rev 628 at 641–42 [Moreham, "Doctrinal"]. Similarly, see WA Parent, "A New Definition of Privacy for the Law" (1983) 2:3 Law & Phil 305 (personal information defined as "facts about a person which most individuals in a given time do not want widely known" or "facts about which *a particular person* is acutely sensitive and therefore chooses not to reveal about himself" at 306–07).

112. Moreham, "Doctrinal", *supra* note 111 at 646.

113. Baroness Hale uses this example to demonstrate that whether something is private is always a matter of "fact and degree" not a question of a priori categorization. See *Campbell*, *supra* note 5 at 501.

relationship.[114] To the extent that the "obviously private" test encourages a categorical approach, it may thus be criticized on the basis that it fails to capture this more nuanced and context-sensitive assessment.[115]

(i) A Better Judge: The Reasonable Expectation of Privacy

What is needed, then, is a test that can guide a court's assessment of what activities and information qualify as private, without falling into the problems of bifurcation and categorization identified above. This test should be sensitive to the plaintiff's own views in order to respond to the essentially subjective nature of privacy. At the same time, the test must have an objective aspect, lest the tort become intolerably broad. The current approach taken in England satisfies each of these criteria. In *Murray v. Express Newspapers*, Lord Justice Clarke M.R., for the Court of Appeal, reviewed the various tests that emerged in the early years of England's privacy tort and proposed the following reformulation:

> The first question is whether there is a reasonable expectation of privacy. This is of course an objective question . . . [But] the reasonable expectation [is] that of the person who is affected by the publicity . . . "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity".
>
> As we see it, the 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 [1] the attributes of the claimant, [2] the nature of the activity in which the claimant was engaged, [3] the place at which it was happening, [4] the nature and purpose of the intrusion, [5] the absence of consent and whether it was known or could be inferred, [6] the effect on the claimant and [7] the circumstances in which and [8] the purposes for which the information came into the hands of the publisher.[116]

---

114. *Supra* note 102 at 299–300, citing *Browne v Associated Newspapers Ltd*, [2007] EWHC 202 at paras 45–46, [2007] EMLR 19 (QB) (Eady J rejected the defendant's submission that business information was not private on the basis that it became private by virtue of it being communicated between lovers).

115. Delany & Carolan, *supra* note 102 at 298.

116. *Supra* note 5 at paras 35–36.

This test now governs in England.[117] Although it is said to be objective, it is more accurately labelled as mixed subjective-objective or "situationally subjective".[118] The court considers all the circumstances relating to the particular individual, including their expectations in relation to the information or activity in question, and uses the objective element to assess whether, in the circumstances, these expectations are reasonable.[119]

A number of advantages are inherent in this approach. First, as a matter of principle, it must be right to evaluate reasonableness from the *claimant's perspective*, as the situationally-subjective aspect of the test does. After all, tort law is not concerned with defining rights in the air, but with vindicating them in the context of bipolar disputes.[120] Since it is the *claimant's* privacy that is the subject of litigation, it makes sense to frame the inquiry from his perspective.[121] This is especially important in the case of privacy torts because, as I have argued elsewhere, the right to privacy is tied conceptually to a person's subjective desires.[122] As several appellate decisions have recognized, this "situationally subjective" focus creates room for the plaintiff's subjective expectations of privacy, and thereby responds to one of the underlying reasons why a conceptual claim to privacy can arise.[123] The reasonable expectations aspect of the test has similar advantages. The criterion of reasonableness implies that prevailing social norms are important markers guiding the assessment of

117. See *LNS*, *supra* note 5 at para 55; *Mosley*, *supra* note 5 at para 7; *Regina*, *supra* note 7 at paras 24–25.

118. See H Fenwick & G Phillipson, *Media Freedom Under the Human Rights Act* (New York: Oxford University Press, 2006) at 745–46.

119. See Delany & Carolan, *supra* note 102 at 299. Several English cases illustrate this approach, emphasizing the importance of the plaintiff's subjective expectations of privacy when determining whether, in the totality of circumstances, these expectations are reasonable. See Hunt, "Misuse", *supra* note 110 at 117–18 for a discussion.

120. See generally Ernest J Weinrib, "Correlativity, Personality, and the Emerging Consensus on Corrective Justice" (2001) 2:1 Theor Inq L 107.

121. See Moreham, "Doctrinal", *supra* note 111 (reasonableness must be assessed from the claimant's perspective, because, "given that the test is concerned with the *claimant's* expectation of privacy, it is difficult to see how it could be otherwise" at 645).

122. Hunt, "Conceptualizing", *supra* note 6.

123. Several English cases have emphasized the importance subjective desires play in this test. See Hunt, "Misuse", *supra* note 110 at 117–18 for a discussion.

whether a claim has been established.[124] This is important because, as I have argued elsewhere, community mores help identify private information and activities at a conceptual level.[125]

As a practical matter, this "situationally-subjective, reasonable expectations" test has the advantage of contextual sensitivity. As the above passage from *Murray* attests, whether a claim is reasonable must be assessed in the totality of circumstances. This means having regard not only to the nature of the information or activity (the core concern of the category-driven, "obviously private" approach), and to the plaintiff's location at the time of the alleged infringement (a key concern of the "private facts" test), but importantly to any other factors that strike a court as relevant in context of the case.[126] This reflects the test's relativistic premise—that privacy is a "matter of fact and degree rather than a matter of absolutes"[127] and it thereby avoids the problems of categorization[128] and bifurcation[129] identified above.

Two further practical advantages are that, owing to its "open-textured" approach, the test is flexible and inherently well suited to respond to unforeseen privacy threats[130] arising from technological and social changes, which have obvious impacts on the analysis of legal privacy rights.[131] Furthermore, because judges are well-versed in the

---

124. See Delany & Carolan, *supra* note 102 at 305; *Hosking*, *supra* note 3 (noting "contemporary societal values" influence which expectations are reasonable at para 250).

125. Hunt, "Conceptualizing", *supra* note 6.

126. The factors listed in *Murray*, *supra* note 5 are not exhaustive.

127. Des Butler, "A Tort of Invasion of Privacy for Australia?" (2005) 29:2 Melbourne UL Rev 339 at 370.

128. Moreham, "Doctrinal", *supra* note 111 at 646–49 (endorses an REP test and says it overcomes the problems of categorization inherent in the "obviously private" test because it does not view some types of information or activities as always or never private, but instead takes a context-sensitive approach, appreciating that "privacy" rights cannot be determined based solely on the nature of the information).

129. Paton-Simpson, "Circles", *supra* note 43 at 338–39 (endorses an REP test and says it overcomes the problems of bifurcation inherent in the "private facts" test, because it does not define private in opposition to public, thus avoiding conceptualizing privacy as an all-or-nothing concept).

130. Mark Warby, Nicole Moreham & Iain Christie, eds, *The Law of Privacy and the Media*, 2d ed (New York: Oxford University Press, 2011) at 229.

131. NSWLRC Report, *supra* note 37 at para 5.4.

concept of reasonableness, given its wide applicability in other areas of private law, this test fits in nicely with established tort principles.[132] Indeed, Baroness Hale preferred this test to Gleeson C.J.'s formulation because it is "much simpler and clearer" for judges to apply.[133]

Finally, the English approach is consistent with (and indeed, is essentially the same as) the principled approach used by the Supreme Court of Canada in its *Charter* jurisprudence on determining whether an REP exists. The Supreme Court emphasized that two key issues guide this assessment: first, there must be a subjective expectation of privacy, and second, this expectation must be objectively reasonable in light of the "totality of circumstances".[134] It surely makes more sense to align Ontario's privacy tort with this body of law (upon which, it should be remembered, it is initially based) than it does to import American tests.

C. Highly Offensive Qualifier

Recall that under the third element of Ontario's privacy tort the plaintiff must prove that a "reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish".[135] Both the intrusion and publicity torts in the *Restatement* have this requirement.[136] According to Sharpe J.A., the highly offensive qualifier acts as a limiting principle, excluding claims brought by the overly sensitive and ensuring that only "significant" invasions of privacy are actionable.[137] In this section, I argue that attaching the qualifier not only undermines the basis for the action—that it is an affront to one's dignity—but that it is redundant in light of a reasonable expectations-based test.

Moreham has offered two arguments against the requirement. First, she asserts that it obscures the fact that the privacy interest is about a person's dignity.[138] Requiring plaintiffs to prove that intrusions are

---

132. *Ibid* (citing Australian High Court Justice Callinan's (extra-judicial) view that determining the existence of a right of privacy is a "classic jury question" at para 5.5).

133. *Campbell*, *supra* note 5 at 495.

134. See *R v Tessling*, 2004 SCC 67 at paras 19, 32, [2004] 3 SCR 432.

135. *Jones*, *supra* note 1 at para 71.

136. *Supra* note 2, §§ 652B, 652D.

137. *Jones*, *supra* note 1 at para 72.

138. Moreham, "Important", *supra* note 80 at 240–43.

distressing fails to treat the invasion of an REP itself as a complete wrong. This is misguided because the purpose of the tort is to vindicate the harm to one's dignity inherent in all invasions of privacy, and this harm is established by the act of intruding upon an REP itself—it does not depend on any distress or anguish the plaintiff may suffer.[139] Post, in his influential analysis of the American privacy tort, has similarly argued that invasions of privacy are "intrinsically harmful" because the harm to one's dignity is "logically entailed by, rather than merely contingently caused by, the improper conduct".[140]

Moreham's second argument is that requiring distress takes the privacy tort "out of step" with other dignity-based torts, especially trespass to the person (which includes battery, assault and false imprisonment).[141] These torts vindicate the "indignity inherent in unwanted touching, threatening and confinement", and so for each tort the harm is assumed. [142] Privacy is similarly based on vindicating a dignity-based interest, and Moreham asserts that consistency with existing rights-based torts suggests it too should be actionable without proof of distress. Both of her arguments are convincing, and I would add a related point: the requirement that disclosures cause distress finds no analogue in the rest of tort law. In Anglo-Canadian law, torts take one of two forms—those requiring damage (such as negligence) and those actionable per se (such as trespass to the person or to property). Distress is not damage, unless it

---

139. For a discussion of dignity as the basis of privacy rights, see Hunt, "Conceptualizing", *supra* note 6. One leading commentator in New Zealand, in the course of discussing the essential features of the *Hosking* test, said the "harm protected against is humiliation and distress", which seems to confirm, if only anecdotally, Moreham's point that the dignitary basis is being lost sight of. See Ursula Cheer, "The Future of Privacy: Recent Legal Developments in New Zealand" (2007) 13: 2 Canterbury L Rev 169 at 171.

140. Robert C Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77:5 Cal L Rev 957 at 964; similarly, see Edward J Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39:6 NYUL Rev 962 ("[intrusions] are wrongful because they are demeaning of individuality . . . [a blow to human dignity] . . . , and they are such whether or not they cause emotional trauma" at 974) [Bloustein, "Answer to Prosser"].

141. Moreham, "Important", *supra* note 80 at 243–44.

142. *Ibid.*

amounts to a recognized psychiatric illness.[143] Thus, if it is not actionable per se, the creation of a third category necessarily arises. Consistency with established tort principles militates against creating a novel third category of torts that depend on mere distress, and the values underpinning privacy militate in favour of aligning it with torts actionable per se.

(i) A Better Approach: Offensiveness as One Factor, Not an Independent Requirement

Insisting on a "separate highly offensive" requirement turning on distress is undesirable. A better formulation, it might be suggested, is to retain this requirement but interpret it broadly to mean the intrusion must cross some seriousness threshold, but not necessarily cause distress. This was recently proposed by Laws L.J. in the English Court of Appeal.[144] His Lordship suggested that the claimant must prove not only a valid REP but also that the intrusion attained a "certain [undefined] level of seriousness".[145] Two arguments support such a threshold. The first is practical: It serves as a necessary "antidote" because privacy is an amorphous concept and a protean right.[146] The second is principled: a certain level of seriousness should be required because it is simply "unreal" and "unreasonable" to treat trivial intrusions as prima facie breaches of fundamental human rights.[147]

These are important points, but it is doubtful that an additional offensiveness or seriousness requirement is necessary to keep privacy torts within bounds.[148] Both Tipping J., in the New Zealand Court of Appeal, and the New South Wales Law Reform Commission (NSWLRC)

---

143. See *Wainwright*, *supra* note 7.

144. *Regina*, *supra* note 7 at para 22.

145. *Ibid.* A similar observation was made by Buxton LJ in *McKennitt*, *supra* note 5 at para 12, citing *M v Secretary of State for Work and Pensions*, [2006] UKHL 11 at para 83, 2 AC 91.

146. *Regina*, *supra* note 7 at para 22.

147. *Ibid* at 23, citing *Regina ex rel Gillian v Commissioner of Police of the Metropolis*, [2006] UKHL 12 para 28, 2 AC 307, Bingham LJ.

148. See Moreham, "Important", *supra* note 80 at 244–46.

have argued (in slightly different terms) that offensiveness is unnecessary because the objective test of reasonable expectations is itself sufficient to weed out *de minimis* claims.[149] For Tipping J., this is because offensiveness is generally implicit in any finding that an expectation is reasonable.[150] For the NSWLRC, it is because the "reasonable expectations" test is an objective normative standard that is necessarily sensitive to balancing various competing interests. Accordingly, it is unlikely that a court would recognize a prima facie claim where the breach was trivial, where the claim would fetter the rights of others, or where the plaintiff was overly sensitive.[151]

For its part, the NSWLRC recommended that offensiveness be simply one non-determinative factor courts consider when assessing the existence of an REP.[152] In my view, there is much to praise in the NSWLRC's approach. It reflects the fact that reasonable expectations always cut two ways.[153] Put simply, there are always two different questions the reasonable expectations test must answer. The first is to identify a privacy interest; and the second is to gauge whether, in the circumstances, the specific claim at issue is of sufficient importance to justify, prima facie, the law's intervention. The law does not vindicate just *any* expectation of privacy, but only those that are reasonable in the circumstances. In deciding whether a claim is reasonable, it looks not only to the nature of the privacy interest but also to the way in which it was violated. This is because the court is not asked to define privacy rights in the air, but to decide whether the plaintiff should be free from the specific intrusion at hand. These issues are inextricably intertwined in the normative question posed by the REP inquiry.[154]

---

149. *Hosking*, *supra* note 3 at paras 256–59; NSWLRC Report, *supra* note 37 at paras 5.9–5.10.

150. *Hosking*, *supra* note 3 at paras 256–59.

151. NSWLRC Report, *supra* note 37 at paras 5.5, 5.9–5.11. See also Moreham, "Important", *supra* note 80 at 244–46.

152. NSWLRC Report, *supra* note 37 at paras 5.9–5.10.

153. See *Regina*, *supra* note 7 at para 25.

154. See Norman Witzleb, "A Statutory Cause of Action for Privacy? A Critical Appraisal of Three Recent Australian Law Reform Proposals" (2011) 19 Torts Law Journal 104, text accompanying nn 58–60 (noting questions relating to the offensiveness of the defendant's behaviour overlap with the question of whether the claimant's privacy

Once this dual dimension—which looks not just to the plaintiff's privacy interest, but also to any offensive conduct on behalf of the defendant—is appreciated, a curious feature of the various REP factors listed by the Court of Appeal in *Murray* is explicable. While some of those factors are plaintiff-oriented and quite obviously serve to identify a privacy interest (that is, the nature and location of the information/activity), others are defendant-oriented and seem logically unrelated to whether a particular matter is private (that is, the purpose of the intrusion and whether the defendant knew the claimant had not consented to disclosure). In my view, the latter group of factors is aimed not at determining whether the information is private but at helping to decide whether the impugned intrusion was sufficiently objectionable to justify recognizing a prima facie claim.[155] The Court's analysis in *Murray* supports this interpretation. The case involved anodyne photos of J.K. Rowling's toddler taken while he was on a public street. In finding a valid REP, the Court emphasized that these photos were not simply taken as "street scenes" (which it hinted would not be objectionable), but were taken "deliberately, in secret and with a view to their subsequent publication . . . for profit, [and] no doubt in the knowledge that the parents would have objected to them".[156] In other words, despite the relatively weak privacy interest at stake, the Court held that

---

claim is reasonable); Edward J Bloustein, "Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?" (1968) 46:5 Tex L Rev 611 at 615 (normative reasonableness standard is capable of distinguishing between flagrant and trivial breaches by the defendant) [Bloustein, "Constitutional"].

155. Indeed, it is interesting to note that the list of REP factors identified in *Murray*, *supra* note 5, overlaps substantially with a list of factors used to assess the offensiveness of the intrusion in a leading American case interpreting the *Restatement* privacy torts. See *Miller v National Broadcasting Co*, 232 Cal Rptr 668 at 679 (Crt App 1986) (which lists: (1) degree of intrusion; (2) conduct and circumstances of the intrusion; (3) intruder's motives and purpose; (4) setting of intrusion; and (5) expectations of the victim). This overlap simply reflects the fact that questions of offensiveness are implicit in a normative REP inquiry. See McClurg, *supra* note 38 ("The magnitude of intrusion, measured by the defendant's conduct and its correlative impact upon the plaintiff's privacy, is . . . of obvious importance in determining [whether] liability [should normatively arise]" at 1063).

156. *Murray*, *supra* note 5 at para 50.

a prima facie claim was established by reference to the defendant's bad behaviour.

Crucially, because the normative REP inquiry is necessarily sensitive not just to the plaintiff's privacy interest but also to any offensive behaviour exhibited by the defendant, it is simply not necessary to have a separate requirement that intrusions attain a certain level of seriousness before being actionable.[157] Additionally, an added seriousness threshold is undesirable because it undermines the normative force of the REP test. Such a requirement implies that the law is not willing to recognize a prima facie claim, despite declaring it reasonable. However, absent some countervailing right or applicable defence, the law should vindicate reasonable claims.[158] A seriousness threshold also implies that questions about the seriousness of the breach are not part of the REP inquiry, and yet it is difficult to imagine how an REP can be established absent some consideration of the sensitivity of the information or activity. Indeed, even judges who have endorsed this approach have failed to abide by it.[159] For these reasons, it is in my view conducive to clearer analysis to imbed questions of seriousness into the multi-factoral REP test, and dispose of any separate "highly offensive" requirement.

---

157. See Samuel D Warren & Louis D Brandeis, "The Right to Privacy" (1890) 4:5 Harv L Rev 193 (Warren and Brandeis wrote that their privacy tort should only bite at "flagrant breaches of decency and propriety" as assessed by the "reasonableness or unreasonableness" of an act in light of the "varying circumstances of each case" at 214–16). *C.f.* Bloustein, "Constitutional", *supra* note 154 at 615.

158. See NSWLRC Report, *supra* note 38 at para 5.11.

159. See *Campbell*, *supra* note 5. Lord Nichols said considerations relating to the intrusiveness of breach should not be considered under the REP inquiry controlling the prima facie case, but under the balancing stage measuring the strength of privacy against the strength of expression; four paragraphs later he found the information that Campbell was attending Narcotics Anonymous not sufficiently serious to be prima facie actionable. See *ibid* at paras 22, 26. See also *McKennit*, *supra* note 5. Justice Eady said questions of "triviality or banality" belong at the second balancing stage, not the REP stage, but later excluded some information from the first stage because it was "anodyne" and "not sufficiently intrusive". *Ibid* at paras 58, 141.

Conclusion

While the Ontario Court of Appeal was right to recognize a common law privacy tort, its approach suffers from three serious deficiencies. First, its decision implies that the plaintiff's affairs or concerns must be secluded in order for a claim to be successful. The seclusion requirement is based on specious premises and produces unfair results. This requirement, if it exists, should be dropped. If it does not exist, it is simply confusing to describe the action as the tort of "intrusion upon seclusion". Second, the Court's approach to identifying "private affairs and concerns" is based on a conceptually unsatisfying bifurcated rationale; and the Court's attempts to provide further guidance by offering category-driven examples of obviously private matters fails to appreciate that privacy is a relative concept, existing in degrees, and thus is not suited to a priori list making. Finally, the "highly offensive" qualifier is detrimental to the action because it obscures the dignity-based nature of the privacy interest, takes privacy torts out of step with other dignity-based torts, undermines the normative force of the REP test, and is unnecessary in any event.

I have argued that the modern English approach overcomes each of these general problems while also aligning the inquiry more closely with the Supreme Court of Canada's Charter jurisprudence. In my view, Canadian courts would be wise to embrace the increasingly mature and principled approach taken in England, and to reject the *Restatement* approach, which many scholars see as conceptually flawed and insufficiently robust to protect personal privacy.