

# **ADVANCED TORTS**

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**\*\*NOTE** these notes contain some direct extracts from the **assigned readings** for the subject\*\*

## TOPIC 4

### PROTECTION OF PRIVACY

#### Introduction

- Australian courts have been slow to respond to the challenges posed by invasions of privacy and are yet to recognise a common law right to privacy (no tort of invasion of privacy)
  - Australia has some existing torts and equitable actions which protect privacy incidentally or in limited circumstances (eg trespass and BOC)
  - Some statutes also protect privacy in limited circumstances
    - Eg Surveillance Device legislation, Privacy Act, Privacy and Data Protection Act
    - The Victorian Charter expressly protects the right to privacy see **Charter s 13**
  - But these aren't broad or general protections, and leave gaps
- The law hasn't kept up with developments in technology, therefore there is arguably more reason to have strong privacy protections now (technology is a significant threat to privacy in modern society)
  - Privacy values many vary between generations and different cultures
  - Just because younger generations may choose to control the flow of information differently to older generations (ie posting a lot on social media), doesn't mean they shouldn't have a right to control the flow of information about themselves – it should always be a conscious choice
- A number of recent Law Commission reports have recommended the introduction of a statutory tort for serious invasion of privacy

#### Definitions of privacy

- Privacy is the bundle of interests that individuals have in their personal sphere free from interference or intrusion by others
  - Protects personality interests (immaterial interests) and right to personal autonomy
  - Includes a right to be let alone (ie to exclude people intruding on your day to day life)
    - We want others to respect our desire to be let alone when we want to be let alone
  - Includes a right to control the flow of information about yourself (ie to withhold revealing information or information central to our personality, unless you choose to disclose it)
    - We want to be able to control how much of this information we give away, who we give it to, in what circumstances etc
- Four types of privacy:
  - Information privacy: the establishment of rules governing the collection and handling of personal data eg credit information, and medical and government records (ie data protection)
  - Bodily privacy: the protection of people's physical selves against invasive procedures eg genetic tests, drug testing and cavity searches
  - Privacy of communications: covers the security and privacy of mail, phones, email and other forms of communication
  - Territorial privacy: the setting of limits on intrusion into the domestic and other environments eg workplace, homes or public spaces (eg searches, video surveillance and ID checks)
- This division is partially reflected in current law
  - Information privacy protected in Privacy and Data Protection Act and Privacy Act (handling and disclosure of data, enforced by Fed and State Privacy Commissioners)
  - Territorial (trespass to land, nuisance, Surveillance Device legislation)
  - Bodily (eg legislation regulation strip searching)
  - BOC may cover other types of information
- Privacy should be protected as between citizen and state (human rights underlay), as well as between citizens
- Privacy interacts with two fundamental human rights:
  - Autonomy: to live your life in a self-determined way
    - Everyone should have a small sphere of privacy to determine what they want to do
  - Dignity: others shouldn't be able to decide what happens to you or treat you as an object
    - Private information is central to someone's personality
    - If people can't make decisions about themselves anymore, they lose their dignity

## Australian approach to privacy claims

### No CL right to privacy

- There is no dedicated CL right to privacy or tort of invasion privacy (even though privacy is accepted as a recognisable legal interest)
- **Victoria Park Racing v Taylor (1937) 58 CLR 479**: although privacy is recognised as a human right, there is no CL right to privacy in Australia
  - For several decades, it was assumed the HCA's decision in this case conclusively prevented the recognition of a legally enforceable right to privacy as part of the CL of Australia
  - Aligns with the old decision of **Kaye v Robertson** in the UK
- **ABC v Lenah Game Meats (2001) 208 CLR 199**:
  - Reconsidered whether the reading of **Victoria Park Racing** as preventing a CL right to privacy in Australia was correct and whether the CL of Australia should develop a tort of invasion of privacy
  - The case is now the leading (albeit problematic) authority on the issue of privacy at CL in Australia
  - HCA held that previous case law does not stand in the way of developing a cause of action for invasion of privacy, but didn't go as far as to recognise a right to privacy in this case
- Although HCA in **Lenah Game** invited courts to develop the right further, no superior or appellate court has since recognised a CL right to privacy or a tort of invasion of privacy
  - Some superior courts have accepted that a tort of invasion of privacy is arguable, but no superior court has found liability for such a tort
  - Some superior courts have denied that this cause of action was endorsed in **Lenah Game**, have held that the CL of Australia doesn't recognise a tort of invasion of privacy
  - Therefore, CL treatment of privacy post **Lenah Game** is still unclear and shows little prospect of clarifying in the near future, assume that there is no tort for the invasion of privacy in Australia
- However, lower/first instance courts have been more willing to embrace and apply a tort of invasion of privacy:
  - **Grosse v Purvis [2003] QDC 151** per Skoien DCJ:
    - Found that HCA in **Lenah Game** did in fact recognise a tort of invasion of privacy, therefore recognised and applied a CL tort of invasion of privacy (for the first time in Australia)
    - Described this as a "bold step" but also a "logical and desirable step"
    - Here the COA was established, harassment was an aggravated form of invasion of privacy
    - Awarded P \$108k compensatory damages, \$50k AD and \$20k ED
    - The essential elements of a tort of invasion of privacy are:
      - A willed act by D
      - Which intrudes upon the privacy or seclusion of P
      - In a manner which would be considered highly offensive to a RP of ordinary sensibilities
      - Which causes harm to P in the form of mental, psychological or emotional harm or distress, or which prevents or hinders P from doing an act which she is lawfully entitled to do
  - **Doe v ABC [2007] VCC 281** per Hampel J:
    - Found that there has been a blurring or intertwining of BOC and a tort of invasion of privacy, and that HCA in **Lenah Game** had sanctioned the recognition of the tort of invasion of privacy
    - The novelty of such a tort isn't a sound basis for objecting to its recognition, and this case is an appropriate case in which to impose liability for it
    - Refined the elements of the COA articulated by Skoien DCJ in **Grosse v Purvis** to replace a "willed" act with an "unjustifiable" act ("willed" was too narrow, wouldn't extend to negligence)
    - Here the COA was established
    - P was awarded \$85k compensatory damages and \$25k aggravated damages
  - **Giller v Procopets [2008] VSCA 236**: left open whether there should be a tort of invasion of privacy

### Indirect protections of privacy

- Aspects of privacy are protected indirectly/incidentally through existing causes of action, such as defamation, trespass (to the person), IIED, breach of confidence, copyright and private nuisance
  - Torts protecting interests in land (trespass, private nuisance) demonstrate CL's alignment of privacy with property rather than personality rights
- These COAs are intended to principally protect interests other than privacy
  - Therefore they often fail to provide adequate protection of privacy
  - But where there is an area of overlap, they may be used to protect privacy

#### Breach of confidence:

- **Prince Albert v Strange (1849):**
  - P was the husband of Queen Victoria, etchings had been made of the family that depicted family scenes and had been distributed for profit
  - Court awarded an injunction against the distribution of the etchings against this
  - First time BOC was recognised and personal confidence was protected
- **Coco v AN Clark (Engineers) Ltd (1969):**
  - Sets out the 3 elements of BOC
  - The usual remedy will be injunction, but if too late, damages (noting this is an equitable COA)
  - BOC was mostly argued in cases of commercial BOCs
- **Giller v Procopets [2008]:**
  - Recognised BOC to protect against personal privacy
  - Awarded damages for emotional distress caused by BOC (although this isn't settled), referring to UK developments, see **Cornelius v de Taranto [2001] EMLR 329**, **Campbell v MGN [2004] 2 AC 457**

#### Trespass to land:

- Title to sue:
  - P must have a possessory interest in the land upon which D directly enters (but it isn't necessary for P to be the owner of the land)
  - The principal interest protected by TTL is P's exclusive possession of the land, but courts have recognised that privacy, as an incident of the possession of land, may be indirectly protected by TTL
  - Therefore TTL is only effective to protect privacy where the intrusion occurs on P's business or residential premises (not where the intrusion occurs in a public place or another place where P has no possessory interest)
  - Therefore TTL is a limited protection against media intrusions into privacy
- Liability:
  - **Coco v R**: every unauthorised entry upon private property is a trespass
    - Trespass may be intentional or negligent
    - P bears the onus of proving D's direct interference with P's possessory interest in land
    - Onus then shifts to D to disprove intention or negligence on his part
    - The right of a person entitled to possession to exclude others from their premises is a fundamental CL right (CL provides a high level of protection of P's possessory interest)
    - A possessor of land may use reasonable force to eject a trespasser from her property
- Aerial trespass:
  - The interest of an occupier of land isn't limited to the surface of the land, it extends to the airspace above the surface and the subterranean space below the surface
  - **Bernstein v Skyviews**: the occupier's interest in airspace is limited to such height as is necessary for the ordinary use and enjoyment of his land and the structure upon it (ie planes aren't trespass)
    - No trespass had been committed because there was no interference with the use of the land, but rather the mere taking of a photo (from an aircraft)
  - **LJP Investments v Howard Chia** (overhanging scaffolding case) per Hodgson J: the relevant test isn't whether the intrusion actually interferes with the occupier's actual use of land at the time, but whether it is of a nature and at a height which may interfere with any ordinary uses of the land which the occupier may see fit to undertake
  - **WA s 30**: no TTL or private nuisance by an aircraft flying at a height that is reasonable and in accordance with regulations
- Defences:
  - Consent of P: if P expressly or impliedly grants permission for entry, D won't be liable for TTL
  - Some other lawful excuse ie implied licence or statutory abrogation
  - Implied licence:
    - A member of the public may have an implied licence in law to enter P's property for the purpose of communicating with P
    - The implied licence may be revoked by P by giving notice to that person
    - If that person remains on the property after the revocation of the licence, he commits a TTL
  - Statutory abrogation of P's right:
    - The legislature may abrogate P's right to complain about trespass to land
    - However there is a rebuttable presumption that the a legislative provision doesn't intend to interfere with such a right
    - The legislature must communicate this intention by express words or necessary implication
    - In **Coco v R**, HCA found that a statutory authorisation to use a listening device didn't by express words or necessary implication permit the AFP to enter onto private property in execution of a warrant
  - There are no special defences for the media

- Remedies:
  - Damages: TTL, like all forms of trespass, is actionable per se (damages are awarded as of right, without proof of damage)
    - May be nominal but are ordinarily likely to be substantial
    - P is entitled to compensatory damages to vindicate her right to exclusive possession
    - If any damage is caused to the land in the course of the trespass, P is also entitled to compensatory damages in respect of that damage
    - AD and ED are also available for TTL
    - The availability of EDs for TTL gives it an advantage over defamation (for which EDs have been abolished)
  - Injunction: P may seek an injunction not only to restrain a continuing trespass, but to restrain the broadcast of any footage taken in the course of a TTL (ie the fruits of the trespass)
    - The grant of an injunction is discretionary, not as of right (see general injunction principles)

#### IIED:

- Invasions of privacy are frequently distressing to the person whose privacy is invaded
- If a person whose privacy is deliberately invaded suffers RPI (as opposed to mere distress) he or she may recover damages for IIED
- However, the prevailing view is that CL damages for mere emotional distress aren't available (see *Rhodes*)

#### Defamation:

- Prior to the introduction of the national uniform defamation laws, 4 of 8 Australian jurisdictions required proof not only of substantial truth, but also that the matter was one of public interest or was for the public benefit
  - This afforded indirect privacy protection to prospective P's
  - Eg in order to have a defence of fair comment at CL or honest opinion under statute, D's statement must have relates to a matter of public interest or public benefit
- However defamation law now provides less indirect protection of privacy than it did
  - Now, proof of substantial truth is sufficient to justify the publication of defamatory matter, no need to prove the matter was in the public interest or for the public benefit
  - Defamation no longer providing indirect protection of privacy is arguably justifiable, given that defamation is concerned with reputation (ie P's public self), and therefore is distinct from privacy
- EDs for defamation have been abolished (but ADs are still available)

#### Private nuisance:

- PN is any conduct by D that substantially and unreasonably interferes with P's use and enjoyment of her land
- D's conduct must interfere with a recognised right or incident attached to the possession of land
  - PN depends upon P establishing a possessory interest in land
- Isolated acts tend not to give rise to liability for PN
  - A PN usually involves some degree of repetition or continuance (ie repeated phone calls to a house)
- If there is a continuing PN, P is generally entitled to an injunction
- P may also be entitled to an award of damages
  - Including ADs if there are circumstances that aggravated the harm experienced by P
  - But consequential damages for injury to health appear not to be available for PN
- Leading HCA authority on privacy being an interest potentially protected by tort of PN is *Victoria Park Racing*

#### Proposed reform

##### Earlier calls for legislative reform

- ALRC For Your Information Report (2008)
  - Government didn't say whether they would or wouldn't enact a tort of privacy
  - Instead, they asked the ALRC to frame what the tort would look like (which led to the 2014 report)
- NSWLRC Invasion of Privacy Report (2009)
- VLRC Surveillance in Public Places Report (2010)
  - This was narrower than NSWLRC and ALRC reports which were for broad based COAs
  - This report targeted aspects of personal privacy which are the most vulnerable and most susceptible to intrusion or infringement warranting legal intervention:
    - Misuse of private information
    - Intrusion on seclusion
- HOR Standing Committee on Social Policy and Legal Affairs, Report on drones and privacy (July 2014)
- All reports have recommended the introduction of a statutory cause of action for the invasion of privacy

### ALRC Report 123, Serious Invasions of Privacy in the Digital Era (2014)

- In September 2014, the ALRC recommended a statutory tort for serious invasions of privacy
- This recommendation hasn't been implemented, but the report is widely regarded as providing a good basis for the statutory tort, should it be enacted
- ALRC concluded that "privacy and free speech are both better protected by finding a reasonable balance between them", and that the result of the balancing exercise will be that "privacy interests give way to free speech, when this is in the public interest"
- In exam: this is the most influential report, refer to it and set out how the ALRC structured the tort
- Also made a range of recommendations about how the general law might be reformed to accommodate the competing interests of protection of privacy and freedom of expression (if a statutory tort weren't enacted)

#### Statutory tort:

- ALRC proposed a statutory tort, not a general statutory cause of action
  - This means that existing tort law principles can be relied on (eg vicarious liability and defences)
- ALRC recommended federal statute
  - This will have uniform application throughout Australia (better than state-based approach)
  - ALRC did not want the tort developed through the courts (considered pros and cons)

#### Elements:

- P must have had a reasonable expectation of privacy
  - This is a common baseline requirement for international privacy torts
  - Must be objectively (not subjectively) private
  - The public conduct of a public figure may be legitimately discussed in the media
    - Those who participate in public life should expect to be the subject of public discussion
    - However, public figures aren't deprived of a right of a private life
  - Photos of a subject are personal information, but it is the context in which they are taken which determines whether the subject has a reasonable expectation of privacy, see **Hosking v Runting, Campbell v MGN**
- The invasion of privacy must have been an intrusion into seclusion or misuse of personal information
  - Intrusion into seclusion:
    - Protects a geographical sphere of privacy (where P has erected a barrier of privacy and D goes into that sphere)
    - Protects in the absence of a misuse or disclosure of information
    - Ie looking through a fence or window, opening a car or briefcase
  - Misuse of personal information:
    - Where information has been provided to someone for a particular purpose and it is used for another purpose
    - Where information has been provided to someone, and they have been careless with the information and allowed a third party to access the information
    - Doesn't require that the information have been obtained in an illegitimate way
  - These scenarios can overlap:
    - Eg where someone intrudes into P's seclusion to obtain the information, then publishes that information obtained wrongfully
- The invasion of privacy must have been intentional or reckless
  - The tort doesn't cover negligent interferences of privacy (eg data breaches where someone doesn't protect the data from hackers)
- The invasion of privacy must have been serious
  - The limit of the COA to "serious" breaches of privacy was already contained in the terms of reference of the enquiry
  - Given the Australian Parliament's historically conservative approach to privacy, ALRC didn't want to overextend the application, wanted a realistic prospect of approval and enactment
- The interest in privacy must outweigh any countervailing public interest:
  - Eg freedom of expression, freedom of the media, proper administration of government, open justice, public health and safety, national security, prevention and detection of crime and fraud
  - This balancing of competing interests is part of the COA (not a defence)
    - D has an evidentiary burden to point to interests that justify invasion of privacy
    - But the onus rests of P to show that the countervailing public interest isn't as strong as P's interest in privacy
  - Don't want to undermine considerations of public interest (eg media reporting about people who engage in misconduct), even if they concern issues of a private nature
  - Privacy cannot be protected absolutely, everyone discloses personal information in modern society
  - Media asserts that the tort would impose additional fetters on them, but Normann doesn't think this is the case – the protections for media freedoms are built into the tort quite strongly
  - Note not everything that interests the public is in the public interest



#### Defences:

- The defences are broad and helpful to D, ensures that privacy tort doesn't extend to circumstances where D has good reason to publish the information:
  - D's conduct was required or authorised by law
  - D's conduct incidental to the exercise of a lawful right of defence of persons or property, where that conduct was proportionate, necessary and reasonable (similar to self-defence)
  - Necessity
  - Consent
  - Absolute privilege
  - Publication of public documents
  - Fair report of proceedings or public concern
- There is also an exemption for children and young persons

#### Remedies:

- Given the statutory COA is a tort, can use tort remedies
- But the ALRC proposal goes further to include other remedies
- Injunctions (particularly prohibitive injunctions)
  - Primary concern is to prevent invasion of privacy (eg to stop publication)
  - Interlocutory injunction:
    - Often need to be quick eg in cases of publication by the media
    - Courts may be influenced by restrictive approach in defamation cases
      - Difficult to get an injunction because it is censorship, strong interference with D's right to freedom of expression
      - But defamation and invasion of privacy aren't really the same types of harm
      - Easier to undo the inference to P's reputation by defamation, but once private information is published, the damage cannot be undone
      - Courts should be more willing to award interlocutory injunctions in privacy actions
  - Final injunction:
    - Depends on whether P establishes the COA, and that there is still a risk of publication
- Compensatory damages (per se), including for emotional distress
  - Where invasion already occurred and caused damage, and cannot be undone
  - Most people feel emotional distress upon an invasion of privacy, so this is important here
- EDs (in exceptional circumstances)
  - Where D published in exceptional or outrageous circumstances deserving of punishment
  - ie in contemptuous disregard of P's rights
- AOP (gains based)
- Delivery up or destruction and removal (eg USB)
- Correction order (similar to injunction, but specifically directed)
- Order to apologise (similar to injunction, but specifically directed)
- Declaration (that the invasion has occurred)
  - Similar to an order to pay nominal damages in traditional tort
- Note that ADs aren't available

#### Later calls for legislative reform

- ACCC, Digital Platforms Inquiry, Final Report (2019)
  - ACCC wants to protect consumers who engage with digital platforms (ie social media) from breaches of privacy
  - Recommended adoption of the ALRC statutory tort, see Rec 19, see Ch 7 (pp 493-496)
  - Advocated for the introduction of a direct right for individuals to bring actions and class actions under the Privacy Act
- AHRC, Human Rights and Technology, Discussion Paper, December 2019
  - Deals with rights and applications of AI
  - Recommended adoption of the ALRC statutory tort, see Proposal 4
- The Federal Government will consider these recommendations in a forthcoming review of privacy regulations
  - The government has committed to review the situation in response to the ACCC's Digital Platforms Inquiry
  - Reform has been on the agenda for a while in Australia
- Notwithstanding this law reform activity, Australian legislators have demonstrated no appetite to introduce a statutory COA for invasion of privacy
  - Difficult for governments to get the balance right between private interests in privacy and public interests in disclosure
  - Therefore legislative development may be just as slow as CL development in Australia

## Comparative approach

- It is instructive to consider how other legal systems are addressing protection of privacy
- The most developed jurisprudence on privacy is found in the US
- In recent decades, the UK and NZ have begun to develop different general law protections of privacy
- The UK's approach is highly observed and engaged with in Australia

## UK approach

### HRA:

- Until the HRA, the UK's approach was similar to the current Australian approach (BOC, to provide a remedy for invasion of privacy, reluctant to identify an enforceable right to privacy)
- The **Human Rights Act 1998 (UK)** provided the impetus for a rapid development of privacy protection (in particular against media intrusion)
  - HRA requires adequate protection of privacy **Campbell v MGN Ltd [2004] UKHL 22:**
    - Photo taken from a street (public place) as Naomi Campbell was stepping into a AA meeting
    - This was private information, newspaper had no business publishing it, there was not enough value to warrant publication of the information (notwithstanding the fact it was taken in public)
  - Implemented the **European Convention on Human Rights** into domestic law in the UK, therefore now the UK CL is guided by and must conform to the ECHR
  - The ECHR is an instrument of the Council of Europe (broader), not the EU
  - The ECHR is partially enforced, and jurisprudence developed, by ECtHR
  - Per Rolph, the significant and distinctive human rights jurisprudence being developed in the EU will continue to have an increasing influence on the development of UK law in relation to privacy
- Per Rolph, "the reluctance has remained, even after the introduction of the HCA, which incorporated the ECHR into domestic law, including the right to privacy"
  - "Whether this resistance to acknowledging a free-standing, legally enforceable right to privacy can be sustained is questionable"
  - In **Wainwright v Home Office**, W complained to the ECtHR which upheld W's application, finding that W's right to privacy under ECHR Art 8 had been violated and that the UK courts had failed to give W an effective remedy
  - See also **Peck v UK** (similar outcome)

### MOPI:

- A tort of privacy (Misuse of Private Information) has recently been developing in the UK
- Because UK law must conform to the ECHR, UK courts recognised that the HRA's protection of the right to privacy needed to be bolstered, and developed CL accordingly
- Originally, the courts expended BOC:
  - Originally, BOC only protected confidential information (information disclosed in relationships of confidence)
  - To protect information which is private because of the subject matter of the information (not determined by the relationship through which it was disclosed)
  - Courts became increasingly concerned that the expanded BOC tried to shoehorn different interests into the concept of confidentiality
- Therefore courts recognised a new tort of **MOPI**, which protects private/personal information, rather than confidential information
- MOPI is established through a two stage test:
  - Does P have a reasonable expectation of privacy in relation to the information?
    - Engages **ECHR Art 8** (which protects the right to a private life)
    - There is no legally binding pre-notification requirement for media publishing defamatory material **Mosley v Newsgroup**
      - Raises consideration of how to respond to a defamation or privacy matter in the client's best interests – sometimes it is better to let a matter rest, because going to court could give extra publicity to something that would otherwise be quickly forgotten
      - In Australia there is a self-regulation complaints-based process through the Australian Press Council – doesn't have a legally binding effect, but members of the Council (ie only certain media) subject themselves to the ruling of the Council
      - Media argues that this provides a mechanism of redress to those who are aggrieved by media reporting, so there is no need for privacy protection (but there are gaps)



- Is interference justified; do countervailing interests in freedom of expression outweigh right to privacy?
  - Engages **ECHR Art 10** (which protects freedom of expression, especially by the media)
  - This involves a direct balancing of Arts 8 and 10 **McKennitt v Ash [2006] EWCA Civ 1614:**
    - Which of the two competing interests should be afforded more weight in the factual circumstances of the case? (The interests start from a point of equality)
    - There is a lot of influential jurisprudence on Arts 8 and 10 by the ECtHR
  - Each member state needs to ensure its laws are compliant with the ECHR
    - **Von Hannover v Germany:** all member state of the ECHR need to ensure their domestic law is in line with jurisprudence of ECtHR, but each member state must do this in the context of its own domestic law
    - In the UK, MOPI allows for the balancing that the ECtHR requires
- MOPI is a disclosure tort, but are increasing signs that MOPI may also protect against intrusion into seclusion

#### **McKennitt v Ash [2006] EWCA Civ 1714, [2008] QB 73**

- Eady J considered the tension between freedom of expression and the privacy rights of an individual
- In the UK there is a significant shift taking place between freedom of expression for the media and the corresponding interest of the public to receive information, and the legitimate expectation of citizens to have their private lives protected (this is being given more weight)
- Even where there is a genuine public interest in information, alongside a commercial interest of the media in publishing articles or photographs, sometimes such interests will have to yield to the individual citizen's right to the effective protection of their private life

#### **Mosley v Newgroup Newspaper Ltd [2008] EWHC 1777 (QB)**

- M was the boss of F1, had a high public profile
- Attended a sex party, News of the World published an article and video about this on its website, which gained a huge amount of publicity (was accessed 1.4m times over 2 days)
- M won \$60k, but spent much more than this on legal costs and his reputation was ruined
- M argued that that English law wasn't sufficiently protective of the right to private life at the ECtHR
- Argued that where the media intend to publish something that is defamatory or infringes on privacy, there should be a requirement to notify the person concerned (a right to be forewarned prior to publication), and if notification doesn't occur, the publication should be unlawful
- Argued English law didn't provide sufficient protection to seek an injunction when something could still be done to prevent exposure of his private activities, and awarding damages isn't a true protection of privacy
- Note that most media do give people the opportunity to comment (which also gives them a chance to seek an interlocutory injunction prior to publication)
- M argued all media should be bound, not just those who adhere to journalistic standards and act ethically
- ECtHR rejected M's claim
- Having regard to the chilling effect to which a pre-notification requirement risks, the significant doubts as to the effectiveness of any pre-notification requirement and the wide margin of appreciation in this area, the ECtHR was of the view that Art 8 does not require a legally binding pre-notification requirement
- Chilling effect: a pre-notification requirement would change the way in which newspapers would report, they wouldn't report on certain matters because they'd be taken to court
- Whilst it is a matter of good journalistic practice, it shouldn't be a legally binding requirement

## NZ approach

- NZ is influenced by Human Rights legislation but doesn't make as much reference to it as in the EU
  - NZ has Human Rights legislation, but doesn't contain explicit right to private life, just guarantees against unreasonable search and seizure (similar to US)
  - Carries an aspect of privacy protection, particularly against interference by the state, but isn't as broad as a right to private life (as in the EU)
- Since 1980's, NZ courts have recognised a tort of wrongful publication of private information (different to US)
  - Developed through a series of judgments handed down by trial judges
  - Its existence, and the contours of liability, available defences and possible defence, was recently endorsed by the NZCA in **Hosking v Runting [2005] 1 NZLR 1**:
    - Facts in respect of which there is a reasonable expectation of privacy (similar to **ECHR Art 8**)
    - The public exposure of the private facts is highly offensive to a reasonable person
      - Different to UK and ALRC test
      - Highly offensive makes the element more subjective (despite referring to a RP)
      - Puts emphasis on the emotional affect the publication would have on the person
      - It is only in cases where privacy invasion is highly offensive that it will be recoverable
    - Unless publication in public interest, because it involves a matter of legitimate public concern
      - Accounting for countervailing public interests (similar to **ECHR Art 10**)
  - In **Hosking v Runting**, the tort wasn't made out where there was publication of photographs that showed P (who had a public reputation) and her children in the streets (if you go into public streets, you can't have a reasonable expectation of privacy)
    - In comparable cases in UK (eg photos of JK Rowling's children), UK courts have found this is an invasion of privacy
    - It may be ok to take photos of P (with a public profile), but it's generally not ok to take photos of children
    - Children have a heightened risk of privacy invasion, the law seeks to protect children in a wider range of circumstances
- More recently, NZ courts have begun to recognise a second tort of intrusion upon seclusion (from the US)
  - **C v Holland [2012] 3 NZLR 672**: recognised a tort of intentional and unauthorised intrusion into seclusion
- Therefore NZ has two related torts
  - In Australia, ALRC has recommended these be combined into one tort with 2 different avenues

## US approach

- Although the US has a well developed right to privacy, there is a strong and expansive protection of freedom of speech pursuant to the First Amendment (so torts of invasion of privacy haven't been as effective)
  - Claims of defamation or privacy can be thwarted by very strong protection of free speech
  - Whilst EU has conflict between Art 8 and Art 10, no preference is given to each interest in the balancing exercise (whereas in the US, free speech has more weight than privacy interests)
- Prosser identified four privacy torts in 1960:
  - Unreasonable intrusion upon the seclusion of another
  - Unreasonable publicity given to the other's private life
    - Australian law doesn't recognise a right of publicity
    - However, celebrities may be able to use other COAs, such as the tort of passing off, to obtain a measure of control over the use of their image
  - Publicity that unreasonably places the other in a false light before the public
    - Ie making a false claim about someone
    - Overlaps with defamation, but covers situations where the false information isn't necessarily defamatory
    - In the UK, a wrongful disclosure of private information doesn't depend on the information being true or false **McKennick v Ash**
  - Appropriation of the other's name or likeness
    - Commercial appropriation of name and likeness (ie associating someone who has a public profile with a product or service)
    - Name and likeness aren't private information, but they are an aspect of personality for which people are entitled to expect respect
    - Link to privacy is tenuous because this doesn't concern injury to feelings from private information being disclosed
    - Australia, this conduct is dealt mostly through MDC and IP rights eg passing off
- The **Restatement of Torts** (summarises US law) has adopted this classification, see **ss 652A-E**
  - "One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other"
  - Note some states have statutory causes of action that recognise or modify the CL torts