

NEW TECHNOLOGIES, ESTABLISHED IDEAS: DRONE CAMERAS AND THE PRIVACY TORTS

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This article considers what the challenges posed by drone camera technology tell us about the desirable operation of the New Zealand privacy torts. It highlights, in particular, the importance of recognising the normative nature of the reasonable expectation of privacy test, of considering the claimant's signals that observation was unwelcome when applying it, and of ensuring that privacy protection extends beyond publication of private information.

I INTRODUCTION

Since their inception, privacy torts have been called upon to respond to technological advancements in the way that people look at, record and obtain information about each other. Academic articles have been prompted by the advent of instantaneous photography, video recording and, of course, the dazzling array of privacy-infringing technologies ushered in by the Internet age.¹ The advent of drone cameras is therefore both a significant step change in privacy-encroaching technology and business as usual. Just like earlier innovations the torts have responded to, drones create new ways of watching and recording people. They can look over fences and walls, fly past 10th-storey windows, and follow people into remote, formerly inaccessible public spaces, all whilst the user remains a safe distance away. This expansion of traditional sightlines makes drones valuable creative and practical tools, but it also has the potential to undermine privacy and extend notions of public accessibility in undesirable ways.

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1 See for example Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193 (responding to instantaneous photography); and Andrew Jay McClurg "Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73 NC L Rev 989 (responding to video recording).

This short article uses drone technology as a springboard for examining the operation of the New Zealand privacy torts. More specifically, it uses the example of drones to show how a structured understanding of the reasonable expectation of privacy test at the heart of those torts enhances courts' ability to respond clearly and coherently to new privacy challenges. Drawing on the author's own articulation of how the reasonable expectation of privacy test should be applied,² the article makes three brief points. First, it uses drone technology to show why it is important to recognise the normative nature of the reasonable expectation of privacy test. Secondly, it shows how drones' ability to fly almost anywhere reinforces the importance of considering any signals the claimant gave that the observation was unwelcome (as well as the nature of the activity in which he or she was engaged). Thirdly, this new form of camera surveillance reminds us that privacy breaches do not necessarily involve publication of private information.

Before turning to these matters, I observe that my introduction to the English law of privacy was on an LLM Civil Liberties course co-taught by Professor ATH Smith at the University of Cambridge. Tony was also one of a long line of New Zealand law Fellows at my college, Gonville and Caius, where he was renowned for the hospitality he showed to postgraduate students, colleagues, and visitors alike. I was privileged to be the recipient of this intellectual and personal generosity as both a student and Fellow of Caius and as an academic at Victoria University of Wellington Law Faculty during his deanship. I am very glad, in the light of these valued connections, to be contributing this piece to a festschrift in his honour.

II DRONE CAMERAS AND THE PRIVACY TORTS

New Zealand courts have developed two privacy torts in the past two decades: the tort of giving publicity to private information and the tort of intrusion into solitude and seclusion. The Court of Appeal first recognised the publicity tort in *Hosking v Runting*, an ultimately unsuccessful claim by a radio presenter to prevent publication of photographs of his 18-month-old twins being wheeled down a busy Auckland shopping street in a pram.³ In the main majority judgment, Gault and Blanchard JJ held that the tort had "two fundamental requirements":⁴

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

2 See NA Moreham "Unpacking the Reasonable Expectation of Privacy Test" (2018) 134 LQR 651.

3 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

4 At [117].

A defence "enabling publication to be justified by a legitimate public concern in the information" was also recognised.⁵ These requirements have been applied with only minor amendments ever since, albeit in the face of strong academic and judicial criticism of the second requirement that the publicity be highly offensive.⁶

The requirements of the second New Zealand privacy tort – intrusion into solitude or seclusion – are similar. In *C v Holland*, in which the claimant resisted an attempt to strike out a damages claim against a former flatmate who had surreptitiously videoed her in the shower, Whata J said it has four key requirements:⁷

- (a) an intentional and unauthorised intrusion;
- (b) into seclusion (namely intimate personal activity, space or affairs);
- (c) involving infringement of a reasonable expectation of privacy; and
- (d) that is highly offensive to a reasonable person.

Legitimate public concern in the "information" may provide a defence.⁸

These torts' requirements are similar to those applied in the tort of misuse of private information in England and Wales. Although the English tort was developed by extending the requirements of the breach of confidence action to ensure consistency with the right to respect for private life in art 8 of the European Convention on Human Rights (which was incorporated into domestic law by the Human

5 At [129].

6 In his separate majority judgment in *Hosking*, Tipping J argued that the highly offensive test was unnecessary and that, if it was retained, a requirement of "substantial" offence would be enough: see *Hosking v Runting*, above n 3, at [256]. See also *Peters v Attorney-General* [2021] NZCA 355, [2021] 3 NZLR 191 at [113]; *Hyndman v Walker* [2021] NZCA 25, [2021] 2 NZLR 685 at [69]–[76]; NA Moreham "Abandoning the 'High Offensiveness' Privacy Test" (2018) 4 CJCL 1; Chris DL Hunt "New Zealand's New Privacy Tort in Comparative Perspective" (2013) 13 OUCJL 157 at 163–165; Jennifer Moore "Traumatised Bodies: Towards Corporeality in New Zealand's Privacy Tort Law Involving Accident Survivors" (2011) 24 NZULR 386 at 402–405; and Tim Bain "The Wrong Tort in the Right Place: Avenues for the Development of Civil Privacy Protections in New Zealand" (2016) 27 NZULR 295 at 304–305.

7 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [94]. For a discussion of each of the tort's requirements, see Thomas Levy McKenzie "The New Intrusion Tort: The News Media Exposed?" (2014) 45 VUWLR 79. The existence of the tort and/or its requirements have been acknowledged in a handful of cases since *C v Holland*: see *Graham v R* [2015] NZCA 568 at [22]–[23]; *Henderson v Slevin* [2015] NZHC 366 at [62]–[66]; *Duval v Clift* [2014] NZHC 1950 at [84]; and *Faesenkloet v Jenkin* [2014] NZHC 1637 especially at [35]–[40] (although Asher J doubted whether there is a need for separate torts for publication of private facts and intrusion at [38]).

8 *C v Holland*, above n 7, at [96]. It is questionable whether this focus on "information" is apposite in a tort which does not have the disclosure, or even acquisition, of information as a requirement. See further NA Moreham "A Conceptual Framework for the New Zealand Tort of Intrusion" (2016) 47 VUWLR 283 at 301–302.

Rights Act 1998 (UK)),⁹ it has very similar requirements to its New Zealand equivalents. At stage one of the misuse of private information tort, the claimant needs to show that he or she had a reasonable expectation of privacy in respect of the information or activity in question.¹⁰ Once that is established, English courts determine whether the privacy interest is outweighed by countervailing interests of the defendant, particularly the right to freedom of expression protected by art 10 of the Convention.¹¹ As in the New Zealand torts, the result of this balancing exercise will usually depend on the strength of the public interest in the material in question.¹²

When it comes to the interpretation of the reasonable expectation of privacy test, the English courts consider a broad range of factors. In a passage cited with approval by the New Zealand Court of Appeal, the English Court of Appeal said in *Murray v Express Newspapers plc*:¹³

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 the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.

These similarities make England and Wales useful comparators in any discussion of the New Zealand privacy torts.

A Whether Something is Private is a Normative Question

As outlined above, the aim of this article is to ask what drone cameras show us about how the first of the New Zealand torts' requirements – the reasonable expectation of privacy test – should be applied. The first point that this new technology highlights is that the reasonable expectation of privacy test needs to be a normative enquiry, not a purely factual one. In other words, the question in any tort case concerning drone footage – or indeed any unwanted looking, listening or publication –

9 European Convention on Human Rights 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953).

10 The second requirement of the New Zealand publicity tort – that any publicity be highly offensive to an objective reasonable person – was held to be unnecessary by the House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 (see in particular Lord Nicholls at [21]–[22]).

11 See for example *Campbell v MGN Ltd*, above n 10, at [137]; and *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158 at [56].

12 See for example *Campbell v MGN Ltd*, above n 10, at [137]; *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808, [2012] EMLR 2 at [35]; and NA Moreham "Privacy, Free Speech and Legitimate Audience Interest" (2023) 139 LQR 412.

13 *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 at [36], cited with approval in *Peters v Attorney-General*, above n 6, at [109].

is not just whether a person *can* expect to be free from drone surveillance when they are engaged in a particular activity but whether they *should* be able to expect it.

If the reasonable expectation of privacy test did not have this normative underpinning, people's reasonable expectations of privacy would be reduced each time a new privacy-invading technology was developed. If you know that a drone camera could fly past your window at any time then how, this reasoning goes, can you expect privacy when you are in the place in question (especially if you are a public figure or someone else in whom others are particularly interested)? On this thinking, the scope of the privacy interest is set by privacy interferers themselves. If journalists or camera enthusiasts habitually send drones up to film into people's bedrooms then, on this reasoning, those places could no longer be considered private. Given the starting point for this discussion was that there are few places that drone cameras cannot go, this logic has potentially far-reaching consequences.

Fortunately, New Zealand courts are well-equipped to avoid this kind of thinking. The Court of Appeal has explicitly said that the focus of courts' enquiries when applying the reasonable expectation of privacy test must be on what protection a person *should* have against the privacy-infringing activity in question. Speaking for the Court in *Peters v Attorney-General*, Goddard J said (citing this author):¹⁴

Professor Moreham has suggested that this limb of the test should be framed in terms of "reasonable expectation of privacy *protection*". That formulation provides some helpful insights into the way the test should work in practice. First, it emphasises that this is a normative inquiry. The focus is on what a person should be entitled to expect in the circumstances in question. So for example the mere fact that police frequently disclose certain information, or that media frequently report certain matters, is not determinative: the question is whether it should be lawful for them to do so.

In other words, the New Zealand Court of Appeal has made it crystal clear that when asking whether a breach of privacy has occurred – including by using new technology – the question is what privacy the claimant is entitled to expect, not what people like the defendant usually get up to.

This echoes statements in leading English authorities about the operation of the reasonable expectation of privacy test. Although less explicit than their New Zealand counterparts, courts in these cases consistently use normative language when considering whether an activity or information is private; they talk about what *should* happen when applying the reasonable expectation of privacy test; what privacy a claimant is *entitled* to expect. For example, in the leading English case of *Campbell v MGN Ltd*, in which a famous fashion model successfully sued for publication of photographs and information about her treatment for drug addiction, Lord Nicholls said his concern was with whether

¹⁴ *Peters v Attorney-General*, above n 6, at [107], citing Moreham, above n 2, at 655. My argument was also adopted in *Henderson v Walker* [2019] NZHC 2184, [2021] 2 NZLR 630 at [201]–[202] and by the Hon Justice Helen Winkelmann (as she then was) in the Sir Bruce Slane Memorial Lecture (Victoria University of Wellington, 30 October 2018).

the claimant had "a reasonable expectation of privacy that [the claimant's drug taking] *should* be private".¹⁵ Similarly, when considering whether the children of a well-known musician could recover damages for publication of photographs of them on a family outing in Los Angeles, the Court of Appeal in *Weller v Associated Newspapers Ltd* sought to ascertain "the reasonable expectation of the parents as to whether the child's life in a public place *should* remain private".¹⁶ In *Murray*, the same Court said the issue was whether the child targeted by a paparazzo had a reasonable expectation of privacy "in the sense that a reasonable person in his position would feel that the photograph *should not* be published".¹⁷ And it concluded that he did, even though, as a matter of factual reality, the fame of his mother, author JK Rowling, meant that it was almost inevitable he would receive media attention of some kind.

The desirability of expressly spelling out the test's normative underpinnings is reinforced, however, by the occasions on which "what-privacy-can-you-actually-expect" reasoning has crept into courts' decision-making. Hints of this can be seen, for example, in *Kinloch v HM Advocate* where Lord Hope observed, obiter, that a person has to "expect to be the subject of monitoring on closed circuit television in public areas where he may go, *as it is a familiar feature in places that the public frequent*".¹⁸ In other words, because CCTV filming has become so common in the United Kingdom, people cannot expect to be free from it. More strikingly, in *Shulman v Group W Productions Inc* the Californian Supreme Court held that the claimant could not have had a reasonable expectation that members of the media would be excluded or prevented from photographing her as she was attended by paramedics at the scene of a serious road accident because "for journalists to attend and record the scenes of accidents and rescues is in no way unusual or unexpected".¹⁹ In contrast, the claimant did have an objectively reasonable expectation of privacy in respect of conversations conducted inside a rescue helicopter because the Court was "aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent".²⁰ In other words, whether the claimant had an objectively reasonable expectation of privacy depended not on the acceptability of the defendant's conduct but on whether the media *usually respected* an individual's privacy in the situation in question. Because the media had developed a consistent practice of riding along with ambulances and publishing detailed footage of people's treatment at accident scenes, there

15 *Campbell v MGN Ltd*, above n 10, at [24] (emphasis added).

16 *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176, [2016] 1 WLR 1541 at [20] (emphasis added).

17 *Murray v Express Newspapers plc*, above n 13, at [39] (emphasis added).

18 *Kinloch v HM Advocate* [2012] UKSC 62, [2013] 2 AC 93 at [19] (emphasis added).

19 *Shulman v Group W Productions Inc* 955 P 2d 469 (Cal 1998) at 490. It could possibly be argued that the courts' statements about common practice in *Shulman* and *Kinloch* should be interpreted as indirect references to social mores in respect of filming rescues and CCTV recording respectively, but this is not a natural reading of the judgments.

20 At 490.

could be no reasonable expectation of privacy in respect of that kind of recording. But since the media had *not* developed a practice of entering ambulances and hospital rooms, claimants could have a reasonable expectation of privacy in respect of what went on in those places. One infers that if the media had made a practice of following paramedics into such spaces, there would be no reasonable expectation of privacy there either. Express recognition of the normative nature of the reasonable expectation of privacy would have avoided this kind of norm-deficient reasoning.

Before leaving this issue, it should be acknowledged that, in some circumstances, "what-privacy-can-you-actually-expect" reasoning has the potential to *expand* a person's reasonable expectations of privacy. In New Zealand, civil aviation safety regulations restrict the use of drones outside of public areas unless the user has a licence.²¹ This means that there are places where, as a matter of factual reality, one can generally expect to be free from drone surveillance. Remembering that these rules are designed with safety not privacy in mind, does this factual reality create a reasonable expectation of privacy that one will not be subject to drone surveillance in those places?

The answer to this question needs to depend on a normative assessment of the situation at hand. When courts say that somebody has a reasonable expectation of privacy in a particular situation, they are saying that what the person is doing in that situation is no-one else's business.²² The fact that safety regulations prevent people from flying drones in a particular place could affect courts' assessment of that question to the extent that the inaccessible nature of the claimant's location was a message that outside observation was unwelcome.²³ Beyond that, regulations created to protect safety (or any other non-privacy) interest should have a limited impact; courts need to make a separate assessment of whether the claimant is entitled to be free from drone surveillance for *privacy* reasons.²⁴ To illustrate, if, in breach of safety regulations, X used a drone camera to film through Y's window as Y was committing a violent act, liability would turn on whether Y was entitled to expect privacy at that moment and/or whether there was a legitimate public concern which justified X's filming. That would depend principally on the court's attitude to the harmful conduct in which Y was engaging, considered in the light of the place where it was occurring. The fact that X had breached civil aviation safety regulations in obtaining the footage might have some bearing on the latter question (ie their assessment of the nature of the place) but, otherwise, would seem to be irrelevant.

21 See Civil Aviation Rules, pt 101, and the Civil Aviation Authority of New Zealand *Share the Skies* summary brochure, which explains that drones must "[s]tay a safe and considerate distance away from people and buildings" and must not "fly over private land, such as farms or houses" without consent.

22 For further development of this argument, see NA Moreham "Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private" (2019) 11 JML 142 at 155–160.

23 See discussion in Part II(B).

24 For discussion of this argument in the context of the impact of confidentiality on the reasonable expectation of privacy test (especially where the confidentiality was not imposed for the claimant's benefit), see Moreham, above n 22, at 143–148.

B The Relevance of Privacy Signals

The second point that drone cameras highlight about the reasonable expectation of privacy test is the importance, when applying it, of any signals the claimant was giving that observation by outsiders was unwelcome. I have argued elsewhere that close analysis of English privacy decisions reveals that two interlocking questions underpin the application of the reasonable expectation of privacy test.²⁵ The first question examines societal attitudes to the activity or information in question: is the activity or information something which most people would think you are entitled to keep to yourself? This question is very context-specific, but such activities would include sexual activity, things to do with the naked body, health information and the intimate workings of the mind. The second question – which establishes an alternative way of showing that something is private – looks at the way in which the claimant him or herself has behaved in respect of that activity or information. Did the claimant store the photos on a private device? Did he or she put a physical barrier in front of the camera? Did the activities take place behind closed doors? Or conversely did the claimant post a photograph of the activity publicly on Instagram? This part of the enquiry, I have argued, is about the *signals* that the claimant gave that the information or activity is not for the observation of others.

This approach highlights the nuanced role that a claimant's location plays in determining whether there has been a breach of his or her privacy. It has sometimes been argued that if something can be seen from a public place then it cannot be regarded as private. Most significantly, the United States *Second Restatement of the Law of Torts* says, in connection with the tort of giving publicity to private life, that "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye".²⁶ But that statement was qualified even at the time that it was made and it is clearly too simplistic an approach now.²⁷ Courts in New Zealand and England and Wales have recognised rights to privacy in public places and few commentators would argue that whether a person is entitled to watch another engaging in intimate activity depends solely, or even primarily, on whether the drone camera was in public at the time.²⁸

It is suggested then that in both New Zealand and English law a person's location is most usefully seen as an example of the signals principle at play. In other words, the fact that a person is in public

25 Moreham, above n 2, especially at 657 and following.

26 American Law Institute *Restatement of the Law of Torts* (2nd ed, St Paul, Minnesota, 1977) vol 3, § 652D at 386.

27 See for example *Daily Times Democrat v Graham* 162 So 2d 474 (Ala 1964).

28 See for example *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC) at [65]; and *Stoute v News Group Newspapers Ltd* [2023] EWCA Civ 523 at [36], where the English Court of Appeal held:

The case law establishes that a person is less likely to have a reasonable expectation of privacy with respect to a photograph if the photograph was taken in a public place than if it was taken in a private place, but this is not a bright-line rule and depends on the circumstances.

can be seen as a signal that he or she did not object to observation of what he or she was doing there. This is because people who go into public know they might be seen by others and generally tailor their self-presentational efforts accordingly.²⁹ The converse also applies. If I go into my house and shut the door or into a changing room and pull the curtain then, as well as making use of physical barriers to prevent you from seeing what I am doing, I am sending you a strong behavioural signal (which society would usually demand that you respect) that your observation is unwelcome. Once we recognise this, it becomes clear that the *act of retreat* – going into the house or drawing the curtain – should be respected even if modern technology means that the physical barrier could in fact be penetrated with the use of technological devices. So, the fact that you can fly a drone up to look through my bedroom window should not stop me from having a reasonable expectation of privacy there.³⁰

The way in which New Zealand courts talk about private property reflects this idea of retreat. For example, Thomas J explains in the New Zealand Supreme Court case of *Brooker v Police*:³¹

The home is a place where the wellbeing of the occupants can be nurtured and protected and the peace and quiet provided within the four outer walls (or fences) enjoyed by the occupants without unwanted intrusions. It provides its occupants with a sanctuary, a place to retreat or repair to in order to escape from the tensions and tribulations of the daily world.

English courts have made similar observations about the "sanctity" of the home,³² including in *Prince Albert v Strange* where the Court referred to "home" as "a word hitherto sacred among us".³³ This supports the idea that location is relevant because of what it potentially tells us about the claimant's attitude to the information or activity in question – in other words, it is a signal that he or she is giving to the world about whether he or she welcomes access and observation.

This signals-based approach assists when applying the reasonable expectation of privacy test to drone footage. Where the drone camera has been used to record someone's activity against his or her wishes, the first question should be whether the activity captured by the drone camera is of a type which most people would think others are entitled to keep to themselves. Did the drone catch the person using a toilet, engaging in sexual activity or getting undressed, for example? The second

29 The ideas in this section are more fully developed in NA Moreham "Privacy in Public Places" (2006) 65 CLJ 606; and Moreham, above n 2, especially at 665–668.

30 That is the case, a fortiori, if the subject is engaged in an activity (such as toileting or sexual activity) which most people would recognise as private (see Part II(B) above).

31 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [257] (emphasis added). See further [256] and [258].

32 *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 at [21]–[22]. See also *McKennitt v Ash* [2005] EWHC 3003 (QB), [2006] EMLR 178 at [158].

33 *Prince Albert v Strange* (1849) 2 De G & Sm 652 at 698, 64 ER 293 at 313. See also *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch) at [12].

question – which will either reinforce the conclusion on the first question or provide an alternative route to privacy protection – is whether the claimant made some signal (which society would usually respect) that the observation of others was unwelcome. Did they, for example, go inside their house and shut the door, duck behind the bushes, or walk for a day to a remote, (usually) inaccessible place?

So, if someone were to use a drone camera to film their neighbour sunbathing naked on the other side of a high fence, the first stage of the analysis would highlight the intimate nature of the activity being observed, ie exposure of the naked body. Given most people would regard their appearance whilst naked as something they are entitled to keep to themselves, this weighs in favour of the reasonable expectation of privacy. At the second stage, the court would ask what signals the claimant had given that observation was unwelcome. Here the fact that the claimant had located him or herself behind a high fence would be treated as a clear signal that they did not wish to be observed by others. Both the nature of the activity – step one – and the claimant's signals about outside access – step two – would therefore point to a reasonable expectation of privacy in respect of the footage captured by the drone. It should be added that this approach should not be dependent on the physical robustness of the barrier which the claimant has relied on. It is strongly arguable that the same approach should be taken if the neighbour had hidden behind some bushes or relied on a flimsy curtain to shield them.

Finally, and relatedly, the signals principle highlights the importance of voluntariness when considering a claimant's location. If being in public is regarded as a signal that one is ready for and accepts the observation of others, then the basis for that observation will fall away if a person involuntarily experiences something intimate or traumatic in a public place.³⁴ At such a time, the claimant's self-presentational efforts are thwarted and their choice about how to conduct themselves within the view of others undermined. It is difficult to argue, for example, that it is appropriate to broadcast drone footage of a person caught up in a car wreck or suffering a cardiac arrest simply because they had the misfortune to experience that trauma in public. Consent-based arguments for allowing recording in public do not readily apply in these situations.

C Privacy is Not Just about Publication

The principal objection to drone surveillance is not always to dissemination of the footage in question; sometimes it is to the observation of the drone users themselves. This brings home the third point about the use of drone cameras – that protection against their improper use needs to extend beyond *publication* of private information. The neighbour being filmed in his or her garden is still highly likely to object even if the user simply keeps the recording for his or her own purposes. This reminds us about a crucial, but sometimes neglected, part of the privacy interest: the right to be free from unwanted watching, listening and/or recording in the absence of further publication.

³⁴ See further Moreham, above n 2, at 667–668; and Moreham, above n 29, at 625–626.

The effects of this kind of intrusion can be significant. Even though there was no dissemination of the footage in *C v Holland*, the anxiety suffered by the claimant when she discovered that her flatmate had filmed her in the shower prevented her from going out in public for a week.³⁵ She experienced insomnia, nightmares, mistrust of others, shame and fear of the defendant for months after the discovery of the filming.³⁶ Similar types of harm were reported by claimants in the phone hacking case of *Gulati v MGN Ltd*.³⁷ Nearly all of the eight plaintiffs in that case used language like "violated" or "sickened" to describe the effects of systematic tabloid hacking of their telephone messages for a number of years.³⁸ Some also reported ongoing problems with trust and mental health.³⁹

In New Zealand, the intrusion tort deals expressly with this issue both in the context of drone cameras and beyond. Unwanted drone surveillance or recording can undoubtedly be an actionable interference with intrusion or seclusion, even without dissemination of the footage. Indeed, *C v Holland* itself was about unwanted video observation.⁴⁰ Even in the context of the information-focused English privacy tort, courts have signalled that drone footage without consent could be actionable. In *MBR Acres Ltd v Free the MBR Beagles*, specialist media judge Nicklin J said, obiter, that:⁴¹

It can hardly be doubted that the law would provide a remedy against someone who used a drone to obtain (*a fortiori*, to publish) footage of a person getting undressed in the bedroom of his/her home. The entitlement to a remedy would not depend upon whether the drone was trespassing in the airspace of the homeowner's land. It would appear to be a straightforward claim for misuse of private information.

He continued that, when determining whether a claimant can obtain redress from a person obtaining drone footage (either in privacy or breach of confidence), "much will turn on what has been filmed/photographed and what it shows".⁴² It is almost beyond doubt that the New Zealand intrusion tort – which much more obviously covers this kind of interference – would be applied in a similar way.

35 See *C v Holland*, above n 7.

36 The claimant was interviewed by NA Moreham and Professor Yvette Tinsley on 27 March 2014.

37 *Gulati v MGN Ltd* [2015] EWCA Civ 1291, [2017] QB 149.

38 At [247], [273], [407], [513], [571] and [661].

39 The surveillance also exacerbated one claimant's obsessive paranoid mental health condition (at [569]); another became so distrustful that he still lived in a house surrounded by CCTV cameras years later (at [362]).

40 See *C v Holland*, above n 7. See also *Faesenkloet v Jenkin*, above n 7; and discussion in Moreham, above n 8.

41 *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (QB) at [113].

42 At [114], referring to *Tillery Valley Foods v Channel Four Television* [2004] EWHC 1075 (Ch) at [11].

III CONCLUSION

So, the advent of drone camera technology helps illustrate how the reasonable expectation of privacy test should be applied in the context of the New Zealand privacy torts. It drives home, first, the importance of recognising that the reasonable expectation of privacy test is a normative enquiry. This, in turn, ensures that reasonable privacy expectations do not shrink with every new privacy-intruding technology. Secondly, drone-based examples of privacy interference reinforce the fact that the circumstances in which a person is observed against their wishes must be considered carefully. A public location is not the end of the enquiry; rather, location should be seen as a signal of how the claimant regards the information or activity in question. Finally, the advent of drone cameras reminds us that privacy breaches do not always involve the publication of private information and that it is important to extend privacy protection to other kinds of intrusions. Consideration of all this suggests that the New Zealand torts are well-equipped to deal with the new challenges that drone camera technology presents. As with the other technological developments which have preceded them, drone cameras just help remind us that the requirements of the privacy torts need to be applied in a nuanced, thoughtful way.