

TASNEEM HARADASA, ASSISTANT EDITOR

Victoria University of Wellington, Faculty of Law, Student/Alumni
tazharadasa@gmail.com

JOHN PREBBLE QC, EDITOR

Professor of Law, Victoria University of Wellington - Faculty of Law, Gastprofessor, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien, Adjunct Professor of Law, University of Notre Dame Australia - School of Law

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Announcements

Privacy Law Part I: Papers by Professor N.A. Moreham, Professor of Law, Victoria University of Wellington

Table of Contents

■ **Compensating for Loss of Dignity and Autonomy in the Misuse of Private Information Tort**

N. A. Moreham, Victoria University of Wellington - Faculty of Law

■ **A Conceptual Framework for the New Zealand Tort of Intrusion**

N. A. Moreham, Victoria University of Wellington - Faculty of Law

■ **Liability for Listening: Why Phone Hacking Is an Actionable Breach of Privacy**

N. A. Moreham, Victoria University of Wellington - Faculty of Law

■ **Grief Journalism, Physical Intrusion, and Loss: The Pike River Coal Mine Disaster**

N. A. Moreham, Victoria University of Wellington - Faculty of Law

Yvette Tinsley, Victoria University of Wellington - Faculty of Law

[^top](#)

LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

■ **"Compensating for Loss of Dignity and Autonomy in the Misuse of Private Information Tort"**



in 'Remedies for Breach of Privacy' Varuhas & Moreham eds (2018, Hart Publishing)
Victoria University of Wellington Legal Research Paper No. 6/2019

N. A. MOREHAM, Victoria University of Wellington - Faculty of Law

Email: nicole.moreham@vuw.ac.nz

This chapter examines the conceptual basis for English courts' recent awards of substantial damages for loss of privacy per se ie damages awarded absent any distress or other consequential harm. It argues that the basis for such awards is provided in English case law itself which says that even in the absence of distress, all actionable breaches of privacy interfere with the dignity and autonomy of the individual. This position, the article argues, is consistent both with widely-held philosophical, sociological and psychological understandings of nature of privacy harms and, as a result, with the reasons why English courts developed the misuse of private information action in the first place. This includes reasoning derived from the jurisprudence on the right to respect for private life in Article 8 of the European Convention on Human Rights 1950 the incorporation of which into English domestic law

formed part of the impetus for introducing the privacy right into English privacy law.

The chapter develops these arguments in three parts. In the first part, the author discusses the leading English decisions on damages for misuse of private information. Having considered arguments that damages for the breach itself are designed to 'vindicate' the right, the chapter concludes that damages for the loss of privacy itself in fact compensate for the harm to dignity and autonomy inherent in all breaches of privacy. Part II shows that these reasons for protecting privacy breaches align with dominant theoretical conceptions on the relationship between privacy and the protection of dignity and autonomy. Finally, the chapter briefly reflects on how damages for loss or dignity and autonomy fit with other types of damages including those awarded for distress.

"A Conceptual Framework for the New Zealand Tort of Intrusion"

(2016) 47 VUWLR 283

Victoria University of Wellington Legal Research Paper No. 7/2019

N. A. MOREHAM, Victoria University of Wellington - Faculty of Law

Email: nicole.moreham@vuw.ac.nz

This article provides a conceptual framework for understanding the nascent New Zealand privacy tort. It argues that, although it has the potential to be applied more broadly, the intrusion tort should focus on unwarranted watching, listening and recording of activities in respect of which a person has a reasonable expectation of privacy. The article is divided into three main parts. It begins by identifying retreat and inaccessibility as the basis for Anglo-Commonwealth understandings of privacy and providing a taxonomy of six sub-interests which fall within it. Then, it considers which of those six privacy sub-categories should come within the scope of the intrusion tort. Finally, the intrusion tort is reformulated so that it is clear precisely what behaviour it seeks to proscribe and on what legal basis.

"Liability for Listening: Why Phone Hacking Is an Actionable Breach of Privacy"

(2015) 8 Journal of Media Law

Victoria University of Wellington Legal Research Paper No. 8/2019

N. A. MOREHAM, Victoria University of Wellington - Faculty of Law

Email: nicole.moreham@vuw.ac.nz

The fallout from the phone hacking scandal which has engulfed two of the United Kingdom's major newspaper companies is well-known to anyone with an interest in media law. But until recently, many of the legal issues arising from the hacking – including the juridical basis for liability for listening to private conversations – had not been tested.

This article explores the significance of the acceptance, in the recent English High Court decision *Gulati v MGN Ltd*, that phone hacking itself is an actionable wrong. It begins by explaining how the judgment moves the privacy tort beyond its traditional focus on the disclosure of private information. It then explains how breach of confidence – particularly the Court of Appeal's decision in *Tchenguz v Imerman* – provides a possible juridical bases for that extension. The article goes on to argue though that Mann J's judgment in *Gulati* does more than just extend breach of confidence principles into the privacy context. It also recognises that there is more to privacy than the dissemination, or indeed the acquisition, of private information; that privacy can also be breached by watching, listening to, or physically encroaching on a person against his or her wishes. By recognising these physical privacy interests, *Gulati* represents a conceptual sea-change in English law and, the article will argue, can be seen to be ushering in a new tort based on intrusion into physical privacy interests.

"Grief Journalism, Physical Intrusion, and Loss: The Pike River Coal Mine Disaster"

In Andrew T Kenyon (ed) *Comparative Defamation and Privacy Law* (Cambridge University Press) Forthcoming

Victoria University of Wellington Legal Research Paper No. 9/2019

N. A. MOREHAM, Victoria University of Wellington - Faculty of Law

Email: nicole.moreham@vuw.ac.nz

YVETTE TINSLEY, Victoria University of Wellington - Faculty of Law

Email: Yvette.Tinsley@vuw.ac.nz

This chapter examines the impact of intense media interest on the family members and friends of people killed in high profile disasters. It sets out the preliminary results of a study into the effect of intense media interest on the family and friends of the men lost at Pike River. The study raises a plethora of legal and ethical questions about the behaviour of journalists and reporters in the aftermath of tragedy. This paper focuses on just one of them: the participants' concerns about the

media's physical presence in the aftermath of the explosions. The discussion will explain the nature of those concerns and show how the participants' responses to them reinforce theorists' views about the importance of privacy in maintaining a sense of dignity, security, and autonomy. The paper furthers the study's ultimate aim of using the experience of the Pike River families to gain deeper understanding of the effect of the media on those experiencing trauma and loss, and to ask what, if anything, should be done to change media behaviour.

[^top](#)

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Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

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Email: bblack@northwestern.edu

RONALD J. GILSON

Stanford Law School, Columbia Law School, European Corporate Governance Institute (ECGI)

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