

Court Decision Sets New Privacy Boundaries

A new decision from the High Court indicates that while we may not need to worry about seeing semi-nude photographs splashed through the tabloids like the Duchess of Cambridge and other celebrities, we may still be able to take court action to protect the privacy of our most intimate activities. Anderson Lloyd Lawyers litigation specialist Taryn Gudmanz explains.

The High Court recently considered the extent to which we can be compensated for an invasion of privacy.

A woman (known as 'C') discovered that her flatmate had secretly installed a camera in their bathroom and recorded video footage of her undressing and showering. The flatmate was convicted of a criminal offence. C then brought a claim for breach of her privacy and won damages.

Parliament has not provided for the circumstances that C found herself in. Although the flatmate's actions were criminal, this did not give C a right to claim damages. To decide whether C should be compensated, the Court had to consider the extent to which New Zealand law recognises privacy.

Key developments in privacy law happened in 2005 when media personality Mike Hosking sued for an invasion of privacy when *New Idea* tried to publish photographs of his children. His case was unsuccessful but it established privacy parameters known as the *Hosking* principles.

The Court recognised that there was a right to privacy, in that people are protected against unjustified publication of information about their private lives. If the matters publicised give rise to a reasonable expectation of privacy, and the publicity given to those private facts would be considered highly offensive to an objective reasonable person, then privacy will have been breached. There was no actual breach of privacy for the Hosking twins as they were in a public area when the photographs were taken (and so there could be no reasonable expectation of privacy) and the photographs simply showed the twins shopping.

The *Hosking* principles may not have protected the Duchess of Cambridge. While she was on a private estate, she was outside and the photographs were taken from a public road. Although the photographs showed the Duchess's bare breasts, she was just sunbathing. The reasonable person may not be 'highly offended' if toless sunbathing photographs were taken of them.

The *Hosking* principles did not protect C either, as her flatmate had not published or distributed his footage (on YouTube or otherwise). The Court held that C's privacy had been breached, even without publication, as she had suffered 'an intrusion into her seclusion'. This is a new cause of action.

A person will have a claim where there is (1) an intentional and unauthorised intrusion (2) into seclusion (namely intimate personal activity, space or affairs) (3) involving infringement of a reasonable expectation of privacy (4) that is highly offensive to a reasonable person. The last two elements reflect the *Hosking* requirements. The first two elements are new.

As the intrusion must be intentional, an accidental or careless intrusion would be insufficient. C would not have had a claim if her flatmate had accidentally walked in on her while she was in the bathroom.

Consensual or lawfully authorised intrusions will not be actionable. If C was an exhibitionist and allowed her flatmate to make the recordings, she could not later complain about the recordings. In the age of the celebrity sex tape, it should also be remembered that just because the sexual activity is consensual, it does not mean that the recording is consensual.

An intrusion could be authorised by statute. For example, the Search and Surveillance Act 2012 authorises warrants for the observation and recording of private activity on private premises. Intimate activities unrelated to the surveillance may be legitimately recorded incidentally.

The intrusion must be into intimate personal matters. The protection is for those matters that are most important to us and affect our personal autonomy. For example, an intrusion on a residential property would likely be

looked at more closely than one on a commercial property. Even within a house, there are public areas (lounges) and private areas (bedrooms). The content of the material looked at would also be considered – was it a doctor's letter or just a party invitation?

Fears that this might lead to ridiculous claims are dealt with by the 'highly offensive to the reasonable person' requirement. This strikes a balance between protection of privacy and freedom of expression so that we do not become unreasonably constrained in what we do for fear of breaching others' rights.

There may be a defence that the matter was of genuine public concern (or was at least of genuine concern to the person intruding). This is a high standard – curiosity is not enough. While we may wonder what the Duchess of Cambridge does on private holidays, knowing that she sunbathes topless does not affect the functioning of democracy, or public policy. Perhaps if a person was concerned that a family member was abusing drugs, they might be able to search their room for evidence of drug abuse.

It is not yet clear how far these protections extend. However, similar Canadian case law gives some indication. A Canadian court recently found against a bank employee who used her position to read her partner's former wife's bank statements.

This may affect employers too. Employees often store personal material on work computers. If this material was sufficiently private (say, personal financial information), the employer might be liable if they reviewed it (although employment contracts may deal with this).

Posting embarrassing photographs of friends onto Facebook could be problematic. Photographs of your friend dancing on top of a bar in town should be fine. But that hilarious one of him covered in vomit and hugging the toilet (taken through the window) may cross the line.

Overall, this seems to be a common sense approach. Effectively, it is a rule against snooping, where the question is: Would you want someone to look at this if it was yours? If the answer is no, then don't do it.

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