IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA254/2020
[2021] NZCA 355

BETWEEN	WINSTON RAYMOND PETERS Appellant
AND	ATTORNEY-GENERAL SUED ON BEHALF OF MINISTRY OF SOCIAL DEVELOPMENT First Respondent
	BRENDAN BOYLE Second Respondent
	PETER HUGHES Third Respondent

Hearing:	20–21 April 2021
Court:	French, Collins and Goddard JJ
Counsel:	B P Henry and A R Kenwright for Appellant V E Casey QC, N J Wills and S P R Conway for Respondents
Judgment:	2 August 2021 at 11.00 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal is dismissed.

C The appellant must pay the respondents one set of costs for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel.

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REASONS OF THE COURT

(Given by Goddard J)

Mr Peters' claim for interference with privacy

Mr Peters receives a superannuation overpayment

[1] The Right Honourable Winston Peters is a well-known New Zealand politician. He is the leader of the New Zealand First Party. He has held many Ministerial offices, and has served as Deputy Prime Minister. Mr Peters has a high public profile, but he has always sought to keep his personal life out of the public eye.

[2] In April 2010 Mr Peters began receiving New Zealand Superannuation (NZS). He should have been paid NZS at the partnered rate, which is lower than the single rate. But errors (not involving any fault on Mr Peters' part) led to NZS being paid to him at the single rate. The overpayment was discovered in 2017. Mr Peters immediately arranged for the overpaid amount to be repaid.

Ministers are briefed

[3] The Chief Executive of the Ministry of Social Development (MSD), Mr Boyle, was advised of the overpayment. He informed the State Services Commissioner, Mr Hughes, about the overpayment and the process for addressing it.

[4] On 31 July 2017 Mr Boyle briefed Ms Tolley, the Minister of Social Welfare at the time. On 1 August 2017 Mr Hughes briefed Ms Bennett, the Minister for State Services at the time. The briefings were provided by Mr Boyle and Mr Hughes to their Ministers under what is known as the "no surprises" principle, on a confidential basis. They provided the briefings in good faith, in the course of performing their functions as public service chief executives.[1]

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1 *Peters v Bennett* [2020] NZHC 761 [High Court judgment] at [262]. This finding was not challenged on appeal.

Anonymous leaks to the media

[5] Between 23 and 25 August 2017 a number of reporters received anonymous calls that referred to the overpayment. On 26 August 2017 Mr Peters became aware that the media knew about the overpayment. Mr Peters released a press statement the following day to pre-empt any publicity about the issue. Over the coming weeks a number of news items were published in the media referring to, and commenting on, the overpayment.

Mr Peters brings High Court proceedings

[6] Mr Peters considered that the disclosure of the overpayment was a breach of his right to privacy. He did not make a complaint to the Privacy Commissioner under the Privacy Act 1993. Instead, he brought proceedings in the High Court alleging that the tort of invasion of privacy had been committed by MSD; the two Chief Executives; and the two Ministers.

[7] The claims were unsuccessful. Venning J held that Mr Peters had a reasonable expectation that the details of the payment irregularity would be kept private and not disclosed to parties who did not have a genuine need to know about it or a proper interest in knowing about it. In particular, Mr Peters had a reasonable expectation that the details of the payment irregularity would not be disclosed to the media.[2] However his claim against all of the defendants failed as he was not able to establish that they were responsible for the disclosure of the payment irregularity to the media. Mr Peters had conceded that neither Minister was directly responsible for that disclosure.[3] The disclosures by the Chief Executives to their Ministers were made for a proper purpose, and the Ministers had a genuine interest in knowing the details of the payment irregularity.[4] Nor had Mr Peters established that the disclosure to the media was made by an employee of MSD.[5]

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2 At [276].
3 At [278].
4 At [279].
5 At [280].

The appeal to this Court

[8] Mr Peters appeals to this Court against the dismissal of his claims against the two Chief Executives and MSD. He no longer pursues his claims against the Ministers.

[9] We agree with the High Court Judge that information about Mr Peters' application for NZS, and the payment irregularity, should not have been publicly disclosed. The deliberate disclosure of that information to the media was a serious invasion of Mr Peters' privacy.

[10] However we do not consider that Mr Peters had a reasonable expectation that information about the payment irregularity would not be provided by the Chief Executives to the Ministers. The relationship between a chief executive of a government department and the responsible Minister is a relationship of trust and confidence. It is not the function of the privacy tort to regulate what can or cannot be disclosed by a chief executive to their Minister in good faith, on a confidential basis. The claim in tort against the Chief Executives must therefore fail. And that claim was in any event precluded by the statutory immunity conferred on the Chief Executives by s 86 of the State Sector Act 1988.

[11] Nor has Mr Peters made out his claim against MSD. The evidence before the Court does not establish that any employee of MSD was responsible for the disclosures to the media. By the time those disclosures occurred, the information was in the hands of a number of people inside and outside MSD. Mr Peters sought to rely on the evidential principle res ipsa loquitur: that is, the matter speaks for itself. But as a matter of logic the leak could have come from a number of sources. MSD is not liable for the unlawful disclosures made by an unknown person merely because it was the original holder of the information, which had subsequently been provided (lawfully) to a number of people inside and outside MSD.

[12] In those circumstances, the appeal must be dismissed.

Background

Mr Peters applies for NZS and is paid at the single rate

[13] In April 2010 Mr Peters turned 65 and became eligible for NZS. He completed an application for NZS then attended an MSD service centre. He met with an MSD officer. He gave her the completed form. The form included a number of questions about the applicant's relationship status. Mr Peters answered the relevant question (question 26 in the form) as follows:

Partner

Q26 note: A partner is your spouse (husband or wife), your civil union partner, or a person of the same or opposite sex with whom you have a de facto relationship.

We need partner information even if your partner is not being included because it affects your rate of pay.

Work and Income

26. Do you have a partner?

☐ No ▶ Are you: ☐ Single ☑ Living apart/ separated ☐ Divorced ☐ Widowed ☐ Civil union dissolved

▶ Go to Living Alone Payment section on page 13.

☐ Yes ▶ Are you: ☐ Married ☐ In a civil union ☐ In a relationship

[14] Mr Peters did not answer the primary question about whether he had a partner: he ticked neither "yes" nor "no". Instead, he ticked the box for a subsidiary question, advising he was "living apart/separated". Mr Peters explained in evidence that he understood the question to be about his wife, from whom he was separated. MSD proceeded on the basis that because this box had been ticked, there was no need for an answer to the primary question in question 26: "Do you have a partner?": the answer to this primary question must be "no".

[15] It was common ground before us that the form was not as well laid out as it might have been. It has been replaced by a form which clearly identifies the need to answer the primary question about whether the applicant has a current partner before moving on to more detailed questions.

[16] The answer given by Mr Peters resulted in him being paid NZS at the rate for a single person even though he had a partner, Ms Trotman, and was living with her at the relevant time.

[17] The Judge considered that both MSD and Mr Peters bore some responsibility for the ambiguity in the form as completed and the issues that subsequently arose.[6] The error in Mr Peters' NZS payment rate could have been avoided if the form had been more clearly laid out, or if Mr Peters had read the form more carefully and answered the primary question, or if MSD had sought clarification of Mr Peters' incomplete response.[7]

The overpayment is discovered

[18] The overpayment came to the attention of MSD in 2017, when Ms Trotman applied for NZS. Mr Peters was invited to attend a meeting with Ms Nugent, the Acting Regional Director for the relevant area. They met on 26 July 2017. Ms Nugent was satisfied there had been no intention to mislead or defraud MSD. Mr Peters agreed to repay the overpaid amount. Mr Peters was subsequently advised that the overpayment figure was $17,936.43. It was repaid immediately. On 3 August 2017, a formal letter was sent to Mr Peters confirming the overpayment had been repaid in full and MSD considered the matter was closed.

Mr Boyle briefs the State Services Commissioner and his Minister

[19] Meanwhile, Mr Boyle had been alerted to the issue. Recognising the sensitivity of the matter, Mr Boyle directed that the file and investigation be "locked down" and access to all relevant information restricted.

[20] Mr Boyle decided that he should brief the State Services Commissioner, Mr Hughes, about the issue, and seek his advice on how it should be handled.

[21] Mr Boyle also decided to brief his Minister, Ms Tolley. He considered that he should brief her under the "no surprises" principle (discussed in more detail below at [123]–[143]), even though this would involve disclosure of information personal to Mr Peters. Mr Boyle considered that the way in which the payment irregularity had been handled was a significant matter that went to the integrity of MSD's administration of the benefit system, for which the Minister was accountable.

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6 At [24].
7 At [28].

MSD's response to the overpayment — seeking repayment and taking no further action — had the potential to be highly controversial and subject to public debate.

[22] On 31 July 2017, at the end of their regular weekly meeting, Mr Boyle advised Ms Tolley that there was a matter on which he wished to brief her on a confidential basis. After others attending the weekly meeting left the room, Mr Boyle briefed the Minister about the payment irregularity. He offered to follow the oral briefing with a written briefing. The Minister indicated that she wanted to think about whether that was necessary. She subsequently advised she did want a written briefing. It was hand-delivered to her by Mr Boyle on 15 August 2017.

Mr Hughes briefs his Minister

[23] Mr Hughes was conscious of the personal nature of the information, and its potential political sensitivity. Mr Hughes and Ms Power, the Associate State Services Commissioner, ensured they were the only people within the State Services Commission (SSC) to know about the issue.

[24] Mr Hughes considered that the overpayment to Mr Peters, and the steps taken by MSD, "raised two immediate flags" for the SSC. The first was that a very senior politician had been overpaid a benefit for a number of years. That raised a potential concern about special treatment, bias or interference in MSD's processes for dealing with the overpayment. The integrity of the public service was in issue. One of the core functions of the State Services Commissioner is to provide oversight of State services to ensure the maintenance of high standards of integrity.[8] The second issue was whether Ministers should be briefed, and when. Mr Hughes' view was that there should be no briefing until MSD had completed its processes, to ensure there could be no suggestion of political interference in MSD's final decision.

[25] Mr Hughes considered that the information was relevant to Ms Bennett as Minister for the SSC. She was accountable to Parliament for the performance and integrity of the public service. It was important that Ms Bennett be in a position to provide an assurance to Parliament and the New Zealand public that the issue had been

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8 State Sector Act 1988, s 4A (now repealed).

handled appropriately and impartially by MSD. It was also important that she could provide that assurance to Ms Tolley. On 16 July 2017, just a few weeks earlier, the media had reported that Ms Turei, the co-leader of the Green Party, had publicly announced that when she was a beneficiary she had lied to MSD in order to receive a larger benefit payment than she was entitled to. Against the backdrop of the recent publicity in relation to Ms Turei's benefit fraud, the possibility that the overpayment to Mr Peters could get into the public domain could not be ruled out.

[26] On 31 July 2017, Mr Boyle advised Ms Power that the matter had been resolved and that he had briefed his Minister about the case. Ms Power informed Mr Boyle that the SSC would now brief their Minister. They did so the next day.

The Ministers' involvement

[27] Both Ms Bennett and Ms Tolley gave evidence.

[28] Ms Bennett confirmed that she was briefed about the payment irregularity by Mr Hughes and Ms Power on 1 August 2017. She knew that MSD were also briefing their Minister, Ms Tolley. A few days later the two Ministers had a very short conversation about those briefings.

[29] Ms Bennett said in evidence that she did not discuss the topic of Mr Peters' overpayment with anyone else until 26 August 2017. She had no involvement with the calls made to the news media. On 26 August 2017, the Prime Minister, Mr English, asked her about a series of tweets published by a journalist about a story that was about to be published, including one that referred to a "mother of all scandals". Ms Bennett told the Prime Minister that she thought the story was going to be about Mr Peters. She also had a conversation with another senior Minister, Mr Joyce, on 26 August 2017, in which the issue was briefly discussed.

[30] Ms Tolley gave evidence that she was briefed by Mr Boyle on 31 July 2017. She recalled Mr Boyle saying the briefing was necessary because of the recent controversy concerning Ms Turei. She did not remember the details of the briefing.

[31] Following the briefing, Ms Tolley spoke to her senior adviser at the time, Mr Harvey, about what Mr Boyle had told her. She told him the information was to be kept in absolute confidence. She sought his advice on whether she should ask for a written briefing. They agreed that Ms Tolley should discuss this with the Prime Minister's Chief of Staff, Mr Eagleson. Ms Tolley spoke to Mr Eagleson. He said it was Ms Tolley's decision whether to get a briefing in writing.

[32] When Ms Tolley returned home at the end of the week, she mentioned the briefing to her husband in order to seek his advice on whether she should get a written briefing. Ms Tolley gave evidence that she has absolute confidence in her husband's ability to keep such matters confidential. She does not remember how much detail she gave him, as her focus was on whether she should request a written briefing.

[33] Ms Tolley confirmed she had a brief discussion with Ms Bennett. It occurred at a lift in the Beehive, as Ms Bennett was getting out and Ms Tolley was getting in.

[34] Ms Tolley said that her sister was the only other person to whom she mentioned Mr Peters' overpayments. It was a brief and off-the-cuff response to a glowing comment her sister had made about Mr Peters. Ms Tolley said he was not as great as her sister thought, and had been receiving a single superannuation payment when living with his partner. It was a general statement, without any detail. Ms Tolley said she regretted making that unguarded statement. Ms Tolley confirmed that she did not make the phone calls to the news outlets, and did not have any involvement in them.

[35] Before the High Court, Mr Henry, counsel for Mr Peters, accepted in closing that the Ministers' evidence that they did not leak the information to the media was unchallenged.

Internal investigations by MSD and Department of Internal Affairs

[36] An internal investigation into MSD's handling of Mr Peters' information was conducted by Ms Raines, who at the relevant time was MSD's Manager of Workplace Integrity. She identified all individuals who had worked on, or accessed, Mr Peters' file on the MSD internal processing systems. She concluded that only persons who had proper business reasons to do so had accessed the records.

She reviewed all communications by email and phone that those persons had with the media. Nothing of concern was discovered. She sought declarations from 29 staff who had contact with the file but would not have had sufficient information to have been the source of the leak, and interviewed 11 staff who had access to all the relevant information. She concluded that there was no evidence that an MSD staff member was the source of the leak. As she acknowledged under cross-examination, her investigation could not discover oral communications or the use of "burner" phones.

[37] The Department of Internal Affairs (DIA), which is responsible for employing some staff in Ministerial offices, also carried out an internal investigation. The DIA investigation concluded that there was no evidence linking any DIA employee to the disclosure to the media.

[38] The DIA investigation disclosed that Mr McLay, an MSD employee on secondment to Ms Tolley's office as a Private Secretary, had been told about the overpayment by Mr Nichols, an MSD director. Mr Nichols had not remembered the discussion he had with Mr McLay when he was first interviewed by Ms Raines. When Mr Nichols was reminded of that discussion, he recollected that he had mentioned the issue to Mr McLay as a confidential "heads-up". Ms Raines was satisfied with this explanation. Ms Raines also contacted Mr McLay, and obtained a declaration confirming that he had kept the information secure and confidential.

Evidence from journalists

[39] Three journalists gave evidence in the High Court under subpoena. They described telephone calls from an anonymous person in relation to Mr Peters. They were told that Mr Peters had been overpaid NZS and that there was a large repayment. One of the journalists recorded in their notes that the source said that Mr Peters was "lying applied as a single".

[40] None of the journalists was prepared to disclose their sources. They invoked the protection of s 68(1) of the Evidence Act 2006. The High Court Judge was not asked to make an order for disclosure of sources under s 68(2).

The claim before the High Court

[41] Before the High Court, Mr Peters framed his claim for the tort of invasion of privacy in a number of ways. His first cause of action against all five defendants alleged that they were responsible for the public disclosure of his private information. He pleaded that:

(a) All recipients of NZS have a reasonable expectation that MSD will keep all personal information it holds relating to NZS recipients private. In particular, there is a reasonable expectation that where MSD is investigating an irregularity in respect of a beneficiary's NZS payments, this fact and details of any investigation will be kept private.

(b) Mr Peters had a reasonable expectation that MSD would keep details of the payment irregularity private.

(c) The defendants individually and collectively breached their duty to keep the fact of, and details of, the payment irregularity private. By way of particulars of this allegation, Mr Peters pleaded the anonymous disclosures to the news media.

[42] In order to attribute responsibility for these disclosures to the defendants, Mr Peters pleaded that he relied on "the doctrine of res ipsa loquitur". He provided lengthy particulars of the allegation that the events spoke for themselves, referring to the imminent general election to be held on 23 September 2017, the timing of the breach shortly before voting started in the general election, and the prospect that release of information about the payment irregularity would enable his political opponents to improperly damage his reputation. He pleaded that:

(a) The defendants knew that the greater the number the persons who knew details of the payment irregularity, the greater the likelihood of its being leaked to the media, with resulting damage to his reputation.

(b) There was no need for the Chief Executives to disclose the payment irregularity to their Ministers, who were Mr Peters' political opponents in the forthcoming general election.

(c) MSD and Mr Boyle had no lawful reason to disclose the payment irregularity to Mr Hughes or Ms Bennett. Nor was there any lawful reason for the disclosures by Mr Nichols to Mr McLay; Ms Tolley's disclosures to her senior adviser, Mr Harvey; Mr Harvey's disclosure to other staff members in the ministerial office; and Ms Tolley's disclosures to Mr Eagleson.

(d) It was foreseeable by each of the defendants that breaches of their duty to protect Mr Peters' personal information would lead to further disclosure of the details of the payment irregularity to other persons, including Mr Peters' political opponents, the media, and the public at large. This would damage Mr Peters' reputation and diminish his prospect of electoral success.

[43] Mr Peters' second cause of action against MSD and Mr Boyle alleged that they breached a duty owed to Mr Peters by disclosing the payment irregularity to each of the Ministers, to Mr Hughes, and to Mr McLay.

[44] Mr Peters' third cause of action against Mr Hughes alleged that Mr Hughes breached a duty owed to Mr Peters by disclosing the payment irregularity to Ms Bennett.

[45] The fourth cause of action against the two Ministers alleged that they breached their duty to Mr Peters by inducing the two Chief Executives and MSD to disclose the payment irregularity to them under the government's "no surprises" policy.

High Court judgment

The test for invasion of privacy

[46] As the Judge noted, this Court confirmed the existence of a tort of invasion of privacy under New Zealand law in *Hosking v Runting*.[9] In that case, Gault P and Blanchard J (two of the three Judges in the majority) identified two elements that a plaintiff must make out:[10]

> (a) the existence of facts in respect of which there is a reasonable expectation of privacy; and
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> (b) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

[47] There is some debate about the need for the second element to be made out as a separate requirement.[11] But the Judge considered that he was required to apply the two elements identified by the majority in *Hosking v Runting*.[12]

Applying the test

[48] The Judge found that Mr Peters had, and was entitled to have, a reasonable expectation that the payment irregularity would not be disclosed to the media and, through them, the public at large.[13] But that expectation was contextual and was not absolute. It must take into account that there were some parties to whom it was necessary or appropriate to disclose the information. That included a number of people within MSD involved directly in the review and investigation. That also extended to disclosure to the Chief Executive of MSD and by him to the Chief Executive of SSC (as Mr Henry had conceded in opening).[14]

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9 High Court judgment, above n 1, at [81], discussing *Hosking v Runting* [2005] 1 NZLR 1 (CA).
10 *Hosking v Runting*, above n 9, at [117].
11 See below [111]–[115].
12 High Court judgment, above n 1, at [82]–[88].
13 At [106].
14 At [108].

[49] The Judge summarised his conclusion on the first element of the test as follows:

> [117] In summary, on the first point, I accept that Mr Peters had a reasonable expectation that the details of the payment irregularity would not be disclosed to parties who did not have a genuine need to know about it or a proper interest in knowing about it, and certainly had a reasonable expectation that the payment irregularity would not be disclosed to the media.

[50] He then went on to consider the second element. He found that it was highly offensive to deliberately disclose details of the payment irregularity to the media.[15]

[51] Against this backdrop, the Judge considered whether Mr Peters could make out his particular claims against each of the defendants.

The claims against the Ministers

[52] The Judge began by considering the claims made against the two Ministers.

[53] In closing, Mr Henry had accepted that Mr Peters could not show that either Minister was the direct source of the disclosure to the media.[16]

[54] The Judge accepted that Ms Bennett's disclosure of the information to the Prime Minister was for a proper purpose. It could not on any view be considered highly offensive to an objective reasonable person.[17]

[55] The disclosures Ms Tolley made to her adviser Mr Harvey, to the Prime Minister's chief of staff Mr Eagleson, and to her husband, were for the purposes of taking advice about the payment irregularity and whether she should request a written briefing. They were reasonable, and were not made for the purpose of embarrassing Mr Peters. These disclosures could not be said to have been highly offensive.[18] The disclosure to Ms Tolley's sister was indiscreet, but was in general terms that lacked the detail necessary to have been the source of the disclosure to the

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15 At [125].
16 At [135].
17 At [136].
18 At [137].

media. And in any event, as this occurred after the initial disclosures to the media it could not have been the source of those disclosures.[19]

[56] Mr Harvey had given evidence under subpoena. He was not asked if he was the source of the disclosure to the media. The internal investigations referred to at [37] above had concluded that he was not the source of the disclosure.

[57] The Judge then considered Mr Peters' reliance on the res ipsa loquitur principle to link the actions of the Ministers to the disclosure to the media. The Judge noted that res ipsa loquitur is a rule of evidence. It did not assist Mr Peters to identify the relevant defendant in the present case. There were a number of possible explanations as to how the details of the payment irregularity were disclosed to the media.[20]

[58] Mr Peters was thus unable to establish that either Minister was responsible for the deliberate disclosure of the payment irregularity to the media.[21]

[59] The Judge declined to award relief against the Ministers. With the exception of Ms Tolley's unguarded comment to her sister, the disclosures made by the Ministers were either made for proper purposes or to persons who had a genuine need to know about the payment irregularity. Ms Tolley had not been challenged on her evidence about her reason for discussing the matter with her husband. Given the brief and very general nature of the comment made to her sister, the Judge declined to make any declaration about that disclosure.[22]

[60] The Judge also dismissed the claim that the Ministers breached a duty owed to Mr Peters by inducing disclosures of the payment irregularity to them. The decisions to disclose the information to the Ministers were made by Mr Hughes and Mr Boyle. The Ministers received, but did not seek out, the information.[23]

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19 At [138].
20 At [147]–[151].
21 At [155].
22 At [168].
23 At [164]–[165].

The claims against the Chief Executives and MSD

[61] The Judge then considered the claim against the two Chief Executives and MSD. The internal MSD disclosures for the purpose of investigating the payment irregularity were for a proper purpose and/or to persons with a genuine need to know. So the relevant disclosures were those by MSD to Ms Tolley, and by SSC to Ms Bennett.[24]

[62] The Judge explored in considerable detail the reasons given by Mr Boyle and Mr Hughes for briefing their Ministers. He described the expert evidence called by the defendants from Sir Maarten Wevers, a retired senior public servant, about the circumstances when a chief executive might brief a Minister, in particular in the context of a "no surprises" briefing.[25]

[63] The overpayment and subsequent inquiry were MSD operational matters. Mr Peters had argued that chief executives should not brief Ministers about operational matters of this kind.[26] But as Sir Maarten had explained in his evidence, it was wrong to suggest that Ministers have no responsibility for operational matters. Ministers are accountable for such matters to the House of Representatives (the House), as Mr Peters had acknowledged in evidence.[27]

[64] The issue in this case was the nature of the operational matter. The Judge considered that normally an operational matter of this kind would not justify a briefing to the Minister, because it would not be sufficiently significant. The only issue which raised an important matter of principle, namely the integrity of MSD and the public service, was the involvement of a senior Member of Parliament. It was important to confirm he or she had not been treated differently.[28]

[65] The Judge considered that it was important that there be a measure of restraint over information provided by chief executives to Ministers on a "no surprises" basis, and that briefings be restricted to matters of genuine significance to the Minster's

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24 At [176].
25 At [193]–[199].
26 At [214].
27 At [215]–[216].
28 At [217].

portfolio.[29] Were it not for one issue, the Judge would have found that, even if the briefings were required, it was unnecessary to identify Mr Peters by name. Ministers could have been briefed in general terms that an MP had been overpaid NZS, MSD had investigated the matter in accordance with its usual processes, and MSD were satisfied there was no need to take the matter further. The overpayment had been repaid, and the matter was at an end. That would have been sufficient to reassure Ministers about the integrity of MSD's processes.[30] The one factor which, on balance, changed the position was the recent publicity in relation to Ms Turei. The Judge accepted that disclosure of Mr Peters' identity became relevant given the timing of Ms Turei's disclosure, the public debate about it, and Mr Peters' position as leader of another party in Parliament.[31]

[66] The Judge noted that Mr Peters had suggested in his evidence that the use of the "no surprises" disclosure in this case was a sham. That allegation had not been put to Mr Hughes or Mr Boyle. The disclosures were made for proper purposes.[32]

[67] The Judge then dealt with the second cause of action against MSD and Mr Boyle. Disclosure for proper purposes or to persons with a genuine need to know within MSD was not objectionable. There was a proper public interest in the communication from Mr Boyle to Mr Hughes to ensure that Mr Hughes, in performance of his statutory functions and as Mr Boyle's employer, could advise Mr Boyle on the conduct of the proposed investigation in a manner that maintained high standards of integrity and conduct in, and maintained public confidence in, the public service. The allegation that further disclosure to Ministers was for the purposes of "salacious gossip" was unsubstantiated. The defendants were not cross-examined on that allegation, which should not have been made. Similarly, the allegation that the disclosure had no purpose but to disclose the payment irregularity to a political opponent was not made out.[33]

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29 At [220].
30 At [226].
31 At [229].
32 At [234].
33 At [243]–[245].

[68] There was no evidence of deliberate disclosure by MSD or Mr Boyle to the media. For reasons already given, Mr Peters was unable to rely on the principle of res ipsa loquitur.[34]

[69] For essentially the same reasons, the third cause of action against Mr Hughes was dismissed. His disclosure to the Minister responsible for the SSC was for a proper purpose, to a person who had a genuine interest in receiving it.[35]

Affirmative defences

[70] Mr Hughes and Mr Boyle pleaded as an affirmative defence the statutory immunity in s 86 of the State Sector Act, which (at the relevant time) provided:

> **86 Immunity for Public Service chief executives and employees**
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> (1) Public Service chief executives and employees are immune from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers.
>
> (2) *See also* section 6 of the Crown Proceedings Act 1950.

[71] Mr Peters had pleaded bad faith by alleging that the disclosures to the Ministers were for no purpose but "salacious gossip", and to make disclosure to Mr Peters' political opponents. The Judge noted that there was no probative evidence led to support that pleading. The proposition was not put to Mr Hughes or to Mr Boyle. These allegations of bad faith should not have been made. The evidence demonstrated that Mr Boyle and Mr Hughes had made their disclosures in good faith. If necessary, they could rely on the statutory immunity in s 86.[36]

[72] The Crown defendants also pleaded by way of defence that the various disclosures were justified by a legitimate public concern in relation to the information. The existence of such a defence had been accepted by the majority in *Hosking v Runting*.[37] The Judge accepted the submission of Ms Casey QC, for the defendants, that it was difficult to envisage a clearer example of legitimate concern than the briefing of Ministers with portfolio responsibilities for the matter to which

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34 At [246]–[247].
35 At [250].
36 At [260]–[263].
37 At [264], citing *Hosking v Runting*, above n 9, at [129].

the information related. The issue was whether it was necessary for the disclosure to be made under the "no surprises" policy, which he had concluded was the case.[38]

Damages

[73] Finally, although Mr Peters' claim failed, the Judge considered the issue of damages. The Judge expressed the view that if Mr Peters had identified the person who disclosed his private information to the media, damages in the region of $75,000–$100,000 might have been appropriate. This was a deliberate breach of Mr Peters' privacy, with the intention of publicly embarrassing him and causing him harm.[39]

Issues on appeal

Issues raised by Mr Peters' appeal

[74] At the heart of Mr Peters' appeal is a challenge to the *Hosking v Runting* approach to the elements of the tort of invasion of privacy. He says the "highly offensive" limb of the test adopted in *Hosking v Runting* is unnecessary and undesirable and should be omitted. Mr Henry submits the tort should be reformulated by reference to two elements:

(a) there must be information in relation to which a reasonable person would have an expectation of privacy; and

(b) a person or entity holding private information uses that information in circumstances where that is not justified by the reason it holds the information in the first place.

[75] The High Court held that Mr Peters had a reasonable expectation of privacy in relation to the information that MSD was investigating a payment irregularity in relation to the NZS paid to him. That is, Mr Peters had a reasonable expectation that the information would not be disclosed other than for a proper purpose, and would not

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38 At [267].
39 At [275].

be disclosed to parties who did not have a genuine need to know about it.[40] So, Mr Henry submits, the first of his two elements is satisfied.

[76] The second element is also satisfied, Mr Henry says, as:

(a) The disclosures by the respondents within MSD were broader than was justified. The information was disclosed multiple times by Mr Boyle and other MSD employees without a proper purpose. This transferred the information from the original source (MSD) to persons outside MSD and created a chain of unlawful disclosures which ultimately led to public disclosure in the media.

(b) In particular, the disclosures by Mr Boyle to Ms Tolley and by Mr Hughes to Ms Bennett were not made for a proper purpose.

[77] Mr Henry's primary argument in relation to the briefings of the two Ministers was that there was no justification for a "no surprises" briefing in these circumstances. There was no real issue as to the integrity of MSD's systems, or the public service. The information was too personal to be provided to Ministers, particularly given its potential political use in the context of the imminent election. Alternatively, if a briefing was justified, it should not have extended to disclosing Mr Peters' identity. A disclosure referring to a "prominent person" or "Member of Parliament" would have served the same purpose.

[78] Mr Henry also came at the issue another way. It was clear that there was an invasion of Mr Peters' privacy by the publication of his private information in the media: that finding in the High Court was not challenged on appeal. So the only remaining issue is whether the respondents are answerable for that wrongful breach of Mr Peters' privacy. The information was originally held solely by MSD. In those circumstances, Mr Peters can rely on the doctrine of res ipsa loquitur to prove a breach of his privacy by MSD. Where a defendant has control over a plaintiff's private information, and that information leaks from their control, the plaintiff can come to the court and require the defendant to prove that they did not leak the private

[40] At [105]. See also [106].

information. MSD and the other respondents created the risk of leaks by disseminating the information more widely than justified. So they must prove that they were not responsible for the leaks. They have failed to do so.

Further issues raised by the respondents on appeal

[79] The respondents say that the approach to the tort of privacy contended for by Mr Henry is inconsistent with the authorities. It seeks to impose liability in tort for any disclosure of private information in breach of the Privacy Act 1993, in a manner that is inconsistent with the scheme of that Act. They support the approach to the scope of the tort adopted by the Judge based on the test in *Hosking v Runting*.

[80] The respondents submit that the allegation that the confidential disclosures within MSD were tortious is not open to Mr Peters before this Court, as it was not pursued in the High Court.

[81] The respondents raise a number of other points by way of cross-appeal and/or to support the High Court judgment on other grounds:

(a) Whether the High Court erred in undertaking a detailed review of the correctness of the judgments made by Mr Boyle and Mr Hughes to brief their Ministers.

(b) Whether the High Court erred in giving less weight to Sir Maarten's expert evidence because part of that evidence proceeded on the basis that the payment irregularity resulted from an error made by Mr Peters.

(c) Whether the High Court erred in expressing the view that MSD ought not to have accepted Mr Peters' application for processing, because it was incomplete.

(d) Whether s 86 of the State Sector Act prevents the grant of declarations against Mr Hughes and Mr Boyle.

(e) Whether it is open to Mr Peters to argue that MSD is vicariously liable for the actions of Mr Hughes and/or Mr Boyle. The respondents say that this argument was not advanced in the High Court. If the argument is open on appeal, have the requirements for vicarious liability been established on the evidence?

(f) Whether the High Court erred in the indication it gave in relation to the appropriate level of damages for disclosure of Mr Peters' information to the media.

[82] The respondents do not challenge the result reached in the High Court. Rather, they wish to challenge certain aspects of the Judge's reasoning, and advance alternative justifications for the result reached in the High Court. In these circumstances it was not necessary for them to file a cross-appeal.[41] A notice of intention to support the judgment on other grounds was sufficient. We will approach the issues raised by the respondents in their notice of cross-appeal on that basis.

Application to adduce further evidence

[83] There is one preliminary issue that we need to address. The Crown applied for leave to adduce further evidence on appeal in the form of an affidavit exhibiting a media article and record of a radio interview with Mr Peters, published on 20 May 2020, and a record of statements made by Mr Peters outside the House on 23 July 2020. In essence, these media reports record Mr Peters saying that after the High Court trial, he had found out who the "leaker" was.

[84] The Crown says that the proposed evidence bears directly on Mr Peters' invitation to the Court to apply the principle of res ipsa loquitur. If Mr Peters now knows who leaked the information about the payment irregularity to the media, he cannot ask the Court to draw an inference inconsistent with that knowledge on the basis of the evidence that was before the High Court.

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41 *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [25]; and *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2013] NZSC 35, [2013] 2 NZLR 397.

[85] Mr Peters opposes the application. He says that the evidence is not cogent: it merely records Mr Peters' belief that he knows who leaked the information, based on information provided by another person. The affidavit does not contain any admissible evidence about who provided Mr Peters' private information to the media.

[86] Further evidence may be admitted on appeal if it is fresh, credible and cogent.[42] This Court granted provisional leave to adduce the further evidence de bene esse — that is, provisionally pending a final decision when the appeal is heard.[43] But we must now determine whether it should be admitted with the benefit of full argument on both the substantive appeal and the application for leave to adduce further evidence.

[87] The evidence is fresh, in the sense that it came into existence after the High Court trial. It is credible, insofar as it records statements made by Mr Peters. But we accept the submission that it is not cogent. The statements recorded in the proposed evidence have no bearing on the issues before the Court. They provide no admissible evidence about the identity of the person who disclosed the payment irregularity to the media. At their highest, they establish that Mr Peters now has a suspicion or belief about the identity of the leaker, based on information from others. We do not consider that this fact is relevant or admissible. We decline leave to adduce this evidence.

Protection of privacy under New Zealand law

[88] Privacy is essential to human dignity and autonomy. Privacy is also important to liberty: to freedom of thought, freedom of religion, and freedom from unreasonable search and seizure.[44] Hence the importance of legal protection of privacy, as recognised in international human rights instruments and in domestic law.

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42 Court of Appeal (Civil) Rules 2005, r 45(1); and *Erceg v Balenia Ltd* [2008] NZCA 535 at [15], citing *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] NZSC 59, [2007] 2 NZLR 1 at [6]; and *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192.

43 *Peters v Attorney-General* [2020] NZCA 649.

44 Helen Winkelmann (Sir Bruce Slane Memorial Lecture) November 2018 at 3; N A Moreham "Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty and Legislation* (LexisNexis, Wellington, 2008) 231 at 232–238; *Hosking v Runting*, above n 9, at [239] per Tipping J; and *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [51] per Lord Hoffman.

[89] Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides:[45]

> **Article 17**
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

[90] The right to freedom of expression is protected by art 19 of the ICCPR:

> **Article 19**
>
> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> a) For respect of the rights or reputations of others;
>
> b) For the protection of national security or of public order (ordre public), or of public health or morals.

[91] The New Zealand Bill of Rights Act 1990 (NZBORA) affirms New Zealand's commitment to the ICCPR. Section 14 protects freedom of expression:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[92] NZBORA does not contain any provision referring to the right to privacy found in art 17 of the ICCPR. That was a deliberate choice, as Keith J explained in

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[45] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). See also *Universal Declaration of Human Rights* GA Res 217A (1948), art 12; and United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 16.

Hosking v Runting.[46] But privacy values underpin a number of the provisions of NZBORA, including the s 21 right to be secure against unreasonable search and seizure. Section 28 provides that that other rights and freedoms are not affected, abrogated or restricted merely because they are not included in NZBORA. And s 5 of NZBORA recognises that the rights affirmed in that Act — in particular, in the present context, the right to freedom of expression — may be subject to reasonable limits prescribed by law that are demonstrably justified in a free and democratic society.

[93] Thus the absence of any provision in NZBORA expressly referring to privacy rights, and the express protection of freedom of speech, do not preclude the development of statutory regimes or common law rules designed to protect privacy that may have the effect of limiting freedom of speech.

[94] The first New Zealand statute that made comprehensive provision for the protection of privacy was the Privacy Act 1993. That Act, as amended from time to time, was in force at the time of the events with which these proceedings are concerned. It has since been repealed and replaced by the Privacy Act 2020. The long title of the Privacy Act 1993 described its purpose as follows:[47]

> An Act to promote and protect individual privacy in general accordance with the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, and, in particular,—
>
> (a) to establish certain principles with respect to—
>
> (i) the collection, use, and disclosure, by public and private sector agencies, of information relating to individuals; and
>
> (ii) access by each individual to information relating to that individual and held by public and private sector agencies; and
>
> (b) to provide for the appointment of a Privacy Commissioner to investigate complaints about interferences with individual privacy; and
>
> (c) to provide for matters incidental thereto

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46 *Hosking v Runting*, above n 9, at [181].

47 Subsequent references to the "Privacy Act" are to the Privacy Act 1993.

[95] Section 6 of that Act set out 12 principles in relation to protection of privacy. The limits on disclosure of personal information set out in Principle 11 are of particular relevance to these proceedings:

> Principle 11
>
> *Limits on disclosure of personal information*
>
> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
>
> (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
>
> (b) that the source of the information is a publicly available publication and that, in the circumstances of the case, it would not be unfair or unreasonable to disclose the information; or
>
> (c) that the disclosure is to the individual concerned; or
>
> (d) that the disclosure is authorised by the individual concerned; or
>
> (e) that non-compliance is necessary—
>
> (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
>
> (ii) for the enforcement of a law imposing a pecuniary penalty; or
>
> (iii) for the protection of the public revenue; or
>
> (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
>
> (f) that the disclosure of the information is necessary to prevent or lessen a serious threat (as defined in section 2(1)) to—
>
> (i) public health or public safety; or
>
> (ii) the life or health of the individual concerned or another individual; or
>
> (fa) that the disclosure of the information is necessary to enable an intelligence and security agency to perform any of its functions; or
>
> (g) that the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or

(h) that the information—

(i) is to be used in a form in which the individual concerned is not identified; or

(ii) is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or

(i) that the disclosure of the information is in accordance with an authority granted under section 54.

[96] A number of limits on the operation of Principle 11 (and other Principles) are set out in other provisions of the Privacy Act. The most important limit for present purposes is found in s 11(2), which provides that with certain exceptions (which are not relevant here) the information privacy principles do not confer on any person any legal right that is enforceable in a court of law.[48]

[97] If a person's privacy is infringed by a disclosure made in breach of Principle 11, a complaint may be made to the Privacy Commissioner under pt 8 of the Privacy Act. The functions of the Commissioner include investigating any such complaint, and deciding what further action (if any) to take in respect of the complaint. The Commissioner may seek to secure a settlement of the complaint, coupled with appropriate assurances against the repetition of action of the kind that was the subject of the complaint. The Commissioner may refer the matter to the Director of Human Rights Proceedings to decide whether to initiate proceedings against the person in respect of whom the complaint was made. If the matter is referred to the Director of Human Rights Proceedings, the Director then decides whether to bring proceedings before the Human Rights Review Tribunal. In certain circumstances an aggrieved individual can bring proceedings before the Human Rights Review Tribunal. The Tribunal has the power to grant relief including declarations, and damages in respect of certain forms of loss or damage identified in s 88 of the Privacy Act.[49]

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48 The Privacy Act 2020 contains a corresponding restriction on methods of enforcement: see s 31.

49 That power is now found in s 103 of the Privacy Act 2020.

The emergence of the tort of invasion of privacy

[98] The common law in relation to protection of privacy has been developed by the New Zealand courts against the backdrop of the rights recognised in the ICCPR and the Privacy Act. The tort recognised by the New Zealand courts is sometimes referred to as the tort of invasion of privacy. This umbrella term refers to two distinct torts concerned with giving publicity to private facts, and intrusion into solitude and seclusion.[50] Mr Peters' claim concerns publicity given to private facts: the rate at which he was paid NZS from 2010 to 2017, the error in making those payments at the single rate, the investigation of that error, the resolution of that investigation, and his repayment of the amount overpaid.

[99] The tort of giving publicity to private facts was recognised by a majority of a full court of this Court in *Hosking v Runting*. That case concerned photographs of the plaintiffs' young children, taken in the street, which were intended for publication in a magazine. As already mentioned, Gault P and Blanchard J considered that in New Zealand there are two fundamental requirements for a successful tort claim for invasion of privacy:[51]

(a) the existence of facts in respect of which there is a reasonable expectation of privacy; and

(b) publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

[100] They emphasised that the tort is concerned with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned. The right of action should be only in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm.[52] The test of *highly offensive to a reasonable person*, which relates to the publicity rather than to whether the information is private, is intended to draw this line.[53]

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50 See N A Moreham "Abandoning The 'High Offensiveness' Privacy Test" (2018) 4 CJCCL 1 at 2.
51 *Hosking v Runting*, above n 9, at [117].
52 At [126].
53 At [127].

[101] Gault P and Blanchard J considered that there should be a defence enabling publication to be justified by a legitimate public concern in the information.[54]

[102] The other Judge in the majority, Tipping J, was in general agreement with the judgment delivered by Gault P and Blanchard J. But he differed in relation to the precise formulation of the elements of the tort.[55]

[103] Tipping J agreed that the first and fundamental ingredient of the tort should be that the plaintiff must be able to show a reasonable expectation of privacy in respect of the information or material which the defendant has published or wishes to publish.[56] But he did not consider that there should be a separate requirement of offensiveness. The question of offensiveness should be controlled within the need for there to be a reasonable expectation of privacy. He accepted that it will always be necessary for the degree of offence and harm to be substantial, so that freedom of expression values are not limited too readily. But he preferred the qualifier to be "a substantial level of offence" rather than "a high level of offence".[57]

[104] Tipping J agreed that it should be a defence to an action for invasion of privacy that the information or material published is a matter of legitimate public concern.[58]

[105] Subsequent cases in New Zealand have consistently applied the formulation of the test adopted by Gault P and Blanchard J. But there has been some development in the way in which the elements of the tort are expressed, and reservations have been expressed about the desirability of a separate "highly offensive" limb of the test.[59]

A reasonable expectation of privacy

[106] The first limb of the test identified in *Hosking v Runting* is whether there was a reasonable expectation of privacy in respect of the facts in issue.

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54 At [129].
55 At [223] and [248]–[259].
56 At [249]–[250].
57 At [256].
58 At [257].
59 See below at [111]–[115].

[107] Professor Moreham has suggested that this limb of the test should be framed in terms of "reasonable expectation of privacy *protection*".[60] 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.[61] 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.

[108] Second, this formulation brings squarely into focus two very important questions: protection *of what*; and protection *from what*? The inquiry into reasonable expectations is necessarily a contextual inquiry. It focuses on how reasonable people would respond to disclosure of the particular information or activity at issue in the case. So for example a person might have a reasonable expectation that their privacy would be protected in respect of publication of a photograph of a particular activity, but not in respect of a description of that activity. The inquiry should also focus on the particular disclosure in issue in each case.[62] A person might have a reasonable expectation of protection from widespread public disclosure of information, but not from more limited disclosure of that same information.[63]

[109] In *Murray v Express Newspapers plc* the Court of Appeal of England and Wales described the question whether there is a reasonable expectation of privacy as "a broad one, which takes account of all the circumstances of the case".[64] The Court identified (in a passage that has been widely cited) seven factors that may be relevant to an assessment of a claimant's reasonable expectation of privacy: 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

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60 N A Moreham "Unpacking the Reasonable Expectation of Privacy Test" (2018) 134 LQR 651.
61 At 655.
62 At 656–657.
63 At 656.
64 *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 at [36].

the circumstances in which and the purposes for which the information came into the hands of the defendant.[65]

[110] In the course of oral argument Mr Henry invited this Court to adopt this passage in *Murray* as an encapsulation of the tort of invasion of privacy. We agree that this passage provides a helpful reminder of the contextual nature of the "reasonable expectation" test, and identifies a number of factors that may be relevant when applying that test. It would be artificial to separate the inquiry into the private nature of the information from an inquiry into the expectations that a reasonable person would have about how that particular information could appropriately be used.

The "highly offensive" requirement

[111] The "highly offensive" limb of the test propounded by Gault P and Blanchard J in *Hosking v Runting* was influenced by United States jurisprudence, and by the recent decision of the Court of Appeal of England and Wales in *Campbell v MGN Ltd*.[66] However that decision was reversed on appeal.[67] The House of Lords rejected a high offensiveness requirement as an element of the tort under English law.[68] Subsequent English decisions have confirmed that the evolving privacy torts in that jurisdiction do not include such a requirement.

[112] As already mentioned, the desirability of such a requirement was doubted by Tipping J in *Hosking v Runting*. In New Zealand doubts about this threshold have also been expressed by Elias CJ and Anderson J in *Television New Zealand v Rogers*,[69] and by this Court in *Hyndman v Walker*.[70]

[113] The "highly offensive" threshold has also been trenchantly criticised by academic commentators, in particular Professor Moreham. She has made a strong case for abandoning this limb of the test, and incorporating the concerns that it

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65 At [36].

66 *Campbell v MGN Ltd* [2002] EWCA Civ 1373, [2003] QB 633.

67 *Campbell v MGN Ltd* (HL), above n 44. The House of Lords decision was delivered some two months after the decision of this Court in *Hosking v Runting*.

68 At [22] per Lord Nicholls, at [135]–[136] per Baroness Hale, and at [96] per Lord Hope.

69 *Television New Zealand v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [25] per Elias CJ, and at [144] per Anderson J. See also the observations of William Young P in the Court of Appeal: *Television New Zealand v Rogers* [2007] 1 NZLR 156 (CA) at [122].

70 *Hyndman v Walker* [2021] NZCA 25 at [69]–[75].

addresses in the "reasonable expectation of privacy (protection)" test, approached on the contextual basis described above.[71]

[114] However as this Court noted in *Hyndman v Walker*, it is appropriate for courts to proceed with care, paying close attention to countervailing rights and interests, when formulating the criteria that will be used to gauge reasonable expectations of privacy. The courts must also recognise their institutional limitations, which dictate that law should be developed incrementally and by reference to specific facts.[72] The Court did not consider that *Hyndman v Walker* was a suitable case for a substantial reformulation of the tort.[73]

[115] As we explain in more detail below, this also is not a case in which we need to determine the appropriateness of a "highly offensive" threshold for liability in tort. The present appeal can be determined by reference to the "reasonable expectation of privacy" test, applied contextually. The desirability of a threshold for liability that turns on the nature and extent of the harm caused by the disclosure, and the level at which any such threshold should be set, are issues that are best considered in the context of a case (or cases) where liability turns on how the test is formulated. That will also bring into sharper relief countervailing considerations, in particular the implications of ss 5 and 14 of NZBORA. Any expansion of liability for public disclosure of private facts necessarily limits freedom of expression, so must be demonstrably justified in a free and democratic society. We prefer not to undertake this inquiry in the abstract, in a factual vacuum.

Publication to whom?

[116] We do however need to say something about the question of what amounts to publication in the context of the tort of giving publicity to private facts. The United States privacy tort only applies to widespread publication to the public, or to so many people that the matter is substantially certain to become one of public

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71 Moreham "Abandoning the "High Offensiveness" Privacy Test", above n 50; Moreham "Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort", above n 44, at 230–247. See also Moreham "Unpacking the Reasonable Expectation of Privacy Test", above n 60; and N A Moreham "Privacy, Reputation and Alleged Wrongdoing: Why Police Investigations Should Not Be Regarded As Private" (2019) 11 JML 142.

72 *Hyndman v Walker*, above n 70, at [75].

73 At [75]–[76].

knowledge.[74] We were not referred to any English decision in which liability had been imposed in tort for disclosures to one person, or to a small group.

[117] Ms Casey argued that the United States approach should be adopted in New Zealand: the tort should be confined to widespread publication of private information. However it is difficult to identify a principled basis for such a restriction. The dignity and autonomy of a person may be affronted by disclosure of private information (for example, intimate photos taken by a former partner) to a small group, or even to one person. That harm may be very substantial. The "reasonable expectation" test does not support restriction of the tort to widespread publication. A person may have a reasonable expectation that very sensitive information will not be disclosed to anyone at all.

[118] In *Hyndman v Walker* this Court held that the tort of invasion of privacy may be committed where disclosure is made to a small class.[75] We agree. Indeed for the reasons outlined above, it is strongly arguable that the tort could be committed by disclosure to one person, where there was a reasonable expectation that no disclosure of any kind would occur. That will especially be the case where the recipient of the disclosure is not subject to any obligation to refrain from disclosing the information more widely, and there is a real prospect that they may do so.

Communication of information in which there is a legitimate interest

[119] If the tort can be committed by disclosure to a small group, or to one person, the defence accepted in *Hosking v Runting* — publication justified by a legitimate public concern in the information — needs to be reframed to encompass the scenario where there is a *private* disclosure of the information, and a legitimate *private* concern in relation to that information. Just as there may be good reason for excluding liability in respect of disclosure to the public, where the public has a legitimate interest in receiving the information, so too liability in respect of a more confined disclosure should be excluded where the recipient(s) have a legitimate interest in receiving the information.

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74 See *Hosking v Runting*, above n 9, at [70].
75 *Hyndman v Walker*, above n 70, at [50].

[120] This is another aspect of the tort that will need to be developed by the courts over time, as cases arise. There may be a useful analogy with the qualified privilege defence in the context of the tort of defamation. A privileged occasion is one where the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.[76] A communication on an occasion of qualified privilege is protected unless the plaintiff establishes that in publishing the communication in question, the defendant was predominantly motivated by ill will towards the plaintiff or otherwise took improper advantage of the occasion of publication. It seems plausible that reasonable expectations of protection of privacy are subject to similar limits, and do not extend to good faith communications on occasions of this kind. There is also something to be said for the law of tort adopting a consistent approach to identification of the occasions on which communication of information in good faith will not give rise to liability, whether that information is subsequently shown to be true or false.

[121] However at least some of the factors relevant to the defence of qualified privilege in the context of a defamation claim will be relevant in the privacy context when assessing whether there is a reasonable expectation of protection from such a disclosure, not just at the point of considering a defence of legitimate interest in communication. The interplay between the reasonable expectation test and the legitimate interest defence is another aspect of the privacy tort that will need to be developed by the courts over time.

[122] In this case we do not need to resolve the precise formation of the legitimate interest defence, or determine whether it is co-extensive with the circumstances in which qualified privilege is recognised in the context of defamatory statements. But we do need to consider the implications for Mr Peters' claims of the setting in which the relevant disclosures occurred, and the relationship between the individuals making and receiving the relevant disclosures.

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[76] *Adam v Ward* [1917] AC 309 (HL) at 334. See also Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [16.11.01].

The nature of the relationship between a chief executive and a Minister

[123] The relationship between a Minister and the chief executive of a department for which that Minister is responsible reflects basic constitutional principles concerning the operation of Executive government in New Zealand, and the respective roles of Ministers and public servants. Those principles are helpfully summarised in the introduction to the Cabinet Manual written by Sir Kenneth Keith.[77]

[124] Collectively, Ministers direct the executive branch of government. Ministers are supported by and (to varying degrees, depending on the nature of the entities concerned) direct officials in the State services and the wider State sector.[78]

[125] In a broad sense, it is the Ministry or government of the day which governs New Zealand. The members of the Ministry as a whole have the support of the House and must take collective and individual responsibility for their decisions, the decisions that are taken in their name, and the measures they propose.[79] Sir Kenneth describes the role of the Prime Minister and Ministers as follows:[80]

> The Prime Minister is the head of government, chairs Cabinet and has a general coordinating responsibility across all areas of government. By constitutional convention, the Prime Minister alone can advise the Governor-General to dissolve Parliament and call an election, and to appoint, dismiss, or accept the resignation of Ministers.
>
> Ministers constitute the ministry, or executive arm of government. Their powers rise from legislation and the common law (including the prerogative). Ministers are supported in their portfolios by the public service.

[126] Sir Kenneth goes on to describe the role of the public service as follows:[81]

> The role of the public service is stated in some detail in legislation, particularly in the provisions of the State Sector Act 1988, the Public Finance Act 1989, and the Official Information Act 1982, as well as a great number of particular

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77 Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in *Cabinet Manual 2017* (Cabinet Office, Wellington, 2017) 1 at 1–6.

78 *Cabinet Manual 2017* (Cabinet Office, Wellington, 2017) at [2.22].

79 Keith, above n 77, at 3.

80 At 4.

81 At 4.

> statutes. Constitutional principles and that legislation support four broad propositions (among others). Members of the public service:
>
> - are to act in accordance with the law;
> - are to be imbued with the spirit of service to the community;
> - are (as appropriate) to give free and frank advice to Ministers and others in authority, and, when decisions have been taken, to give effect to those decisions in accordance with their responsibility to the Ministers or others;
> - when legislation so provides, are to act independently in accordance with the terms of that legislation.
>
> Public servants meet these obligations in accordance with important principles and values such as political neutrality, fairness, and integrity.

[127] The formal relationship between Ministers and the public service at the relevant time was governed primarily by the State Sector Act (now, the Public Service Act 2020) and the Public Finance Act 1989. The relationship is also governed by convention.[82] The relationship is helpfully summarised in the following passages from the Cabinet Manual:

> 3.7 Ministers decide both the direction of and the priorities for their departments. They are generally not involved in their departments' day-to-day operations. In general terms, Ministers are responsible for determining and promoting policy, defending policy decisions, and answering in the House on both policy and operational matters.
>
> 3.8 Ministers have a duty to give fair consideration and due weight to free and frank advice provided by the public service.
>
> 3.9 Officials are responsible for:
>
> (a) supporting Ministers in carrying out their ministerial functions;
>
> (b) serving the aims and objectives of Ministers by developing and implementing policy and strategy;
>
> (c) actively monitoring the performance or condition of state sector organisations, government assets, and regulatory regimes within their Ministers' portfolios;
>
> (d) informing Ministers of significant developments within their portfolios, and tendering free and frank advice; and
>
> (e) implementing the decisions of the government of the day.

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82 *Cabinet Manual 2017*, above n 78, at [3.6].

> 3.10 Officials must be politically neutral in their work, serving the current Minister in such a way that they will equally be able to serve any future holder of the office. This principle of political neutrality is central to the public service's ability to support the government of the day and any future government.

[128] The main point of contact between a Minister and that Minister's department is the chief executive. The chief executive is responsible to their portfolio Minister(s) for, among other matters:[83]

(a) the operation of the department;

(b) supporting the Minister to act as a good steward of the public interest;

(c) the performance of the functions and duties and the exercise of the powers of the chief executive or of their agency (whether those functions, duties, or powers are imposed or conferred by an enactment or by the policies of the government);

(d) giving advice to Ministers;

(e) the integrity and conduct of the employees for whom the chief executive is responsible; and

(f) the efficient and economical delivery of the goods or services provided by the department, and how effectively those goods or services contribute to the intended outcomes.

[129] Chief executives must act independently, and are not responsible to the relevant Minister, in matters relating to decisions on individual employees.[84] Chief executives are also expressly required to act independently when performing certain functions and exercising certain powers under other legislation.[85] Express provisions of this kind underscore the point that on all other matters in relation to the activities of

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83 Public Service Act 2020, s 52. See also s 32 of the State Sector Act 1998.
84 Public Service Act, s 54. See also State Sector Act, s 33.
85 See for example Corrections Act 2004, s 7(3); Charities Act 2005, s 9(2); and Tax Administration Act 1994, s 6B(2).

a department, the chief executive is responsible to the appropriate Minister and does not act independently. The Minister is entitled to be informed about such matters, and to give (lawful) directions in relation to them. And even where a chief executive is required to act independently, the Minister is entitled to be kept informed about matters such as the way in which the department undertakes those (independent) activities, and significant decisions that have been (independently) made.

[130] As the Cabinet Manual notes, the style of the relationship and frequency of contact between Minister and department will develop according to the Minister's personal preference. The Cabinet Manual offers the following guidance:[86]

> (a) In their relationship with Ministers, officials should be guided by the "no surprises" principle. As a general rule, they should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.
>
> (b) A chief executive should exercise judgement as to whether, when, and how to inform a Minister of any matter for which the chief executive has statutory responsibility. Generally a briefing of this kind is provided for the Minister's information only, although occasionally the Minister's views may be a relevant factor for the chief executive to take into account. In all cases, the chief executive should ensure that the Minister knows why the matter is being raised, and both the Minister and the chief executive should act to maintain the independence of the chief executive's decision-making process. The timing of any briefing may be critical in this regard. As a matter of best practice, briefings should be in writing or at least documented in writing.
>
> (c) It would clearly be improper for Ministers to instruct their departments to act in an unlawful way. Ministers should also take care to ensure that any direction they give their chief executive could not be construed as improper intervention in administrative, financial, operational, or contractual decisions that are the responsibility of the chief executive.
>
> (d) Ministers are ultimately responsible for setting the government's policy priorities and objectives and are accountable for them in the House. Chief executives must provide their Ministers with all the relevant information and advice to enable the Ministers to set these priorities and objectives. In providing this information and advice, chief executives must take into account the resources available to their departments and the need for stewardship of their departments' future capability.

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86 *Cabinet Manual 2017*, above n 78, at [3.22].

(e) On a day-to-day basis a Minister will have contact with the senior officials best able to provide the necessary information or advice. Departmental staff and the Minister's office should keep the chief executive informed, at least in general terms, of any contact between the department and the Minister. This information helps to keep lines of communication and accountability between the Minister and the department clear.

(f) Ministers should exercise a professional approach and good judgement in their interactions with officials. Ministers must respect the political neutrality of the public service …

…

[131] As a matter of constitutional convention, Ministers are accountable to the House for ensuring that the departments for which they are responsible carry out their functions properly and efficiently. A Minister may be required to account for the actions of a department when errors are made, even when the Minister had no knowledge of, or involvement in, the actions concerned.[87]

[132] Ministers are also, of course, accountable to the Prime Minister. The Prime Minister is responsible for the coordination of government decision-making. The Prime Minister determines the allocation of portfolios to Ministers and decides on portfolio titles.[88] The Prime Minister is responsible for Ministerial appointments and removals. Hence the very real practical significance for Ministers of this form of accountability.

[133] Sir Maarten Wevers gave expert evidence in the High Court about the relationship between chief executives and Ministers. His evidence was based on his experience in many senior public service roles, including as Chief Executive of the Department of the Prime Minister and Cabinet. Sir Maarten held that role from June 2004 until his retirement in June 2012. His evidence provides a helpful account of the conventions and practices that accompany, and give practical effect to, the constitutional principles outlined above.

[134] As Sir Maarten explained, a public service chief executive is responsible for the conduct of the department he or she leads. The Minister is accountable to the

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87 At [3.27].
88 At [2.32].

House for the department's performance, including through answering questions in the House on policy and operational matters. Ministers are individually responsible to Parliament for their own activities and the activities of their public servants in administering their ministerial portfolios. On occasion, this means that a Minister may be required to account for the actions of their department when errors are made, even when the Minister had no knowledge of, or involvement in, the errors. Hand in hand with this responsibility comes the power by law for the Minster to direct an agency, through its chief executive, on the operations and conduct of the agency, save for matters where legislation provides that the chief executive must act independently.

[135] The accountability of Ministers to the House is effected through a number of well-established parliamentary processes, including the delivery of annual departmental reports to Parliament, annual budget processes, Select Committee processes, and Parliamentary questions. These accountability mechanisms extend to any aspect of the department's performance, policy and operational. Ministers and agencies are also subject to scrutiny by the media, and through other accountability mechanisms including the Offices of the Ombudsmen and the Auditor-General.

[136] Operational matters can be a focus of intense public scrutiny. Ministers may need to answer for such matters in the House, to the Prime Minister, and/or publicly. Thus in practice, operational matters are regularly the subject of Ministerial briefings. Ministers wish to be informed of, and appropriately scrutinise, significant or controversial activities of their departments.

[137] Ministers are regularly briefed by their advisers, including chief executives. Some briefings take place on a recurring basis. Others are more ad hoc, at the request of the Minister or on the initiative of the chief executive.

[138] The responsibilities of most Ministers are such that it is likely that briefings to Ministers will routinely include sensitive material. Sir Maarten provided helpful examples of the range of those sensitive matters:

> 80. The sensitivity may relate to matters ranging from national security, commercially sensitive negotiations, budget sensitive decisions, diplomatically confidential disputes, stakeholder relationships or matters affecting individuals or groups that are personal or confidential to them.

> The fact that such matters may be discussed with Ministers is recognised in a number of places in the Cabinet Manual — examples being paragraphs 8.11 to 8.13 (which address information relating to commercial entities) and paragraphs 8.71 to 8.74 (which address personal information).
>
> 81. Examples of briefings relating to individuals could include:
>
> 81.1 The Chief Executive of the Department of Corrections might brief the Minister of Corrections on a high profile individual who is coming up for parole;
>
> 81.2 The Secretary for Justice (as the Chief Executive of the Ministry of Justice) might brief the Minister of Justice on a high profile individual who is subject to an extradition request by a foreign government;
>
> 81.3 The Secretary for Transport (as the Chief Executive of the Ministry of Transport) might brief the Minister of Transport on a failure to meet transport safety standards by a particular provider;
>
> 81.4 The State Services Commissioner might brief the Minister of State Services on the leak by a public servant of sensitive information, or on performance issues with a named Chief Executive, or particular difficulties a Chief Executive was having with another Minister or with senior public servants in their department; and
>
> 81.5 The Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) might brief the Minister of Immigration on concerns that Immigration New Zealand have about an application for residency by a named individual.

[139] The trust that our system reposes in Ministers is exemplified by the approach adopted to briefings which involve national security considerations. Ministers with national security responsibilities are not required to hold a security clearance to receive classified information. Ministers are not required to undergo security vetting.

[140] As a corollary of the fact that Ministers in practice regularly require and receive briefings containing sensitive information, it is expected that Ministers will not use the information that they receive for their personal political advantage. Sir Maarten described this principle as "fundamental". This expectation can be seen pervasively in the Cabinet Manual.[89]

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[89] See [2.65], [2.106], [8.9] and [8.11]–[8.13]. See also [8.120]–[8.123].

[141] Chief executives are entitled to expect Ministers to uphold these expectations. They could not perform their roles on any other basis. Chief executives are also entitled to rely on Ministers to honour the expectation that they will act lawfully and behave in a way that upholds and is seen to uphold the highest ethical standards.[90] As Sir Maarten said, it would be quite improper for a chief executive to attempt to "filter" information that a Minister is entitled to receive on the basis of an assessment that a Minister might act inappropriately:

> That would be a fundamental breach of the obligations of political neutrality, putting the Chief Executive into some sort of gate keeper role making decisions based on his or her views of the likely political or personal attributes of the Minister. It is the Minister and not the Chief Executive who is accountable to the House for the performance of their portfolio, and Chief Executives are obliged to provide their Ministers with information and advice to support that accountability, regardless of who fills that role. If a Chief Executive had genuine concerns about the conduct of their Minister, that would be a matter for them to raise with the Chief Executive of the Department of the Prime Minister and Cabinet or the State Services Commissioner, who in turn might take the matter to the Prime Minister. Responsibility for the conduct and discipline of Ministers lies with the Prime Minister, not government officials.

[142] Briefings by chief executives on a point that the Minister has not requested will sometimes involve what are referred to as "no surprises" briefings. Such briefings often relate to operational matters. Some "no surprises" briefings will include information about individuals that is sensitive for one or more of the reasons identified by Sir Maarten in the passage set out at [138] above. Others will not.

[143] As Sir Maarten explained, in practice the "no surprises" principle can require difficult judgement calls to be made under the pressures of time and competing demands for attention. Chief executives need to decide whether to give a "no surprises" briefing to their Minister, and sometimes more importantly, when and to what level of detail. Those are judgement calls on which reasonable and experienced chief executives could reach different decisions, without being wrong.

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90 See [2.55]–[2.56].

Claims against Mr Boyle and Mr Hughes: statutory immunity

[144] The logical starting point in relation to the claims against Mr Hughes and Mr Boyle personally is the statutory immunity provided by s 86 of the State Sector Act, which we set out again for ease of reference:

> **86 Immunity for Public Service chief executives and employees**
>
> (1) Public Service chief executives and employees are immune from liability in civil proceedings for good-faith actions or omissions in pursuance or intended pursuance of their duties, functions, or powers.
>
> (2) *See also* section 6 of the Crown Proceedings Act 1950.

[145] This provision now appears as s 104 of the Public Service Act 2020.

[146] The version of s 86 set out above was introduced by the State Sector Amendment Act 2013.[91] It was enacted in response to the view expressed by the Supreme Court in *Couch v Attorney-General* that the former s 86 did not provide immunity for chief executives and other public servants from claims by a plaintiff.[92]

[147] The central purpose of the new version of s 86 (and now, of s 104 of the Public Service Act) is to ensure that public servants are not exposed to civil proceedings against them personally provided they act in good faith in the (intended) pursuance of their duties. This important provision protects the ability of public servants to carry out their functions impartially and fearlessly, without being deflected from doing so by the threat of proceedings which — even if ultimately unsuccessful — may be protracted, stressful and costly. The purpose of the provision is undermined if proceedings are brought against public servants without a proper basis for alleging bad faith.

[148] Mr Peters' pleading alleged bad faith, asserting that the disclosure by the Chief Executives to their Ministers was "for no purpose but for salacious gossip in respect of the Plaintiff in the days before voting commenced in the general election", and "had no purpose but to disclose the 'payment irregularity' to a political opponent". However no particulars were provided of those allegations, and no evidence was led

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91 State Sector Amendment Act 2013, s 58.

92 *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [174].

to support them. Nor were these allegations put to Mr Boyle or Mr Hughes in cross-examination.[93] Their evidence that they briefed their Ministers in good faith, in the course of performing their functions as chief executives, was not challenged.

[149] Mr Henry's written submissions in this Court did not address the implications of s 86 of the State Sector Act for the claims against the Chief Executives. Nor did Mr Henry identify, in oral argument, any principled basis on which s 86 would not apply to these claims. He did suggest, rather faintly, that s 86 might not preclude claims seeking a declaration rather than damages. However s 86 is not framed in terms of immunity from certain forms of relief. Rather, it provides that public servants who act in good faith are "immune from liability in civil proceedings". We do not consider that this leaves any scope for claims for declaratory relief in respect of a claim in tort. There are contexts in which a declaration is available without a finding of liability — for example, in relation to matters of status.[94] But it could not sensibly be suggested that a declaration that a person had committed the tort of invasion of privacy could be made without a finding of liability for commission of that tort.

[150] We therefore agree with the Judge that s 86 applied to the claims against the Chief Executives. We agree with the Judge that in the absence of any evidence to support allegations of bad faith, such allegations should not have been made.[95] And absent such allegations, the claims should not have been brought against the Chief Executives personally. For that reason alone, the appeal must be dismissed so far as the claims against them personally are concerned.

Vicarious liability of chief executives?

[151] Mr Henry also sought to argue before us that Mr Boyle could be vicariously liable for wrongful disclosures made by other MSD employees.

[152] The chief executive of a department has the rights, powers, and duties of an employer in respect of the employees of the department.[96] But we do not consider that

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93 High Court judgment, above n 1, at [260].

94 See Lord Woolf and Jeremy Woolf *The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at 94–100.

95 High Court judgment, above n 1, at [260]–[263].

96 State Sector Act, s 59(1)(c). This provision now appears in s 66(c) of the Public Service Act.

it is arguable that this provision imposes vicarious liability on a chief executive for acts of employees of the relevant department. They remain employees of the Crown, and it is the Crown that is vicariously liable for torts committed by public servants in the course of performing their duties, as contemplated by s 6(1)(a) of the Crown Proceedings Act 1950.

[153] Moreover s 86 of the State Sector Act would preclude any claim based on vicarious liability against the chief executive personally, absent bad faith on the part of the chief executive. It is quite clear from the scheme of the legislation that any claim based on vicarious liability for torts committed by public servants must be brought against the Crown, not against the relevant chief executive.

[154] The argument that Mr Boyle is vicariously liable in respect of the actions of other MSD employees lacks any merit. We need not consider it further.

Did Mr Peters have a reasonable expectation that his privacy would be protected from disclosures within MSD and/or to Ministers?

[155] Mr Peters argued before us that MSD was vicariously liable for the actions of Mr Boyle. He also argued that MSD was vicariously liable for the actions of other MSD employees who disclosed Mr Peters' private information within MSD, and to persons outside MSD. As Ms Casey pointed out, the claim was not pleaded in this way. But we are content to address the allegations on their merits.

[156] We begin by considering the claims in relation to:

(a) internal disclosures within MSD;

(b) the disclosure by Mr Boyle to his Minister;

(c) the disclosure by Mr Hughes to his Minister; and

(d) the disclosure by Mr Nichols to Mr McLay, the MSD employee seconded to the Minister's office as a Private Secretary.

[157] We will then consider the argument that MSD is liable for the ultimate disclosure to the media and to the public, based on the res ipsa loquitur principle.

Framing the reasonable expectation test

[158] The first step in considering these claims is to ask whether Mr Peters had a reasonable expectation that his private information would be protected from the disclosures made by Mr Boyle, and by others within MSD.

[159] As noted above, Mr Henry argued that the tort of invasion of privacy had two elements:

(a) there must be information in respect of which a reasonable person would have an expectation of privacy; and

(b) a person or entity holding private information must only use that private information when justified by the reason it holds the information in the first place.

[160] On this approach, if information is personal information in respect of which there is a reasonable expectation of privacy, liability would attach to any publication (however limited) unless that disclosure comes within the scope of the purpose for which the person holds the information in the first place.

[161] This is not the test for liability in tort for invasion of privacy in any jurisdiction of which we are aware. Mr Henry was not able to point to any authority to support his preferred approach. In essence, his argument boiled down to the fact that use of personal information for a proper purpose is required by the Privacy Act, and people in New Zealand have a reasonable expectation of compliance with the Privacy Act. Disclosures in breach of that reasonable expectation should be actionable in tort. There are many difficulties with this argument.

[162] First, the underlying premise of Mr Henry's submission is that liability in tort should be imposed whenever a person acts in a manner that is inconsistent with Principle 11 in the Privacy Act. But the courts have consistently rejected the creation

of a tort that is co-extensive with liability under the Privacy Act. Such a tort would be difficult to reconcile with s 11(2) of the Privacy Act.[97] It would cut across the specific complaints procedure under that Act, and the tailored institutional arrangements for bringing a claim for breach of those Principles.

[163] Second, Mr Henry's suggested test does not in fact align with the requirements of the Privacy Act. Principle 11 permits disclosure of information in a number of circumstances. Mr Henry's test reflects — inaccurately — only one of those circumstances: where disclosure of the information "is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained".[98] Because the suggested test does not refer to the other limbs of Principle 11, it would on its face impose liability in relation to many disclosures that are lawful under the Privacy Act: for example, disclosure to prevent or lessen a serious threat to public health or public safety, or to the life or health of the individual concerned or another individual.[99] These other forms of disclosure that are permitted under Principle 11 might be able to be addressed in the context of a "legitimate interest in communication" defence. But it is difficult to see why one limb of Principle 11 should be singled out as a pre-condition for liability, leaving the rest to be addressed — if at all — at a later stage in the analysis.

[164] Third, the suggested test does not accurately reflect the one limb of Privacy Principle 11 on which it is based. Privacy Principle 11 refers to disclosures for the purpose for which the information was *obtained*, in circumstances where obtaining information is also regulated by the Privacy Act. Mr Henry's reference to the reason for which the person *holds* information would produce quite a different test. So expectations of compliance with the Privacy Act do not support his formulation of the test.

[165] Fourth, we doubt that the suggested test would be workable in practice, or produce sensible results. It is difficult to see how it would operate in relation to media defendants who are given information about a person by sources other than that

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97 See now s 31 of the Privacy Act 2020.
98 Privacy Act, s 6, Information Privacy Principle 11(1)(a).
99 Section 6, Information Privacy Principle 11(1)(f).

person, with a view to publication of that information. Would the suggested test mean that any publication by them is permitted, since that is the purpose for which they were given the information, and for which they hold it? Surely not. But then what does the reference to the purpose for which information is held actually mean?

[166] Fifth, Principle 11 does not apply to news entities carrying on news activities, for good reasons. Applying a modified version of one limb of this Principle to news entities via the law of tort would be inconsistent with the policy underpinning the privacy legislation, and would be inappropriate.

[167] Sixth, the suggested test is not consistent with Mr Henry's submission, referred to at [110] above, that this Court should adopt the approach to the "reasonable expectation" test outlined by the Court of Appeal of England and Wales in *Murray*. That approach requires the court to consider whether there was a reasonable expectation that the information would not be disclosed in the particular manner in issue in that case. That is a wider inquiry than the one contemplated by Mr Henry's suggested test. We have already endorsed that wider, contextual, approach.

[168] In summary, the test suggested by Mr Henry is supported by neither authority nor principle. We decline to adopt it.

The scope of Mr Peters' reasonable expectation of privacy

[169] Whatever the precise test may be for liability for the tort of public disclosure of private facts, it seems clear that it is an essential element of the tort that the complainant have a reasonable expectation of privacy in that context, assessed by reference to the particular information, and the particular disclosure in issue. In other words, the complainant must have a reasonable expectation that their privacy in relation to that particular information will be protected from that particular disclosure.

[170] We accept Mr Henry's submission that the information in relation to the payment irregularity was personal information about Mr Peters, and that he had a reasonable expectation that it would be protected from disclosure to the public generally. It is well-established that information about an individual's finances is of

a kind that is generally regarded as private.[100] There is room for debate about whether information about a live investigation into a person's affairs has the necessary character of privacy.[101] But in the present case, the MSD investigation related to inherently private matters: Mr Peters' finances, and the error in the financial dealings between him and MSD. In the absence of any allegation of wrongdoing, or any proper basis for such an allegation, we consider that all information about the payment irregularity was private information that Mr Peters had a reasonable expectation would not be disclosed to the media, or to the public.

[171] However it does not follow from the fact that Mr Peters had a reasonable expectation of protection from disclosure to the public at large that he had a reasonable expectation of protection from disclosure of this information within MSD. Nor does it follow that he had a reasonable expectation that the information would not be disclosed by Mr Boyle to his Minister. We consider each of these in turn.

Disclosures within MSD

[172] A person dealing with MSD in relation to NZS does not have a reasonable expectation that information about their finances, and the NZS they are receiving, will not be disclosed within MSD in connection with the administration of their NZS entitlement. It is not a function of the tort of invasion of privacy to regulate the internal handling, within a government agency, of information lawfully held by that agency. Agencies to which the Privacy Act applies are subject to requirements in relation to storage and security of personal information.[102] But it could not sensibly be suggested that liability in tort could attach to a disclosure between officials within an agency of information about a person in circumstances where that information has been lawfully received by the agency in connection with the performance of its functions, the disclosure is made in good faith in connection with those functions, and the recipient is required to keep the information confidential and use and disclose it only for the agency's purposes.

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100 *Television New Zealand v Rogers* [2007] 1 NZLR 156 (CA) at [49], referring to *Hosking v Runting*, above n 9, at [119], quoting *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199 at [42] per Gleeson CJ.

101 See Moreham "Privacy, Reputation and Alleged Wrongdoing: Why Police Investigations Should Not Be Regarded as Private", above n 71.

102 See Privacy Act, s 6 Information Privacy Principle 5.

[173] We accept that the tort might well be committed by a person within an organisation who provides personal information to another person inside the organisation in bad faith, with a view to its wider disclosure for purposes not connected with the performance of the organisation's functions. But there is no evidential basis for any such allegation in the present case. This limit on what can reasonably be expected in relation to internal disclosures of information within a public agency is in our view self-evident.

[174] The same conclusion could also be reached by reference to a "legitimate interest in communication" defence, along the lines discussed at [119]–[121] above. The difference in incidence of burden of proof is not material in the present case, though it could be in other contexts. The existence of a relationship of the relevant kind between officials is self-evident, so the defence would apply unless Mr Peters could establish a lack of good faith. No such allegation was made in relation to the disclosures within MSD, with the exception of the disclosure by Mr Nichols to Mr McLay, which we discuss at [182]–[188] below. It follows that Mr Peters' claim fails in so far as it relates to all other internal disclosures within MSD.

Disclosure by Mr Boyle to the Minister for Social Development

[175] For essentially the same reasons, we do not accept that Mr Peters had a reasonable expectation that information about him would not be provided by Mr Boyle (or other MSD employees) to the Minister for Social Development, in good faith and on a confidential basis. The Minister is supported by the department, and is accountable for all aspects of its operations that are not required by statute to be performed independently. Information provided by a department to their Minister is provided in the context of a relationship of trust and confidence. The chief executive and other officials are entitled to expect a Minister to whom sensitive information is provided to keep that information confidential, and to use it only for proper purposes. Information flows between the department and the Minister fall into the same category as information flows within the department, so far as the tort of giving publicity to private facts is concerned.

[176] The same conclusion can be reached by reference to a defence of legitimate interest in communication. A Minister has a legitimate interest in receiving information from a chief executive in connection with the activities of a department for which that Minister is responsible.

[177] Whichever path is adopted to reach this conclusion, it is in our view very clear that it is not the function of the law of tort to regulate what a chief executive can disclose to their Minister in good faith. As a matter of constitutional principle, it would be quite wrong for the law of tort to restrict the good faith provision of information by a chief executive to a Minister. The effective functioning of our Westminster system of government requires that a chief executive be able to brief a Minister on a confidential basis, where the chief executive considers that it is desirable to do so, without any concern that such disclosure might engage liability in tort. Such a briefing would not expose the chief executive to liability in defamation, if the information proved to be incorrect: plainly it would attract qualified privilege.[103] Similarly, the tort of invasion of privacy does not restrict what information a chief executive (or any other public servant) can disclose to a Minister in good faith, on a confidential basis.

[178] As will be apparent from this analysis, we accept the submission of Ms Casey that it was not necessary for the High Court Judge to engage with the merits of the decision by the Chief Executives to brief their Ministers. It was sufficient to consider whether the information was provided in connection with the good faith performance of the Chief Executive's functions. No further inquiry was needed.

[179] It was a central plank of Mr Henry's submissions that the information about Mr Peters was simply "too personal" to be provided to a Minister. There are a number of ways in which this submission might be understood. If the argument is that personal information about an individual cannot properly be provided by a chief executive to a Minister in any circumstances, we have no hesitation in rejecting that submission. It is inconsistent with the role of a Minister as head of the relevant Ministry, and the constitutional relationship between Ministers and chief executives outlined above. In the absence of any applicable statutory restriction on provision of information,[104]

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[103] See *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 at [15]–[20].

[104] For example, the secrecy obligations under s 81 of the Tax Administration Act (now repealed).

there is no information held by a chief executive that a Minister is not entitled to receive. If the argument is that Mr Boyle should not have briefed his Minister in the circumstances of this particular case, having regard to the identity of Mr Peters and the imminent election, we reject that proposition because:

(a) It overlooks the nature of the relationship between chief executive and Minister, and the ability (indeed, obligation) of the chief executive to act on the basis that the Minister will not disclose or use information inappropriately.

(b) It requires the Court to engage in a review of the merits of the Chief Executive's decision to brief the Minister on this particular occasion. For the reasons set out above, that is neither necessary nor appropriate.

Disclosure by Mr Boyle to Mr Hughes

[180] Mr Henry accepted that Mr Boyle was entitled to brief Mr Hughes about the payment irregularity. We agree: for essentially the same reasons outlined above, there is no reasonable expectation that private information will not be provided by a chief executive to the State Services Commissioner in good faith and on a confidential basis. The tort of invasion of privacy should not, and does not, restrict confidential communications of this kind.

Disclosure by Mr Hughes to the Minister for State Services

[181] It also follows that there could be no reasonable expectation that Mr Hughes would not brief his Minister on a confidential basis, if he formed the view that it was appropriate to do so. It is neither necessary nor appropriate for the courts to attempt to inquire into whether he was correct in that view, provided only that he held it in good faith.

Disclosure by Mr Nichols to Mr McLay

[182] Mr Henry submitted that the disclosure by Mr Nichols, the Director of the Office of the Deputy Chief Executive, to Mr McLay, an MSD employee on

secondment as a Private Secretary in Ms Tolley's office at the relevant time, was an example of disclosure of Mr Peters' private information without a legitimate purpose. Mr Henry submitted that this disclosure, which was described in Ms Raines' evidence as a "confidential heads-up", was no more than sharing gossip.

[183] It is common for departmental employees to be seconded to the Minister's Office as a Private Secretary. Secondments of this kind reflect the relationship between a Minister and their department described above, and the regular flow of information between department and Minister pursuant to that relationship.

[184] We do not consider that Mr McLay's secondment to the Minister's office puts the disclosure to him in a materially different position from other disclosures within MSD. A communication made to him in good faith in connection with the performance of MSD's functions — functions which include keeping their Minister and the Minister's office informed about significant operational matters — is consistent with any reasonable expectation of privacy. Even if Mr McLay had not been an employee of MSD, communications by MSD to the Minister's Private Secretary on a confidential basis would be unobjectionable, for the same reason that communications to the Minister direct are unobjectionable. It is wrong to think of the Minister and her advisers as external to the Ministry that she heads, in this context.

[185] That leaves the question of whether the communication in question was made in good faith, in connection with the performance of MSD's functions. If for example an MSD employee provided private information about Mr Peters to a political adviser in a Minister's office in order to enable that information to be passed on to the media, that could well result in liability in tort. We therefore turn to the evidence about this particular disclosure.

[186] Neither Mr Nichols nor Mr McLay gave evidence in the High Court. Ms Raines produced an email from Mr Nichols which recorded that Mr Nicholls had many conversations with the person from MSD in the Minister's office as Private Secretary at any given time, and often raised issues as a "heads up" which were confidential in nature. He remembered mentioning to Mr McLay a potential issue

with Mr Peters' NZS payments. Mr Nichols said that he believed that in that conversation he identified Mr Peters, and reiterated this information was confidential. He did not believe he gave Mr McLay any detail beyond a potential overpayment. He did not tell Mr McLay actual amounts or outcomes.

[187] Ms Raines sought and obtained confirmation from Mr McLay that:

(a) All involvement he had with Mr Peters' superannuation case was appropriate and work-related.

(b) He only discussed Mr Peters' information, and what work he was doing in relation to that, with people who had an authorised business purpose and a right to know.

(c) He kept Mr Peters' information secure and confidential. Mr McLay provided that confirmation.

[188] Mr Peters had the burden of establishing that the communication was not made in good faith in connection with the performance of MSD's functions, given the relationship between MSD (and Mr Nichols) and the Minister's office (and Mr McLay). That is the position whether this is seen as a necessary element of the "reasonable expectation of privacy" element of the test, or as a response to invocation of the "legitimate interest in communication" defence. If Mr Peters wished to pursue an argument that the relevant disclosure was not made in good faith for the purposes of performing MSD's functions, notwithstanding Ms Raines' evidence and the documents she produced, he needed to provide some evidence to support that allegation. In the absence of any such evidence, the claim in relation to this disclosure must fail.

Is MSD liable for public disclosures on the basis of res ipsa loquitur?

[189] That leaves Mr Peters' argument that MSD is liable for the release of his information to the public generally, relying on the principle of res ipsa loquitur. Mr Henry emphasised that information about the payment irregularity was initially

held by MSD alone. It was MSD that identified the error in the rate at which NZS had been paid to Mr Peters. MSD then raised the issue with Mr Peters.

[190] Mr Henry submitted that in circumstances where the information was in the possession of MSD alone, and was wrongfully disclosed to the media, it would be unfair to expect a plaintiff in Mr Peters' position to identify the precise path by which the information had reached the media. Rather, Mr Henry submitted, it could be inferred from the fact that the information had reached the media that MSD was responsible for that wrongful disclosure.

[191] In support of this submission, Mr Henry placed some emphasis on what he said was the unduly wide dissemination of the information by MSD, beyond what was justified in order to investigate the payment irregularity and resolve it in accordance with standard procedures. The number of people within MSD who were aware of the issue, coupled with the individuals at the SSC who were informed about the issue and the disclosures to Ministers and to staff in their offices, significantly increased the risk of a leak. MSD should be required to accept responsibility for the end result of its failure to properly protect Mr Peters' personal information.

[192] Mr Henry submitted that the inference that the disclosure must have come from MSD was strengthened by the evidence given by the two Ministers that they had not disclosed Mr Peters' information in a way that led to its public release. Counsel for MSD did not cross-examine the two Ministers on this issue. So, Mr Henry said, MSD cannot now argue that the disclosure may have come from the Ministers.

[193] We accept unhesitatingly that it cannot be necessary for a plaintiff to show that a particular individual within an organisation wrongfully disclosed their private information: that would make it extremely difficult, if not impossible, for claims to be brought in circumstances where they ought in principle to be available. If the evidence before the court suggested that at the time of the media disclosure the information about the payment irregularity was held only by MSD employees, there would be real force in Mr Henry's argument. In those circumstances, the court would be entitled to draw an inference that it must have been a person within MSD who wrongfully disclosed the information. MSD would then need to call evidence to establish that no

MSD employee was in fact responsible for the disclosure: for example, by showing that the information had reached the media in some other way.[105]

[194] However the difficulty with Mr Peters' claim against MSD on this basis is that by the time the leak to the media occurred in mid to late August 2017, a number of people outside MSD held information about the payment irregularity.

[195] We accept Mr Henry's argument that if MSD wished to argue that the information had been leaked by one or other of the Ministers, it needed to put that proposition to the Minister when they gave evidence. The question whether an inference can be drawn that an MSD employee disclosed the information falls to be considered on the basis of the findings made by the Judge about the disclosures made by the Ministers. It would be inconsistent with those findings to proceed on the basis that the information could have been disclosed to the media by one or other Minister.

[196] But that leaves a number of individuals in SSC and in Ministers' offices who had the information and could have disclosed it. It also leaves open a real possibility that an eavesdropper who overheard conversations between non-MSD personnel — for example, between Ms Bennett and Ms Tolley, or between Ms Bennett and Mr Eagleson — could have been the source of the leak. Even putting the Ministers to one side as potential sources of the leak, a significant number of realistic possibilities remain. The res ipsa loquitur principle is not a licence to speculate. As the Judge said, that principle is simply a rule of evidence which permits an inference to be drawn from established facts in the absence of proof to the contrary. But in this case, there were a number of possible explanations as to how the details of the payment irregularity were disclosed to the media. The principle does not enable Mr Peters to establish, on the balance of probabilities, that MSD was the source of the wrongful disclosure.

[197] For the sake of completeness we note that Mr Henry did not identify any legal basis for the proposition that lawful disclosures by MSD to persons outside MSD on a confidential basis could result in liability in tort on the part of MSD, if those external

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[105] Questions about MSD's vicarious liability might also arise, depending on the facts. In particular, in circumstances where the disclosure was inconsistent with the leaker's obligation to keep the information confidential, and was a breach of their contractual and statutory obligations as a public servant, MSD might be able to argue that it was not vicariously liable for that disclosure.

persons subsequently disclosed the information in breach of confidence. Neither authority nor principle provides any support for an argument that MSD can be liable in tort in such circumstances.

Other issues

[198] In light of the findings we have already made, it is unnecessary for us to address the other issues raised by the respondents. We mention some of them briefly.

[199] It was common ground that the question whether MSD should have accepted and processed Mr Peters' application was irrelevant to the issues before the Court. The topic was only addressed in submissions out of an abundance of caution. We agree this topic is irrelevant, and we need not address it.

[200] Nor need we consider whether there was a justification for the briefing provided by Mr Boyle to Ms Bennett under the "no surprises" principle. For the reasons explained above, the merits of a chief executive's decision to brief their Minister are not relevant in this context.

[201] For the same reason, we do not need to consider Ms Casey's submissions about the limited weight that was given to Sir Maarten's evidence concerning the justification for the particular briefings given by these Chief Executives to their Ministers. We have accepted as accurate, and helpful, Sir Maarten's evidence about the relationship between a chief executive and a Minister. That evidence confirmed our view that the relationship is one of trust and confidence, into which the tort of invasion of privacy ought not to intrude in the absence of bad faith. It is unnecessary for us to go further.

[202] We also decline to embark on a consideration of the damages that might have been recoverable in respect of a wrongful disclosure to the media, in circumstances where none of the defendants has been shown to be responsible for that disclosure.

Result

[203] The application for leave to adduce further evidence is declined.

[204] The appeal is dismissed.

[205] Mr Peters must pay the respondents one set of costs for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel.

Solicitors:
Clifton Killip Lyon, Auckland for Appellant
Crown Law Office, Wellington for Respondents