



How Private is Private When Taking Photos in a Public Place?

At last year's Melbourne Cup, a young Kiwi woman had her photograph circulated around the globe after a journalist photographed her antics at the races. As the woman was in a public place with no expectation of privacy no criminal offence was committed, nor was there any civil wrong. This would also be the case in New Zealand. The situation raises some interesting questions about how private is private when taking photographs in a public place?

What are the rules?

It's generally lawful to take and/or publish photos or film people in public places such as a beach, shopping mall, park or other public place without their consent. There is no expectation of privacy in these places.

You must not, however, film or take photos of people if they are in a place where they can expect privacy (such as a public changing area or toilet) and that person:

- » Is naked, in underclothes, showering, toileting etc
- » Is unaware of being filmed or photographed, or
- » Has not consented to be filmed or photographed.

You should not take photos of people if:

- » They are in a place where they would expect reasonable privacy and publication would be highly offensive to an objective and reasonable person
- » It has potential to stop other people's use and enjoyment of the same place, or
- » You have no legitimate reason for taking the film or photos.

Recent cases

Earlier this year a Taranaki woman was convicted after she distributed photos of her ex-husband's mistress to local residents. This was an offence given the woman photographed was naked. The photos had been taken from a cell phone, copied and distributed. There would also have been an issue around ownership of the photos but the conviction related to the distribution.

A man was recently convicted in the Nelson District Court after taking photos of three girls on a beach. The girls were believed to be aged between 12 and 15 years. The man was convicted of doing an indecent act with intent to insult. While taking photographs on a public beach is generally legal, the charge was based on the man's intentions.

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Who owns the photos?

Once a photo is taken of you that image is owned by the photographer. This may be subject to any employment agreement between the photographer and their employer. In some situations the photo may be owned by the employer.

Privacy law

New Zealand's main privacy law is the Privacy Act 1993. It's predominantly focused on personal information about individual people. The Privacy Commissioner also has a wider ability to consider developments or actions that affect personal privacy.

There's no guaranteed right of privacy in the New Zealand Bill of Rights Act 1990. However, a person can sue based on a belief of invasion of privacy.

The common law has established a tort that has been developed through the courts. A tort is a breach of the law that's not a criminal offence. To establish this tort there needs to be an invasion of personal privacy by public disclosure of private facts.

The leading case in New Zealand on this topic is the Mike Hosking case.¹ Media personality Mike Hosking and his former wife Marie took legal action against a photographer and *New Idea* magazine that had taken photos of the couple's children.

Mr and Mrs Hosking had previously given media interviews regarding Mrs Hosking's pregnancy with twins. However after their daughters were born the Hoskings declined to give interviews or allow photographs of the twins to be taken. After the Hoskings separated, several magazines published articles on the relationship breakdown.

New Idea commissioned Mr Runting to take photographs of the twins to be published with an article on the couple's separation. The children's photographs were taken on an Auckland street as their mother pushed them in a buggy. The photos were taken without Marie Hosking's knowledge.

In the High Court decision,² Justice Randerson concluded that the New Zealand courts should not recognise a tort of invasion of privacy and that any gaps in privacy law were a concern for Parliament, not the courts. He noted that the photographs would not be described as offensive to persons of ordinary sensibilities. The case went to the Court of Appeal.

Ultimately, the Court of Appeal ruled that a tort of invasion of privacy existed in New Zealand but it didn't apply in the case of the Hosking twins. The court held that neither the parents nor the children had a reasonable expectation of privacy in respect of the photos that were taken. The photos were taken in a public place and there was no evidence for the court that publication would be harmful to the children. The appeal was dismissed.

Are private conversations protected by privacy laws?

Several years ago a hoo-ha involving the then Prime Minister, John Key, broke out after a journalist recorded a conversation between John Key and ACT party candidate, John Banks in an Auckland café. The conversation occurred during the 2011 election campaign and the journalist later gave the recording to a national newspaper. John Key laid a complaint with police. Search warrants were obtained and media outlets were searched. The complaint was later dropped. As there was no prosecution the courts never ruled on the issue.

There are differing opinions on whether the conversation was public or not. However, anyone in a public place whose conversation is overheard by a third party is open to the risk that their conversation is no longer private. The third party would be entitled to release that information to any media outlet, to post it on websites and to tell their friends (subject to defamation laws).

What about social media?

The terms and conditions for social media forums such as Facebook and Instagram generally state that the company has rights to images and comments that are published. The companies behind those sites can use any content for promotional purposes. In reality, once information is on sites like Facebook exclusive ownership of the information is gone.

More legislative guidance

The Harmful Digital Communications Act 2015 has made it an offence to distribute, via technological means, photos that may be harmful and cause distress. This legislation must be interpreted alongside the Privacy Act. While privacy laws don't prohibit taking photographs of people in public places, the Harmful Digital Communications Act may well prevent distribution and publication in certain circumstances.

Offences under the Harassment Act 1997 may also be committed if people are being followed for the purposes of photography and filming - even if it's in a public place. Much will turn on the facts of the particular situation.

Anyone taking and using photographs for whatever means should be fully aware of the legal requirements in terms of the Privacy Act and the tort of invasion of privacy.

Given today's technology, the number of social media platforms, and the ability for photos and conversations to be circulated around the world in an instant, you should always think carefully about the implications of what you're about to do.

If you hesitate before you post an image or recount a conversation, it may mean you're about to invade someone's privacy - which could land you in court. *

1 *Hosking v Runting* [2005] 1 NZLR 1

2 *Hosking v Runting* [2003] 3 NZLR 285



Rural Fires

Who is liable for the damage?

The recent fires in the Port Hills above Christchurch are a timely reminder of the risks of fire to our communities. Every year the New Zealand Fire Service and National Rural Fire Authority battle fires all over New Zealand, which begs the question – *Who pays for this?*

You pay if you start the fire. Liability for rural fires is found in the Forest and Rural Fires Act 1977. Section 43 states that the National Rural Fire Authority or the New Zealand Fire Service Commission can recover costs from the person responsible. If you are the landowner and did not start the fire, you also may be able to recover damages from the person who did.

What this means is that if you started the fire, and don't control that fire and it escapes your control causing damage to property or people, then you are liable. Because you started the fire it's not necessary to prove you were negligent or didn't exercise care while dealing with the fire. At this point you will be hoping your insurance policy is fully up-to-date.

'Property' within the Act has a broad meaning. The High Court held in the *Hollamby* case³ that the exposure of land to erosion as a result of the vegetation being burnt off can create damage to property, which can lead to the award of damages.

Where a person deliberately lights a fire that person has a duty to ensure that the fire remains under their control and does not 'escape' their control and cause damage.

Accidental fire

Even if the fire is accidentally started liability remains. However, it may be possible to avoid liability in some circumstances, for example, in the case⁴ where a tyre blew out with the rim causing sparks which started a fire, the High Court held that the driver wasn't liable. The judge held that the New Zealand Fire Service Commission had to show that the driver had been able to anticipate the fire and in this driver's case he could not, because in all the circumstances of the situation he could not have anticipated that a roadside fire could eventuate from a blown-out tyre of which the driver was unaware. The circumstances referred to in this judgment make it quite a unique situation.

The amount that may be recovered under the Act is not limited. If the liable person can prove that a Rural Fire Officer's actions in fighting the fire⁵ were excessive then the amount recovered may be limited. Alternately the National Rural Fire Authority may, in circumstances under other parts of the Forest and

Rural Fires Act 1977, elect to levy land owners; this may also limit the amount recovered against the person who started the fire.

Fire being a valid farming tool

Fire is often used to control noxious weeds such as gorse. It's a legitimate farming tool but, regardless of that, the issue of strict liability remains.

Insurance is an important factor in being prepared if you want to use fire either in controlled burn-offs or disposing of farm waste. The National Rural Fire Authority (www.nrfa.org.nz) has information regarding insurance. In essence, however, using fire as a farming tool you need to:

- » Ensure you have planned adequately for fire use
- » Minimise the risk of a fire accidentally starting when extreme fire periods are in place
- » Include fire protection for your land and home in your business plan, and
- » Discuss your insurance needs with your insurance agent.

Health and safety

Finally, fire as a farming tool is a health and safety issue under the Health and Safety at Work Act 2015. A fire which gets rapidly out of control can hurt your employees or they could die.

You are obliged to take all practicable steps to ensure your employees are safe at work. In the *Northburn* case⁶, a controlled burn off went badly and their employee was 'engulfed by a fire front' and was killed. The court awarded the deceased's family \$100,000 for emotional harm and a further \$7,000 for consequential financial losses.

Regardless of the penalties awarded, nothing can compensate for the loss of someone's life when thoughtful planning and proactive management of workplace health and safety can reduce risks significantly.

Treating fire with respect

As a farm management tool fire has a long-established use in New Zealand but it needs to be kept under your control; if it's not, you are likely to be found liable for the damage it causes. Worse still someone may lose their life. To prevent such a disaster, fire needs to be treated with respect and careful planning given to its use. ✨

3 *Hollamby v Attorney General* HC Blenheim M24/62, 31 March 1983

4 *Tucker v New Zealand Fire Service Commissioner* [2003] NZAR 270

5 *West v New Zealand Fire Service Commission* HC Hamilton CIV-2007-419-1531, 16 November 2007

6 *Worksafe New Zealand v Northburn Limited* [2016] NZDC 11310 (also CRI-2015-002-000070)



Buying off the Plans

The advantages, pitfalls and the Kawarau Falls case

If you live in one of New Zealand's cities, it's likely that you've noticed a multitude of brand-new apartments, terraces, and town houses popping up in your area. You may have decided that you too, want to secure one of these brand-new properties as an investment or as a home. What do you need to know before taking the plunge?

Many people choose to buy these kinds of properties 'off the plans.' Developers make building plans and specifications available to prospective purchasers and sell the properties ahead of construction as a method of convincing the bank to fund their project.

To secure one or more of these properties for yourself, you would need to enter into an agreement where you agree to pay a deposit (usually 5%–10% of the developer's asking price for the property) and then pay the balance on completion.

Before entering into any agreement with a developer, you should be aware of the advantages, and pitfalls, of buying off the plans. We have set out some below, but they are by no means exhaustive.

Advantages

The early bird gets the worm: When buying off the plans, you can often acquire the exact property of your choice, as opposed to having to pick from what is left which may not meet your exact requirements.

By buying at this early stage, you have the opportunity to choose the best property, with the best location and views. You also can choose finishes and so on.

Making a profit: If you get in early enough, you could buy at a comparatively lower price, as prices often rise as construction nears completion.

If the property market is favourable during the construction of your property, you could potentially make a profit on it between the time of paying your deposit and the final instalment.

Pitfalls

The Agreement for Sale and Purchase: As a purchaser, you would enter into an Agreement for Sale and Purchase (ASP).

The ASP has clauses that typically favour the developer and specify important factors such as how much the developer can deviate from the initial plan to which you agreed.

As well, most ASPs contain clauses which mean the developer cannot be held liable for failing to complete your property, and don't allow you any way out of the agreement. Some developers seek to impose cost escalation clauses in their agreements so they can pass on construction cost increases.

Unless these clauses are carefully limited, a purchase price could increase substantially.

If the market drops during the construction phase and you want to sell on completion, there's a risk you could make a loss.

Timing: Some projects can take years to complete, and delays can and do happen. It's important to consider these potential delays when planning your future.

Your expectations: As there was no physical property to view, it may only be at the final stages, or after completion, that you realise your property is built to a lower standard or that certain aspects are not how you had envisioned.

If your expectations haven't been met, whether it be due to the time it has taken to be built, or you find yourself dissatisfied with the finished product – the fine print in the ASP becomes critical.

The Kawarau Falls case: when things go wrong

Imagine that you had already bought off the plans, when, to your horror, you get a call – the developer's company is in receivership, and the project cannot be completed. What are your rights? Do you get your deposit back?

On 9 September 2016, the Court of Appeal answered this very question.⁷

This case involved Dr Ho Kok Sun (Dr Ho), a purchaser of one of the luxury properties that were to be built in Queenstown. Dr Ho and other purchasers had paid their 10% deposits and agreed to pay the balance when the properties were completed.

When it came time for the property to be completed and it was not, Dr Ho, and others like him, cancelled their agreements.

The developers refused to refund the purchasers' deposits. The High Court agreed with the developers. The Court of Appeal disagreed with the High Court, and required the developer to refund Dr Ho, and others, their deposits.

Although the outcome of this case appears favourable to those who have bought off the plans, it's important to note the decision has now been appealed to the Supreme Court and will be heard in early April 2017.

Conclusion

Although there are undoubtedly advantages in buying off the plans, there are also pitfalls.

Until the Supreme Court has released its decision on the Kawarau Falls case, the purchaser's rights are still uncertain.

Before deciding to buy off the plans, do talk with us so we can explain your rights and obligations under the agreement you are signing. *

⁷ *Sun v Peninsula Road Ltd (in rec and in liq)* [2016] NZCA 427

DIY at the Disputes Tribunal

If you have a claim of up to \$15,000 – the Disputes Tribunal provides a simple, cost-effective way of dealing with civil disputes. We outline below the basics of what you need to know to make a claim.

The Disputes Tribunal is not a court and there are no judges. Hearings are run by referees who will help the parties to reach an agreement. You can't have a lawyer with you at the actual hearing – you have to represent yourself. You can, however, talk with us before lodging a claim or attending your hearing.

We do urge you, however, to try and settle your dispute rather than have to go to the Disputes Tribunal.

Claim threshold

Generally, the Disputes Tribunal is for claims of up to \$15,000. However, if everyone agrees then the amount can be \$20,000. If you have a dispute for between \$15,000 and \$200,000, you will need to go to the District Court. The High Court hears larger disputes.

A claim usually needs to be made within six years of the event or dispute. If you have run out of time then you will need to speak with us about other options.

Claims you can make

The Disputes Tribunal can help with the following disputes:

- » Goods and services: for example, work completed which you are not satisfied with
- » Your place of residence: such as damage caused to property or flatmates disagreeing to contribute as previously agreed
- » Business contracts or agreements: it's important to know that you can make a claim at the Disputes Tribunal even if you signed an agreement stating you would not do so.

Claims held elsewhere

- » Employment: the Employment Relations Authority deals with these
- » Family disputes such as child care or relationship property: you'll need to talk with our family law specialist
- » Disputes between landlords and tenants: Tenancy Services is the place to go
- » Debts: when the person owing the money agrees they owe the debt but doesn't pay anyway, ie: you can't use the Tribunal as a debt collection agency
- » Wills, intellectual property, land: speak with us about these types of disputes
- » Rates, taxes, benefits or ACC payments: contact the agency that deals with those payments such as Work and Income for benefits.

Making a claim

Go to www.disputestribunal.govt.nz and complete the form online. Alternatively, complete the paper form that's available at your local District Court.

The hearing

Make sure you're well prepared, including briefing any of your witnesses. Take with you all the information and copies of supporting documents needed to prove your claim.

The referee will explain the hearing process. The referee will help the parties in reaching a resolution. If, however, no agreement can be reached then the referee will make the decision for you. You must follow the decision that has been made.

To know more

For more information on the Disputes Tribunal process, filing fees, how to enforce the decision made, and so on, go online to the Disputes Tribunal or visit your local District Court. *

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 Welsh McCarthy – Hawera
 Wilkinson Rodgers – Dunedin
 Woodward Chrisp – Gisborne

Postscript

Minimum wage review 2017

Every year the government reviews the minimum wage. On 1 April 2017 the adult minimum wage increased from \$15.25/hour to \$15.75/hour. The starting out and training minimum wage increased from \$12.20/hour to \$12.60/hour.

We recommend you review all wage and salary structures to ensure your employees are paid at least the minimum wage at all times for the hours worked.

In some businesses (farms, in particular) work fluctuates throughout the year. You must ensure that your employees are receiving at least the applicable minimum wage rate for any hours worked at all times. This is the case even when your employees are paid a salary. This may mean your employee's pay needs to be topped up at certain times of the year.

Keeping and maintaining accurate time and wage records is vitally important, and a legal requirement of employers. *

Retirement Villages Code of Practice update

On 1 April 2017 changes were incorporated into the Retirement Villages Code of Practice. These mainly involve the dispute resolution process in retirement villages.

Changes include a new step-by-step complaints process that includes the option of mediation to encourage earlier resolution.

Over the last 10 years the number of seniors living in retirement villages has grown to a record 32,000 people. Announcing these changes, Minister of Housing, Dr Nick Smith, said that the changes acknowledged the power imbalance between residents and retirement village companies and the need for a robust Code of Practice to ensure residents are treated fairly.

To find out more about the Retirement Villages Code of Practice, go to www.cffc.org.nz/retirement *

Keeping your energy costs down

Before we know it the cold winter months will be upon us and we will be cranking up our heating.

To check whether you're on the best plan for your household, go to www.whatsmynumber.org.nz, complete all the fields and submit.

What's My Number is an initiative of the Electricity Authority working with Consumer NZ to help New Zealanders make more informed choices about our electricity suppliers.

The site provides information about the ability to switch power companies, the ease of switching and the potential savings you can make on your power bills by switching energy providers. *



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