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INTRODUCING NEW TORTS: THE FACTORS REQUIRED AND HOW THEY EXPLAIN PRIVACY'S SUCCESS

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ABSTRACT

This paper examines the factors responsible for introducing new torts into the common law. The model adopted is partly based on a model proposed by Bernstein, an American writer. Bernstein identifies three ways to package new torts to make them more attractive to the common law. By establishing their 'antiquity', identifying them with non-tort remedies like property and contract and obscuring their agents new torts appear more 'conservative'. However, it is necessary to examine other factors to explain the New Zealand experience. It is suggested a dynamic court is required and some way to justify extending the law. Further, new torts must be necessary or at least useful. The parties and interests at stake may also play an important role. There should also be some justification for establishing a new tort as opposed to a new sub-category of negligence.

These factors are examined against the background of two torts that have been introduced into the common law, privacy and unlawful interference. This paper then examines how the same factors that help introduce new torts may explain the relative success of the privacy in comparison with unlawful interference. Particularly, the importance of human rights at the moment and necessity seem very significant.

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The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 15,016 words.

I INTRODUCTION

A General

This paper discusses the factors that encourage courts to introduce new torts. It is not often that new torts are created.[1] New torts are novel and free standing torts, as differentiated from a sub-category of negligence.[2] The reasons we develop new torts may be to redress wrongs that have been neglected or inadequately protected, and to reinforce values.

Several factors may be required to introduce successful new torts. They include certain paradoxes suggested by Bernstein: the novelty, tort and agency paradoxes. However, other factors may play a role such as a dynamic court, some basis to legitimise the extension of the common law, necessity (or at least the tort is useful), the parties involved and some reason making negligence inappropriate. These factors will be discussed against the background of privacy and unlawful interference with trade.

Secondly, this paper will discuss whether and the extent these factors explain the different degrees of success between unlawful interference and privacy. New Zealand courts have been receptive to the the introduction of a tort of privacy. The recognition of privacy elevates to a remediable right the principle which underlies the various causes of action used to protect privacy interests. New Zealand has gone further than other Commonwealth countries towards establishing a separate privacy tort.[3] The English position, for example, is that no tort of privacy exists.[4] However, 'success' has various degrees.

Unlawful interference has been recognised but seems less appealing to judges. Unlawful interference will be compared and contrasted with privacy

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[1] Anita Bernstein "How to Make a New Tort: Three Paradoxes" [1997] 75 Texas Law Review 1539 ["New Torts"].

[2] "New Torts" above n1, 1540. 'Novel' refers to the originality of the tort, not to its newness.

[3] Todd et al *The Law of Torts in New Zealand* (Brookers, Wellington, 1997) 978 [*The Law of Torts*] 978.

[4] *Kaye v Robertson* (1990) IPR 147 [*Kaye*].

to examine how the factors that introduced them and the nature of these interests themselves explain privacy's greater apparent success. It is appropriate at this point to explain the basis for claiming privacy has had greater success.

B Privacy 's Success

The privacy torts may not be as successful here as they were in America. Bernstein describes privacy as a successful tort.[5] However, she neglects to say that privacy may no longer be 'successful' in America after the impact of the constitutional right to freedom of expression which has virtually destroyed public disclosure.[6] This will be discussed later.

There are different degrees of 'success'. Success at one of the spectrum may be the acknowledgement of a need for protection. Recognition by the judiciary is a step forward. Becoming part of legal thinking and vocabulary, not merely amongst the judiciary and academics, is a further degree of success. But winning the battle of ideas and changing a mind set so that there is a paradigm shift is true success.

Privacy is described as an emerging tort.[7] Yet there appears to be a view that privacy will eventually be incorporated into the common law through the impact of human rights.[8] There is already some evidence of privacy's success.

There is an awareness in society of privacy as something that should be protected. This is evidenced by the privacy actions that have been taken and the adoption of privacy standards in industries like the Broadcasting Standards Authority.[9] Privacy has achieved judicial recognition and

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5 "New Torts" above n1, 1541.

6 See *Florida Star v BJF* (1989) 491 US 524, 105 L Ed 2d 443 [*Florida Star*].

7 H Schwartz "The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act " [1998] NZL Rev 259, 294 ["Death of the New Zealand Bill of Rights "].

8 S Sedley "Private & Public: Beginning of an End" Lecture at Victoria University of Wellington, 27 August 1998 ["Private & Public"].

9 Broadcasting Standards Authority Advisory Opinion, 6 May 1996 ["BSA Advisory Opinion"].

legislative recognition in statutes like the Privacy Act 1993. Privacy is taught at least at Victoria University and this in conjunction with numerous books and academic articles, helps privacy gain intellectual respectability.

However, there is a significant body of opinion against a right to privacy. The Court of Appeal in *Gardiner* [10] relied upon the English wiretap case of *Malone*[11] and disregarded New Zealand authority of common law and statutory recognition of a right to privacy. The court ignored criticism of *Malone*.[12] By not addressing these issues the court's reasoning seems lacking and therefore unconvincing. The court should have at least acknowledged existing jurisprudence for a privacy tort.

Unlawful interference on the other hand is not a widely known tort, although it has been recognised in the common law and may be found in tort text books. It is not taught at Victoria University. Perhaps an explanation for unlawful interference's lower profile is that it has become subsumed into the Fair Trading Act 1986. The result though is that privacy has achieved greater success, although it remains to be seen whether this eventually results in a paradigm shift .

II THE MODEL

This paper proposes a number of possible factors that influence the courts to extend the common law. These factors may also explain why some torts are more successful than others. This paper examines the model suggested by Anita Bernstein, an American writer. Bernstein considers that the American experience of introducing new torts can be explained on the basis of three paradoxes.

While her approach is useful, her model alone does not explain the New Zealand experience. It is suggested that there are other factors that are key to

[10] *R v Gardiner* (16 July 1997) unreported, Court of Appeal, CA 239/97 [*Gardiner*].
[11] *Malone v Commissioner of Police* (no 2) [1979] 2 All ER 620, 638.
[12] "Death of the New Zealand Bill of Rights" above n7, 294.

the success of a new tort. Success depends on a willing court which views its role in society as dynamic to ensure the court keeps up with modern expectations to adequately protect its citizens.

Further, the area of law must appear suitable for judicial intervention. A recognised need in society will be required where the existing common law actions prove or seem inadequate. A deserving plaintiff and/or reprehensible defendant may help the tort achieve success. This may be understandable, but it is questioned the extent that this factor should influence the courts. Instead courts should look at the need for protecting the wider community.

Even if the courts decide to extend the common law, the question then is whether it should become a sub-category of negligence or a new independent tort. Most new torts are intentional or strict liability according to Bernstein.[13] In order to balance the interest with competing interests, intention may be required. Intention may also provide limitations that without which the tort would be too wide and difficult to justify. Alternatively, the vehicle used to introduce the new tort may impose restrictions on the new tort.

A Bernstein's Three Paradoxes for Successful New Torts

The enemy of new torts is conservatism.[14] 'Conservatism' means that the tort should appear to conform to the traditional judicial method of following and building on past precedent. The tort should not appear to be doing anything new but to find or develop existing law. New torts should appear as a gradual progression. If the new tort is perceived as a departure, or something new and different, it will be more difficult to find acceptance in the common law.

Bernstein identifies three 'paradoxes' that she considers differentiate successful new torts from the unsuccessful in America: novelty, tort and

13 "New Torts" above n1, 1541.
14 "New Torts" above n1, 1543.

agency.[15] These paradoxes disguise the new torts with a conservative appearance. The question then is to what extent the introduction and varying successes of privacy and unlawful interference can be explained in New Zealand based on these paradoxes. The New Zealand experience appears different.

1 *Novelty/Antiquity Paradox*

Common law judges supposedly develop principles of law on a "stepping - stone" basis. Therefore new torts should appear to develop by analogy, synthesis and small increments so they seem to emerge naturally from prior common law rules.[16] When general principles are pronounced they are found to be distilled from an extensive body of law by chance or by design.[17]

This paradox should be called the 'antiquity paradox' as the tort is new, but it is portrayed as simply a restatement or development of what has been done in the past. The common law has claimed that identification of a right requires a remedy. However, the study of formation of new torts shows that where there is a remedy there is a right.[18] Bernstein suggests successful creators of new torts frame them in the past.[19] Even where innovation must be acknowledged, novelty may be denied by claiming the law is simply being corrected and the changes are minor.[20]

The antiquity paradox is as important in our common law as it is in America. This can be explained by the need of the common law, as Sedley explained, to face the past and future.[21] The common law should respond to developments in society but it needs some justification in order not to appear arbitrary or ad hoc, otherwise the system would be undermined. There are underlying tensions between adaptability and certainty. Precedent

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15 "New Torts" above n1, 1538.
16 "New Torts" above n1, 1545.
17 John Irvine "The Appropriation of Personality" Dale Gibson (ed) *Aspects of Privacy Law: Essays in Honour of John M Sharp* (Butterworths, Toronto, 1980) 163, 164.
18 "New Torts" above n1, 1544.
19 "New Torts" above n1, 1544.
20 "New Torts" above n1, 1545.
21 "Private & Public" above n8.

('antiquity') can help resolve this problem. Antiquity provides a tort with some degree of legitimacy so it appears more of an incremental and logical development rather than a an arbitrary or radical departure from the law.

2 *Tort Paradox*

Bernstein considers that 'tort' is associated with expansion, unpredictability and redistribution of power, whereas contract and property appear to have tradition and continuity behind them.[22] The 'tort' label should be avoided and contract or property be relied on to overcome conservative opposition.

However, there may be another explanation for the use of property and equity to create new torts. Perhaps the aim of new tort creators is not simply to be conservative for judicial acceptance. The judiciary has limited tools to work with, they are "coerced into categories such as 'good faith' and 'property'".[23] The courts are obliged to offer historical analyses because that is what the common law expects. That does not necessarily mean judges are unaware of the novelty of their actions.

The courts cannot directly admit what they are doing and "call a spade a spade".[24] Perhaps then courts create new causes of action first and then try to show that their origins are consistent with the common law afterwards. Judges may not be more receptive to new torts because they appear conservative. However, a conservative appearance may make their creation easier to justify.

However, 'torts' do not appear to have the same connotations in New Zealand, at least in regard to privacy which was clearly based on an existing tort. It is suggested therefore, that provided that the tort vehicle introducing the new tort is well established and has connotations of antiquity, the tort label is unproblematic. Certainly the tort label does not appear a strong

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[22] "New Torts" above n1, 1547.

[23] HJ Glasbeek "Limitations on the Action of Breach of Confidence" Dale Gibson (ed) *Aspects of Privacy Law: Essays in Honour of John M Sharp* (Butterworths, Toronto, 1980) 217, 242 ["Limitations on the Action"].

[24] "Limitations on the Action" above n23, 242.

enough factor to differentiate privacy and unlawful interference.

3 *Agency Paradox*

Disclaiming or obscuring the authors or advocates of new torts is key to creating new torts according to Bernstein. New torts need to be portrayed as independent of human creation.[25] Although someone is needed to promote the new tort for it to succeed, any active promotion needs to take place behind the scenes. That is the agency paradox, an agent is required but needs to seem unimportant.

The agency paradox is linked to the antiquity paradox because a skilful agent will be able to make the new tort appear conservative by building on past precedent and dicta. It is not the status or notoriety of the agent that is important but his/her skills in presenting the tort as an incremental and logical development.

B *Additional Factors*

1 *Role of Judges*

Another paradox exists within the common law itself. Some courts are more easily convinced than others of the conservativeness of a new tort. This suggests some courts are more willing to be convinced. Although unlawful interference succeeded in New Zealand and England, English courts refused to introduce a tort of privacy. Maybe the reason for resistance lies in the courts' view of their role in society.

It has been suggested that Commonwealth courts lack the boldness to establish new causes of action. Judicial conservatism is justified by their modern constitutional role.[26] They are subordinate to parliament. The formal role of the courts is resolving disputes and a wider role in the

25 "New Torts" above n1, 1552.

26 Peter Burns "Privacy and the Common Law: A Tangled Skein Unravelling?" Dale Gibson (ed) *Aspects of Privacy Law: Essays in Honour of John M Sharp* (Butterworths, Toronto, 1980) 21, 23 ["Privacy and the Common Law"].

governance of society is better left to the legislature.[27] The common law path means that decisions lack certainty because fact situations will not always be identical to past decisions, although precedent is supposed to make decisions more certain.

Glasbeek considers that courts do not really understand social needs, nor do they have the tools required for the creation of adequate solutions. Therefore, they should be discouraged from acting, the legislature is the more appropriate forum.[28] Complex political decisions should be the legislature's.[29]

Crucial to an expanded judicial role is adjudication in accordance with current standards.[30] The law must change with society. Some may doubt judges' qualifications in this area. Courts may be in a poor position to decide if the social need truly exists.[31] Even if the need exists the courts are then faced with deciding its nature and scope. However, if the legislature dislikes what the courts decide it is free to overrule them. Therefore, judicial angst is an unconvincing reason for inaction.

It is suggested that the better approach is for the courts to have a more dynamic role. There is legitimacy in ensuring that the common law responds to modern needs. The law should adapt to changing circumstances if it is going to protect and ensure society's confidence.

The common law has inherently dynamic features that are responsible for new causes of action like nuisance and intentional infliction.[32] The common law can adapt to changing conditions. New Zealand, like Canada, seems to have chosen a more dynamic path, at least regarding privacy. Although the courts still play the common law game of making decisions

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27 GHL Fridman "Unlawful Interference with Trade - Part II" [1993] 1 Tort Law Review 99, 121 ["Interference with Trade Part II"].
28 "Limitations on the Action" above n23, 218-219
29 "Limitations on the Action" above n23, 222.
30 Peter Robson "Problems of Judicial Study" Peter Robson & Paul Waterman (eds) *Justice, Lord Denning and the Constitution* (Gower Publishing, England, 1981) 45, 56.
31 "Limitations on the Action" above n23, 220.
32 "Privacy and the Common Law" above n26, 23.

appear incremental.

Although dispute resolution is the primary role of judges, in the latter twentieth century the lawmaking role of the judge in the Commonwealth has greatly expanded.[33] Lawmaking is not always confined to small incremental changes. Lawmaking can be legitimised though if based on the antiquity paradox. The courts' legitimacy for acting may also come from the need to resolve the issue before them and from the dominant climate in society. Evidence of society expectations may be found in existing international conventions and statutes. Torts may be successful because they come at the right time.

Judges have moved into social policy as a result of rights being elevated to constitutional status. This is a key feature of legal thinking approaching the new millennium.[34] The importance of rights touches even countries without constitutional bills of rights. Sedley contends the judiciary should and will incorporate rights in covenants and statutes into the common law.[35] The separation between private and public law is artificial, not only the state but individuals too should be required to respect rights.

Important social issues may be dealt with by the courts because the legislature appears unable or unwilling to tackle them. There is validity in the 'justice of the common law' remedying the omissions of the legislature. Further, some issues may be too controversial for the legislature to deal with so the courts are left to decide.[36] Arguably decisions are controversial because society is not yet ready for change. However, the court's hand may be forced where the need is evident and the legislature is slow in responding. Any arguments that the courts do not have the resources to deal with social policy are therefore less convincing.[37] The parties before the court need a decision. The courts are pragmatic, even if all the consequences

33 Beverley McLachlin "The Role of Judges in Modern Commonwealth Society" [1994] 110 LQR 260, 262-263 ["The Role of Judges"].
34 "The Role of Judges" above n33, 263.
35 "Private & Public" above n8.
36 "The Role of Judges" above n33, 263.
37 "The Role of Judges" above n33, 264.

of their action are unforeseen.

Sometimes the legislature may not wish to act, especially where a powerful lobbying group is against such action. The blocking power of the English press was a reason given for the reluctance of the English legislature to protect privacy.[38]

2 *Necessity*

If there is an expectation of protection, and existing common law remedies fail to provide adequate protection, the court may decide develop a new tort. External factors creating this necessity may be new developments in society that the current law does not adequately protect against. Generally there will be gaps in the present law justifying new remedies. Tort may fill those gaps to better reflect society's expectations.

3 *Importance of the Parties and Interest*

The parties before the court may encourage the creation of new torts. A plaintiff who is easy to identify and sympathise with may be more likely to succeed. The reverse is also true. A plaintiff who in some way seems undeserving or difficult for judges to identify with may mean the proposed tort is rejected.

Defendants also play an important role. If the defendant's action appears reprehensible and unjustified that may help the new tort. If on the other hand the defendant is justified in doing what he/she did the court may be unwilling to impose liability.

However, judges should be looking beyond the parties before them to the good of society as a whole. If the judges are swayed by the individuals before them then other arguably more 'deserving' parties may miss out later.

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[38] Basil Markesinis "Our Patchy Law of Privacy - Time to Do something About It" [1990] MLR 802,806 ["Our Patchy Law of Privacy"]. Although the reasons given for inaction were the problems of defining privacy, the inhibition of journalism and that judges should not second guess the media.

The fact that a new tort is available to a wide range of potential plaintiffs may explain why certain torts, like privacy, have more appeal than others. If judges can identify with a particular interest that will also surely render them more receptive to incorporating it into the law.

4 *Justification for not Using Negligence*

Further, if new torts are going to be created then the reason why they do not become a sub-category of negligence should be justified. What factors require separate, independent torts rather than using negligence to deal with gaps in the common law? Negligence is a growing area of tort liability based on fault. There may be reasons why the fault standard is unsuitable. The type of interest requiring protection and the success or failure it has had under negligence may be important factors the courts consider before introducing new torts. Negligence may be too low a threshold if the harm is not physical.

Intentional torts may be the result of both political and judicial conservatism. Intention may be required to make the torts limited enough to be acceptable. Emotional and economic harm are interests that the common law is not particularly receptive to, except where combined with other damage.[39]

Recognised harms in tort include physical harm under negligence and harm to reputation under defamation. Nervous shock though emotional, still has strict limitations on who can recover. Intentional infliction, which also deals with emotional harm, requires physical harm for liability.
The causes of action relied on to introduce these causes of action may explain why privacy and unlawful interference developed as independent torts. Although even if a higher standard for liability exists, there may come a time when negligence absorbs the torts.

[39] DL Zimmerman "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort" [1983] Cornell Law Review 291, 324.

III THE TORTS

A Privacy

1 Definition

Gavison describes privacy is a limitation of others' access to an individual which has three distinct but interrelated aspects, secrecy, anonymity and solitude.[40] Secrecy involves the protection of information about a person. Anonymity means that there is a loss of privacy when someone pays attention to you. In obscurity there is privacy.[41] Solitude involves physical access to the person.

There are various things that Gavison does not consider part of privacy. Harassment, emanations from neighbouring land, abortion prohibition, non-interference by the State and presenting someone in a false light are not privacy issues.[42] This essay assumes that Gavison is correct, except in excluding false light.

2 Possible Torts

Four possible privacy torts protecting different interests have been accepted in the United States.[43] They are:

(i) Intrusion upon the plaintiff's seclusion or solitude, or into his/her private affairs;

(ii) Public disclosure of embarrassing private facts about the plaintiff;

(iii) Publicity which places the plaintiff in a false light in the public eye; and

(iv) Appropriation for the defendant's advantage of the plaintiff's name or likeness.

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40 Ruth Gavison "Privacy and the Limits of Law" (1980) 89 Yale LJ 421, 428 ["Privacy and the Limits of Law"].

41 Andrew Jay McClurg "Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73 North Carolina Law Review 989, 1033 ["Bringing Privacy Law Out of the Closet"].

42 "Privacy and the Limits of Law" above n40, 436.

43 W Prosser "Privacy" (1960) 48 Cal LR 383, 389 ["Privacy"].

Some of these torts may find greater acceptance in New Zealand than others. They have met with different degrees of success in the United States.

B Unlawful Interference

Unlawful interference may be either an umbrella tort or a residual category Some consider it a genus tort.[44] However, Bedggood considers that the New Zealand Court of Appeal indicated that unlawful interference was a residual tort.[45]

There must be an intentional interference with the trade or economic interests of the plaintiff, by unlawful means, causing damage to the plaintiff.[46] Justification may limit liability, but the issue is undecided at present. In New Zealand the defendant's intention must be to cause economic loss to the plaintiff. Further, that intention must be a cause of the defendant's conduct though it need not be the primary purpose.[47] However, this factor has not gone without criticism.[48]

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44 Hazel Carty "Intentional Violation of Economic Interests: The Limits of Common Law Liability" [1988] LQR 250 ["Intentional Violation of Economic Interests"].

45 *The Law of Torts* above n3, 712. See *Van Camp Chocolates Ltd v Aulsebrooks Ltd* 1 NZLR 354, 359 [*Van Camp*], where they said they saw "insufficient reason for disregarding a judicial remedy which from time to time may be useful to prevent injustice".

46 *The Law of Torts* above n3, 712.

47 *Van Camp* above n45, 360.

48 "Interference with Trade Part II" above n27, 111-113.

IV APPLYING BERNSTEIN'S MODEL

A Novelty Paradox

1 Privacy

(a) In America

Warren and Brandeis argued that privacy was not novel, instead the law had recognised privacy interests under other doctrines such as copyright, implied contract, breach of confidence and defamation. Development of the law was inevitable according to Warren and Brandeis.[49] Thoughts and emotions required legal recognition and the common law had the capacity to grow to provide the necessary protection.[50] As Bernstein points out, Warren and Brandeis in their article did not want credit for novelty but asserted the long line of pedigree of their tort.[51]

The origins of privacy go back a long way. Roman law stated to enter a man's house against his will, even to serve a summons, was an invasion of privacy.[52] The common law maxim "every man's house is his castle" arguably recognised privacy as well.

(b) In New Zealand

Privacy was first introduced here in *Tucker*.[53] The court did not expressly argue the ancient pedigree of privacy nor try to deny the novelty of the action or the tort label. Instead the court relied on intentional infliction of emotional distress to introduce the tort. Public disclosure was described as the 'natural progression' of intentional infliction.

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[49] S Warren and L Brandeis "The Right to Privacy" (1890) 4 Harvard LR 193, 193-195 ["Right to Privacy].

[50] "Right to Privacy" above n49, 195.

[51] "New Torts" above n1, 1546. See "The Right to Privacy"above n49, 193-95, 204-5, 207-10 where they present common law cases implicitly recognising an intangible property right in personal privacy.

[52] *Pavesich v New England Life Ins Co* (1905) 50 SE 68, 71 [*Pavesich*].

[53] *Tucker v News Media Ownership* [1986] 2 NZLR 716 [*Tucker*].

Intentional infliction dates back to 1897 in *Wilkinson v Downton*[54] and was introduced here in 1922 by *Stevenson v Basham*.[55] Jefferies J said in relation to intentional infliction,[56] "[t]hat cause has been long recognised in the law." By implication privacy is not novel and appears incremental rather than radical.[57]

> It seems a natural progression of the tort of intentional infliction...and in accordance with the renowned ability of the common law to provide a remedy for a wrong.

Although, intentional infliction has been used infrequently.[58] Privacy then seems to fit the common law model. A cause of action develops within the common law by extension of another.

2 *Unlawful Interference*

(a) General

Unlawful interference can be viewed as a logical, natural progression from the other economic torts. It has affinities with the other economic torts, particularly inducing or procuring a breach of contract.[59] The threads of the separate nominate torts have been drawn together to form one tort.[60] Most of the nominate torts can be explained on the basis of unlawful interference.[61] Arguably because unlawful interference builds on previous existing causes of action it appears more conservative.

In *Lonrho Plc v Fayed*[62] Ralph Gibson LJ acknowledged unlawful interference could still be described as new though it was familiar when unlawful means used were intimidation or procuring breach or interference

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54 *Wilkinson v Downton* [1987] 2 QB 57 [*Wilkinson*].
55 *Stevenson v Basham* [1922] NZLR 225 [*Stevenson*].
56 *Tucker* above n53, 731. See the quote from Jefferies J's judgment.
57 *Tucker* above n53, 732.
58 *Tucker* above n53, 731. See the quote from Jefferies J's judgment.
59 GHL Fridman "Interference with Trade or Business - Part I" [1993] Tort Law Review 19 ["Interference with Trade Part I"].
60 Lyn Stevens "Interference with Economic Relations - Some Aspects of the Turmoil in the Intentional Torts" (1974) 12 Osgoode Hall L J 595, 620 ["Interference with Economic Relations"].
61 "Interference with Economic Relations" above n60, 622.
62 *Lonrho v Fayed* [1990]2 QB 479, 491-92 [*Lonrho v Fayed*].

with contract.

Some economic torts though are of comparatively recent origin.[63] Conspiracy goes back hundreds of years but has significantly changed this century.[64] Intimidation was only established in 1964 in *Rookes v Barnard*.[65] Inducing or procuring a breach of contract dates back to 1853 to *Lumley v Gye*.[66] Yet, it too has been altered and expanded by modern cases.

However, unlawful interference's pedigree is more respectable than often thought.[67] It derives partly from the Courts of Equity which would grant an injunction against criminal acts which destroyed or diminished the value of property, *Springhead* sets down the principle.[68] Unfortunately, doubt exists about the validity of the origins of this tort. The authority of *Springhead* was said to be reduced in the case of *Lonrho v Shell*.[69] It has also been suggested that there should be a distinction between unlawful interference and the equitable jurisdiction. As intention is key for the tort but may not be for equity.[70]

There is dicta supporting liability for "he who hinders another in his trade or livelihood" going back to 1706.[71] Stevens claims the many of the older cases can be explained on the basis of unlawful interference.[72] Others have said that although only recently acknowledged there is dicta of a general economic tort as early as *Allen v Flood* [73] which was decided in 1898. Other cases of about the same period could also have been used to establish a tort

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63 "Interference with Trade Part I" above n59, 20 .
64 "Interference with Trade Part I" above n59, 20.
65 *Rookes v Barnard* [1964] AC 1129 [*Rookes v Barnard*].
66 *Lumley v Gye* (1853) 2 El & Bl 216; 118 ER 749 [*Lumley v Gye*].
67 "Rocking the Torts" [1983] 46 MLR 224 ["Rocking the Torts"].
68 "Rocking the Torts" above n67, 224. *Springhead Spinning* (1868) 6 Eq 551, 558-559 [*Springhead*]. *Springhead* was approved by *Gouriet v UPW* [1978] AC 435.
69 "Interference with Trade Part II" above n27, 103. In *Associated British Ports v Transport and General Workers' Union* [1989] 3 All ER 796 the authority of *Springhead* was said to be reduced since *Lonrho Ltd v Shell Petroleum Ltd* [1981] 2 All ER 456.
70 Andrew J Stewart "Civil Liability for Industrial Action: Updating the Economic Torts" (1984) 9 Adelaide LR" 359, 373 ["Civil Liability for Industrial Action"].
71 *Keeble v Hickeringill* (1706) 11 East 574. See also *Carrington v Taylor* (1809) 11 East 571.
72 "Interference with Economic Relations" above n60, 22.
73 *Allen v Flood* [1898] AC 1 [*Allen v Flood*].

of unlawful interference.[74]

(b) In New Zealand

In New Zealand authority supporting unlawful interference goes back to 1914. In *Fairbairn*[75] the Court of Appeal held that a trader whose business was injured by a trade rival by unlawful means had a right of action. The court relied on the House of Lords decision in *Mogul*[76] to establish liability, a case based on conspiracy. Our Court of Appeal held it was clear authority that in competition between rivals unlawful weapons could not be used to advance their interests. If unlawful means were used causing injury the injured party had a good cause of action.[77]

Mogul dates back to 1892. Again the new tort appears to have been developed by expanding another established tort. Unlawful interference appears to be a natural development. Perhaps such descriptions down play the reality though.

In *Coleman*[78] the court found the tort was recognised in a case dating back to 1925.[79] The courts used older cases to establish the new tort.[80] By building on dicta from cases dating back to the nineteenth and early twentieth century novelty could be denied. Therefore unlawful interference appears to fit Berstein's novelty paradox. It has roots going back a long way and dicta in several cases were the possible seeds of its creation.

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74 Patrick Elias and Keith Ewing "Economic Torts and Labour Law: Old Principles and New Liabilities" [1982] CLJ 321, 335 ["Economic Torts and Labour Law"]. See also *Mogul SS Co Ltd v McGregor, Gow & Co* [1892] AC 25 [*Mogul*]; *Allen v Flood* above n73; *Quinn v Leathem* [1901] AC 495 [*Quinn*]. These are the cases setting the ground rules for the economic torts.

75 *Fairbairn, Wright & Co v Levin & Co* [1914] NZLR 1 [*Fairbairn*].

76 *Mogul* above n74.

77 *Fairbairn* above n75, 29.

78 *Coleman and Others v Myers and Others* [1977] 2 NZLR 225 [*Coleman*].

79 *Sorrell v Smith* [1925] AC 700.

80 See *Emms v Brad Lovett Ltd* [1973] 1 NZLR 282 where the court used *Sorrell* above n79 and also *Quinn* above n74, as well as relying on *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106.

B Tort Paradox

1 Privacy

(a) In America

Warren and Brandeis considered that intellectual property had already been used to protect privacy. Although the courts rested their decisions on the narrow grounds of property they were recognition of a more liberal doctrine.[81] So privacy appeared to have some basis in property but had outgrown it.

Warren and Brandeis also used contract and breach of confidence to support the new tort of privacy. The authors cited cases were these causes of action had provided a measure of protection to an individual's privacy.[82] But again they considered that those methods of protection were no longer sufficient.[83]

Other common law vehicles may have covered the new right with conservatism yet Warren and Brandeis clearly promoted a tort to protect privacy.[84] The way they presented privacy though was consistent with the tort and antiquity paradoxes.

(b) In New Zealand

Four torts were identified by Prosser. If Bernstein's model was applied to these privacy torts misappropriation and intrusion would be expected to be the most successful. However, the New Zealand experience seems to have produced different results.

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81 "Right to Privacy" above n49, 204.
82 *Prince Albert v Strange* (1849)1 McN & G 25, *Tuck v Priester* (1887) 19 QBD 639 and *Pollard v Photographic Co* (1888) 40 Ch Div 345.
83 "Right to Privacy" above n49, 210.
84 "Right to Privacy" above n49, 211.

(i) Misappropriation

Misappropriation arguably has a strong property basis. Prosser said the interest protected is not so much a mental one as it is proprietary in the exclusive use of the plaintiff's name and likeness.[85]

As far back as 1867 Cairns LJ supported property in a name.[86] Supporting dicta came from Malins VC in *Springhead* that a man had sufficient property in his own name to prevent another from falsely passing off and causing injury to his reputation.[87] There is a strong basis for arguing that misappropriation emerged from property.

Misappropriation would therefore appear to have a strong chance of success. Misappropriation has been recognised in Australia. In *Talmax* the plaintiffs recovered damages on the premise that the publication of Kieran Perkins' photo (a well known sporting hero) in promotional material without consent diminished the opportunity to commercially exploit his name, image and reputation.[88] Yet it has not yet been recognised here.

(ii) Intrusion

Intrusion arguably also has property links because it may be seen as an extension of trespass. Trespass protects property. Intrusion has been recognised as going further than physical intrusion in America to include eavesdropping by wire tapping. [89]

Even if intrusion does go beyond territorial limits, it can still be analysed as having origins in property. There are clear links with trespass. Like the wider privacy interest itself advocated by Warren and Brandeis, intrusion arguably has simply outgrown its origins.

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85 "Privacy" above n43, 383.
86 *Maxwell v Hogg* (1867) 2 CH App 307, 310.
87 *Springhead* above n68.
88 *Talmax Pty Ltd v Telstra Corporation Ltd* [1996] 36 IPR 46.
89 *Hamberger v Eastman* (1964) 106 NH 107, 206 A 2d 239.

It remains to be seen whether intrusion will be incorporated into New Zealand law. Opportunities have arisen to introduce it (where there was video surveillance and wire tapping) but the courts have chosen to ignore them.[90]

(iii) False light

False light has clear links with defamation. They share the element of a false association or statement being made about the plaintiff. Under both the plaintiff's reputation is protected. In false light though the falsity need not be defamatory. False light may be differentiated from defamation if it is limited to nondisparaging false statements that are highly offensive.[91] However, it could still be said to emerge from defamation.

There is also an overlap with intentional infliction of emotional distress if false light requires intention. This may be implicit if to be actionable the statement must be highly offensive.[92] However, basing one tort on another would be a disadvantage for new torts on Bernstein's model as they cannot avoid the tort label.

Further, the extent the new torts overlap with existing torts might affect their success. False light for instance might overlap too much with defamation. However, there is dicta supporting the possibility of the introduction of false light in *Bradley*.[93]

(iv) Public Disclosure

Prosser considered public disclosure an extension of defamation into the

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[90] *Gardiner* above n10 and *R v Fraser* [1997] 2 NZLR 442 [*Fraser*] seem to suggest there is no privacy tort where video surveillance and wire taps are used. However, there may be an explanation for this which will be discussed later in this paper.

[91] Gary Schwartz "Explaining and Justifying a Limited Tort of False Light Invasion of Privacy" (1991) 41 Case Western Res L Rev 885, 918 ["False Light"].

[92] "False Light"above n91, 980.

[93] *Bradley v Wingnut Films* [1993] 1 NZLR 415, 425 [*Bradley*]. This case does not establish false light but the judge suggests it is a possibility.

field of publications not falling within the narrow limits of the old torts.[94] The difference being the truth defence does not apply. The interest protected was the same as in defamation, reputation and mental distress.

Public disclosure could also be viewed as an extension of breach of confidence as it deals with the disclosure of facts of a non-public nature. Breach of confidence may be based in contract, property or equity. The new tort may appear more conservative by association, despite the fact that breach of confidence is a tort.

However, New Zealand has preferred to view public disclosure as an extension of intentional infliction. This is explainable by the fact that intentional infliction has a long history enabling privacy to conform to the antiquity paradox. It may also be easier. Jefferies J distinguished public disclosure from defamation as the injury was not to character or reputation, but to "feelings and peace of mind".[95]

Public disclosure appears to be based on another tort. Yet, New Zealand introduced it in *Tucker*. Therefore, provided a new cause of action is based on a well established tort, the tort label is not problematic.

2 *Unlawful Interference*

Unlawful interference is said to be an extrapolation from a dozen precedents and a mixture of the economic tort principles.[96] However, unlawful interference has roots in other common law vehicles. A property analysis is possible.

Lord Denning in *Island Records* [97] adopted a wide definition of property. 'Property' according to Lord Denning covered economic benefits expected to flow from unimpeded business. According to Stewart the earlier cases

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[94] "Privacy" above n43, 398.

[95] *Tucker* above n53, 732. McGechan J quotes Jefferies J's judgment.

[96] Peter Burns "Tort Injury to Economic Interests - Some Facets of Legal Response" (1980) 58 Can Bar Rev 103, 148 ["Tort Injury to Economic Interests"].

[97] *X P Island Records* [1978] 1 Ch 122, 136 [*Island Records*].

discussed in *Island Records* justified a broad interpretation.[98] Waller J agreed that equity would grant an injunction where there was an injury to a property right.[99] So Waller and Denning granted the injunction. Equity was also arguably part of the origins of this tort. Equity and property would give the tort a strong basis.

Unlawful interference has been described as the natural progression of the economic torts.[100] Some of the economic torts involve contract issues because a party threatens to breach a contract or does breach it. The tort of inducing or procuring a breach of contract was established in *Lumley v Gye*.[101] In *Rookes v Barnard* [102] there was a threat to break a contract and it was held to be sufficient unlawful means for liability. This is what Lord Denning seems to have suggested in *Torquay*.[103] Interference with contract rights is use of unlawful means. So there may be links with contract law.

C *Agency Paradox*

1 *Privacy*

(a) *In America*

Warren and Brandeis are recognised as playing a major role in the success of privacy. Their article was responsible for promoting privacy and has been cited in many cases.[104] Bloustein contends that they played the role of learned and ardent counsel rather than detached scholars.[105] It appears then that Warren and Brandeis do not fit the agency paradox.[106] Yet, they were playing the common law game of making the tort they promoted appear to be emerge from a long line of previous cases so it conformed to the antiquity

98 "Civil Liability for Industrial Action" above n70, 373.
99 *Island Records* above n97, 144.
100 "Tort Injury to Economic Interests" above n96, 148.
101 *Lumley v Gye* above n66.
102 *Rookes v Barnard* above n65.
103 *Torquay* above n80, 138.
104 See for example *Kaye* above n4, 155.
105 Edward J Bloustein "Privacy Tort and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional As Well?" [1968] 46 Texas Law Review 611, 615.
106 "New Torts" above n1, 1554.

paradox.

Further, the tort was not entirely new or Warren and Brandeis's invention alone. In *De May v Roberts*,[107] in 1881 for example, a plaintiff was awarded damages when the defendant witnessed her giving birth. Warren and Brandeis did not claim any originality though, again this is what the antiquity paradox requires good agents should do.

Warren and Brandeis also seemed to advocate only a tort of public disclosure. They intended privacy to be limited to only the most flagrant breaches and to be consistent with defamation.[108] Thereby giving the tort a conservative appearance.

Prosser certainly had a hand in privacy's acceptance. Prosser identified the four different privacy torts.[109] He claimed to have identified the torts from cases decided in the United States rather than be promoting them.[110] Prosser has been called "the master portraiter and veiled agent of American tort history".[111]

He was uninterested in promoting the rights of the disenfranchised, changing the balance of power or identifying new victims. Therefore, his proposals were seen as undirected and imminent.[112] A conservative demeanour is said to have charmed away some of the conservative resistance.[113] The fact the torts he advocated were not born in a 'bleeding heart' may have helped deny novelty and agency.[114] The adoption of privacy in the *Restatement of Torts* also helped privacy achieve credibility and agency was a little less apparent.[115]

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107 *DeMay v Roberts* (1881) 9 NW 146. The court stated that were a wrong had been committed the court would provide a remedy. The decision was arguably about privacy.
108 "The Right to Privacy" above n49, 214-218.
109 "Privacy" above n43.
110 "Privacy" above n43, 389. "What has emerged from the decisions is no simple matter"
111 "New Torts" above n1, 1552.
112 "New Torts" above n1, 1553.
113 "New Torts" above n1, 1553.
114 "New Torts" above n1, 1553.
115 "New Torts" above n1, 1554. See also Anita Bernstein "Restatement Redux" (1995) 48 Vand L Rev 1663, 1679-80.

(b) New Zealand

Developments in America have had an impact here. New Zealand has looked to American caselaw for guidance.[116] So the agency of Warren, Brandeis and Prosser is relevant but perhaps less obvious here. There is no mention of Warren and Brandeis in *Tucker*, however, reference is made to *Prosser on Torts*[117] and American case law. Arguably New Zealand imported the American agents.

Cases recognising privacy since then seem to have relied on *Tucker* as establishing the tort. The irony is that New Zealand imported a tort that has been practically abolished by the United States Supreme Court. Public disclosure no longer really exists. In balancing privacy with freedom of expression, privacy was limited to cases where revelations were so intimate and unwarranted as to outrage the community's notions of decency.[118] The tort was further limited in *Florida Star* [119] to the point that it has perhaps completely destroyed the tort. The court held that if a newspaper lawfully obtains information of public interest then the publishers could not punished, unless to protect a state interest of the highest order.[120] Protecting disclosure of a rape victim's name was not such an interest, although a statute existed to this effect. The effect of this decision according to one judge was to hit the bottom of the slippery slope.[121]

Further, we took from America a version of that tort was not the mainstream view. McGechan J referred to *Melvin*[122] and *Briscoe*[123] in regard to public disclosure.[124] In these cases the plaintiffs were allowed to retreat into the past.

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116 See *Tucker* above n53 and the "BSA Advisory Opinion" above n9.

117 *Prosser on Torts* (4th ed, 1971) 809-812, see *Tucker* above n53, 733.

118 *Sidis v FR Publishing Corp* (1940) 113 F 2d 806, 809 [*Sidis*].

119 *Florida Star* above n6.

120 *Florida Star* above n6, 455. Affirming their decision in *Daily Mail* 443 US 103, 61 L Ed 2d 399. Further the American Supreme Court in *Time Inc v Hill* (1967) 385 US 374 made false light consistent with the first amendment privilege as recognised in *New York Times v Sullivan* (1964) 376 US 254.

121 *Florida Star* above n6, 468. As per Scalia J dissenting.

122 *Melvin v Reid* (1931) 297 P 91 [*Melvin*].

123 *Briscoe v Readers' Digest Association* (1971) 483 P 2d 34 [*Briscoe*].

124 *Tucker* above n53, 733.

They do not represent the general American approach. In *Sidis*, the court refused to grant protection to a man who had once been a public figure as a child. Once a public figure it was not possible to retreat into obscurity.

2 *Unlawful Interference*

It has been said that this tort owes its modern acceptance to Lord Denning, who decided to establish it.[125] He was a clever agent playing the common law game. His agency was not that obvious, despite the fact he built on his own dicta. Unlawful interference began to appear in litigation to restrain industrial action and be added on to other economic torts.[126]

Lord Denning referred to unlawful interference in *Daily Mirror*.[127] In *Torquay*[128] he persuasively argued its existence, relying on dicta from *Stratford*,[129] *Rookes v Barnard* and *Daily Mirror*. Denning does not appear to be an obvious agent because he backs himself up with other judicial statements. It is not who Denning was that is important, but the way he presented the tort when he introduced it that makes him a good agent.

Denning illustrated how the principle of unlawful interference had developed in the past.[130] In *Hadmor*[131] Denning mapped the genealogy of the tort.[132] He said that Lord Reid left open whether interference without breach of contract was actionable in *Stratford* . He explained the common law would be deficient if it did not condemn the action in this case.[133] So he appeared to be filling a gap that was previously identified.

He adopted the tort noting that it exemplified the law as he always understood

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125 "Intentional Violation of Economic Interests" above 44, 263.
126 "Intentional Violation of Economic Interests" above n44, 263.
127 *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762 [*Daily Mirror*].
128 *Torquay* above n80.
129 *JT Stratford & Son Ltd v Lindley* [1965] AC 269.
130 The principle started in *Lumley v Gye*, above n66, was expanded in again in *Quinn* above n74.
131 *Hadmor Productions Ltd v Hamilton* [1981] ICR 960.
132 "Intentional Violation of Economic Interests" above n44, 263.
133 *Torquay* above n80, 138.

it to be.[134] Rather than offering something novel he makes it appear to be aimed at achieving consistency, by explaining earlier precedent.[135] The introduction of unlawful interference appears logical. Official recognition of unlawful interference came in *Merkur*.[136]

Agency in this case arguably may be more apparent than in privacy because of Denning's reputation. He has been called "England's Most Revolutionary Judge"[137] and seen as an innovating and substantial force on the development of the law.[138]

Denning may have had a reputation for protecting the weak from the abuse of the more powerful but even that was not necessarily deserved, at least regarding the homeless and social security claimants.[139] Arguably he was less of a bleeding heart and more like Prosser than is often recognised. His moral views could be quite traditional.[140] Unlawful interference is linked to commercial morality. If he was conservative regarding other moral views, he could have been perceived as conservative about business morality, therefore unlawful interference seemed more conservative. Further, the tort may have appeared more acceptable because most people would consider competition between businesses should be restricted to lawful means. Perhaps therefore not all Denning's innovations were perceived as that novel.

Using precedent and suggesting incremental change may have overcome Denning's reputation as a judicial revolutionary in this area. His expansion has been described as "a conservative elaboration of extant principles" rather than a

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134 *Torquay* above n80, 139.

135 "Tort Injury to Economic Interests" above n96, 143. Denning also highlighted that this was a separate cause of action.

136 *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570 [*Merkur*].

137 Hugo Young "England's Most Revolutionary Judge" *Sunday Times*, London, 17 June 1973.

138 Ray Geary "Lord Denning and Morality" *Justice, Lord Denning and the Constitution* P Robson and P Watchman (eds) (Gower Publishing Co Ltd, England, 1981) 74 ["Lord Denning"].

139 Peter Robson and Paul Watchman "Resisting the Unprivileged" Peter Robson and Paul Watchman (eds) *Justice, Lord Denning and the Constitution* (Gower Publishing Co Ltd, England, 1981) 113, 123.

140 "Lord Denning" above n138, 81. "Apart from sterilised husbands, recalcitrant women students and the permissive society in general, other areas that have attracted Lord Denning's moral ire have been pornography, artificial insemination and homosexuality." Whereas society's view regarding some of these issues was changing.

revision.[141] This illustrates his skill in using common law tools.

Further, according to Fridman "Denning cannot be singled out as the sole progenitor".[142] He was not the only one responsible for unlawful interference's development, older cases existed to support unlawful interference such as *Mogul* and *Allen v Flood*. So that may also have helped unlawful interference escape being perceived as 'new'.

Denning's influence on New Zealand courts is even weaker because *Fairbairn* recognised unlawful interference in 1914. Denning was promoting it in the 1960s and 1970s. That does not mean Denning had no effect here though. In *Coleman*[143] in 1977, the court was referred to English authorities like *Torquay*. In *Van Camp* the New Zealand Court of Appeal did not just rely on New Zealand authority but also *Merkur*.[144] Lord Denning's name appears, but he is not alone.[145]

V OTHER FACTORS FOR INTRODUCING TORTS

A *Dynamic Court*

Bernstein suggests that analogy, respected themes, existing doctrines and adaptation to circumstances are important to the success of new torts.[146] Basing privacy on other causes of action may partially explain its success. However, even then it was quite a stretch of an existing cause of action. In New Zealand there was no precedent for a tort of privacy, even if it is considered an extension of intentional infliction. No such tort existed in England or Australia either.

In *Kaye* the English Court of Appeal declined the opportunity to introduce

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141 "Tort Injury to Economic Interests" above n96, 155.
142 "Interference with Trade Part II" above n27, 102.
143 *Coleman* above n78. See *Torquay* above n80.
144 *Merkur* above n136. See *Van Camp* above n45.
145 *Coleman* above n78, 294. See also *Emms* above n80, 286-87.
146 "New Torts" above n1, 1565.

privacy, despite their sympathy for the plaintiff. Although intentional infliction was not argued, the court thought that only the legislature could introduce a tort of privacy because the right had so long been disregarded.[147] Despite the fact the lack of protection was considered a failing of statutory and common law.[148] Was privacy's introduction not then a leap rather than a step forward? New Zealand appears to have chosen a dynamic judicial role rather than the conservative English approach.

Whereas, unlawful interference has a long history and is arguably a natural progression from the other economic torts. It better fits the model of the common law as a step by step development. It seems a smaller and more gradual step than privacy.

Saying new torts that have failed to be successful are 'too radical' is just an explanation offered for their failure rather than the cause.[149] Bernstein considers privacy is quite radical, as other successful torts have been. Radicalism has not prevented the success of privacy. That same radicalism may be the reason for the interest in privacy, illustrating the possibilities of the common law to develop with society's values.

New Zealand courts seem to have been more willing to be convinced that it was the common law's role to provide a remedy. It is suggested that the explanation lies in the court's view of their role as more expansive. Where they perceived a need they were willing to act. However, the courts seem more enthusiastic about privacy than unlawful interference.[150] What factors make a court more willing to act?

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147 *Kaye* above n4, 155. Per Leggatt LJ.
148 *Kaye* above n4, 154. Per Bingham LJ.
149 "New Torts" above n1, 1557-1558.
150 Compare the cases of *Tucker* above n53 and *Van Camp* above n45. The legislature had not acted and the court saw a need that needed to be addressed. In *Van Camp* the court seems to suggest unlawful interference will not often be necessary.

Despite the fact that privacy is not expressly recognised in the Bill of Rights 1990 (BORA), it has been recognised in other areas of the law and in international covenants. This gives privacy a high profile.

(a) Human Right

There is a link between privacy and the ability to develop individuality and creativity. Diversity promotes vitality and progress in society.[151] Privacy permits an emotional release, opportunity for self-evaluation and limited and protected communication.[152] This explains why privacy has come to be seen as a fundamental in a society where the pressures of modern day living are increasing. In the Twentieth Century there has been growing recognition of privacy as a fundamental right. This can be illustrated by several international documents.

Article 12 of the Universal Declaration of Human Rights states that no one shall arbitrarily interfere with the privacy, family, home or correspondence or attack a person's honour or reputation. This clearly puts privacy into the realm of fundamental rights and highlights it as something that should be preserved by law. Although the declaration lacks legal force it carries moral force.

The International Covenant on Civil and Political Rights 1966 (ICCPR), of which New Zealand is a signatory, also refers to privacy in Article 17. Our own BORA does not specifically refer to privacy. However, privacy is implicit under section 21 which deals with unreasonable search and seizure. Underlying search and seizure is the extent to which the state can invade the personal privacy and sovereign sphere of the individual.[153] Recognition through the ICCPR alone may support its recognition and strength in the

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151 Arthur Schafer "Privacy: A Philosophical Overview" Dale Gibson (ed) *Aspects of Privacy Law: Essays in Honour of John M Sharp* (Butterworths, Toronto,1980) 1, 14 ["A Philosophical Overview"].

152 John Mintz "The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain" [1996] 55 MLR 425, 428-29.

153 "Death of the New Zealand Bill of Rights" above n7, 261.

common law.

However, in *Gardiner* [154] our Court of Appeal was not convinced. The court pointed out that while our BORA affirmed the ICCPR, privacy was not mentioned. The court did not suggest that this meant the ICCPR had no influence but that it was a much longer step to argue ratification, which did not adopt the same relevant language, rendered video surveillance unlawful. Such a radical change to the common law was not to be taken as having occurred except by direct expression.[155] If our domestic law was an inadequate response to the ICCPR it was for the legislature to remedy. However, the Court of Appeal's reasoning is unpersuasive. Why should the courts not incorporate international standards into the common law?

There is dicta disagreeing with the Court of Appeal's approach. Lord Cooke suggested that international covenants reflect society's expectations. He considered that international standards may be taken into account in shaping the common law.[156] Arguably it is not just empty rhetoric, we need up to date torts. The common should reflect society's values. Covenants can be used to legitimise the extension of the common law and help it to grow.

The views of Lord Cooke accord with Justice Sedley. The common law atmosphere has changed in the last few decades. Canada's Charter transformed legal and political cultures, as did the Australian constitution. The success of these rights is a consequence of courts and lawyers, courts understand human rights and the human rights culture.[157] The constitutionalisation of the common law is not arbitrary. Statutes like the BORA and international covenants are the new sources of rights.

Sedley considers that fundamental human rights should not be actionable only between individuals and the state. Instead these rights should have a cascade effect so that they are also enforceable between individuals. It is the court's role to incorporate fundamental rights into the common law. Our courts should be

154 *Gardiner* above n10, 3-4 .
155 *Gardiner* above n10, 4.
156 *Hunter v Canary Wharf* [1997] 2 All ER 430, 458 [*Canary Wharf*].
157 "Private & Public" above n8.

taking up the challenge rather than shying away from it.

The common law may be able to develop with the needs of modern society without constitutional provisions.[158] It may prefer to develop without reference to an external force.[159] Justice Gault seems to be of the view that fundamental social rights can be incorporated into the law even if not referred to in the BORA. The modern declarations of rights are in fact a progression in an evolutionary process rather than a departure from the common law.[160] The dynamics of the common law do not end with the BORA. Although some rights have been specifically listed, other rights exist independent of the Act. Gault specifically refers to the possibility of a privacy right.[161] There will continue to be an evolution of rights recognisable in the common law.

(b) Legislation and Dicta Supporting Privacy

There has been very strong dicta in support of privacy. Woodhouse P said:[162]

> The courts will always be careful to guard and protect personal freedoms including the right to privacy.

But the importance of privacy is also evident elsewhere. An aspect of control over police powers of search, entry and questioning,[163] deciding whether to publish names[164] and the fact that the right to a lawyer in s23(1)(b) of the BORA should be exercised in reasonable privacy are examples of privacy's recognition. The list goes on.[165]

The Privacy Act 1993 though dealing with regulation of the collection, use and

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158 *Tucker* above n53, 733. "While American authorities have a degree of foundation upon constitutional provisions not available in New Zealand, the good sense and social desirability of the protective principles enunciated are compelling. I do not think it beyond the common law to adapt the *Wilkinson v Downton* principles to significantly develop the same field and same needs."

159 See *Lange v Atkinson* (25 May 1998) unreported, Court of Appeal, CA 52/97. Where the court made a significant addition to the defence of qualified privilege but without a lot of reference to the Bill of Rights Act 1990.

160 *Simpson v AG* (1994) 1 HRNZ 42, 94 [*Baigent's Case*].

161 *Baigent's Case* above n160, 94.

162 *R v Owen* [1982] 2 NZLR 416, 417.

163 See for example *Transport Ministry v Payn* [1977] 2 NZLR 50.

164 *Re T* [1975] 2 NZLR 449.

165 See *The Law of Torts* above n3, 963.

storage of information is still recognition of privacy's importance, although that may not be one of its main aims.

In introducing public disclosure McGechan J carefully justified the new tort on the basis of legislative recognition of privacy, listing several statutes.[166] At the same time McGechan made it clear legislative action would be preferable:

> the courts are being forced into a position where they must soon create new law as they see appropriate.

This seems to accord with McLachlin that the courts are obliged to act where legislatures are reluctant and there is a need in society. Protection of privacy has a direct effect on the media. The press has the ability to make Members of Parliament unpopular. This could explain why the legislature has not acted.[167] Popularity and publicity are important for politicians.

2 *Unlawful Interference*

The judiciary see their duty as promoting entrepreneurial activity and there may be a judicial preoccupation with enhancing commercial morality.[168] This helps explain the creation and continued development of the economic torts. The economic torts can be used to control trade competition and industrial pressure.[169] The courts' aim may be admirable in attempting to achieve better commercial behaviour, but is it an appropriate role?

The law may have needed to change to keep up with changing commercial practices but it may be questioned whether the courts rather than the legislature should be engaging in this policy making.[170] It is arguable that the courts have interfered with policy underlying legislation.[171] This tort has affected union strikes which is a delicate area. Heydon notes that in many jurisdictions unlawful interference has been modified by statue.[172]

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166 *Tucker* above n53, 733.
167 P Prescott "*Kaye v Robertson* - A Reply" [1991] MLR 451.
168 "Limitations on the Action" above n23, 241-242.
169 "Intentional Violation of Economic Interests" above n44, 250.
170 JD Heydon *Economic Torts* (2ed, Sweet & Maxwell, London, 1978) 10 [*Economic Torts*].
171 *Economic Torts* above n170, 10.
172 *Economic Torts* above n170, 70.

However, in New Zealand the Employment Contracts Act 1991 accepts and endorses the existence and suitability of the economic torts in the industrial area.[173] It confirms the necessity of establishing whether industrial action is lawful or unlawful for the purpose. For example, if picketing is lawful it will not involve the commission of a civil wrong. The recognition of the wider tort of unlawful interference may extend liability here.[174] Unlawful interference is expressly referred to in the Act.[175] This clearly suggests the legislature acquiesces in judicial intervention is this area, otherwise why would they include it in statute? Unlawful interference's inclusion is related to our government's policies which favour employers and are anti-unions. Unlawful interference was previously used against unions. The Employment Contracts Act is a tool to achieve these policies.

Unlawful interference is the result of judicial policy recognised since the late nineteenth century that defendants should not be able to harm the business interests of another by unlawful means.[176] Such acts are not legitimate competition.

There could be several rationales to explain the courts' creativity, the economic view of tort law, the idea that tort law is concerned with protecting morality or simply that the courts are being pragmatic.[177] On the pragmatic approach the courts try to prevent unfairness in business and see themselves as protectors of society, controlling what certain groups within society do. This is a combination of economic analysis and morality.[178] Fridman criticises this because it gives the court too great a role in the governance of society. There is no problem with the economic or morality analysis, as he sees this as a more valid way of interpreting and understanding the common law.[179]

However, 'unlawful means' is a wide and vague concept. No objection might arise had the courts limited 'unlawful means' to criminal acts or other torts.

173 *The Law of Torts* above n3, 735.
174 *The Law of Torts* above n3, 751-52.
175 Employment Contracts Act 1991, s73(1).
176 "Interference with Economic Relations" above n60, 624.
177 "Interference with Trade Part II" above n27, 121.
178 "Interference with Trade Part II" above n27, 121.
179 "Interference with Trade Part II" above n27, 121.

Most people would see this as inappropriate conduct. This has been extended to contract breaches and threats. There are many uncertainties however. Will any breach of contract be sufficient? Breach of statute may not be sufficient here.[180]

Another problem is that there is no uniform approach to what constitutes 'unlawful means' amongst the economic torts. If unlawful interference is a genus tort meaning the other unlawful means torts are a subspecies, 'unlawful means' would be expected to be interchangeable.[181] This is uncertain. There are also emerging areas of unlawful means such as misuse of confidential information and economic duress.[182] A lot of questions are yet to be resolved.

Some propose a very wide definition of 'unlawful means'. Lord Denning thought that "any act by the defendant which he is not at liberty to commit" would suffice.[183] This leaves a lot of power in the judge's hands. Should this include action against the public interest?[184] Bedggood suggests distinguishing between acts actionable except for some technicality or defence available, and acts where there is no liability however morally reprehensible the conduct.[185] There is a lot of room for uncertainty.

'Interference with a business' includes affecting the performance of a contract or future economic prospects. *Emms* and *Van Camp* suggest that making a business less profitable could be included.[186] Here the law becomes unclear. The moral line may be harder to find.

The judge's task has been to balance too little competition and too much which

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180 *Van Camp* above n45, 359.

181 *The Law of Torts* above n3, 723.

182 *The Law of Torts* above n3, 723-24.

183 *Torquay* above n80, 139.

184 *In Associated Newspaper Group Ltd v Wade* [1979] ICR 664 referring to interference with freedom of the press, although not supported as the ground of the decision. This has not been supported though according to Carty, see "Intentional Violation of Economic Interests" above n44, 266.

185 *The Law of Torts* above n3, 725. For example in *National Phonograph Co Ltd v Edison Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335, fraud had not resulted in damage and therefore could not constitute the tort of deceit, but it was admitted as 'unlawful means'.

186 *The Law of Torts* above n3, 718. *Emms* above n80 and *Van Camp* above n45.

has resulted in the intentional torts.[187] Controlling business is arguably a more suitable function for the legislature when it touches the business and employment worlds, which are of vital importance to the economy. However, traditional judicial intervention in this area and the fact that the other economic torts regulate the same type of behaviour may have led the courts to adopt unlawful interference.

Why has New Zealand not shown great enthusiasm for unlawful interference? Perhaps it is partly due to the Commerce Act 1986 and Fair Trading Act 1986 which regulate unfair competition. The courts may see this area as more appropriate for the legislature.

The underlying policy of unlawful interference was also more popular in the 1970s than today. The climate has changed in New Zealand. There is less interest now in protecting businesses, instead Government's view (and of the political right) is that they should be exposed to the rigours of the free market.

Further, privacy's success is partly due to it becoming a significant human right in modern society. Whereas, unlawful interference is an economic right, financial interests are arguably less important.

B Necessity for Protection

1 Privacy

Was the introduction of a privacy tort brought about by some necessity or gap in the law that the courts saw as needing to be filled? There was arguably a need. Other common law causes of action provided some protection, but perhaps at the risk of being distorted themselves. Cases could fall through the gaps.

187 "Interference with Economic Relations" above n60, 625.

(a) *Modern Technology and Society*

Modern industrial society may have greater opportunities for privacy. We generally live in nuclear families in individual households. There is anonymity in urbanisation. Mobility and less religious control contribute to privacy.[188] However, modern technology poses a threat. The growth in surveillance and technology may create a greater need for privacy protection. The courts' awareness of this need in modern society may have spurred them to act.

Modern technology was a factor recognised by Warren and Brandeis as endangering privacy in 1890. Instantaneous photos, the development of widespread publication and other devices, such as the means to surreptitiously take photos, meant that what was "whispered in the closet" would be "proclaimed from the house-tops".[189] The intensity and complexity of life meant privacy was necessary.[190] Further, mental injury can cause more pain than physical injury. These are sentiments that may be even more relevant today than they were then.

Twentieth Century developments have further increased the risks to privacy. Technology has made extensive surveillance relatively easy and inexpensive. Video cameras have been described as the "newest threat to privacy".[191] Although it is not the only device available.

Cameras with powerful zoom lenses, microphones and transmitters, easy to conceal cameras, night vision glasses and devices to track vehicles exist. Photos may be taken from space satellites able to pinpoint houses.[192] In *Tucker* the court referred to the pressing need for protection due to increasing population pressures and computerised information retrieval systems.[193] Privacy is said to be the result of a communications and information revolution which has

188 A Westin *Privacy and Freedom* (Bodley Head, London, 1970) 21.
189 "The Right to Privacy" above n49, 195.
190 "The Right to Privacy" above n49, 196.
191 "Bringing Privacy Law Out of the Closet" above n41, 1017.
192 See "Bringing Privacy Law Out of the Closet" above n41, 1018-19.
193 *Tucker* above n53, 733.

increased our vulnerability to unwanted intrusion.[194] However, our expectations for privacy, confidentiality and security remain.

Added to this is the increasing commercialisation and sensationalism of the media.[195] We are said to live in an increasingly intrusive and uncivil society.[196] The press is interested in stories that may pander more to the public's interests than the public interest. Doubtful methods are sometimes employed to obtain stories.[197] Our privacy is at risk.

Then there are the reality television shows based on filming real events as they happen. Shows may follow the police or emergency services as they work. Hidden cameras, listening devices and microphones may serve the public interest,[198] but more often the practice may amount to lazy journalism and unwarranted intrusion.[199]

Well grounded fears about the ability of individuals to protect themselves against unwarranted intrusions have arisen.[200] Courts cannot be oblivious to these developments.

(b) Common Law Protection

How well does the common law protect privacy without the help of an independent tort? Privacy interests have been protected to some extent by the common law and equity. According to Burns other causes of action have mainly been helpful when property, reputation or physical integrity were also present.[201]

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194 David J Seipp "English Judicial Recognition of a Right to Privacy" [1983] 3 Oxford Journal of Legal Studies 325, 370 ["English Judicial Recognition"].

195 " A Philosophical Overview" above n151, 2-3.

196 "Bringing Privacy Law Out of the Closet" above n41, 1009.

197 See *Mrs S v TV3 Network Services Ltd* BSA 1/94 and *Marris v TV 3 Network Ltd* (14 October 1991), unreported, High Court, Wellington Registry, CP 754/91 as examples of intrusive reporters.

198 "Crimewatch" on Television 2 is an example of a show where the intrusion may be justified.

199 "Bringing Privacy Law Out of the Closet" above n41, 1015.

200 "A Philosophical Overview" above n151, 4.

201 "Privacy and the Common Law" above n26, 24.

(i) Defamation

The test for an injunction under defamation is extremely high. The reasonable jury must inevitably find that the statement was defamatory. Unless an injunction is granted privacy may be lost. It is difficult to argue that damages after the fact restore the harm of publication, as in the case of defamation.

Further, if truth is going to be pleaded the courts are extremely reluctant to grant an injunction. The courts are reluctant to inhibit freedom of speech. Just because the information is true does not mean that there would not be a serious breach of privacy if published. The truth can hurt more than lies.[202] Defamation is narrower than privacy.

Sympathetic judges and juries could also look for inaccuracies in detail in an otherwise truthful account.[203] Alternatively they could interpret disclosures of personal information as unprivileged. There is a risk of distortion of defamation to protect privacy.

There are limits to the protection that defamation can offer. Arguably defamation could not effectively protect privacy unless it was expanded.[204] Privacy and defamation overlap. If defamation contained a 'public interest' qualification it would protect to some degree privacy where disclosures affected reputation.[205] But this still requires changes to the current defamation law.

(ii) Trespass

Trespass controls the access others have to enter our property where we have exclusive possession or ownership. It provides us with a private space and remedy for an invasion of land.[206] The legal doctrine that a "man's house is his

202 "Our Patchy Law of Privacy" above n38, 808.
203 "English Judicial Recognition" above n194, 343.
204 "Privacy and the Common Law" above n26, 31.
205 *The Law of Torts* above n3, 959.
206 *The Law of Torts* above n3, 460.

castle" for safety and repose can be traced back hundreds of years.[207] An Englishman had legitimate recourse to physical violence and trespass to protect his home.[208] A trespass remedy was available whatever the motivation for the intrusion. The courts placed great value on the private repose and security of a man in his home.[209] Property owners were successful in preventing observation of their houses by curious strangers.

Trespass may protect privacy, but not always. The first problem is that not everybody owns or has exclusive possession of land, in which case they would not have standing to sue. The second difficulty is proving entry.

Bathurst [210] illustrates why the entry requirement is problematic. The defendants had taken photos and video of the plaintiff's land without consent. Unfortunately there was no entry. The photos were taken from neighbouring land and the footpath. There was no tortious conduct.[211] A person may be under surveillance or watched without a trespass ever occurring.

In *Bernstein* [212] there was no entry because the plane taking photos flew above the area of reasonable use. There is no authority for preventing the taking of photos for an innocent purpose provided a tort such as trespass or nuisance was not committed in doing so.[213]

Even when there is an entry if the purpose is bona fide there will not be liability. However, in *Lincoln Hunt* [214] the defendants, who were from the television media, entered the plaintiffs business premises with their cameras rolling. The court held that there was an implied licence but only for limited purposes, that is legitimate commercial or business purposes. In some circumstances this case may be helpful. However, there will often be room for argument on whether or not the defendant exceeded their permission to

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207 See *Semayne's Case* (1605) 77 Eng Rep 194, 194.
208 "English Judicial Recognition" above n194, 344.
209 *Burdett v Abbott* (1811) 14 East 1, 154-155, 104 Eng Rep 501, 560.
210 *Bathurst CC v Saban* (1985) 2 NSWLR 704 [*Bathurst*].
211 *Bathurst* above n210, 706.
212 *Bernstein v Skyviews* [1978] QB 479 [*Bernstein*].
213 *Bernstein* above n212, 488.
214 *Lincoln Hunt v Willesee* (1986) 4 NSWLR 457 [*Lincoln Hunt*].

enter.[215]

The strength of the trespass cause of action is that it is unlikely that there will be a public interest defence to trespass.[216] The courts tend to be very firm in protecting proprietary interests. There is a strong privacy interest at the heart of trespass, but in some circumstances this cause of action will not be very effective.

(iii) Private Nuisance

Private nuisance also protects the plaintiff's interests in land. Private nuisance deals with actions on the defendant's land which cause interference with the plaintiff's enjoyment of his/her land.[217] The courts have not been very willing to use nuisance to protect privacy although it has succeeded in some cases.[218] A plaintiff invoked nuisance to enjoin his neighbour from holding parties attracting crowds which destroyed his privacy.[219]

In *Bernstein* the court considered that if the plaintiff was subjected to constant surveillance and his activities were photographed, the court may regard such an invasion of privacy as an actionable nuisance.[220] But that was not the case.

In *Khorasandjian*[221] the plaintiff was being harassed in her home by the defendant's persistent telephone calls. She was not the owner of the house and did not have exclusive possession of the property. Yet the majority still used nuisance to protect her.[222] However, Gibson J (dissenting) considered that a proprietary interest in the land was still required to sue in nuisance.[223] The

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215 *The Law of Torts* above n3, 956.
216 *Lincoln Hunt above* n214, 461.
217 *The Law of Torts* above n3, 460.
218 *The Law of Torts* above n3, 957. Cases where it has been used include *Motherwell v Motherwell* (1976) 73 DLR (3d) 62; *Khorasandjian v Bush* [1993] QB 727 and *Walker v Brewste*r (1867) 47 LQR 23, 27 [*Brewster*].
219 *Brewster* above n218, 26.
220 *Bernstein* above n212, 489.
221 *Khorasandjian* above n 218.
222 *Khorasandjian* above n218, 734.
223 *Khorasandjian* above n218, 745.

House of Lords agreed in *Canary Wharf*.[224] Lord Goff considered that extension of the tort to occupiers of land would transform nuisance from a tort to land to a tort to the person, distorting nuisance.[225]

However, Lord Cooke was prepared to extend nuisance to the protect people living in their homes. Unless Cooke's approach is adopted in New Zealand nuisance's protection of privacy is limited to owners or those with exclusive possession of land.

(iv) Breach of Confidence

In theory, breach of confidence could protect privacy regarding the collection of information about people.[226] This tort may provide one of the best avenues of protection of privacy.[227] There have been successful cases.[228] It is easier to get an injunction under breach of confidence compared with defamation, and other equitable remedies may be available.

Breach of confidence can be used where there exists a relationship and confidential information is shared, or even in the absence of a relationship.[229] If it would be unconscionable in the circumstances, publication may also be restrained. However, information in the public domain is not confidential.[230] Under public disclosure this is not necessarily the case. The New Zealand court has cited *Melvin*[231] and *Briscoe* [232] as the American approach to the tort where the plaintiffs were allowed to retreat into the past.[233]

In *Tucker* the court seemed to focus more on a legitimate public interest test

224 *Canary Wharf* above n156, 426.
225 *Canary Wharf* above n156, 439.
226 *Stephens v Avery* [1988] 2 All ER 477 [*Stephens*].
227 *Younger Committee on Privacy* (CMND 5012, 1972) and the Australian Law Reform Commission's Report on *Privacy*, Report No 22 (1983), para 827 ff.
228 *Stephens* above 226, illustrates that breach of confidence protects privacy quite well. Other cases which used breach of confidence to protect privacy are: *Prince Albert v Strange* above n82; *Argyll v Argyll* [1967] Ch 302; *X v Y* [1988] 2 All ER.
229 *The Law of Torts* above n3, 961-962.
230 See discussion in *A-G (UK) v Wellington Newspapers Ltd* [1988] 1 NZLR 129.
231 *Melvin* above n122.
232 *Briscoe* above n123.
233 *Tucker* above n53, 733.

rather than whether or not the information had been in the public domain.[234] In fact, publication by one part of the media has been held to mean that the story is not so public that all media can publish it.[235] So unless 'confidential information' can include information that has already been in the public domain, there are gaps in protection. This tort could be distorted to protect privacy.

Breach of confidence also has a public interest defence. Courts have to balance two conflicting interests, the public interest in people being informed of matters of real public interest and the public interest in the maintenance of confidence generally.[236] The balancing in privacy cases may be particularly sensitive.[237]

Arguably, breach of confidence does not provide a sound basis to protect all uses of information, knowledge and attributes about a person.[238] Privacy which deals with an individual's sensibility and dignity.[239] Breach of confidence does not have privacy interests as its primary concern. If privacy is secondary, weighing it against other social aims will be uncertain.[240]

If privacy is, or should be, an intentional tort breach of confidence could be problematic. Intention is unimportant to liability under this head.[241] It may be desirable though to restrict privacy to intentional acts only.

(v) Intentional Infliction of Emotional Harm

The test for intentional infliction is that the defendant has wilfully done an act calculated to cause physical harm to the plaintiff and has in fact caused physical

234 *Tucker* above n53, 732. Justice McGechan cites Justice Jefferies' judgment from the High Court which he seems to approve: "The gravamen of the action is unwarranted publication of intimate details of the plaintiff's private life which are outside the realm of legitimate public concern, or curiosity".
235 *A v TVNZ* (25 March 1996) unreported, High Court, Wellington Registry, CP 55/96 7.
236 *Lion Laboratories v Evans* [1985] 1 QB 526, 536.
237 *The Law of Torts* above n3, 967.
238 "Limitations on the Action" above n23, 227.
239 "Limitations on the Action" above n23, 227.
240 "Limitations on the Action" above n23, 255.
241 "Limitations on the Action" above n23, 237-238.

harm.[242] The problem with intentional infliction arises out of the physical harm requirement. The court looks at the person of ordinary state of health and mind.[243] It is the physical harm for which damages are awarded, not for shock or emotional harm.

In *Khorasandjian* Gibson J thought that cumulative stress may be enough to satisfy the harm requirement, where if unrestrained the defendant's behaviour would continue and impair the plaintiff's health.[244] However, how long does the behaviour need to go on for before it is evident that the plaintiff will break down? Unless physical harm is dropped, intentional infliction has too high a threshold to effectively protect privacy.

(c) A New Tort?

There are gaps in the protection that the common law can provide. Indirect protection must of necessity be partial as privacy even in its most modest definition is wider than the existing torts.[245] A separate tort is preferable rather than a variety of common law actions for coherence and clear recognition of the interest that is being protected. If the harm is severe enough, the gap should be filled. This reinforces the value we place on privacy.

Further, perhaps common law torts are filling most of the gaps, but there is a danger other causes of action are being stretched. In *Kaye* the plaintiff was successful in obtaining an injunction because the judges were sympathetic and willing to be persuaded that something should be done.[246] There may be a loss of coherence to other causes of action. The court may not be taking into account all the consequences of extending the tort at the time.

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242 *Wilkinson* above n54. The question is whether the defendant's act was so obviously calculated to produce some effect of the kind that was produced so intention can be imputed to the defendant. *Stevenson* above n55, however, suggests that negligence may be enough for liability.

243 *Wilkinson* above n54, 59.

244 *Khorasandjian* above n218, 746.

245 *The Law of Torts* above n3, 955.

246 "Our Patchy Law of Privacy" above n38, 804-805.

Kalven considered that the tort of privacy was trivial and unnecessary.[247] Although he considered that privacy was of great value, a tort to protect it was an error.[248] It was the lofty rhetoric and recognition of the spiritual side of people that captured judges' attention but to Kalven privacy did not deserve such attention.

Yet courts even in countries where privacy has not been recognised have seen a need for it and encouraged legislative action. It was judicial conservatism arguably that held them back. They would not seem to agree the tort is petty.[249] The English Court of Appeal appeared to advocate a separate tort for privacy. It quoted Markesinis:[250]

> True, many aspects of ... privacy are protected by the multitude of existing torts but this means fitting the facts of each case in the pigeon hole of an existing tort and this process may not only involve strained constructions; often it may also leave a deserving plaintiff without a remedy.

The breadth of protection required seems to support a separate tort.

New Zealand relatively recently adopted the tort believing there was a need for protection. McGechan J supported the introduction of the tort because it made good sense and was socially desirable.[251]

(d) Are All of the Privacy Torts Necessary?

Prosser considered the privacy torts were supported by public demand and feeling, made necessary by real abuses.[252] However, all four privacy torts may not be required in New Zealand.

The Broadcasting Standards Authority's Opinion[253] may guide the courts in

247 "Were Warren and Brandeis Wrong?" (1966) 31 Law and Contemp Probs 326, 337 ["Were Warren and Brandeis Wrong?"].

248 "Were Warren and Brandeis Wrong?" above n247, 327-328. "[F]ascination with the great Brandeis trade mark, excitement over the law at a point of growth, and appreciation of privacy as a key value have combined to dull the normal critical sense of judges and commentators and have caused them not to see the pettiness of the tort they have sponsored."

249 *Kaye* above n4, 155.

250 Professor Markesinis *The German Law of Torts* (2ed, 1990) 316.

251 *Tucker* above n53, 733.

252 "Privacy" above n43, 423.

253 "BSA Advisory Opinion" above n9.

deciding what privacy torts are necessary in New Zealand. Public disclosure and intrusion are included. The exclusion of misappropriation and false light seems to suggest they are unnecessary.

Misappropriation seems more about property than privacy. New Zealand should not introduce misappropriation as a privacy tort. False light overlaps significantly with defamation.[254] Yet it seems advantageous to have a limited false light tort because statements may be false but not defamatory.[255] The harm is that there is a mismatch or conflict between the plaintiff's actual identity and his identity in the minds of others. This conflict may itself be offensive or disorienting.[256]

Public disclosure and intrusion would also be valuable additions to the courts' armoury, filling in the gaps left in the common law. For example, intrusion is important because technology means there may never be a physical trespass.

2 *Unlawful Interference*

Unlawful interference arguably has not caught the imagination of lawyers and the courts in the same way as privacy. Despite academic support for the rationalisation of the economic torts, judicial acceptance has been slow.[257] The courts have preferred to find one of the other economic torts where unlawful interference might have applied.

Unlawful interference provides a rationale basis to the economic torts by revealing the basic principle underlying the other economic torts.[258] This way the law has a more secure and logical foundation. A more logical division could be established between those requiring independent illegal means (such

254 *Renwick v News Observer Pub Co* (1984) 312 SE 2d 405, 413. The court considered that recognition of false light would reduce judicial efficiency by requiring courts to reconsider two claims for the same relief that if not identical would not differ significantly.

255 "False Light" above n91, 893. Schwartz points out several categories where the statement is false but may not be defamatory. For example, the statement might make false claims about private aspects of plaintiff's lives, about the plaintiff's personal thoughts, ascribe virtues the plaintiff does not have.

256 "False Light" above n91, 898.

257 "Civil Liability for Industrial Action" above n70, 367.

258 "Economic Torts & Labour Law" above n74, 336.

as indirect contractual interference, intimidation, conspiracy by illegal means and unlawful interference) and those that do not (including direct contractual interference and conspiracy to injure).[259]

However, rationalising the basis of the economic torts is more of academic interest than necessity. The courts may be more interested in pragmatic solutions than tidying up this group of torts.

Unlawful interference may be less necessary or arise less frequently than privacy. The New Zealand Court of Appeal seems to suggest it will be used infrequently. If though the tort is a means to achieve justice in the circumstances then it is still a valuable tool:[260]

> It is a recognised tort in New Zealand, although its boundaries will receive closer definition as cases emerge, and we see insufficient reason for discarding a judicial remedy which from time to time may be useful to prevent injustice.

Frequency may not be an important factor. But there may not be many cases where unlawful interference is the only available cause of action.

Unlawful interference may be easier to prove than other economic torts, for example making it unnecessary to prove conspiracy or combination.[261] It is also useful when the unlawful conduct does not fit within the other economic torts.[262] Further, unlawful interference protects not simply the plaintiff's legal rights but also his/her wider interests.[263] For example it may protect an employer's business expectations, there does not need to be an existing contract.

However, unlawful interference is a parasitic cause of action on unlawful means. Therefore, often other causes of action may exist.[264] This factor is said to explain the delay in the emergence of the tort. Although sometimes the unlawful means aspect of the tort may not be independently actionable or may

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259 "Civil Liability for Industrial Action" above n70, 360.
260 *Van Camp* above n45, 359.
261 "Tort Injury to Economic Interests" above n96, 147.
262 "Economic Torts & Labour Law" above n74, 335.
263 "Economic Torts & Labour Law" above n74, 336.
264 "Economic Torts & Labour Law" above n74, 335.

be directed at a third party in order to harm the plaintiff.[265] This is where unlawful interference can play a role.

Arguably though there is not the same necessity for unlawful interference, without it the courts could still control inappropriate conduct causing economic harm. Fridman considers that in some cases the use of unlawful interference was an unnecessary addition for the plaintiff to obtain a remedy. Secondly, even though not pleaded, another cause of action was available to ensure a remedy without unlawful interference.[266] Fridman contends the existence of this tort should be reexamined to see if it is logical or justified.[267]

Even if unlawful interference is not strictly necessary it is still useful. Unlawful interference would be 'necessary' if the existing protection was inadequate and too many cases were falling through the cracks. It is 'useful' though because it provides for the rare cases that would otherwise go remediless, makes liability easier to prove and provides doctrinal clarity. Necessity may differentiate unlawful interference from privacy. Although even if privacy was not strictly necessary either, it would be a value worth reinforcing.

C *Importance of the Parties and Interest*

1 *Privacy*

(a) *In America*

It is suggested that the ability of judges to identify and/or sympathise with plaintiffs or defendants may be one of the factors that determines whether courts will extend the common law.

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265 "Economic Torts & Labour Law" above n74, 335.

266 "Interference with Trade Part II" above n27, 121. Fridman cites *Lonrho v Fayed* above n62 as a case were unlawful interference was not necessary, they were also suing in conspiracy. He considers injurious falsehood was another possible cause of action.

267 "Interference with Trade Part II" above n27, 122.

In America, when privacy was in the early stages of development, this was arguably a factor. In *Roberson*[268] the New York Court of Appeal had an opportunity to recognise privacy. The defendants had used a young lady's picture to advertise their flour without her consent. The court held that there was no protection available. The lack of precedent, purely mental injury and danger of a lot of litigation were the reasons given for no liability. Perhaps the outcome was due to the court's inability to see the injury when it was not defamatory. Maybe the judges could not identify with this woman's distress at having her picture used.[269] However, there was great public disapproval for the decision. This lead the legislature to act.[270]

In *Pavesich*[271] the court did recognise privacy. The defendant insurance company had used the plaintiff's name and photo without permission, including a testimonial supposedly written by him, to advertise. The plaintiff was arguably someone with whom the court could identify and the defendant was using the plaintiff's name and likeness for profit without consent.

(b) In New Zealand

In *Tucker* the plaintiff had previously been convicted of indecency, but the court was not without sympathy for him.[272] Tucker was in need of a heart transplant and had sought donations from the public to finance the operation. The media was threatening publication of the details of his conviction. The stress of this could have killed him. Tucker also had a daughter, which may also have motivated the judge to be sympathetic to

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268 *Roberson v Rochester Folding Box Co* (1902) 64 NE 442 [*Roberson*].

269 *Roberson* above n268, 443. "Such publicity, which some find agreeable, is to the plaintiff very distasteful...she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes..." The court seems to be saying she should be flattered rather than be upset.

270 "Privacy" above n43, 385.

271 *Pavesich* above n52.

272 *Tucker* above n53, 725. Justice McGechan says, "Mr Tucker in the past has had at least one episode of suicidal tendencies, and in the past has sought psychiatric assistance. He may have a psychiatric or medical problem constituting a background to these convictions. I do not know, but I accept the possibility and the need for a sympathetic approach".

Tucker's desire for privacy.[273] Cases since then have also involved sympathetic plaintiffs.[274]

The fact that the interest protected is easy to identify with is another factor that may encourage extension of the common law and help explain privacy's relative success. Everybody can identify with the desire for privacy on some level. Further, privacy is available potentially to anybody.

The court was presented with the opportunity of introducing the intrusion tort into New Zealand for video surveillance and wire tapping in the cases of *Fraser* and *Gardiner*. The court's refusal to do so may be related to the nature of the parties in those cases. Arguably the court turned away from privacy when faced with 'bad' defendants.

For Gardiner and Fraser to establish their cause of action under section 21 of the BORA they had to show the search was unreasonable. If they had established a breach of privacy this would have gone a long way to establishing 'unreasonableness'. The court said 'reasonableness' required a balancing of reasonable expectations of privacy and the state's interest in detecting crime.[275] Intrusion could have been recognised. In both cases the police had Fraser and Gardiner under video surveillance and wiretapping over a period of months in drug dealing investigations. Gardiner was under surveillance longer with the video aimed to catch activity inside the kitchen, which also had a zoom function.

Fraser was dealing in class B drugs. Gardiner was also dealing in serious drugs, supplying and possessing morphine and conspiring to manufacture heroin.

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273 *Tucker* above n53, 735. The Court must have some regard to the interests of an innocent infant.

274 In *Bradley* above n93, the plaintiffs were an elderly couple whose family tomb was filmed in the background of a splatter movie. In *Morgan v TVNZ* (1 March 1990) unreported, High Court, Auckland Registry, CP 765/92, TVNZ wanted to make a documentary involving a child who had been involved in a custody dispute. Although privacy was denied in the case of an arguably 'deserving ' plaintiff when information was disclosed to a natural parent enabling the identification of the adoptive parents. However, public disclosure was not satisfied and another cause of action was possible, see *X v AG* [1994] NZFLR 433, 439.

275 *Fraser* above n90, 452.

The police's action is described as diligent policing which had the support of the community. Their conduct was held to be reasonable.[276] The court was arguably better able to identify and sympathise with the police.

In other circumstances the result may have been different.[277] In *Gardiner* the court notes that the video was not trained on a bedroom, bathroom or other area of particular privacy.[278] The problem with this reasoning is that intimate conduct may occur in the kitchen or dinning room so they are areas of particular privacy.

This may be compared with a Broadcasting Authority decision suggesting a plaintiff may have an action where there is surreptitious filming of a reporter requesting an interview at the plaintiff's door, even if the filming is on public property.[279] In such a case the reporter's actions were underhanded.

Schwartz considers that the court will invariably give weight to the result.[280] The fact that incriminating evidence was found diminishes the weight to be given to privacy because after all these people were criminals and not very nice. It is suggested that the courts should not be swayed by the actual individuals before them or the result.

In cases like *Gardiner* where the police are able to trespass onto private property to seek evidence or videotape inside our homes for months the end result is a society that is less free.[281] The court should have focused on the importance of privacy and not have down played the invasion because

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276 *Fraser* above n90, 453. See also *Gardiner* above n10, 7.

277 *Fraser* above n90, 452.

278 *Gardiner* above n10, 8. Schwartz points out that the Court of Appeal is 'moving back the goal posts' see "Death of the New Zealand Bill of Rights"above n7, 262-263. In *Fraser* the court suggested there may have been a reasonable expectation of privacy if the surveillance was inside the house. Then in *Gardiner* the court suggests the result may have been different had the surveillance been of an area of particular privacy. Until *Bradley* where the court says there is no great privacy interest under the bath, though it might be different if the police looked in draws see *R v Bradley* (22 October 1997) unreported, Court of Appeal, 12-13.

279 *Mrs S* above n197.

280 "Death of the New Zealand Bill of Rights" above n7, 273.

281 "Death of the New Zealand Bill of Rights" above n7, 285.

the police were investigating criminals. Had protection been recognised in these cases ordinary individuals would be better protected.

2 *Unlawful Interference*

In *Emms* [282] the interference was plying the same trade as the plaintiff in close proximity to the plaintiff. The plaintiff was licensed and the defendant was taking customers away from the plaintiff. The courts could probably better identify with the plaintiff. The plaintiff was doing what he was legally entitled to do and the defendant was in breach of the city bylaw. There was a deserving plaintiff and an undeserving defendant who was unjustifiably inferring with the former's livelihood.

In contrast to privacy though, unlawful interference is only available to protect business or trade interests. It is not available to everyday people.

VI WHY NOT UNDER NEGLIGENCE?

A General

There are good reasons for wanting privacy and unlawful interference to be intentional torts. Privacy and unlawful interference may require 'intention' due to conservatism. Both deal with non-physical harm. Policy reasons may also prevent recovery under negligence. Therefore, the courts may turn to intentional torts to protect the interest and this requires independent torts.

Intention exists when the consequences of the conduct are both foreseen and desired. It may include a result where the wrongdoer believes, or ought to have, that harmful consequences would follow.[283] Reckless or wanton acts are sufficient for intentional torts. Whereas if the wrongdoer foresees certain consequences might follow, there is knowledge and appreciation of

282 *Emms* above n80.

283 "Interference with Economic Relations" above n60, 597.

the risk but the risk falls short of substantial certainty, there is no intention.[284]

B Privacy

1 Intentional

Why should intention be a requirement? Kalven asked a valid question when he said does it matter the defendant knew his/her actions were offensive, whether he/she meant to refer to the plaintiff at all or thought the statement was privileged?[285] One problematic area regarding privacy is whether it requires intention or even negligent acts will be actionable. According to Schwartz the privacy tort has always been primarily intentional.[286] Most invasions of privacy will probably be deliberate.[287]

A person who unintentionally acquires information regarding some personal matter does not show disrespect for that person's dignity. There is a connection between the duty to respect the dignity of others and the duty not to violate someone's privacy.[288] Intrusion and public disclosure require that act be offensive and objectionable to the reasonable person. If false light is adopted arguably it should require a similar element.[289] An intentional act is more likely to trigger this factor.

The rationale is also more likely to be intentional because emotional harm is caused.[290] Courts are not receptive to emotional harm because of fears of

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284 "Interference with Economic Relations" above n60, 597.

285 "Were Warren and Brandeis Wrong?" above n247, 332-33.

286 "False Light" above n91, 911. Warren and Brandeis referred to "flagrant breaches of decency and propriety" see "The Right to Privacy" above n49, 197.

287 H Patrick Glenn"The Right to Privacy in Quebec Law"Dale Gibson (ed) *Aspects of Privacy Law: Essays in Honour of John M Sharp* (Butterworths, Toronto, 1980) 41, 53 ["Privacy in Quebec Law"]. Take for example public disclosure in *Stephens* above n226, if you sell personal information to the press it is more than foreseeable that the other person's privacy is breached.

288 "A Philosophical Overview" above n151, 18.

289 "False Light" above n91, 904.

290 *Roberson* above n268, 446. Parker CJ considered in 1902 that "the law does not yet attempt to guard the peace of mind, the feelings, or the happiness of everyone by giving recovery of damages for mental anguish produced by negligence."

unlimited liability, by adding intention the torts would be more conservative. The fact the harm is intangible, because an invasion harms a person's dignity, only the most culpable cases of non-intentional invasions are likely to be sanctioned.[291] Intention probably achieves an appropriate balance with other rights like freedom of expression.[292]

Further, if the privacy is an extension of an intentional tort, that would explain why a freestanding tort developed instead of a sub-category of negligence. Intentional infliction is generally considered an intentional tort. McGechan J thought the common law could adapt the *Wilkinson* principles to met the need for privacy protection.[293] As pointed out in *Bradley*, seeing the privacy tort as a natural progression from intentional infliction could add aspects of motivation or imputed motivation.[294] The defendant's action has to come very close to intention.[295] It does not matter that more harm occurred than was expected. *Wilkinson* has a higher threshold test than *Stevenson* which suggests a standard of negligence.[296] *Stevenson* allows that possibility that intentional infliction be lowered to a negligence standard.

Trespass could be an intentional tort or negligent.[297] Intrusion is probably based on trespass, so if trespass requires intention so might intrusion. The law is not clear at the moment which is required, but the solution will be the same for all trespass actions.[298]

2 *Should Negligence Be Actionable?*

Perhaps privacy could be absorbed by negligence in the future, even if privacy is intentional. Trespass to the person causes of action could become

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291 "Privacy in Quebec Law" above n287, 54.

292 "False Light" above n91, 906. Regarding false light Schwartz says a standard of liability of less than recklessness might be unconstitutional, but a test of intentional or reckless falsehood all but eliminates unconstitutionality.

293 *Tucker* above n53, 733.

294 *Bradley* above n93, 423.

295 *Wilkinson* above n54, 59.

296 *Stevenson* above n55, 228-229 and 232.

297 *The Law of Torts* above n3, 461.

298 *The Law of Torts* above n3, 481.

actionable if negligence was proved. The modern position is probably intentional conduct without any independent requirement that harm be directly inflicted.[299] But there remains the possibility that negligence is sufficient. False imprisonment has been held in Canada to be satisfied if there is negligence. A plaintiff made out a case against prison officials in negligence for failing to review his segregation order on time, that same breach of duty also established false imprisonment.[300]

Whether any reformulation of the test for trespass to the person will also lead to a reconsideration of the nature of trespass to land remains to be seen. There has been little judicial comment so far.[301] But if trespass includes negligent conduct as well as intentional, intrusion may be established by negligent conduct. However, this seems undesirable path.

Privacy should be limited to intentional conduct only. Otherwise the tort will be too wide. If negligence is the standard then a new independent tort is unjustified because it is 'intention' that helps justify an independent tort. However, the requirement that the act be objectionable and offensive to a reasonable person may mean more than negligence is required. Where only negligence exists that element may not be met.

C Unlawful Interference

1 Relationship with Negligence

The more extensive negligence becomes the less room there is for the traditional economic torts.[302] The reason why the economic torts were developed can be explained by the reluctance in the past to allow recovery for economic loss under negligence. Where economic interests were negligently harmed the law was not generous.[303] However, because of the

299 *The Law of Torts* above n3, 103.
300 *Hill v British Columbia* [1997] 10 WWR 691, 701.
301 *The Law of Torts* above n3, 103.
302 *Economic Torts* above n170, see the preface.
303 "Interference with Economic Relations " above n60, 595-96.

complexity of economic life recovery was needed.[304] Loss arising from contracts or mere expectations may be of great value and importance. Even more value sometimes than tangible property.

There are a number of policy arguments for limited liability in negligence. One argument which has force is the danger of indeterminate liability.[305] However, when the economic loss is intentionally caused many of the policy reasons against liability disappear and are replaced by others leading to liability.[306] The class of plaintiffs is more limited because in most economic torts the defendant must aim to harm the plaintiff.[307]

Fleming agreed that despite the reluctance of the common law to protect economic interests against negligence, there was no similar coyness in furnishing legal sanctions against intentional conduct causing financial loss.[308] Therefore one of the hall marks of the economic torts is intention.

It has been said that an interference with one's physical integrity as well as with lands or chattels is actionable if the inference of intention may be drawn. So it would be anomalous if interference with economic interests was treated differently.[309] However, in trespass the act must be intentional but not the harm.

2 *Intent to Harm*

It is difficult though to identify the elements of intention required, the requirements vary for each economic tort.[310] The plaintiff in some way must be the focus of the defendant's intention. Unlawful interference requires an intention to harm the plaintiff.

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304 *Economic Torts* above n170, 1.
305 *Economic Torts* above n170, 7.
306 "Interference with Economic Relations" above n60, 596.
307 *Economic Torts* above n170, 9.
308 Fleming *The Law of Torts* (4 ed, Law Book Co ,Sydney, 1971) 539.
309 "Tort Injury to Economic Interests" above n96, 153.
310 *The Law of Torts* above n3, 712-13.

In *Beaudesert* [311] the court seems to have suggested that illegal means, although the act was not aimed at the plaintiff, was sufficient. However,*Beaudesert* appears wrong, an intention to harm the plaintiff must be established.[312] This narrows the category of potential plaintiffs, getting over the hurdle of indeterminate liability.[313] Intentional harm means foreseeable economic harm will not be recoverable. There is an additional factor in New Zealand further limiting the tort.

The Court of Appeal has held that a cause of action only exists where the defendant has a concurrent purpose to cause the plaintiff economic loss.[314] The court considered that an intent to harm a plaintiff's economic interests would not make the defendant liable unless that intent caused the defendant to act. If the defendant would have used unlawful means without that intent and if that intent alone would not have led him to act;[315]

> the mere existence of the purely collateral and extraneous malicious motive should not make all the difference. The essence of the tort is interference with the plaintiff's interests by unlawful means.

If the defendant's reasons for using unlawful means are completely independent of a desire to interfere with the plaintiff's business, the interference being only an incidental, foreseeable consequence although gratifying to the defendant, imposing liability would be stretching the tort too far.[316] The court's justification was otherwise the court would have to undertake an inquiry into the defendant's precise state of mind. Something that the law should not do when there is a more practicable rule.[317]

Although the court does not suggest that an intention to harm is the primary purpose, this does not mean the test will always be easy to apply. Distinguishing a concurrent activating purpose from a non-causative one

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311 *Beaudesert Shire Council v Smith* (1966) 120 CLR 145 [*Beaudesert*].
312 "Civil Liability for Industrial Action" above n70, 359.
313 *Economic Torts* above n170, 8-9.
314 *Van Camp* above n45, 359-360.
315 *Van Camp* above n45, 360.
316 *Van Camp* above n45, 360.
317 *Van Camp* above n45, 360.

will not be easy.[318]

There is an additional complication in industrial cases where for example strike action is aimed at the employer. Can another employer whose business is incidentally, but knowingly affected sue because the pressure he/she will exert is part of the union strategy or is there no intention to harm the employer?[319] This remains unclear after *Van Camp*. Does the defendant need to harm a particular plaintiff or would one in the plaintiff's position suffice?

Some commentators claim only the target of the defendant's action can sue, excluding those inevitably harmed.[320] Was the Court of Appeal in restricting liability trying to prevent parties inevitably harmed from suing? For example take the case of industrial action against an employer where employees or clients were incidentally harmed. If the defendant was not acting to hurt those clients or employees, they would have no action. The employer would be the only one who could succeed because only an intent to harm the employer caused them to act.

An intention to harm does indicate though at least in New Zealand an independent tort is necessary. Although, Fridman criticises the additional element of concurrent purpose.[321]

3 *Unlawful Means*

Further, unlawful means are required to make economic harm actionable under this tort. It is only by the combination of intent to harm the plaintiff and an unlawful act that a sufficient nexus is established with the plaintiff to justify liability.[322] Early dicta supporting liability was held to be too wide.[323]

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318 *The Law of Torts* above n3, 716.
319 *The Law of Torts* above n3, 716-17.
320 "Intentional Violation of Economic Interests" above n44, 274.
321 "Interference with Trade Part II" above n27, 112-113.
322 "Economic Torts & Labour Law" above n74, 338.
323 See *Keeble v Hickeringill* (1706) 11 East 574; *Carrington v Taylor* (1809) 11 East 571.

Allen v Flood [324] limited liability. The common law would not introduce a general tort of interference with economic interests without unlawful means being used. The English courts moved away from resting liability on the defendant's intention.[325] Unlawful means has been called the key to the tort.[326]

Liability for damage that it is not to a property right (if the wide definition of property proposed by Denning is not accepted), where no contract is broken or hindered may extend the law too far.[327] That is why liability only follows where unlawful means are used.

4 *Has Negligence Changed Enough to Takeover?*

The common law in New Zealand may be more receptive to economic loss now than when unlawful interference was first developed. *Hedley Byrne*[328] confirmed economic loss was recoverable in negligence. New Zealand has taken the view that there is no general rule against recovering financial loss as an ordinary principle where policy considerations allow it.[329] The House of Lords on the other hand has vacillated between a rule of no recovery with *Hedley Byrne* being the exception, and there being no general rule and financial loss is recoverable where policy allows. Perhaps this makes unlawful interference more useful in England.

Then there is relational loss, which is loss caused because of the contractual relationship between the immediate victim of a wrong and the plaintiff.[330] Traditionally the plaintiff would not succeed if he/she only had contractual rights to the property. The test for when such loss will be recoverable is still

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[324] *Allen v Flood* above n73, per Lord Watson. See also lord Herschell at page 132. The House of Lords ruled that in the case of conspiracy the doing of an act which is lawful will not become unlawful through the intentional interference with the plaintiff's interests.

[325] "Interference with Economic Relations" above n60, 599. Although the principle that liability cannot be based on intention has not been universally embraced according to Stevens at page 600. She gives the example of *Sorrell v Smith* above n79, per Viscount Cave LC.

[326] "Interference with Economic Relations" above n60, 620.

[327] "Interference with Trade Part II" above n27, 119.

[328] *Hedley Byrne & Partners & Co v Heller & Partners Ltd* [1964] AC 465.

[329] *The Law of Torts* above n3, 259.

[330] *The Law of Torts* above n3, 262.

uncertain, although development in Canada may help New Zealand.[331] Relational loss may be recovered however under unlawful interference and provide a more certain outcome for the plaintiff. Relational interests can be of great value.

Pure financial loss may be recoverable but only if all relevant policy considerations on balance support liability.[332] The primary matter of policy which arises simply out of the fact that a person has suffered pure financial loss is the fear of indeterminate liability.[333] This is where negligence causes problems for potential plaintiffs. Anyone incidentally and foreseeably harmed by unlawful acts could bring a claim.[334] The fear of indeterminate liability works against the victims of intentional unlawful interference using negligence instead. The class of plaintiffs could be very large if intention to harm the plaintiff and unlawful means were not required. That is why unlawful interference can provide a better avenue for plaintiff's that can satisfy the test requirements.

Significant advances would still need to be made to make negligence more attractive and unlawful interference totally redundant. Although the narrower the tort, the less indeterminate but also the less useful it will be to most plaintiffs. Perhaps negligence will be the only avenue for many.

VII CONCLUSION

Both torts seem to conform to the antiquity paradox. This paradox seems key to the introduction of new torts. However, the tort paradox seems less important in New Zealand, provided the tort introducing the new one is well established. The agency paradox is important because it is linked to the antiquity paradox, privacy and unlawful interference conform to about the same degree. While these factors may help introduce new torts they do not

331 See *Canadian National Railways v Norsk Pacific Steamship Co* (1992) 91 DLR (4th) 289; *Husky Oil v Saint John Ship Building Ltd* (18 December 1997) unreported No 2, 4855.
332 *The Law of Torts* above n3, 269-70.
333 *The Law of Torts* above n3, 270.
334 "Civil Liability for Industrial Action" above n70, 369.

explain the greater interest in privacy over unlawful interference.

It is argued that other factors are required to introduce new torts and that these factors better explain privacy's strength. The most important factors are society's expectations and necessity.

The courts should have a dynamic role. It would be wrong if the courts were powerless to extend the common law to remedy wrongs made possible by progress or resulting from new social or commercial conditions.[335] However, some legitimisation is required, the antiquity paradox is also important for this reason. Torts may succeed because they come at the right time.

The current social climate is particularly important, as it should be if we want a common law that reflects our current values. The common law should respond to society's needs. Judicial intervention may also be easier to justify regarding human rights. International covenants witness society's expectations. Privacy has a higher profile due to the current interest in human rights.

On the other hand, there is a move away from protecting businesses. Also, unlawful interference is an economic right, not a human right. Unlawful interference arguably does not have the same connotations or support as privacy. Economic interests may be considered less fundamental.

Necessity is another key feature that explains why privacy was introduced and has been more successful than unlawful interference. Modern technology and the media are becoming more invasive. It is easy to intrude on individuals' privacy and the tools to do so are readily available. Privacy seems necessary, whereas unlawful interference may be useful but arguably there are few cases falling through the gaps. In most cases other causes of action exist, although unlawful interference may place the economic torts on a more logical foundation.

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335 *Roberson* above n268, 449.

The parties involved may influence the courts in deciding whether to create new actions. A deserving plaintiff the court can identify with is probably more likely to succeed. However, this is undesirable. The courts should look instead at society's interests as a whole.

The fact that judges can identify with a desire for privacy and that it is potentially available to anyone helps to explain privacy's appeal. Unlawful interference does not have the same universality.

An inability to protect the interest under negligence encourages the courts to introduce new torts. Policy reasons may require a separate intentional tort. Unlawful means and intention seem ways to strike a balance between no liability and indeterminate liability for economic loss. The common law dislikes protecting 'feelings' without physical injury, therefore intention may be required for privacy. Conduct is more offensive when intentional rather than merely negligent, therefore privacy should be an intentional tort. There are persuasive reasons for keeping the requirement of intention in both torts. Although eventually the torts may be absorbed by negligence.

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