

PRISCILLA AGIUS

**THE PROTECTION OF PRIVACY INTERESTS
BY BREACH OF CONFIDENCE: SHOULD WE
FOLLOW ENGLAND'S EXAMPLE?**

**LLM RESEARCH PAPER
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ABSTRACT

I will be presenting the argument that the doctrine of breach of confidence in New Zealand should be developed in line with the present English approach. This consists of reasoning based around two fundamental premises. Firstly, that a confidential relationship is no longer an essential requirement between the parties concerned, and secondly, that privacy interests such as are protected presently in New Zealand by the tort of invasion of privacy can be brought within and protected by the breach of confidence doctrine.

I will be aided in my analysis by the seminal article entitled "Commonalities Between Breach of Confidence and Privacy" by Daniel Laster. Given the position I am taking, I submit that Laster based his views and analysis on outdated information, and is therefore wrong in his analysis of the applicable law in this area. Breach of confidence should be developed to encompass privacy interests to the extent recognised in English law. The necessary corollary of this is that New Zealand should not continue to recognize the tort of invasion of privacy.

The requirement of a pre-existing relationship has arguably disappeared in the United Kingdom, and there are suggestions that the same could happen here and that it is desirable for this to be so. I argue that the privacy interests which the tort of privacy in New Zealand aims to protect, can fall squarely within the ambit of breach of confidence, considering that one of the primary interests inherent in both actions is one of autonomy, as Laster has defined it, which necessarily rests on an element of *control* over personal information about oneself. Confidence and privacy are not so different in some important ways.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 15 100 words.

I INTRODUCTION

In 1990 Daniel Laster wrote a seminal article in the New Zealand Universities Law Review which stated that the doctrine of breach of confidence and the tort of invasion of privacy as recognised in New Zealand are conceptually distinct causes of action and should therefore be treated separately. The time has come to revisit his article and update it in light of significant jurisprudential developments in the arena of personal information. I will be presenting the argument that the doctrine of breach of confidence in New Zealand should be developed in line with the present English approach. This consists of reasoning based around two fundamental premises: first, that a confidential relationship is no longer an essential requirement between the parties concerned, and secondly, that privacy interests such as are protected presently in New Zealand by the tort of invasion of privacy can be brought within and protected by the breach of confidence doctrine. The necessary corollary of this is that New Zealand should not continue to recognize the distinct cause of action of the tort of invasion of privacy.

I will be aided in my analysis of this issue by the seminal article aforementioned, entitled "Commonalities Between Breach of Confidence and Privacy". Given the position I am taking, I submit that Laster based his views and analysis on information which is no longer relevant and that his viewpoints do not hold nearly as much force today as they did a decade ago, and therefore must be updated. I submit that he is therefore wrong in his analysis of the applicable law in this area today.

I will firstly summarise Laster's primary arguments and will discuss some aspects of the "traditional" approach to breach of confidence in relation to his arguments. These arguments are based on the reasoning that confidentiality and privacy interests are different. I shall challenge that assumption and will go on to consider whether confidence interests and privacy interests really are different and conclude that to the extent to which New Zealand protects privacy interests, breach

of confidence and privacy should are not and so should not be treated differently. In attempting to answer this question I will be examining Laster's views about the different bases for the causes of action and will be arguing that his assertions are, as mentioned above, wrong today. I will then look at how the English courts have dealt with breach of confidence and have seen fit to extend this cause of action to protect privacy interests of individuals. I will conclude that the New Zealand courts should follow the approach advocated by Randerson J in *Hosking v Runting*¹, in which he supported the approach of treating privacy interests as adequately protected under the action for breach of confidence.

II LASTER: BREACH OF CONFIDENCE, PRIVACY AND PERSONAL INFORMATION

Laster's arguments centre on the key premise that interests underlying breach of confidence and privacy are fundamentally different. Breach of confidence, according to Laster has four distinct interests – the value and importance of candour and full disclosure in certain relationships; encouraging “trust, loyalty and good faith” in relationships; protecting individuals’ rights to privacy; and ensuring that “a confiders interest in obtaining any benefits which would flow from dissemination or use of information originating from them is protected.”² By contrast, the tort of privacy has only the privacy interests at its base. These privacy interests stem from the “touchstone” of “individual autonomy in the form of an individual’s dignity.”³ The important thing to note about this definition is that, in the context of personal information, especially in light of the fact that privacy protection in New Zealand is limited to the public disclosure of private facts⁴ is that “[i]n the context of personal information this would mean recognition of an individual’s *right to determine who*

¹ (30 May 2003) High Court, Auckland CP527/02 Randerson J.

² Daniel Laster “Breaches of Confidence and of Privacy by Misuse of Personal Information” (1989) 7 Otago LR 31, 35.

³ Laster, above, 61.

⁴ *P v D* [2000] 2 NZLR 591(HC)

can learn about the individual.”⁵ As Laster, himself says, this links strongly to the element of *control*. I will discuss this concept further on in the article.

However, for this section of the essay I will go on to give a summary of Laster’s primary arguments relating to varying aspects of the “common” elements of breach of confidence and privacy and why he thinks the two causes of action should be kept separate. In doing so I will be incorporating his arguments within a discussion of the “traditional” approach to the doctrine of breach of confidence (and its corresponding privacy element where appropriate). It is Laster’s focus on the necessity for a confidential relationship between the parties concerned which underlies his arguments in comparing breach of confidence and the tort of invasion of privacy. Therefore, what must be kept in mind throughout this section is Laster’s assertion of the foundation for comparison of the two causes of action - “that breach of confidence is founded upon a *confidential relationship* whereas invasion of privacy is founded upon an individual’s right of autonomy to decide who will learn about them.”⁶

I will be discussing the well-known test for breach of confidence as set out by Megarry J in *Coco v AN Clark (Engineers) Ltd*⁷, however, I will be presenting the elements out of order, starting with the *second* element of the *Coco v Clark* test which relates to the presence of a confidential ‘relationship’, as it gives suitable background with which to discuss the first element of confidentiality of information especially in light of how, Laster argues, a relationship affects the status of the confidentiality or privateness of personal information.

Laster does not discuss in detail the differences between breach of confidence and privacy relating to the element of imparting information in confidential circumstances (that is, within the context of a relationship, real or

⁵ Daniel Laster, above, 61.

⁶ Daniel Laster “Commonalities Between Breach of Confidence and Privacy” (1990) 14 NZULR 144, 144.

⁷ [1969] RPC 41 (HC)

constructed). My conclusion on this issue is that if where there is actually some kind of relationship present in an action for invasion of privacy, or conversely, where there is no relationship in the traditional sense in an action for breach of confidence, the two causes of action are very similar. However, I will outline the second element and its relevance to breach of confidence and privacy for personal information, notwithstanding that a "relationship" of confidence or imparting of information in circumstances of confidentiality is not needed to succeed in a privacy action.

A Imparted in Confidential Circumstances - The need for a "Relationship" or Confidential Circumstances

This element requires that the information in issue must be "imparted in circumstances importing an obligation of confidence".⁸ This can be by way of the express or implied terms of an agreement⁹, through a special relationship between the parties¹⁰ or by virtue of the circumstances in which the information was divulged to the confidence breaker.¹¹

Contractual agreements most usually clearly mark out when information is being imparted in confidential circumstances. The courts can imply this through either the express or implied terms of the particular agreement. Furthermore, there are special types of pre-existing *relationships* where "the element of confidence is so marked that they can be regarded as being essentially relationships of confidence quite apart from any element of contract"¹². These include employer-employee

⁸ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 46 (HC) Megarry J.

⁹ See the series of *Spycatcher* litigation - *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 (HL(E)) where a member of the British secret service was held to be under a contractual duty of confidence not to divulge confidential information gained during his employment.

¹⁰ See, for example *T v Attorney-General* [1988] NZFLR 357 (FC) which concerned obligations of confidence between a social worker and client.

¹¹ The test for this is often cited as being "...where a reasonable man standing in the shoes of the recipient of the information would have realized upon reasonable grounds that the information was being given to him in confidence." *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41,48 (HC) Megarry J. See the case of *New Zealand Health and Nature v GA Thompson* (3 February 2000) High Court, Christchurch CP6/00 Chisholm J, which discussed the relevance of the plaintiffs actions in making sure that the confidentiality of the information was brought home to the defendant.

¹² United Kingdom Law Commission *Breach of Confidence* (WP58, London, 1974) 13.

relationships¹³, marital and domestic relationships¹⁴ and professional relationships such as doctor-patient and solicitor-client relationships¹⁵.

Apart from those specific recognized categories of special confidential relationships as mentioned above, one of the most common forms of a "relationship of confidence" arises where information is imparted in sufficiently confidential circumstances. A relationship is constructed by virtue of the precise circumstances themselves. A reasonable test in determining whether this can be done in any particular case is "[...] if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose on him the equitable obligation of confidence".¹⁶ This is effectively where an undertaking of confidence, express or implied, has been given.¹⁷ This test is broad enough to cover the wide range of situations in which confidential information comes into the hands of people, and so would, on a conventional analysis, sit perfectly with the courts' ability to infer a confidential relationship existing by reason of the circumstances of communication.¹⁸

Additionally, there are a number of recognised exceptions to the need for a confidential relationship or confidential circumstances - information obtained by improper or surreptitious means, information held by third parties, information not divulged to anyone, and accidentally acquired information¹⁹

¹³ See for example, *Cranleigh Precision Engineering Ltd v Bryant* [1966] RPC 81 (QB)

¹⁴ *Argyll v Argyll* [1967] Ch 302 (Ch).

¹⁵ *G v Day* [1982] 1 NSWLR 24 (SC).

¹⁶ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 48 (HC) Megarry J.

¹⁷ John Burrows and Ursula Cheer *Media Law in New Zealand* (4ed, Oxford University Press, Wellington, 1999) 149-150.

¹⁸ See, for example *Stephens v Avery* [1988] 2 All ER 477, 482 (Ch) where Lord Browne-Wilkinson stated that "The basis of equitable intervention to protect confidentiality is that it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information. Although the relationship between the parties is often important in cases where it is said there is an implied as opposed to express obligation of confidence, the relationship between the parties is not the determining factor. It is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information."

¹⁹ Sally Fitzgerald and Victoria Heine *Confidential Information* (New Zealand Law Society, Wellington, October 2002) 36. As to accidentally acquired information, see the comments of Lord

1 The Exceptions

As to information improperly or surreptitiously obtained, the courts have been willing to imply an obligation of confidence in such situations - "the principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in circumstances which ought not to be divulged."²⁰ It has been asked whether and how a "general equitable basis could extend to cover the situation where there is no 'relationship of confidence' in the context of which information is imparted."²¹ Megan Richardson has suggested two solutions. Firstly, one based on a restitution analysis and secondly, one based on a broad 'unconscionability' basis²²

Looking at the restitution argument, it is based on the need to provide a person who has suffered by way of the tortious acts of another, with financial recompense. The main arguments against preferring to apply this approach to the case of surreptitiously or unlawfully obtained information, is primarily that it does not seem an "appropriate way to categorise the treatment of a party who breaches the confidentiality of private and personal information (and who may do so for personal motives rather than economic 'benefit')."²³ This view ignores the fact that for many breaches of confidentiality or privacy of this kind, a monetary-type value placed on such breach is inappropriate and does not reflect the damage, which has occurred to the individual plaintiffs. Often, hurt and distress cannot be adequately compensated by money, and so to describe liability in essentially monetary terms seems somewhat insensitive and ignorant of the real damage, which has occurred.

Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 (HL(E)) at pages 658-659.

²⁰ *Ashburton v Pape* [1913] 2 Ch 469, 475 (ChD) Swinfen Eady LJ

²¹ Megan Richardson "Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory versus Law" (1993) 19 MULR 673, 695.

²² Richardson, above, 697.

²³ Richardson, above, 696.

An unconscionability approach would seem to accord most with the traditionally accepted rationale, that of equity stepping in to protect unconscionable behaviour, especially where someone takes advantage of another's vulnerability – “Applying this to the case of surreptitiously or accidentally obtained information of a personal or private nature, a person who surreptitiously or accidentally obtains such information and who knows or has reason to know that the owner is vulnerable to its not being treated as confidential, acts unconscionably in disclosing the information.”²⁴

Third parties can be restrained from using information received from a party to the confidence, where that person has knowledge or notice of the breach of confidence by the confidant. As Lord Greene said in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd*,²⁵ “[i]f a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights”.²⁶

It is disputed as to exactly when liability arises – is it when a third party first acquires notice of the original breach of confidence, or when the third party first receives the information?²⁷ This may be important in cases where plaintiffs are seeking protection for privacy interests. If the protection of privacy interests is considered “paramount” then arguably the liability should attach on acquisition of the information, and not when knowledge of the breach is acquired.²⁸ This would be based on the view that the information itself and its intrinsic value is to be protected, rather than the obligation of confidence which the third party has gained notice of.²⁹

²⁴Richardson, above, 697.

²⁵(1948) 65 RPC 203 (CA).

²⁶*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd case* (1948) 65 RPC 203, 213 (CA) Lord Greene MR.

²⁷Andrea Thompson *Breach of Confidence: Third Party Recipients of Personal Information* (LLB (Hons) Legal Writing Requirement, Victoria University of Wellington, 1991) 24.

²⁸Thompson, above, 25.

²⁹Thompson, above, 21.

These considerations link back to the underlying bases of breach of confidence to begin with - obligations of confidence between the parties and enforcing a general duty of good faith. If protection were given to "confidential" (and in this case personal) information from the point of acquisition of the information, no matter how innocent the recipient of the information was, "[t]he imposition of liability [from acquisition] would disregard equity's concern with the defendant's conscience."³⁰ This in turn relates to the third party's "derivative nature of their liability" from the breaching confidant.³¹ This would seem to bypass all reasons for enjoining unauthorized use of *confidential* information by a breaching confidant in the first place. If privacy and the "intrinsic value" of the information in isolation were the touchstone for liability in breach of confidence, liability would extend too far and to too many prospective defendants who had acted innocently in the circumstances.

This links back to the limited form of privacy, which we recognize in New Zealand - the public disclosure of private facts. While private information certainly holds intrinsic value to individuals, it is the loss of control over the disclosure of that information which the courts aim to protect. This must be considered in any case where confidentiality or privacy is at stake. The "intrinsic" value of information in itself is not sufficient, and arguably this is why a corresponding test in privacy (that the disclosure of private information must be highly offensive or objectionable to a reasonable person of ordinary sensibilities)³² to the obligation or relationship element in breach of confidence must be satisfied first before a breach of privacy can be made out.

Additionally, if the courts were to find liability on acquisition and not actual or constructive knowledge of the confidentiality or privateness of the information, the value of "privacy" of information looked at in isolation from obligations of confidence would seem to have an undue effect on freedom of speech in this

³⁰ Thompson, above, 25.

³¹ Thompson, above, 25.

³² *P v D* [2000] 2 NZLR 591 (HC).

situation. As has been argued, freedom of expression is only to be restricted so far as is reasonable necessary to protect a countervailing right, and liability for breach of confidence on acquisition of confidential information, especially if looking at the basis for liability in breach of confidence in the first place (such as obligations of confidence and a general duty of good faith and loyalty) would be an “unjustified restriction on this right”.³³ When privacy interests are looked at in the context of breach of confidence however, other factors will be given weight such as the obligations sought to be upheld under the traditional breach of confidence action. Therefore undue weight is not given to privacy interests in isolation as a wide-reaching veil of restriction over another’s right to freedom of expression or freedom of speech. Understandably then, it is wise to conclude that the liability of third party recipients of confidential information should lie from the point of notice of the breach by which the information was obtained – “however innocent the acquisition of the knowledge, what will be restrained is the use or disclosure of it after notice of the impropriety”.³⁴

Laster would focus on the next type of situation to assert that breach of confidence, as it protects such distinct interests as privacy, would not provide protection for a plaintiff where a third party “acquires” confidential information from a person who has not divulged it to anyone. This can occur in a situation such as when a person writes in their personal diary, and intends the information to remain confidential to themselves.³⁵ This circumstance would fail to satisfy the second element of the *Coco v Clark* test – it has not been communicated in confidential circumstances to another person, unless it is considered that the person who comes across the formula or diary is the person to whom the information is “communicated to” (giving “communicated to” a very broad definition). On this traditional view, breach of confidence would fail to give the protection required because an obligation of confidence has not been breached. This again links back to what the relevance of the basis of the confidence action is to Laster’s arguments –

³³Thompson, above, 26.

³⁴*Malone v Metropolitan Police Commissioner (No 2)* [1979] 2 All ER 620, 634 (ChD) Megarry J.

³⁵United Kingdom Law Commission *Breach of Confidence* (WP48, London, 1974) 19.

that the action is there primarily to protect obligations of confidence. If the conscience of a "confidant" is not in existence to be enjoined, it does not seem logical to create a duty where no obligations exist. Equity would arguably be seeking to enjoin an imaginary persona in order to attach liability to the third party acquirer of the information. However, the courts may place emphasis on the nature of the information itself in question and so find that a breach of confidence has occurred – this would be in light of the approach taken by the courts in England recently and especially considering the recent view that "it may be that certain information is so sensitive that it must be clear to all the world that it was not meant to be divulged."³⁶ Since the courts have clearly protected the surreptitious obtaining of confidential information³⁷ based on the rationale that "the acquirer can be said to be fixed with the knowledge that the information is obviously confidential because of the surreptitious way in which it has to be obtained", industrial espionage cases are clearly covered in these situations.³⁸ These types of cases could also be seen as a forerunner to the approach taken in regards to recent cases involving surreptitious taking of photographs of plaintiffs in private situations - if a photographer can only obtain photographs surreptitiously of plaintiffs in private situations or settings, the confidentiality will be implied by virtue of the means needed to obtain the photographs.³⁹

As to accidentally acquired information, an early authority on this point, on whether protection will be afforded in such a situation, is the dictum of Lord Goff in *Attorney-General v Guardian Newspapers Ltd*⁴⁰ where he, in discussing that a relationship will not always be necessary, states in broad terms that circumstances

³⁶ John Burrows and Ursula Cheer *Media Law in New Zealand* (4ed, Oxford University Press, Auckland, 1999) 157.

³⁷ *Francome v Mirror Group Newspapers* [1984] 1 WLR 892 (CA); *Franklin v Giddins* [1978] Qd R 72 (SC).

³⁸ Katrine Evans *Privacy and Publicity: Restraining Abuses of Power In New Zealand* (LLM Research Paper, Victoria University of Wellington, 1999) 80.

³⁹ See, for example, the case of *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473 (QB) at 476 where Laws J said that "if someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, this subsequent disclosure of the photograph would in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter in which the act was recounted and proceeded to publish it."

⁴⁰ [1988] 3 ALL ER 545 (HL(E)).

where breach of confidence would possibly be able protect certain information include “certain situations, beloved of law teachers, where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or when another obviously confidential document, such as a private diary, is dropped in a public street and is then picked up by a passer-by.”⁴¹ The theory remains, as with surreptitiously acquired information, that liability can still attach to a person who divulges the information after obtaining it accidentally. This is because, as mentioned above, the private nature of the information may be so clear that liability should attach solely for that reason. An obligation of confidence is inferred by the very confidential nature of the information in issue.

The relationship of confidence, as seen above is essential to Laster’s arguments in asserting the differences between confidentiality interests and privacy interests. His focus on the relationship element infuses his discussions, as will be seen below, on what information is considered sufficiently private or confidential. According to Laster, the relationship makes all the difference.

B Confidential Information- What is confidential or private?

The preceding discussion gives relevant background within which to discuss the first element of breach of confidence set out in *Coco v Clark*,⁴² which is whether personal information is sufficiently confidential or private. Laster ultimately contends that the “relationship of confidence” present in traditional breach of confidence affects the confidentiality or privateness of the personal information in any particular case.

The information concerned must “have the necessary quality of confidence about it.”⁴³ What information satisfies this requirement has been relatively consistent among the authorities - “[...] ‘something which is public property and public

⁴¹ [1988] 3 All ER 545, 658-659 (HL(E)) Lord Goff.

⁴² [1969] RPC 41 (HC)

⁴³ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 46 (HC) Megarry J.

knowledge' cannot per se provide any foundation for proceedings for breach of confidence."⁴⁴ The most common forms of confidential information have been in the commercial sector and have included trade secrets "particularly in the sense of secret processes, recipes, designs and formulae..."⁴⁵ State secrets are also a recognized category of confidential information and were the subject of litigation in the well-known case of *Attorney-General for United Kingdom v Wellington Newspapers Ltd.*

⁴⁶

The major issue that the courts have been faced with in the last few decades has been in deciding what the status of the law of breach of confidence is in relation to *private* information. It has been acknowledged historically, and presently that private information can certainly be protected by the law of breach of confidence. In *Stephens v Avery*⁴⁷ where sexual conduct of the plaintiff was the subject of breach of confidence proceedings, it was held that there was no reason why "information relating to that most private sector of everybody's life, namely sexual conduct, cannot be the subject of a legally enforceable duty of confidentiality."⁴⁸ However, many cases involving personal information (including *Stephens v Avery*) have also involved a relationship of some kind existing between the parties. In *Argyll v Argyll*⁴⁹, for example, marital confidences were held to be privileged, but the personal information itself was considered in light of its disclosure within the marriage relationship. The specific type of relationship was one which the courts were willing to protect, rather than the information itself, Thomas-Ungoed J remarking "there could hardly be anything more intimate or confidential than is involved in that relationship, or that in the mutual trust and confidences which are shared between husband and wife."⁵⁰ This has meant that the issue of whether

⁴⁴ *Coco v AN Clark (Engineers) Lt*, above, 47, Megarry J citing Lord Greene in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 215 (CA).

⁴⁵ Stephen Todd et al *The Law of Torts in New Zealand* (2ed, Brookers, Wellington, 1997) 805. See, for example *Merryweather v Moore* [1892] 2 Ch 518 (ChD) which involved the detailed dimensions of fire engines.

⁴⁶ [1988] 1 NZLR 129 (CA).

⁴⁷ [1988] Ch 449 (ChD)

⁴⁸ *Stephens v Avery* [1988] 2 All ER 477, 482 (ChD) Lord Browne-Wilkinson VC. [1988] 1 NZLR 129 (CA).

⁴⁹ [1967] Ch 302 (ChD).

⁵⁰ *Argyll v Argyll* [1967] Ch 302, 322 (ChD).

personal information in isolation, is eligible for protection where there is no special relationship, has not been fully resolved, at least until recently.

Laster has made it clear that a relationship of confidence is relevant when determining whether there is an obligation of confidence to begin with. However, it is fair to say that he must also be arguing that a relationship of confidence is also relevant in classifying the nature of the information initially at the start. His arguments seem to be, that a confidential relationship can effectively turn public information for example, into confidential information *by the very reason of its imparting in confidential circumstances or in the context of a confidential relationship.*

Laster gives four tests which he says courts apply when determining whether information is sufficiently private or confidential and the important consequence of having information come under breach of confidence or privacy. The tests are those of "accessibility, extensivity, territoriality, and temporal limitation".⁵¹

1. Public Accessibility

If the information in issue has the general quality of "inaccessibility" about it, it will generally be considered to be sufficiently confidential or private.⁵² Laster looks at this issue in terms of information contained in public records, the extensiveness of publication, and information obtained through public or private places.

(a) Public Records

The main point that Laster seeks to make in regards to publicly available records is the fact that with breach of confidence, information such as births,

⁵¹ Daniel Laster "Commonalities Between Breach of Confidence and Privacy" (1990) 14 NZULR 144, 146.

⁵² Laster, above, 146.

marriages or convictions may have a necessary quality of confidence about it by virtue of the fact that it was disclosed in the confines of a special relationship. He makes the suggestion that it may be because of a special relationship, that the confidant may be aware of the confider's "particular concern about publication or use of such information."⁵³ In contrast, information which is the subject of an action for invasion of privacy, will not have the same "relationship" underlying it and will therefore be able to be used simply because looked at in isolation, it is not sufficiently private to warrant protection.

Looking at this situation, it is clear that the same information will attract differing levels of protection depending on what action is invoked. The issue of whether publicly accessible records should attract a level of confidentiality in certain situations is already controversial. With the addition of the distinction between the status of information within a confidential relationship and information within a private scenario being as defined as Laster has asserted, the controversy becomes deeper. Why should the information regarding a person's conviction for sexual assault, for example be protected from disclosure by a confidant because it was only by reason of a "relationship" that the confider knew of the information? (regardless that they could have looked it up in public records).

In this type of situation it would be the relationship which is protecting the information in issue and not the "privateness" of the information itself. This would suggest that the first element of the *Coco v Clark* test is somewhat misleading - it is the relationship or obligation of confidence (in line with the approach in the recent English cases) which matters. The nature of the information appears simply as an initial consideration. This also raises questions about the "privateness" of publicly available information in the first place.

(b) Extensiveness of publication

⁵³ Laster, above, at 147 - for example that a patient has told his or her doctor that he or she had a past criminal conviction, or had recently been divorced.

Another factor, which the courts look to, and which Laster identifies as a primary test in determining confidential or private information, is the extent of publication. This factor relates to whether information is sufficiently confidential if it has previously been disclosed. This will depend on the circumstances of the disclosure including the audience to whom it was disclosed and circumstances such as the duration of the prior disclosure – “It is clear that the publication of information to a limited number of persons will not of itself destroy the confidential nature of information”.⁵⁴ So, for example in the case of *Prince Albert v Strange*, it was held that the certain private etchings had not lost their confidentiality by reason of the fact some of the impressions had been given to the plaintiffs’ friends.⁵⁵

In most cases, the question will be one of degree, depending on the circumstances of each particular case.⁵⁶ Laster mentions *G v Day*⁵⁷ where a transitory broadcast of an informant’s identity was held not to have been sufficient to destroy the confidentiality of that fact. Laster linked this decision back to the proposition of “whether or not the confider would reasonably have an interest in preventing any further dissemination of the information.”⁵⁸ This does not seem too problematic as arguably if private information brought under either breach of confidence or privacy has been published for a limited purpose and to a limited audience, the courts would likely see the information as still private.⁵⁹

An exception to the general rule that the publication of information destroys the confidentiality or privateness of the information is where public information has become private over time. This is not a concept which is replicated in breach of confidence, as once information has become public, its confidentiality has been

⁵⁴ Francis Gurry *Breach of Confidence* (Clarendon Press, Oxford, 1984) 73.

⁵⁵ Gurry, above, 74 discussing *Prince Albert v Strange* (1849) 64 ER 293, 312 (ChD) Knight Bruce VC.

⁵⁶ Gurry, above, 74.

⁵⁷ [1982] 1 NSWLR 24 (SC).

⁵⁸ Daniel Laster “Commonalities Between Breach of Confidence and Privacy” (1990) 14 NZULR 144, 151.

⁵⁹ Gurry, above, 73.

destroyed.⁶⁰ Under privacy, by contrast, cases such as *Melvin v Reid*⁶¹ and *Tucker v News Media Ownership*⁶² have illustrated the courts willingness to fix previously publicly disclosed information (a sordid past as a prostitute and criminal convictions for sexual offences respectively) with the quality of privateness.

It has been argued that privacy only can protect public information which has become private over time, primarily because the rules relating to public domain information in breach of confidence are “too strict” – that is in privacy, a more liberal consideration in determining the privateness of information would take place – this would include considering things such as where “further breaches of privacy are intentional or reckless breaches of community standards.”⁶³ This element also has great links to the element of control over personal information – an element which I submit forms one of the key interests underlying both breach of confidence and privacy as recognised in New Zealand. As one commentator has put it, “[...]those who view privacy as a form of control over personal information – recognize that the information subject may well wish to protect against further, perhaps wider dissemination of the information....”⁶⁴ By contrast, since “the essence of confidentiality is secrecy”⁶⁵ no such considerations as can be entertained in privacy will be applicable. I think what needs to be added though, is that personal information in privacy still needs to meet the test of having been publicly inaccessible to a degree.

(c) Public and Private Places

⁶⁰ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, 650 (HL(E)) Lord Goff

⁶¹ *Melvin v Reid* (1931) 297 P 91, 93 (Cal Dist Ct) Marks J.

⁶² *Tucker v News Media Ownership* [1986] 2 NZLR 716 (HC).

⁶³ Katrine Evans *Privacy and Publicity Restoring Abuses of Power In New Zealand* (LLM Research Paper, Victoria University of Wellington, 1999) 79.

⁶⁴ Evans, above, 78-79.

⁶⁵ Sally Fitzgerald and Victoria Heine *Confidential Information* (New Zealand Law Society, Wellington, October 2002) 19.

The place where the fact or information is derived from is also relevant to the test of what is accessible or not and therefore what is sufficiently confidential or private. For example, if a fact occurs in a public place, this does not automatically mean it that it cannot be a confidential or private fact.⁶⁶ This is most common where the fact concerns humiliating, distressing or embarrassing circumstances which was recognised *Bathurst City Council v Saban*⁶⁷ which., although not directly concerned with invasion of privacy as a tort, recognised that it would be open to the court to give relief to a plaintiff in circumstances such as where “someone had taken a photograph of [the plaintiff] in a shockingly wounded condition after a road accident”.⁶⁸

Laster picks up on this idea and links it to whether, regardless of where the information is derived from, there is an expectation of privacy by the individual seeking protection.⁶⁹ Again he relates this issue back to the fact that breach of confidence would be able to protect information derived from relatively public places, that is places where people “have a right to go”,⁷⁰ where the parties involved would not have been in a street or a park, for example, but for the existence of a relationship between them.

There are problems with this argument. Laster appears to be arguing that if a fact is disclosed in a public place, under breach of confidence the fact may attract more protection if the confidant was present in the public place because of some relationship with the confider. This situation would be very rare and breach of confidence would often not be able to provide protection if such protection was limited to particular circumstances such as these. There needs to be protection available in a wider variety of circumstances. This is where the determination of the confidentiality of information gained from public places by reason of a relationship

⁶⁶ *Bradley v Wingnut Films* [1993] 1 NZLR 415, 424 (HC) Gallen J.

⁶⁷ (1985) 2 NSWLR 704 (SC)

⁶⁸ *Bathurst City Council v Saban* (1985) 2 NSWLR 704, (SC) Young J.

⁶⁹ Daniel Laster “Commonalities Between Breach of Confidence and Privacy” (1990) 14 NZULR 144, 148.

⁷⁰ Laster, above, 149.

only poses problems. The focus should be not just upon the relationship (especially as this element is becoming disestablished) but the nature of the information itself, regardless of where or by what reason the "confidence breaker" comes across the information.

If a relationship element was not necessary in New Zealand to found an action for breach of confidence, a plaintiff could have a double chance of gaining protection. First, if the information is disclosed in a public place, AND a relationship does exist or can readily be inferred, the courts may protect that information by adopting a "relationship of trust and confidence needs to be upheld" line of reasoning. If there is no such relationship, the courts can look more closely at the nature of the information even if it was disclosed in a public place, and also the circumstances of obtainment of the information. The courts could then adopt a privacy based, "value of the autonomy of the individual over the information needs to be protected" line of reasoning. It would of course depend on the facts of each case, but at least a number of approaches to this issue would be available for the courts to look at.

(d) Territoriality

An isolated publication in a certain location is also relevant to the confidentiality or privateness of information. As Laster mentions, geographically limited publications have been used to successfully assert confidentiality in other places.⁷¹ This is an extension of the extensiveness of publication consideration. The limited geographical publication may be considered to be only to a limited audience and for a limited purpose. As has been said "...availability in one area will not necessarily destroy the confidentiality of information in another location."⁷² In *Franchi v Franchi*⁷³ it was acknowledged that knowledge of secrets by people in a

⁷¹ Laster, above, 151.

⁷² Francis Gurry *Breach of Confidence* (Clarendon Press, Oxford, 1984) 76.

⁷³ *Franchi v Franchi* [1967] RPC 149 (Ch) Cross J.

foreign country does not necessarily destroy the confidentiality in another.⁷⁴ (although on the facts in that case, the court held that the information was no longer confidential as the patent specification information had become well known in England soon after its publication in Belgium). This does not seem to fit too well with the notion that a relationship of trust and confidence is one of the cornerstones of breach of confidence, as Laster asserts for the simple reason that even if information is published in one area, the relationship of trust and confidence has been breached all the same. If the focus is on privacy, then arguably geographical location may have no impact on the fact that autonomy has been interfered with, and control over disclosure has been lost.

While not directly related to the issue of determining whether personal information is sufficiently confidential or private, the duration of the duty to keep such information confidential or private in the circumstances is important and, as Laster asserts, differs under both causes of action.

2 *The duration of duties in a relationship of confidence*

Another of Laster's arguments on why breach of confidence and privacy should be kept separate is based on the duration of duties for upholding the confidentiality or privacy of a plaintiff. He considers that where information enters the public domain in regards to privacy, there can be no obligation to keep the information private, subject to exceptions such as a lengthy passage of time between the initial publicity of the information and its republication.⁷⁵ Conversely, for breach of confidence, the obligation to maintain confidentiality is unclear. As he explains, the decision of the House of Lords in the *Spycatcher*⁷⁶ case gave us two views based on the *nature* of breach of confidence. Lord Griffiths said that the duty of confidence remained even when the information has been brought into the public domain. This

⁷⁴ Gurry, above, 75 discussing the comments of Cross J in *Franchi v Franchi* [1967] RPC 149 at 153 (Ch).

⁷⁵ Daniel Laster "Commonalities Between Breach of Confidence and Privacy" (1990) 14 NZULR 144, 152.

⁷⁶ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 WLR 776 (HL(E)).

was because it would be a mockery of the law if a person could discharge their duty by breaching it.⁷⁷ In contrast Lord Goff commented that this proposition would be untenable and even absurd – “is [a confidant] not even to be permitted to mention in public what is now common knowledge?”⁷⁸ The view of the duty remaining because of a relationship of trust and confidence existing and the view of the duty remaining as long as the value of secrecy of the information being maintained gives rise to definitional problems underlying both causes of action. Without the confidentiality of subject matter (to a great extent obviously) there is no obligation to keep the information “confidential”, no matter what type of relationship exists. With private information, if there is no private information at all, no protection can be given. Since there can be no relationship, the additional protection which could be afforded by breach of confidence cannot be invoked.

D Unauthorised Use of the Information

Supposing that the other elements of breach of confidence have been made out, the third element to be fulfilled consists of an unauthorized use of the information.⁷⁹ This is a factor which does not prove too controversial in its application to both breach of confidence and invasion of privacy. While it may seem more reprehensible to use information while under obligations of confidence because of the inherent trust and confidence present in traditional confidential relationships, the breakdown of a need for a relationship, which I argue for, puts the test for an unauthorized use of information for breach of confidence and privacy on a par. In both actions, unauthorized use will be usually considered as being without the plaintiffs consent.

In most cases this will be the easiest element to fulfill, as it is assumed that there has been an unauthorized use of the information which first gave rise to the

⁷⁷ *Attorney-General v Guardian Newspapers Ltd (No 2)*, above, 793 Lord Griffiths.

⁷⁸ *Attorney-General v Guardian Newspapers Ltd (No 2)*, above, 811 Lord Goff.

⁷⁹ See *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 213 (CA) where Lord Denning considered that detriment is not necessary for an action in breach of confidence. Simply using confidential information without consent is sufficient for liability.

proceedings, or alternatively that there has been a proposed intent to so use the information. It is also accepted that a defendant may be liable in an action even if the unauthorized use of the information is unintentional or subconscious.⁸⁰

Another more debatable issue in relation to an unauthorized disclosure of information is whether *detriment* is a necessary element. See, for example, the comments of Barker J in *T A Macalister Ltd v Black* where, in discussing the *Laws of New Zealand* said that there is sufficient detriment if information is disclosed to a third party "even though that disclosure may not harm the confidor in any way."⁸¹ It is generally accepted that detriment is not a necessary element, as there will arguably be cases where confidentiality or privacy will still be claimed by a plaintiff who has not suffered harm of any kind. This can arise for example, where an anonymous donor of money to a charity wishes to maintain anonymity.⁸² Megarry J in *Coco v Clark* stated -⁸³

At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called detriment to him, as when the confidential information shows them in a favourable light but gravely injures some relative or friend of whom he wishes to protect.

This topic may not be of as much practical significance as the other elements, as it is presumably only in a minutely small amount of cases where no detriment has accrued, and yet someone still brings an action for breach of confidence. The most important consideration in this aspect of the element, is that the obligation rests in *equity*. If a defendant has made unauthorized use of confidential information of the plaintiff, that of itself should be able to justify the finding of a breach. In regards to privacy, there will usually be some form of detriment through the loss of control

⁸⁰ Sally Fitzgerald and Victoria Heine *Confidential Information* (New Zealand Law Society, Wellington, October 2002) 41. See for example *Seager v Copydex* [1967] 2 All ER 415 at 417 where it was held that unconscious use of the plaintiffs ideas by the defendant was sufficient for a finding of an unauthorized use of the information.

⁸¹ (12 July 1999) High Court Auckland AP45-SW99.

⁸² *Campbell v Mirror Group Newspapers* [2002] EWCA Civ 1373 para 52 Lord Philips.

⁸³ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 48 (HC) Megarry J.

over what information is being disclosed, linking always back to the autonomy and dignity of a person and their choice as to their involvement in their surrounding world as much as possible

Perhaps it should be the position that detriment is necessary in order for equity to intervene in privacy for the essential test is whether the disclosure of personal information is highly offensive and objectionable to a reasonable person of ordinary sensibilities. This test connotes some form of traditional harm accruing to the plaintiff, hence the disclosure must be offensive or objectionable in some way. Nevertheless, in the traditional case of breach of confidence it is the unconscionable conduct of the defendant which is sought to be restrained. Perhaps it should make a difference to liability if no damage has accrued, but if a plaintiff feels that they have suffered in one way or another, this should be a sufficient threshold for intervention by the courts. As has been stated before, if actual detriment or prejudice is needed before the courts will intervene, this is introducing "into a purely equitable action the extra common law requirement that damage or actual harm to the plaintiff must be affirmatively proven before an action will lie."⁸⁴ Maybe harm should be inferred from the very fact that an obligation of confidence has been breached.

While the above factors may be important to the individual plaintiff concerned, a wider consideration must come in at the final stage. That is whether there is a sufficient public interest at stake in either protecting or disclosing the information. Individual protection is set up against essentially the public's right to knowledge.

E Public Interest

Laster's final major argument on the necessary maintenance of a distinction between breach of confidence and privacy is that while the public interest is a factor

⁸⁴ Andrea Thompson *Breach of Confidence: Third Party Recipients of Personal Information* (LLB(Hons) Legal Writing Requirement, Victoria University of Wellington, 1991) 21.

relevant to both causes of action, the weight given in balancing the public interest on one hand and privacy or confidentiality on the other hand, will necessarily differ. These tests essentially burden the defendant who wishes to escape liability. It is clear, therefore that "even in relationships which prima facie support an obligation of confidence, an overriding public interest in disclosure to the relevant audience will protect an otherwise unauthorized disclosure."⁸⁵ These include, apart from things such as government "activities"⁸⁶ the important constitutional value in "free speech, free press, and the public right to know".⁸⁷ Laster's primary views on the public interest in relation to breach of confidence and privacy are that "a less demanding 'of public interest' test may develop in privacy cases rather than [an] 'in the public interest' test evolving in breach of confidence."⁸⁸ The "of public interest test" would apply to privacy actions and would imply that public interests considerations would focus around such considerations as what the public may be legitimately curious in whereas in confidentiality situations the disclosure must be "of real concern" to the public in order to justify a disclosure.⁸⁹ As Laster says "Put another way, courts may more readily hold that some public interest in personal information overrides privacy than confidentiality."⁹⁰

Laster is essentially hinting that the courts will give greater weight to a confidential interest as opposed to a purely private interest and will therefore be more willing to allow defences of "its in the public interest" to justify disclosure of private facts to the public. This raises the question, why and on what basis does a court decide that the interests underlying privacy do not hold as much value in society as do the values in breach of confidence? Perhaps a relationship of "candour and trust" is inherently more important than dignity and autonomy. Laster's view on this primary distinction is the key to understanding why he takes the position he does, in that privacy and confidentiality interests need to be kept separate. The

⁸⁵ Daniel Laster "Commonalities Between Breach of Confidence and Privacy" (1990) 14 NZULR 144, 158.

⁸⁶ Laster, above, 159.

⁸⁷ Laster, above, 159.

⁸⁸ Laster, above, 161 citing *Lion Laboratories Ltd v Evans* (1984) 3 WLR 539 (CA)

⁸⁹ Laster, above, 161.

⁹⁰ Laster, above, 161.

problem arises when, as in England, purely personal information can be protected by breach of confidence when there is no relationship of trust and confidence. This may mean that a lower threshold test will always be applied to cases involving personal information, even though the information may be to fit within the traditional breach of confidence action.

Alternatively, while personal information may be harder to place into the action for breach of confidence (although this position is rapidly changing) once such information does get into that particular cause of action, the higher threshold test of being "in the public interest" will apply. So, exactly the same information will be protected at different levels via the two differing approaches to a public interest test. This is why I would suggest a single doctrine should serve to protect privacy interests at the same level, at least for the limited form of privacy which New Zealand currently protects.

Ultimately, Laster derives his views on the distinction between breach of confidence and privacy (and the consequent need to continue to maintain such a distinction) from the additional interests inherent in breach of confidence. I submit, however, the focus should not be on the differences between the two by virtue of the presence of additional interests in one cause of action, but rather the focus should remain on the recognition of the presence of one unifying interest in both causes of action – privacy in the form of autonomy. It is this interest which underlies the two causes of action, at least in the developed form of breach of confidence, and renders them, for all intensive purposes, essentially the same.

III BREACH OF CONFIDENCE AND PRIVACY SHOULD NOT BE TREATED DIFFERENTLY

Traditionally the interests underlying the actions for breach of confidence and invasion of privacy have been considered as conceptually distinct.

Breach of confidence has generally been concerned with "maintain[ing] the fidelity or trust that the plaintiff has reposed in the person to whom he has confided."⁹¹ Privacy is based on a rationale which is "[...] related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others attention."⁹² Laster himself has recognised that without the relationship element, breach of confidence enlarges into a general right of privacy.⁹³ Since the development of the English judiciary in finding that a relationship of confidence or obligations of confidence (in a narrow sense) are no longer necessary before a court will find liability, I submit that the tort of invasion of privacy (at least, as I reiterate again, to the extent New Zealand protects privacy interests) is essentially breach of confidence but without a confidential relationship.

Laster makes a number of important observations on what he thinks are the distinct interests underlying the tort of invasion of privacy and the action for breach of confidence. He is a strong advocate for keeping the interests underlying the two actions separate. I will discuss his views on the interests underlying breach of confidence and privacy and will then go on to discuss recent developments in the law which suggest that the interests are not substantially distinct and therefore, should not be treated differently.

A Limited To The Public Disclosure of Private Facts

It must be strictly kept in mind that New Zealand law only recognizes the protection of privacy as applying to the public disclosure of private facts about an individual. It does not extend so far as to protect an individuals' interest in solitude or seclusion, as a separate head of invasion of privacy. It has been made clear then, that "[t]ort law in New Zealand has not yet developed to the point where a separate

⁹¹ Raymond Wacks *Personal Information: Privacy and the Law* (Clarendon Press, Oxford, 1989) 127.

⁹² Ruth Gavison "Privacy and the Limits of the Law" (1980) 89 YLR 421, 423.

⁹³ Daniel Laster "Breaches of Confidence and Privacy By Misuse of Personal Information" (1989) 7 Otago LR 31, 36.

cause of action is definitely available under this head.”⁹⁴ It seems that because of the judicial failure to recognize that such interests in this branch of invasion of privacy, which involves essentially “a psychological need to preserve an intrusion-free zone of personality and family”⁹⁵ the privacy interests here which arguably cannot be protected by an action for breach of confidence, have had no substantial relevance to the development of the law of privacy thus far. Arguably then, the cases which commentators such as Laster assert may not be adequately covered by an action for breach of confidence would not be covered by an action for invasion of privacy anyway.

While those “invasions of privacy” which fall outside the confines of breach of confidence should be protected through some other medium, I am simply submitting that until these invasions can be adequately protected by some form of privacy law, that we should treat the privacy interests that are currently protected in New Zealand as being able to be protected by breach of confidence. The interests underlying this type of privacy protection are more akin to control over information, rather than the interests inherent in protecting significant, usually physical, intrusions into personal or private life, where an individual, to be enjoined in the “intrusion into solitude and seclusion” cause of action in privacy would only need to have obtained the information in some manner in the nature of prying. Liability is based upon “the unjustifiably intrusive way in which the defendant acted in breaching reasonable expectations to be left alone in a particular zone.”⁹⁶ In contrast, the analysis of invasions of privacy in the types of situations which I am considering stems from a logical extension of the law on breach of confidence, and so I submit, should be dealt with under that head.

B Laster’s view: “The primary public interests which underlie breach of confidence are encouraging candour in relationships, enforcing undertakings of

⁹⁴ Katrine Evans “Of Privacy and Prostitutes” (2002) 20 NZULR 71, 90.

⁹⁵ *L v G* [2002] (21 January 2002) District Court Timaru NP202/00, 20 Abbott J.

⁹⁶ Evans, above, 91.

confidentiality, and recognizing an individual's autonomy to determine who should learn about them. In contrast, only the autonomy interest underlies a privacy action."⁹⁷

Laster takes the view that the comparable interest protected by breach of confidence and privacy is autonomy. As Laster himself has mentioned in a related article on breach of confidence and privacy, "The touchstone for [the] various formulations of privacy is individual autonomy in the form of an individual's dignity. In the context of *personal information* this would mean recognition of an *individual's right to determine who can learn about the individual.*"⁹⁸ This signifies that what the individual is trying to protect, and what the courts are recognising when they grant injunctions or award damages to injured plaintiffs, is the individual right to *control* what information is divulged to the world around them.

This view has been supported by numerous legal bodies and commentators.⁹⁹ Although the inherent dignity of a person and the right to maintain a private life free from the unwarranted gaze of others are the core values which the courts can be said to be recognizing in protecting private or confidential information from disclosure, it is the feeling of the loss of control which is arguably the real damage to the individual. The concomitant of that is the hurt and indignity which arises from that loss of control. The English Justice Committee has recognised that "Above all we need to be able to keep to ourselves, if we want to, those thoughts and feelings, beliefs and doubts, hopes, plans, fears and fantasies, which we call "private" precisely because *we wish to be able to choose freely with whom and to what extent,*

⁹⁷ Daniel Laster "Commonalities Between Breach of Confidence and Privacy" (1990) 14 NZULR 144, 144.

⁹⁸ Daniel Laster, "Breaches of Confidence and of Privacy by Misuse of Personal Information" (1989) 7 Otago LR 31, 61.

⁹⁹ See for example, The Report of the Committee on Privacy (The Younger Report) (1972) Cmnd 5012.at para 100, where the Committee noted that privacy consists of "freedom from intrusion and privacy of information"; *Thurston v Charles* (1905) 21 TLR 659, at 660 (Ch) where Walton J said that the personal information contained in a letter "may be mainly valuable because it gives the plaintiff the right to keep it private"

we are willing to share them.’¹⁰⁰ Again the references back to the element of control are what seems to be driving the protection afforded to individuals at present. An aspect of this element of control, which can be considered another underlying interest inherent in breach of confidence and privacy is directly related to the wider societal interest of promoting individual development.

It has been suggested by John Stuart Mill that a social public policy rationale of protecting personal confidences stems from the benefits of allowing individuals to “develop to their utmost potential if they are given the opportunity to make their own choices about how to live their lives, irrespective of the judgments of others as to the values of those choices.”¹⁰¹ This view makes it easier to assert that privacy and breach of confidentiality are not as different as is contended. If an underlying object of the law of confidence is to develop in the way Mill suggests above, this sounds very similar to a social policy for protecting the privacy of the individuals as we do in New Zealand. This is most apparent when we consider that among the choices which individuals can make, these “must surely be whether to make personal and private information available to others, or to keep it entirely secret, or to disclose it to a select few who are judged as entitled to know.”¹⁰² This was the view expressed by the High Court in *Douglas v Hello! Ltd* where the plaintiffs choice as to whom, when and where they disclosed their confidential information to, should not have been interfered with.¹⁰³ The development of individuals stemming from their choices, which can either include or exclude disclosure to the wider world, is encouraged through maintaining confidences of personal information in the same way as protecting personal information from disclosure under an invasion of privacy action.

¹⁰⁰ A Report by Justice *Privacy and the Law* (Stevens and Sons Ltd, London, 1970) para 13.

¹⁰¹ Andrew McRobert *Breach of Confidence: Revisiting the Protection of Surreptitiously Obtained Information* (2002) 13 AIPJ 69, 71 discussing John Stuart Mill *On Liberty* (Watts, London, 1929).

¹⁰² McRobert, above, 71 citing Megan Richardson “Breach of Confidence, Surreptitiously or Accidentally Obtained Information and Privacy: Theory Versus Law” (1994) 19 AIPJ 673, 683.

¹⁰³ *Douglas v Hello! Ltd* [2003] EWHC 786 paras 196-197 Lindsay J.

Considering that Laster does recognize that the autonomy interest present in privacy also exists in breach of confidence he recognizes that the overlap between breach of confidence and privacy in protecting this aspect of privacy signals the essential commonality between the two actions. The concomitant of this would therefore be that the interests inherent in a privacy action can be fully protected under a breach of confidence action (remembering that this is in light of the fact that the limited form of privacy as protected in New Zealand reflects the same privacy interests as breach of confidence presently does). Indeed, the form of breach of privacy which we do recognize has been described as a "species of breach of confidence".¹⁰⁴ If this is so, and an already well-established cause of action in breach of confidence exists, it would not be wise to continue to maintain a parallel cause of action, acknowledged to be undefined in scope and definition, and as having no substantial history of jurisprudence to infuse its application or promote its understanding.

The privacy interests which the tort of privacy in New Zealand aims to protect, can fall squarely within the ambit of breach of confidence. As Laster has stated, "breach of confidence decisions are quite useful with regard to several key aspects of any privacy claim, including what is private, the duration of any such right, any public interest consideration, and remedies."¹⁰⁵ The only key differences between the two are the existence of a confidential relationship in breach of confidence, and the presence of the test, of whether the disclosure is offensive or objectionable to a reasonable person of ordinary sensibilities, in privacy.¹⁰⁶

Laster's focus on a relationship of confidence and its impact on the additional interests in breach of confidence has led to his assertions of what he thinks is the touchstone for a breach of confidence action - "whether trust can be

¹⁰⁴ *Hosking v Runting* (30 May 2003) High Court Auckland CP527/02 Randerson J para 77 discussing *Campbell v MGN* [2003] EWCA Civ 1373.

¹⁰⁵ Daniel Laster "Breach of Confidence and of Privacy by Misuse of Personal Information" (1989) 7 Otago LR 31, 67.

¹⁰⁶ See *P v D* [2000] 2 NZLR 591, 601 (HC) where Nicholson J sets out the test for the tort of invasion of privacy relating to the public disclosure of private facts.

found to have been reposed in and accepted by the recipient.”¹⁰⁷ I submit that his arguments are based essentially on this now outdated element of “ [r]eliance and acceptance of responsibility”¹⁰⁸ (at least in relation to personal information) and that the bases or interests underlying breach of confidence actions have evolved. The action is no longer concerned primarily with upholding obligations of confidence or recognizing the importance of maintaining the integrity of confidential relationships, as the next section will illustrate. It has evolved to meet the pressing need of protecting individuals’ privacy interests in keeping information which they do not wish to share with the greater population, private. The limited tort of invasion of privacy which New Zealand currently recognizes has the same purpose. Laster’s views need to be updated and perhaps discarded in light of this view. It is on this basis that I argue, in opposition to Laster, that breach of confidence and privacy are not significantly different, and so the law does not need to maintain a distinction between them.

C Privacy and Confidentiality Are Essentially The Same

The approaches of a number of the English courts, as set out below, challenge the validity, nowadays, of Laster’s view primarily applicable in jurisdictions where no tort of privacy exists. A relationship is not needed because the courts now look to more than inherent undertakings of good faith between parties – they see that circumstances, the vulnerability of plaintiffs, and the often unscrupulous methods of defendants in obtaining and divulging confidential or private information” can lead to liability. I submit that privacy, as a separate tort, picked up where a traditional relationship could not be found in breach of confidence, but acted for the same purpose – control over personal information.

1 The Relationship Between Breach of Confidence and Privacy: Protection Already Exists

¹⁰⁷ Daniel Laster “Breach of Confidence and of Privacy by Misuse of Personal Information” (1989) 7 Otago LR 31, 39.

¹⁰⁸ Laster, above, 39.

The most compelling argument for stating that breach of confidence and privacy should be treated similarly is that protection for privacy already exists under breach of confidence. Mummery LJ in *Wainwright v Home Office*¹⁰⁹, for example, as well as stating that there are already torts protecting an individual's bodily, home and personal property, said that breach of confidence can adequately protect "personal information, private communications and correspondence."¹¹⁰ In contrast to Laster's views, Mummery J's approach is one of "incremental evolution, both at common law and by statute....., of traditional nominate torts pragmatically crafted as to conditions of liability, specific defences and appropriate remedies, and tailored to suit significantly different privacy interests and infringement situations".¹¹¹ He maintained that this was a more "promising and well trod path"¹¹² This is the key argument in stating that because privacy and confidentiality are so closely related, there is no need to create a new tort for privacy protection. Protection already exists.

The most important comment which I think is most relevant to rebutting Laster's assertions is that breach of confidence has changed over the past decade, and should keep abreast of changes in the world. In *Theakston v MGN*, Ouseley J recognized this and stated that "...there would seem to be merit in recognizing that the original concept of breach of confidence has in this particular category of cases now developed into something different from the commercial and employment relationships with which confidentiality is mainly concerned."¹¹³ This is the key to understanding the differences which I advance in opposition to Laster.

2 *The Relationship Between Breach of Confidence and Privacy: The Human Rights Act 1998*

¹⁰⁹ *Wainwright v Home Office* [2001] EWCA Civ 2081

¹¹⁰ *Wainwright v Home Office*, above, para 57 where Mummery LJ, cited a comment from The Report by Justice on *Privacy and the Law* at paragraph 30: "it is generally recognised that at the present time there is no existing common law remedy for invasion of privacy."

¹¹¹ *Wainwright v Home Office*, above, para 60 Mummery LJ.

¹¹² *Wainwright v Home Office*, above, para 60 Mummery LJ.

¹¹³ *Theakston v MGN Ltd* [2002] EWHC 137 para 28 Ouseley J.

The approach of the English judiciary as illustrated above, has been infused with considerations of the Human Rights Act 1998, which requires courts, whenever entertaining actions which may impact on a person's freedom of expression, to have regard to privacy, confidentiality, and freedom of expression.¹¹⁴

In *Douglas and Others v Hello! Ltd*¹¹⁵, Lindsay J, while stating that he would not go so far as to recognize a tort of privacy in England,¹¹⁶ assumed that the Human Rights Act 1998 has filled in some of the gaps "as might exist when neither the law of confidence nor any other law protected a claimant".¹¹⁷ Citing the comments made in *Wainwright v Home Office*¹¹⁸ that there was no general right to privacy under the law of England and the Human Rights Act 1998 had not created one,¹¹⁹ Justice Lindsay accepted that while the Human Rights Act does not give rise to an action for privacy under its own head, nonetheless the interests which it protects can be enforced through the action for breach of confidence. This would be through the courts having a strong regard to the privacy interests which the Act protects, when dealing with breach of confidence actions. He opined that the views of Sedley J in the interlocutory judgment of *Douglas and others v Hello! Ltd*¹²⁰ were based on seeing the law as being inadequate to protect and enforce rights to privacy, but that this is not the case. Areas of law such as confidence already provide "protection and enforcement....in theory [and] also in practice...As I have held Mr and Mrs Douglas to have been protected by the law of confidence, no relevant hole exists in English law as such....."

¹¹⁴ See Articles 8, and 10 of The International Convention on Human Rights and Fundamental Freedoms and section 12 of the Human Rights Act 1998.

¹¹⁵ *Douglas v Hello! Ltd* [2003] EWHC Ch 786.

¹¹⁶ *Douglas v Hello! Ltd*, above, para 229 Justice Lindsay.

¹¹⁷ *Douglas v Hello! Ltd*, above, para 229 Justice Lindsay.

¹¹⁸ [2001] EWCA Civ 2081 (CA).

¹¹⁹ *Douglas v Hello! Ltd*, above, para 229 Justice Lindsay.

¹²⁰ [2001] QB 967 (CA) Sedley J.

In *Theakston v Mirror Group Newspapers Ltd*¹²¹ a well-known television presenter visited a brothel, and had engaged in sexual relations with three prostitutes. Photographs had been taken, and one of the prostitutes subsequently sold her story and the photographs to MGN Limited. The plaintiff took an action for breach of confidence and invasion of privacy. The court made it clear that whether or not a tort of privacy exists or not does not necessarily impact on the ability and willingness of the courts to give due weight to privacy interests of individuals as set out in the Human Rights Act 1998.¹²² Ouseley J stated that the convention right to the protection of privacy could always have been considered by the courts in deciding cases such as the present, albeit, under a breach of confidence head (or already established cause of action) and at present that the Human Rights Act privacy rights are afforded to individuals through this cause of action. He then went on to comment that this approach must be informed with the jurisprudence of article 8 of the Convention (as appended to the Human Rights Act) and consequently, whether finding liability under breach of confidence or invasion of privacy may be “little more than deciding what label is to be attached to the cause of action.”¹²³

The court in *A v B plc and Another*¹²⁴ also took the view that the Human Rights Act gave weight to actions for breach of confidence in protecting privacy interests. Lord Woolf CJ mentioned that in regards to articles 8 and 10 of the Convention (protecting privacy and freedom of expression respectively), “[t]hese articles have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified”.¹²⁵ The position which I take is very much supported with the comment of Lord Woolf when he says that: “It is most unlikely that any purpose will be served by a judge seeking to decide whether there exists a new cause of action in tort which protects privacy. In the great majority of

¹²¹ *Theakston v MGN Ltd* [2002] EWHC QB 137 Ouseley J.

¹²² *Theakston v MGN Ltd*, above, para 27 Ouseley J.

¹²³ *Theakston v MGN Ltd* [2002] EWHC QB 137.

¹²⁴ *A v B plc and Another* [2002] EWCA Civ 337.

¹²⁵ *A v B plc and Another*, above, para 4.

situations, if not all situations, where the protection of privacy is justified, relating to events after the Human Rights Act 1998 came into force, an action for breach of confidence now will, where this is appropriate, provide the necessary protection.”¹²⁶

3 Relationship Between Breach of Confidence and Privacy – Breach of Confidence Is Not Enough? *Peck v United Kingdom*

The case of *Peck v United Kingdom*¹²⁷ is an important case in its implications for the law relating to breach of confidence and privacy as it stands in England at present and goes towards finding that breach of confidence, in certain situations, will not be able to afford privacy protection to individuals.

Mr Peck was walking down a public street in England, brandishing a knife. He attempted to commit suicide on the street by cutting his wrists. Closed circuit television filmed the footage of him brandishing the knife, but not his attempted suicide. An operator saw Peck and alerted the police, who came to his aid and got him medical assistance. The council in charge of the circuit system decided to publish certain stills of that footage in a number of publications and later television programmes. This was under the belief that showing such a situation and its successful outcome would promote the advantage of having such a system in place. Peck was subsequently identified by friends and family who saw him in one of the television broadcasts. He decided to take his case to the Press Complaints Commission, but lost on the grounds that he was in a public place at the time, and could not have had a reasonable expectation of privacy in the circumstances. His complaint was dismissed, as was his application to the High Court for judicial review of the decision, even though they recognized that his privacy had actually been breached by the Council’s actions. He therefore took his case to the European Court of Human Rights (ECHR). The ECHR found that the disclosure of the material constituted a disproportionate and unjustified interference with Peck’s

¹²⁶ *A v B plc and Another*, above, para 11.

¹²⁷ [2003] EMLR 15 (ECHR)

privacy in accordance with Article 8 of the Convention of Fundamental Freedoms and Human Rights, and so a remedy was available. What was important in the case was their recognition of the inadequate avenues of redress available for an individual in Peck's situation. The court found that Peck did not have a remedy in *breach of confidence* at the time of the disclosure of the information (and assumedly not presently either) contrary to the submissions of the Crown. This was primarily because it would have been unlikely that the images had the necessary quality of confidence about them or were imparted (notwithstanding that the court did recognize that a positive act of imparting was not necessarily required) in confidential circumstances, as well as once the information was in the public domain, its republication would not have been actionable as a breach of confidence.¹²⁸ The government's submissions were that if the applicant had an expectation of privacy, this could have formed a basis for breach of confidence.¹²⁹ The court rejected this for the reasons above.

I make a tentative submission that perhaps, in light of the introduction of the Human Rights Act (which was not actually in force at the time), the submissions of the Crown were valid. In light of the developments and jurisprudence which had been developing, perhaps Peck *may* have been able to make an argument for breach of confidentiality, especially when looking at the method of obtainment of the footage by the council, and the manner of disclosure, both aspects which can go towards finding an obligation of confidentiality even in light of the publicly accessible place he was in at the time. I am supported by the comments of Randerson J in *Hosking v Runting*¹³⁰ where he discusses this very issue. He says, at paragraph 92 of the judgment, "It may be doubted whether the courts of the United Kingdom would now come to the same conclusion in Mr Peck's case. Although he was undoubtedly filmed in a public place, the overall circumstances might well

¹²⁸ *Peck, above*, para 111.

¹²⁹ *Peck, above*, para 111.

¹³⁰ *Hosking v Runting* (30 May 2003) High Court Auckland CP527/02 Randerson J.

persuade a domestic court that he had a reasonable expectation of privacy and that a duty of confidence arose on the part of the local authority....."¹³¹

4 *Privacy and Confidentiality Should Not Be Treated Differently.*

The approach taken by the English courts especially after the introduction of the Human Rights Act 1998, to breach of confidence should give an indication of how the interests of confidentiality and privacy are not as distinct as Laster would contend. One encompasses the other. This was so, to a great extent even before the introduction of this Act.

I am not advancing the proposition that a relationship in breach of confidence is not still an important element in situations where trade secrets or government secrets are involved, for example. Considerations are different depending on the nature of the information at stake, and obviously in cases involving commercial information, the value is placed on a relationship which has been breached and not just a proprietary value of the information to the plaintiff.

Breach of confidence has been used to protect personal information since it was first incepted. A logical conclusion could be that especially since breach of confidence is founded in equity, it would evolve eventually to meet the needs of its time. This is what equity is about. I am simply asserting that there is no longer such a difference between confidentiality and privacy interests specifically in regard to personal information and that breach of confidence will provide more certainty, scope and definition than the newly recognised and extremely vast notion of privacy.

IV WHERE IS THIS SIMILARITY DEALT WITH BY THE RECENT LAW?

As I have started to illustrate in the previous section, breach of confidence and privacy are interlinked to a great extent already. Both actions protect the privacy

¹³¹ *Hosking v Runtig*, above, para 93 Randerson J.

interests of plaintiffs through the element, as Laster has defined it, of autonomy – autonomy to do as one wishes, to be free from the judgment of others and therefore to be able (to some extent) to control how much of our private lives we divulge to others. As Laster himself acknowledges, breach of confidence has the protection of privacy interests underlying it – “recognizing an individual’s autonomy to determine who should learn about them.”¹³²

A number of cases in England and even Australia (historical and present-day) have therefore dealt with the similarity in the interests of both actions by supporting the view that a relationship of confidentiality is not essential for an action in breach of confidence to succeed. The courts have effectively replaced the traditional need for a relationship with other considerations in finding protection for privacy interests. The *method of obtainment* of confidential information, the *circumstances* in which information is disclosed,¹³³ together with the addition of privacy interests have formed a fluid test in dealing with both the confidentiality and inherent privacy interests of individuals.

A *Method of Obtainment is Sufficient*

The Australian case of *Franklin v Giddins*¹³⁴ found that the unconscionable actions of the defendant in *stealing* trade secrets from the plaintiff was sufficient to found an action for breach of confidence, again where there was no relationship of confidence involved. Although this case did not concern personal information, and the law as to surreptitiously obtained information is relatively uncontroversial, *Franklin v Giddins* still shows the recognition of an important development in Australian legal jurisprudence, which was recognised recently by the Australian High Court in *Australian Broadcasting Corporation v Lenah Game Meats*¹³⁵ where Callinan J said that *Franklin v Giddins* had signaled “the beginning of the demise of

¹³² Daniel Laster “Commonalities Between Breach of Confidence and Privacy” (1990) 14 NZULR 144, 144

¹³³ *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 156 CLR 414, 415 (HC) Deane J.

¹³⁴ [1978] Qd R 72 (SC) Dunn J.

¹³⁵ [2001] HCA 63 (HC).

the need for a prior relationship for the imposition of an obligation of confidence.”¹³⁶ This shows strong support for the development of the action through the discarding of a relationship of confidence and also support for the view that such was recognized in some of the early cases on breach of confidence.

More recently, in England, in the case of *Hellewell v Chief Constable of Derbyshire*¹³⁷ it was stated that the “use of information derived from photographic surveillance of “private acts” would, in the absence of any defence of justification....amount to a breach of confidence”.¹³⁸ This again lends weight to the view that a simple method of obtainment of personal information in a way which invades the privacy of another can be protected adequately under the breach of confidence doctrine. This has been made possible by the willingness of the courts to develop and adapt the requirements of breach of confidence to the circumstances of the time and, consequently have increasingly protected essential private interests of individuals.

B Circumstances of Disclosure Are Sufficient

The similarly factual cases of *Shelley Films Ltd v Rex Features Ltd*¹³⁹ and *Creation Records Ltd v News group Newspapers Ltd*¹⁴⁰ give recognition to circumstances being able to construct obligations akin to confidence in protecting individuals from disclosure of information. Although the information was considered to be of a non-personal nature, the approach taken by the courts can give a general guide as to when obligations of confidentiality to personal information may arise – when the circumstances are so clear as to taint the confidence breaker with knowledge of confidentiality, and so bind them if they break their imputed obligations. Both courts found that the taking of photographs of scenes of a film set

¹³⁶ [2001] HCA 63 (HC) para 301 Callinan J.

¹³⁷ [1995] 4 All ER 473 (QB) Laws J.

¹³⁸ Andrew McRobert “Breach of Confidence: Revisiting the Protection of Surreptitiously Obtained Information” (2002) 13 AIPJ 69, 78 discussing *Hellewell v Chief Constable of Derbyshire*, above, at 478-479.

¹³⁹ *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134 (Ch).

¹⁴⁰ *Creation Films Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1 (Ch).

and a music video set respectively, by photographers amounted to a breach of confidence. The *security measures* (implicit stating of confidentiality) in place and *signs* (explicit mentioning of confidentiality) stating that no photography was to take place were sufficient to fix the defendants in both cases with confidential obligations – the photographers would have known, on reasonable grounds that “[they were] obtaining the information, that is to say the view of the scene, in confidence, at least to the extent that [they were] obliged by that confidentiality not to photograph the scene.”¹⁴¹

In the Court of Appeal case of *Douglas v Hello! Ltd*¹⁴², the court cited *Hellewell v Chief Constable of Derbyshire*¹⁴³ and opined that Laws J had given some very persuasive dicta on the issue. Keene J went on to comment that such a case gave persuasiveness to the view that “a pre-existing confidential relationship between the parties is not required for a breach of confidence suit. The nature of the subject matter or the circumstances of the defendant’s activities may suffice in some instances to give liability for breach of confidence.”¹⁴⁴ Sedley J also went on to make the comment that the law of breach of confidence “no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognize privacy itself as a legal principle drawn from the fundamental value of personal autonomy.”¹⁴⁵

C Considerations of Privacy Interests are Sufficient

The courts have looked at primarily either the nature of the information in question, or the method of obtainment of the information to satisfy themselves that a breach of confidence has occurred, in regards to personal information. It has been

¹⁴¹ *Creation Records Ltd v News Group Newspapers Ltd* (1997) 39 IPR 1, 7-8 (Ch) Lloyd J.

¹⁴² [2001] 2 All ER 289 (CA)

¹⁴³ *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473 (QB)

¹⁴⁴ *Douglas v Hello! Ltd* [2001] 2 All ER 289, 329-330 (CA) Keene J.

¹⁴⁵ *Douglas v Hello! Ltd*, above.

historically acknowledged that this is a welcome extension of the law of breach of confidence, especially where express confidential relationships do not exist.

Reiterating again that Laster's arguments are based on his disputable premise that a confidential relationship or confidential circumstances must be present before a court can provide protection for the unauthorized disclosure of personal information, Lindsay J's approach in *Douglas v Hello! Ltd* show a willingness to focus on the privacy aspects of the personal information at stake in an action for breach of confidence and not on a need for such a relationship.

Lindsay J, in discussing the case of *A v B plc and Another*¹⁴⁶ said that: "A duty of confidence will arise when the party subject to the duty of confidence knows or ought to know that the other person *reasonable expects their privacy to be protected*. The existence of a relationship such as to create a duty of confidence will commonly have to be inferred from the facts."¹⁴⁷

This principle identifies clearly that in most cases where confidences of a personal kind are in issue, a relationship of confidence or circumstances importing such an obligation of confidentiality will be very hard to find. Therefore, the courts will be willing to infer or even create such a "relationship" to satisfy the traditional "confidential circumstances" element. The relationship is inferred from the fact that a person would reasonably expect his or her *privacy* to be protected in certain situations.

Lord Woolf recently concurred in this view in the case of *A v B plc* where he, in giving due weight to privacy interests in an action for breach of confidence, stated that "If there is an intrusion in a situation where a person *can reasonably expect his privacy to be respected* then that intrusion will be capable of giving rise to liability in an action for breach of confidence unless the intrusion can be

¹⁴⁶ *A v B plc v Another* [2002] EWCA Civ 337.

¹⁴⁷ *Douglas v Hello! Ltd* [2003] EWHC Ch 786 para 186 Justice Lindsay citing *A v B plc and Another* [2002] EWCA Civ 337 at para 11.

justified”¹⁴⁸ (emphasis added). This also picks up on the earlier comments made by Lord Philips in *Campbell v Mirror Group Newspapers* (which I shall discuss further below) that reasonable expectations of privacy can form an inherent part of the action for breach of confidence, and so can stand in replacement of a relationship of confidence.¹⁴⁹

Further on in *Douglas Lindsay J* stated that “the scope for breach of confidence must now be evaluated in light of the obligations in the Human Rights Act 1998, via regarding the opposed rights in Articles 8 (privacy) and 10 (freedom of expression) of the European Convention on Human Rights as “absorbed into the action for breach of confidence and as thereby to some extent giving it new strength and breadth.”¹⁵⁰

This is important in recognizing that the courts must place great emphasis on individual rights, especially when it comes to individuals’ privacy, rather than on the artificial need for a relationship. Consequently, as there is no recognised privacy tort in England, those interests would best be protected by being subsumed within an action that can be widely interpreted to enable that protection. Hence, the courts would be more willing to loosen the strings around strict requirements, and be encouraging of international human rights legislation such as embodied, in England, in the Human Rights Act 1998, to help support and justify a generous application of the law.

One final comment which is important for the extent to which privacy interests are becoming a replacement test for a relationship is through the recognition that when a court is considering whether to grant relief in a journalistic

¹⁴⁸ *A v B plc and Another* [2002] EWCA Civ 337 para 11.

¹⁴⁹ *Campbell v Mirror Group Newspapers Limited* [2002] EWCA Civ 1373 para 70 Lord Philips.

¹⁵⁰ *Douglas v Hello! Ltd* [2003] EWHC Ch 786 para 186 Justice Lindsay.

case, which may affect the Convention right to freedom of expression, the court must have particular regard to any relevant privacy code/s.¹⁵¹

Again, this would seem to reiterate that privacy interests must be regarded as important in any, albeit journalistic, case wherever relief may be granted and which may impact on freedom of expression. This would implicitly recognize that relevant privacy codes, which exist and confer limited rights on plaintiffs (in regard to the broadcaster) but which do not have the force of law behind them, signals a willingness to incorporate privacy jurisprudence into the test for breach of confidence. The courts clearly believe that such privacy protection guidelines must be a factor to be balanced when deciding cases of breach of confidence involving personal information, and where no traditional relationship of confidence can be inferred.

D A Problem is Encountered – Is there too much overlap between Breach of Confidence and Privacy?

The court in *Campbell v Mirror Group Newspapers Ltd*¹⁵² seemed to incorporate a privacy-type analysis in determining whether there was a breach of confidence *as a whole*. Lord Philips firstly asked whether the information about Miss Campbell attending drug counseling was confidential (or private) by applying the test of whether “a reasonable person of ordinary sensibilities, on reading that Miss Campbell was a drug addict, would find it highly offensive, or even offensive, that the Mirror also disclosed that she was attending meetings of Narcotics Anonymous.”¹⁵³ The court did not find any breach of confidentiality, it seems, firstly because the facts disclosed were not sufficiently confidential, applying the test above. Lord Philips then went on to state that the disclosure of such facts was not

¹⁵¹ *Douglas v Hello! Ltd* [2003] EWHC Ch 786 para 186 Justice Lindsay discussing section 12(1) and (4) of the Human Rights Act 1998.

¹⁵² [2002] EWCA Civ 1373.

¹⁵³ *Campbell v Mirror Group Newspapers* [2002] EWCA Civ 1373.

“of sufficient significance to shock the conscience and justify the intervention of the court.”¹⁵⁴

It seems that the Court of Appeal replaced the test of breach of confidence for personal information with the test for privacy as found in New Zealand – with no mention of a confidential relationship or confidential circumstances being explicitly made. This may be by reason of the fact that privacy, in the way Miss Campbell was trying to put forward her case, was accepted as a *branch* of breach of confidence, as was suggested by counsel, and apparently accepted by the court. The key passage in the judgment to this effect maintains “The development of the law of confidentiality since the Human Rights Act 1998 came into force has seen the information described as ‘confidential not where it has been confided by one person to another, but where it relates to an aspect of an individual’s private life which he does not choose to make public.’”¹⁵⁵ This judgment it implicitly recognizes that actions which can be termed as protecting plaintiffs from a breach of privacy can be entertained by the courts again, as reiterated in the above mentioned cases, without a need for a confidential relationship. While it is desirable that privacy interests are adequately protected under breach of confidence, it does not seem wise to simply transplant a privacy based test into a breach of confidence action. While I still assert that the two tests effectively protect exactly the same type of information, and have the same interests to protect, the elements are slightly different in each and must be incorporated into breach of confidence more so than arbitrarily transplanting the elements of privacy into an action and calling it breach of confidence. Some stability and definition is still required for plaintiffs to have an opportunity of gaining the maximum protections possible under the law.

¹⁵⁴ *Campbell v Mirror Group Newspapers*, above, para 56 Lord Philips. [1990] 1 All ER 100, 110.

¹⁵⁵ *Campbell v Mirror Group Newspapers*, above, para 70 Lord Philips.

V WHERE TO FROM HERE?

We have seen Laster's arguments, in the context of the traditional view of breach of confidence, on why a relationship of confidence is an essential prerequisite to found an action in breach of confidence. We have also seen the similarity in the important interests which underlie both breach of confidence and privacy. The approach of the English courts and how they dealt with the similarity in interests between the two actions, was also discussed above. The final considerations must therefore be whether *legislation* would be a more prudent solution in the area of protection of personal information also whether it is even necessary or wise to follow the same path in New Zealand as has been taken by our Commonwealth neighbours.

A Is Legislation the Answer?

An argument for legislation to protect privacy interests was made in England in 1970, but no Parliamentary action has been taken to date (if you exclude the Human Rights Act 1998). The Report by Justice was satisfied that a case had been made out for this, including among other things, the growth of technology which give new means of intrusion without any breach of existing laws¹⁵⁶; the accessibility of data collection storage facilities and the ease with which this can be done¹⁵⁷; and the publication of private material through global publication mechanisms.

It was further argued that if developing the law based on common law tort of invasion of privacy, there would need to be a substantial number of cases dealing with personal confidential information, which would take too much time – “it seems likely that very many years would be required to bring the law of privacy in England

¹⁵⁶ A Report by Justice *Privacy and the Law* (Stevens and Sons Ltd, London, 1970) para 110.

¹⁵⁷ A Report by Justice, above, para 114.

to the point which it has reached in the U.S.A. today. And that, in our view, would be far too late.”¹⁵⁸ If a tort of privacy should be established firmly in England (or in any jurisdiction) legislation would arguably give the most a consistent framework without the need for a piecemeal approach as has been the case, for example in the United States.¹⁵⁹

This was the view of Lindsay J in *Douglas v Hello! Ltd*¹⁶⁰, where he stated that the subject of privacy is “better left to Parliament which can, of course, consult interests far more widely than can be taken into account in the course of ordinary inter parties litigation.”¹⁶¹ Justice Lindsay recognized that there are areas where the law of breach of confidence may be inadequate to protect all of the interests which may arise in disputes, and commented on the judgment of *Peck v United Kingdom*¹⁶² where the inadequacies of the English law in this regard, were highlighted. Lindsay J concludes “That inadequacy will have to be made good and if Parliament does not step in then the courts will be obliged to.”¹⁶³ The course of the judiciary “creating the law bit by bit” will be thrust upon the judiciary but only in a case where the “existing law of confidence gives no or inadequate protection.”¹⁶⁴ While I will focus on the issue of the “answer” legislation later on, I will argue for a different interpretation of this statement. If Parliament has already seen fit to recognize that privacy interests exist and should be afforded adequate protection, as set out in the Human Rights Act, surely this is encouragement for the implementation of this policy into the judicial process. But this does not necessarily mean through the process of creating a tort of privacy. The same interests can be protected by the courts developing the law through equitable principles, and well-reasoned jurisprudence but in the context of breach of confidence. And, perhaps instead of the English court considering that it has to be *forced* into the role of

¹⁵⁸ A Report by Justice, above, para 121.

¹⁵⁹ A Report by Justice, above, para 122.

¹⁶⁰ [2003] EWHC Ch 786.

¹⁶¹ *Douglas v Hello! Ltd* [2003] EWHC Ch 786 para 229 Justice Lindsay.

¹⁶² [2003] EMLR 15 (ECHR).

¹⁶³ *Douglas v Hello! Ltd* [2003] EWHC Ch 786 para 229 Justice Lindsay.

¹⁶⁴ *Douglas v Hello! Ltd*, above, para 229 Justice Lindsay.

creating protection for individuals via a new tort, they could be *encouraged* into developing the law, where law already exists.

B The New Zealand Position

It has been recognised, in New Zealand, that a relationship of confidentiality can be found implicitly “as a result of the individual circumstances and the objectively reasonable expectations of the parties,”¹⁶⁵ although New Zealand courts still focus on the need for a relationship, in the traditional sense.¹⁶⁶ In *Crown Houses (New Zealand) Ltd v Cooper*, for example, France J after citing the “essential” element of an obligation of confidence as set out in *Coco v AN Clark*¹⁶⁷, reiterated that a relationship of confidence implies some measure of positive dealing between the relevant parties.¹⁶⁸ Nicholson J in *Earl v Baddeley* by virtue of an employment-type confidential relationship being in existence, the relationship of confidence element was fulfilled— the defendant was under an obligation of confidence because of his involvement as a member of a committee who dismissed the plaintiff from his employed position.¹⁶⁹ A case more relevant to personal interests is the case of *P v D*¹⁷⁰ where arguments based on breach of confidence in relation to medical and psychiatric information failed. The judge stated that on the facts, that plaintiff in no way could have been in a confidential relationship with the defendant. The confidant had simply gleaned information about the plaintiff (a high profile celebrity who had previously been in a psychiatric institution) from other sources.¹⁷¹ The limitations on the present law relating to breach of confidence, such as maintaining a relatively conservative view on the need for a confidential relationship, will only hinder progress in developing the law.

¹⁶⁵ Katrine Evans “Of Privacy and Prostitutes” (2002) 20 NZULR 71, 96.

¹⁶⁶ Evans, above, 96.

¹⁶⁷ [1969] RPC 41 at 47 (HC) Megarry J.

¹⁶⁸ (4 April 2003) High Court Napier CP3/03, 21 France J

¹⁶⁹ (18 May 2001) High Court Auckland CP583-5D00, para 13 Nicholson J.

¹⁷⁰ *P v D* [2000] 2 NZLR 591 (HC).

¹⁷¹ *P v D*, above, 595 Nicholson J.

The modern developments in society have in turn pushed for modern developments in the law. It is in this sense that Randerson J supports a traditional cause of action to adapt to protect privacy interests of the twenty-first century. It is on this basis that I submit that his comments hold great force, and so should be implemented into practice.¹⁷²

Recently, in response to the shake-up of privacy law by Randerson J, Rosemary Tobin makes essentially the same comments as Laster did in 1990. She says that “the two causes of action are designed to protect completely different things....[t]he actions are conceptually distinct and should remain so.”¹⁷³ Again, while Tobin advances the same arguments, she does not consider that the recent English approach has or should change our approach to breach of confidence, but seems fixed on the idea that personal information has not called for a differing approach in the application of the traditional doctrine. Perhaps this is where the problem lies. In not accepting that an equitable action can evolve to meet certain circumstances, even where the possibility of creating a whole new tort exists, prudent development of the law will always be hindered. This was recognised in *Theakston*¹⁷⁴ and *A v B plc and Another*.¹⁷⁵ She goes on immediately to say that the development was indeed necessary in order for courts to protect “the person’s reasonable expectations of privacy. No such development is necessary where a privacy tort is already in existence.”¹⁷⁶ This is not true.

Breach of confidence should be utilized to protect privacy interests that can fit into the elements of breach of confidence rather than embarking on a task to find the extent to which the elements of privacy protect privacy interests themselves.

¹⁷² See Katrine Evans “Of Privacy and Prostitutes” (2002) 20 NZULR 71 at 96-97, where she states it has indeed been recognised that if in a particular case a plaintiff does not plead privacy or it fails on the particular facts for whatever reason, New Zealand courts may have regard to the English courts’ approach to breach of confidence and personal information – “If a person comes into possession of information which is obviously highly sensitive, and which is not meant for broader publication, that person’s conscience may be fixed by an obligation of confidence, which is remediable.”

¹⁷³ Rosemary Tobin “Privacy: One step Forward, Two Steps Back” (2003) NZLJ 256, 258.

¹⁷⁴ [2002] EWHC QB 137.

¹⁷⁵ [2002] EWCA Civ 337.

¹⁷⁶ Rosmeary Tobin, above, 258.

Breach of confidence could encompass the situations which the invasion of privacy does at present. For those situations which it does not cover, privacy will be able to offer protection but only to the extent left by the inadequacies of breach of confidence – which would not be substantial considering the limited form of privacy which New Zealand protects at the moment. Tobin's comment in regards to privacy, that 'the common law has been developing precisely as it is intended to do – on a principled basis, incrementally and case by case' should be equally applicable to the development of breach of confidence to do the same, and within already established deeply entrenched legal jurisprudence so far.

C “But England and New Zealand are Different”

There have been strong arguments about the reasons for the development of breach of confidence in England to the extent today in protecting privacy interests, primarily because no other avenue has been available. The Court of Appeal in *Kaye v Robertson*¹⁷⁷ made it clear that there was no common law tort of invasion of privacy. It is on this basis that it has been asserted that the English judiciary has therefore been forced to develop breach of confidentiality in the way they have to sufficiently protect plaintiffs' privacy interests. It follows that since New Zealand already recognises a limited right to privacy, the development of breach of confidence following England, would serve no useful purpose.

My response to this is that even if the English judiciary has been forced into developing the law of breach of confidence, this does not change the fact that it is perhaps a more prudent course to take than creating or maintaining a new tort parallel with existing legal recourse. In adapting an existing cause of action to fit the needs of their society, where no other option has been available, significant protection has been afforded to individuals in England, who would not otherwise have received such. The law is working, and it is working relatively well. In regards to why New Zealand should adopt the English approach, my argument rests on two considerations - substantial benefits to the court and benefits to the public.

¹⁷⁷ *Kaye v Robertson* [1990] IPR 147 (CA).

If a parallel action is available for both privacy and breach of confidence, the law would no doubt become conflated and also confusing. If the courts are able to entertain actions to protect privacy interests under two causes of action (which they undoubtedly are, although not to the extent of the English courts) the process of determining which action should be invoked and which is best to grant a remedy under may become time-consuming and lead to inefficiency in the legal system. If there were one single cause of action, the law relating to privacy interests would be able to be defined to some degree. This would in turn lead to promoting its understanding and application in cases. Furthermore, judges would be able to develop relatively consistent principles and rules applicable to the area of personal information protection. The law from both original causes of action can be used to inform the application of considerations more relevant to each but within the confines of a unified cause of action.

As to the wider public benefit, with one single cause of action, media and possible defendants would at least know where they stand in regards to determining what a sufficient public interest is in the circumstances of any particular case. If two public interest tests are available, as is arguably the case according to Laster, depending on whether the action is brought under privacy or breach of confidence, this places an unfair burden on defendants in finding out which public interest to apply. If there was one action available, at least there would be some certainty as to what will satisfy the public interest in a general case.

VI CONCLUSION

Raymond Wacks has said that “[e]xcept as a general abstraction of an underlying value, it should not be used as a means to describe a legal right or cause of action.”¹⁷⁸ He links the problems inherent with not being able to protect individuals’ privacy as being linked to the standpoint of privacy to begin with. If

¹⁷⁸ Raymond Wacks *The Protection of Privacy* (Sweet & Maxwell, London, 1980) 21.

legislation is the only reasonable remedy in the circumstances) should be enacted to protect certain privacy interests, this should be done, as mentioned, not from the standpoint of privacy, as it would add more problems than it solves.¹⁷⁹ He would focus on a regulation of personal information via legislation as the core answer for the core problem faced by individuals. A circular argument perhaps. The law is inherently ambiguous, but we can only solve the law if we solve the ambiguity of the concept. This seems like a task which the courts and commentators have so far been unable to do. Instead, privacy interests which have been defined as being able to fall within an autonomy type basis as Laster argues, can and should be protected within the doctrine for breach of confidence.

Laster's arguments are based on an assumption that breach of confidence requires a confidential relationship and that it cannot adequately protect privacy interests - "the action is inadequate because, despite arguments to the contrary, the action appears to lie only in circumstances where there exists a relationship of confidence between the plaintiff and the person who breaches it - a relationship that does not exist in typical instances of either "intrusion" or "public disclosure".¹⁸⁰ This view is now misplaced, as has been discussed above.

A focus on previous interests of which breach of confidence sought to protect will obscure the range of interests which it is now capable of protecting now. If the basis is asserted as being only to "protect the business interests of [a] plaintiff rather than his interests in preserving privacy"¹⁸¹ then the law will of course stand still and not be able to protect that which it is demonstrably capable of. New Zealand should follow England's lead. As Morris J has said, "the action of breach of confidence is one developed by the courts and as such is a *living evolving doctrine*."¹⁸² The law has developed in England. It should do so here.

¹⁷⁹ Wacks, above, 22.

¹⁸⁰ Wacks, above, 15.

¹⁸¹ Wacks, above, 16.

¹⁸² *Roselea Funeral Home Ltd v Willetts* (8 November 1996) High Court Rotorua CP10/95, 7-8 Morris J.

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