

NEW ZEALAND MEDIA & ARTS LAW UPDATE

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RECENT DEVELOPMENTS

[247] The last year has once again been full in terms of media and arts law developments in New Zealand, with the impact of the internet featuring strongly. A variety of issues have arisen in defamation cases, ranging from the extent of qualified and absolute privilege, to procedural issues surrounding summary judgment. Child pornography, and the growing use of the internet dominated censorship developments.²

DEFAMATION

Qualified privilege

Lange v Atkinson,³ discussed previously,⁴ has played itself out and generated new attempts to expand the law relating to qualified privilege. In *Lange* the Court of Appeal affirmed the existence of a defence of qualified privilege where a statement is untrue, as long as the circumstances of publication are appropriate, the defendant was not motivated by ill will against the plaintiff and has not taken improper advantage of the occasion of publication, and there was no carelessness. The defence clearly applies to general publication of statements about politicians, past, present or future. Mr Lange has now settled the matter and will not pursue it further. However, the previous note also referred and that involved defamatory statements about local body officers published in three letters to the media.⁵ The decision of the High Court that the defence was not available in such circumstances has now been [248] affirmed in

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² More developments will be considered in issue 6(4) of the *Media & Arts Law Review* concerning open justice and suppression orders, the Broadcasting Standards Authority, computer hacking and privacy, breach of confidence Parliamentary privilege, whistleblowers, and copyright.

³ [2000] 3 NZLR 385.

⁴ See (2000) 5(3) *Media & Arts Law Review* 196.

⁵ *McLean, Smale & Phillips v Vickery* (Unreported, High Court, Auckland, CP 283/97, 29 May 2000). See (2000) 5(3) *Media & Arts Law Review* 196.

the Court of Appeal.⁶ The Court rejected firmly an argument that *Lange* could apply to the facts or that the defence should be extended. The subject matter of the publications was held not to be political discussion or to fall within an extension of it because the subjects of the defamation were paid servants of a local body, who contributed to policymaking but were not the ultimate policy makers. This meant there was no clear public interest in allowing the defendant to speak and write freely. The Court also noted the allegations were of serious criminality, which it thought must not be disseminated too widely and were thus not made on a qualifying occasion, the sixth criteria set out in *Lange*. The result was the same when the Court considered the possibility of qualified privilege on first principles — it was not in the public interest to ventilate such allegations through the media. It is not surprising the case failed the subject matter and occasion criteria — the facts fell fairly clearly outside the ratio in *Lange*, and although the Court did not have to decide the issue, the defendant would probably have lost the defence anyway because the evidence suggested he had not taken care in publishing the statements. However, what is hopeful about *Vickery* in terms of press freedom is that the Court left open whether *Lange* should be extended to protect discussion in the context of local government, finding it unnecessary to decide this issue.⁷ A more difficult example also yet to be tested will be the position of state-owned enterprises and those involved in the operation of such hybrids. These entities straddle both the public and the private sector, and have at times conflicting statutory responsibilities, financial accountability and commercial profitability being one example.

Ex parte injunction

In *Alexander v Rountree et al*,⁸ the Court of Appeal dismissed an appeal against an interim injunction restraining the plaintiff from publishing an allegedly defamatory letter about a firm of solicitors in relation to their professional services. The solicitors commenced proceedings seeking damages for defamation and obtained an ex parte injunction restraining Alexander from further publication of the statements. The Court

⁶ *Vickery v McLean & Ors* (Unreported, Court of Appeal, CA 125-00, 20 November 2000).

⁷ The Court even hinted its future acceptance of extension to local body politicians, by noting that in *Vickery* it was 'of major moment to notice that those who have been defamed are not politicians, whether national or local' (para 17).

⁸ Unreported, Court of Appeal, CA 229/00, 15 February 2001.

noted that the well-established jurisdiction to restrain publication prior to trial is only to be exercised for clear and compelling reasons,⁹ but held that the appeal had no merit because the statements made by Alexander clearly had the capacity to cause considerable harm to the solicitors in their profession. It pointed out specifically to the appellant (who represented himself) that the interim order did not prevent him from preparing for and defending the defamation claim.

Absolute privilege

*Buchanan v Jennings*¹⁰ was a straightforward application of rather difficult principles relating to the application of absolute privilege to statements made by MPs outside parliament. Jennings, a list MP, expressed concerns in a defamatory manner about the behaviour of the plaintiff during a parliamentary debate. The remarks were reported in the print media and on the radio. Mr Jennings was later interviewed by a reporter for the Independent newspaper, during which he stated he did resile from one element of the remarks but not from another. The original statement and the refusal to resile were reported in a later published article. The newspaper was not sued. The question was whether an original defamatory statement protected by absolute privilege had been repeated outside the House even though the words used had not actually been repeated. The Court referred to *Peters v Cushing*¹¹ where a [249] defamatory statement was made on television and later said by the defendant MP in the House to be referring to the plaintiff. Further reference was made to the original programme and the identity of the plaintiff by the defendant outside the House on television some months later. A first cause of action relying on what was said in Parliament to identify the plaintiff failed because it was seen to breach absolute privilege by calling into question what was said there. However, a second action, which did not rely on the Parliamentary statement to identify, was held to be a republication in the second programme of the defamation in the first programme. In *Buchanan*, the High Court similarly held that Jennings had crossed what it saw as a clear line because his statement was freely made outside the House and effectively repeated the defamation made in the House by refusing to resile from the original remarks. The Court thought

⁹ *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129. See (1999) 4 *Media & Arts Law Review* 191.

¹⁰ Unreported, High Court, Wellington, CP 109/98, 4 April 2001.

this example clear enough not to have any future chilling effect on members of parliament.

Summary judgment procedure

Summary judgment has been available in defamation proceedings since 1998, and it appears that a significant number of applications for the procedure are now being made, and by both parties. Objected to by some of the media because it is seen to 'arbitrarily force newspapers, broadcaster and journalist to argue complex issues of democracy, press freedom and government accountability in haste' and at a low level in the court process,¹² the fast-track High Court Rules procedure based on affidavit evidence is now being exploited by defendants, who previously regarded this avenue as beneficial to plaintiffs because it adds to the expense and time spent in litigation, and increases the pressure to settle. Unless there is no possible defamatory meaning, or absolute defences can be made out, summary judgment should be rare for a defendant. However, *Ferrymead Tavern v The Christchurch Press*¹³ is an early example of a successful defendant application for summary judgment against plaintiffs. In circumstances where a reporter had been given incorrect information by the police from a media tape and the newspaper published an apology the following day, the defendant argued it had an absolute defence of statutory qualified privilege which could support its application. The Master held that summary judgment could be sought rather than a strike out application where the defendant could show that none of the plaintiff's causes of action could succeed and that there was no arguable answer to the defence raised. After examining the nature of the statutory defence, the court held there was sufficient evidence to discharge the defendant's onus of proof and no evidence led by plaintiffs to challenge it. It was not sufficient for a plaintiff just to raise 'hypothetical difficulties unsupported by any positive assertion or corroborative documentation.'¹⁴ More recent decisions have gone against defendants. Summary judgment was declined in *Breitmeyer v The Christchurch Press Company Ltd*,¹⁵ where it was applied for by the defendant. The first defendant newspaper had obtained

¹¹ [1999] NZAR 241.

¹² *The Independent*, 6 June 2001.

¹³ (1999) 13 PRNZ 616.

¹⁴ *Ibid* 628.

and published information from the police about the plaintiff which the latter alleged was defamatory. Possibly inspired by *Ferrymead*, the Christchurch Press applied for summary judgment on the ground that it could rely on the defence of statutory qualified privilege because the article was a fair and accurate report issued for the information of the public on behalf of the police and was a matter of public interest. However, unlike in *Ferrymead*, the newspaper was unable to satisfy the Court that the defence was made out. The [250] second defendant, the Attorney General, also applied for summary judgment on the ground that the plaintiff's statement of claim disclosed no cause of action. That application was also dismissed, the Court requiring the A-G to prove that the plaintiff's cause of action in defamation could not succeed at all. There was one statement that was potentially defamatory and the A-G could not satisfy the Court that it had an absolute defence to that allegation. And in *Sprott v Mitchell*,¹⁶ the defendant argued unsuccessfully for summary judgment on the basis the words complained of did not have the meaning asserted by the plaintiff.

Successful plaintiff applications will be also rare, in particular where substantial defences have been pleaded. It seems no reported applications by plaintiffs have so far been successful. *Dyer Whitechurch & Bhanabhai v Pauanui Publishing Ltd*¹⁷ was an unsuccessful summary judgment application for a declaration of liability for defamatory statements contained in an article, one of which suggested the plaintiff may have been a party to misappropriation from a solicitors' trust account. This was the most serious of four allegations made by the plaintiff, who conceded that there were evidential issues relating to it, which were not suitable for summary judgment. The Court held that it was not appropriate to make a declaration of defamation in respect of the three less serious allegations because it was wrong to handle the matter on a piecemeal basis given that the most serious allegation required trial as to its merits. The Court also noted that the plaintiff could hardly claim to be defamed if the defendant were to prove the truth of the most serious allegation as then the publication as a whole may be substantially true.¹⁸

¹⁵ Unreported, High Court, Christchurch, CO 175-99, 30 June 2000.

¹⁶ Unreported, High Court, Auckland, CP 193-SD00, 12 December 2000.

¹⁷ Unreported, High Court, Wellington, M1736-IM99, 28 June 2000.

¹⁸ Another plaintiff claim against the same publishers is currently before the High Court: *The Independent*, 6 June 2001.

Application for new trial

In *Weir v Karam*,¹⁹ the High Court declined to exercise its discretion to interfere with a jury verdict for a defendant. The plaintiff sought a new trial on the grounds that in respect of an alleged defamatory meaning, the defence of honest opinion found by the jury should not have been available because the relevant words had been presented as fact and were intended to be read as factual. The second plaintiff argued the jury's findings that certain words were not defamatory went against the weight of the evidence. The Court declined both applications, noting that it would interfere in an action for defamation and grant a new trial on strong grounds only, that the findings of the jury were properly open to it, and that the defence of honest opinion is not confined to non-factual judgments.

Nominal damages

*Ti Leaf Productions Ltd v Baikie*²⁰ concerned damage to the reputation of a film company which was said to flow from both defamation and contract, but which was only nominal. The plaintiff argued successfully that the defendant had breached a tenancy agreement not to make negative comments about it during the making of a film. However, although nominal damages of \$500 were awarded, the plaintiff was not able to establish that the publication to their MP and others had caused withdrawal of support from investors and the eventual abandonment of the project, taking into account the modest pace of production, the amount expended on pre-production and the absence of adequate planning for the film. Expenses of \$5000 were awarded to the plaintiff, as they had flowed in part from the defendant's actions.

Application of law of negligence

*Midland Metals Overseas Pte Ltd v Christchurch Press Company Ltd*²¹ suggests that New Zealand courts hold [251] steady in refusing to adopt the principles in *Spring v Guardian Assurance*,²² that a negligence action can be used to protect reputation. The first defendant, the Christchurch Press, published an article about problems Orion, a power company, was having with cables supplied by the plaintiff. The plaintiff

¹⁹ Unreported, High Court, Auckland, CP 139-98, 20 September 2000.

²⁰ Unreported, High Court, Christchurch, CP 9-97, 3 October 2000.

²¹ Unreported, High Court, Christchurch, CP 68-99, 11 December 2000.

pursued actions in defamation, injurious falsehood, breaches of the *Fair Trading Act 1986* and negligence. In this appeal from decisions of a Master striking out parts of the statement of claim and dealing with particulars to properly delineate the proceedings, the High Court clarified that while aggravated damages generally relate to injured feelings of an individual and corporations do not have injured feelings, this did not necessarily mean that the plaintiff company might not be entitled to recover compensatory damages as a result of aggravating conduct of the defendant. However, the Court also found it difficult to see how it could contemplate recognising a duty of care in negligence in the case, referring to previous clear statements of principle from the Court of Appeal that the law of negligence has no place in claims for damage to reputation.²³ The High Court said allowing concurrent claims would open the door to floodgate implications.

Likelihood of pecuniary loss

*Rural News Ltd v Communications Trumps Ltd*²⁴ is an interesting decision in which the appellant was a newspaper which published statements in a satirical column about the respondent, a public relations company. The statements were found by the trial judge to mean, among other things, that the company had given unethical and unprofessional advice and advised a client not to tell the whole truth about genetically modified salmon trials it was carrying out. Although one view might be that it is difficult to defame a public relations company on such a basis,²⁵ the High Court upheld the finding of the trial judge that there was a likelihood of pecuniary loss flowing from such statements in this case, as required by s 6 of the *Defamation Act 1992*, when a company wishes to sue. However, acknowledging some tension in so doing, the High Court went on to uphold a finding that the public relations company had not proved actual pecuniary loss in this case. The company received the declaration it had sought in the alternative to damages, but the matter of a costs order made against it in the trial judge's discretion was referred back, because the appellant

²² [1995] 2 AC 296.

²³ *Bell-Booth Group Ltd v A-G* [1989] 3 NZLR 148, *Balfour v A-G* [1991] 1 NZLR 519.

²⁴ Unreported, High Court, Auckland, AP 167-SW00, 4 April 2001.

²⁵ It was argued by editor, Warren Berryman, commenting on this case in *The Independent*, 2 May 2001, that while it would defame a journalist to say he deliberately withheld information from his readers, it would not be defamatory to say a PR-man did the same thing because concealing embarrassing information is something PR-people are paid to do.

had not had adequate opportunity to make submissions on the exercise of such an uncommon discretion.

Reputation and credibility of newspapers

*W & H Newspapers Ltd v R Oram*²⁶ is a warning to the media of the consequences of negligence by a journalist resulting in the publication of defamatory material. Oram was a senior and experienced reporter who allowed the publication of a photograph of an innocent individual incorrectly described in a newspaper as a 'Gang Chief' claimed by police to be a career criminal and leader of career criminals. A complaint quickly followed. Oram accepted responsibility for the mistake but argued the system at the newspaper for dealing with photographs was inadequate. He was eventually dismissed for serious misconduct and pursued a personal grievance [252] action arguing the decision was not a fair and reasonable one. The matter found its way to the Court of Appeal which upheld the decision to dismiss on the basis that it was open to the employer, acting fairly and reasonably, to have reached the view that Oram's conduct meant he had lost the confidence of his superiors that he could be relied on in the future, notwithstanding his previous unimpeachable employment record with the newspaper. The Court had regard to the nature of the business of publishing newspapers and the need to rely on reporters for the veracity of information published, which was seen as fundamental to the reputation and credibility of the newspaper.

Defamation by, rather than of, Prime Minister

In August 2000, New Zealand's Prime Minister Helen Clark wrongly described an Auckland man as a murderer when in fact he had served time in prison for manslaughter.²⁷ The matter has been settled with an apology and payment of a confidential settlement of \$55,000, the details of which were leaked to the media. Opposition parties took the opportunity to engage a public debate about whether the payment should have come from the Prime Minister personally rather than government funds.

²⁶ Unreported, Court of Appeal, CA140/00, 3 May 2001.

²⁷ *Christchurch Press*, 11 May 2001.

Levels of damages

A District Health Board and three of its executives are reported to be suing a part-time psychiatric nurse for nearly \$1.8 million for publishing a newsletter on notice boards around a hospital which made fun of senior managers at the hospital.²⁸ The claim is exceptionally high and based on loss of future earnings of the executives.²⁹ The defendant is reported to have a net worth of \$19,699, and has filed an application for dismissal of the claim as vexatious and an abuse of court process.

CENSORSHIP

Child pornography

*Moonen v Film and Literature Board of Review*³⁰ noted previously, required sound reasons to be given whenever our censors wish to prevent adults ever seeing certain publications. However, the Board of Review, to which the Moonen photographs were returned for reclassification following the Court of Appeal decision, did not approve.³¹ In the decision reclassifying the Moonen materials, it went so far as to say it 'would ... have been prepared to designate child pornography as outside the protection of s 14 (of the Bill of Rights) altogether',³² and 'in the absence of the Court of Appeal's decision in *Moonen*, [it would have] inclined to the view that the freedom of expression guaranteed by the Bill ... was not engaged in this case, in so far as child pornography is not protected speech ... the Court may wish to reconsider its views on this topic in due course.'³³

This extraordinary position was shared by the previous Chief Censor, and is based on a view that child [253] pornography can be easily identified and defined. However, the Board did not find that the need to take account of freedom of expression

²⁸ *New Zealand Herald*, 16 May 2001.

²⁹ The highest jury award to date is \$675,000 in damages in *Columbus v Independent News Auckland Ltd* unreported, 7 April 2000, HC, Auckland, CP 600/98: see (2000) 5(3) *Media & Arts Law Review* 196.

³⁰ (2000) 5 HRNZ 224. See (1999) 4 *Media & Arts Law Review* 191 and (2000) 5(3) *Media & Arts Law Review* 196.

³¹ Decision of the Board of Review, on reconsideration of the classification of various publications owned by GA Moonen, 8 September 2000.

³² *Ibid* 13.

prevented it from reaffirming its previous classification of all material in *Moonen*, except for two photographs.³⁴ Concerns about the proliferation of child pornography, particularly on the internet, continue to dominate the discourse about censorship in New Zealand.³⁵

Human rights

*Living Word Distributors Ltd v Human Rights Action Group (Wellington)*³⁶ also noted previously, reached the Court of Appeal, where the Court overturned a decision of the High Court banning as objectionable two videos discussing the rights of homosexuals in an extremely negative context. The Court of Appeal had to consider the effect of s 3(3)(e) of the *Films, Videos and Publications Classification Act 1993* which provides that material which '[r]epresents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in s 21(1) of the Human Rights Act 1993' can be found to be objectionable, and whether this trumped freedom of expression which was required to be taken into account in *Moonen*. The Court held there was no clash of rights values because the section did not create a special stand-alone topic for censorship which could embrace the videos. It merely pointed to factors, which may be given weight in the censorship process. Freedom of expression was to be given full weight in assessing whether the videos were likely to injure the public good. The right to be free from discrimination was not directly relevant at that point, but the values underlying it could be imported and become a particular consideration if the subject matter is right. The judgment emphasizes the importance of freedom of expression in the process of censorship and but unfortunately gives a rather vague place to values underlying human rights in relevant cases. This part of the decision caused some concern from human rights activists, who now see little purpose for the inclusion of s 3(3)(e) in the Act.³⁷ However, the Court also clarified

³³ Ibid 24.

³⁴ Ibid Appendix, 5.

³⁵ See discussion of the recently announced Censorship Review, and of the David Hamilton decision, below.

³⁶ [2000] 3 NZLR 570. See (2000) 5(3) *Media & Arts Law Review* 196.

³⁷ See discussion of the recently announced Censorship review below.

the limited categories of material to which the censorship legislation applies, by describing a 'subject gateway.' This subject gateway is established by s 3(1), which provides: 'a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.' The Court held the section has two purposes: to define the subject matter covered by the Act, and to describe the character of that subject matter (as being injurious to the public good). The subject matter is limited by reference to the list (sex, horror and so on) because those words establish a class of relevant publication, and although the words 'such as' allow other examples, these have to be of the same kind as the class established in the statute. Furthermore, the Court elaborated, the words used in the class point to activity rather than expression of opinion. This makes clear the requirement of a connection between such categories and likely injury to the public good. However, such reasoning may have raised the spectre of increased litigation on the distinction between banned activity, and opinion.

[254] **Photographs by David Hamilton**

The Board of Review recently classified a book entitled 'Holiday Snapshots,' by the well-known photographer David Hamilton, as objectionable.³⁸ The book of more than 300 photographs of naked or partially-clad pubescent and pre-pubescent girls arranged with suggestive and humorous captions, was glossy and well-bound. The Board found the girls were presented in a seductive and titillating manner as objects of sexual desire. The captions promoted the idea of sexual activity with the subjects as desirable and desired by the subjects themselves. This, the Board thought, brought the book within the deeming s 3(2)(a) as promoting or supporting or tending to promote or support the exploitation of children or young persons, or both, for sexual purposes. It also fell within s 3(3)(b) of the Act, as having a dominant effect of exploiting the nudity of children and young persons in such a manner that its availability was likely to be injurious to the public good. The publication entered the required 'subject gateway' required in *Living Word* because the photographs and captions depicted or otherwise dealt with the matter of sex. The Board took care to state that it had had regard to *Living Word* and to the *Moonen* requirements to give the publication a

³⁸ Board of Review Decision 2/2001.

meaning which impinged least on the right of freedom of expression, although it did not really explain how in any detail.

Amendment to the Films Videos and Publications Classification Act 1993

In 2000, MP Anne Tolley introduced a private member's bill, the Films Videos and Publications Classification (Prohibition of Child Pornography) Amendment Bill³⁹ which was intended to make child pornography an exception to freedoms under the New Zealand *Bill of Rights Act* and subject to a total and effective ban, and was a response to the decision in *Moonen v Film and Literature Board of Review*.⁴⁰ A further amendment to the Act was proposed in a separate Bill introduced to allow the Classification Office to classify publications based on partial viewing to allow the Office to deal with digital publications such as computer games. Classifying such publications had been noted by the Classification Office in its Annual Report 2000 as extremely time consuming because so much material can be stored electronically. One computer disk dealt with in 1999 contained over 17,000 image files. Neither Bill proceeded, and the Government instead announced a Review of the Government Administration Committee into the operation of the Act and related issues. The Terms of Reference of the Committee are an interesting snap-shot of current concerns about censorship in New Zealand. The most significant issues the Committee is to inquire into are:

- the capacity of the Act to deal with the impact of new technology on the classification process, in particular, the impact of the internet, including the transmission of live performances and related activities.
- the definition of 'objectionable', as set out in s 3 of the Act, to determine whether the Court of Appeal's narrow interpretation of the words, 'matters such as sex, horror, crime, cruelty, or violence' in the *Moonen v Film and Literature Board of Review*, adequately carry out the intent of the Act.
- whether or not the *Bill of Rights Act 1990* should apply to all matters prescribed in s 3(2) of the Act.

³⁹ Introduced 4/7/2000.

⁴⁰ (2000) 5 HRNZ 224. See (1999) 4 *Media & Arts Law Review* 191 and (2000) 5(3) *Media & Arts Law Review* 196.

- the issues to emerge from the Court of Appeal's decision in *Living Word Distributors Limited v Human Rights Action Group* as to the 'gateway' in s 3(1) of the Act and the effect of s 3(3)(e), and whether to include:
 - a 'hate speech' provision in the Act that would allow the Office to classify 'hate speech'.
 - the definitions of 'publication', the difficulty of making excisions to digital publications, and the need for the partial examination of digital publications for classification.
 - the definition of 'broadcasting' in the *Broadcasting Act 1989* (which currently does not appear to cover some forms of publication on the internet); and
 - the viability of creating one media regulatory agency.