

NEW ZEALAND MEDIA LAW UPDATE

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RECENT DEVELOPMENTS

[317] After examining defamation law and censorship previously, further developments in media and arts law in New Zealand are considered in this update. The need for open justice has been noted in relation to name suppression applications in criminal proceedings, where the internet has also made its effects felt. A new application for pre-trial suppression was unsuccessful, and amendments to the bail and local electoral laws were notable. The Broadcasting Standards Authority continued to monitor the behaviour of broadcasters, receiving more complaints than ever. A Bill amending the *Crimes Act 1961* intended to deal with computer hacking raised privacy issues, and the Attorney-General for England and Wales pursued an action for breach of confidence against a New Zealand-born ex-SAS officer who intends to publish a book about the Gulf War. MP Richard Prebble successfully defended his right to use Parliamentary privilege against New Zealand Post, the *Protected Disclosures Act 2000* came into force giving limited protections to ‘whistle-blowers’, and the producers of the Tolkein trilogy *Lord of the Rings* asserted copyright in photographs taken of its film sets in New Zealand.

Suppression

Name suppression in criminal proceedings

Lewis v Wilson & Horton,² the ‘US drug Billionaire’ case, reached the Court of Appeal in an unsuccessful appeal by Lewis against the decision of the High Court allowing the publication of his identity in reports of court proceedings. Lewis had been discharged without conviction after pleading guilty on three charges of importing drugs, and was granted name suppression under s 140 of the *Criminal Justice Act 1985*. The Court of Appeal held that in the absence of identified harm from the publicity, which clearly extended beyond what was normal in such cases, the presumption of public entitlement to the information prevailed. The right to receive

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² [2000] 3 NZLR 546. The High Court decision was noted previously: (2000) 5(4) *Media & Arts Law*

and impart information could not be limited in the criminal context according to qualitative and subjective standards adopted by a judge. It was a right to receive information 'of any kind in any form'. Only in cases where some real harm was identified might it be necessary for the judge to decide whether the harm, [318] which would be caused, was disproportionate to the public interest in open justice and the freedom to receive information. Therefore the standing of the appellant as 'an extraordinarily successful businessman, community leader and philanthropist' was not grounds for suppressing his name in the absence of evidence of special harm to him through publicity, since no harm to the appellant was suggested beyond the submission that his standing would make media interest in him 'undue'. Further, the fact that the newspaper publisher did not speak at the original hearing did not amount to waiving their right to be heard, because the media is a watchdog of the people and has standing to be heard. Finally, there was no invariable rule that courts have to give reasons for their decisions. However, the Court of Appeal noted the giving of reasons is justifiable to assist openness in the administration of justice, the ability of an assessment by a court exercising supervisory jurisdiction, and to provide a discipline for the judge which is the best protection against inconsistent delivery of justice. In this case it had been a breach of the principles of open justice for the trial judge to receive submissions on the disposition of a criminal case in private and to conduct proceedings in open court by allusion to written material and to what had transpired in chambers.

Effect of the internet

Noted previously, *A v Wilson & Horton*³ involved a newspaper establishing a right to publish identifying details of a police officer who had fired a gun which killed a man in a North Island town. The newspaper then followed established practice and did not publish the police officer's name. However, the name was published by one business newspaper, which did not appear to be well received by the public. In a postscript to these events, a person describing himself as a justice campaigner (who had been given authority to investigate the matter of the killing by the family of the deceased, that authority being withdrawn a week later) posted a photograph of the policeman on an

Review 277.

³ Unreported, 5 May 2000, HC Auckland, CP 7/00. See (2000) 5(3) *Media & Arts Law Review* 277.

internet site. The site also included a report by the poster, a copy of the police investigation report, and a section where people could vote on whether they thought the officer should go to trial for manslaughter or murder and whether there should be an independent inquiry. In the meantime, the coroner's inquest into the death has been adjourned until September 2001 on the application of the constables involved.⁴ The coroner found that there might be some prejudice to the applicants in the inquest proceeding, because the family of the deceased has not yet made up its mind whether to take a private prosecution of any of the officers (who have been cleared of any wrongdoing by a police investigation).

Pre-trial publicity

*Bouwer v Allied Press Ltd*⁵ concerned Dr Bouwer, a psychiatrist charged with the murder of his wife. Dr Bouwer denied the charge and a deposition hearing commenced in April 2001, which at the time of the judgment would continue for some weeks. The respondent was the proprietor of the *Otago Daily Times* newspaper. The newspaper learned that Dr Bouwer had an adopted son, who lived in South Africa and had simultaneously been charged with the murder of his wife. The *Otago Daily Times* wished to publish the information about the son. Details of the South African charge faced by the son, and of the coincidence of a similar charge against his father in New Zealand, had already been published in South Africa. The newspaper wrote to Dr Bouwer's counsel, stating its intention to publish a factual account of the matter. Dr Bouwer's counsel immediately sought an injunction to prevent publication, which was declined in the High Court, such refusal being the subject of this appeal. The Court of Appeal considered the High Court had correctly balanced freedom of expression and the right of Dr Bouwer to a fair trial. It noted that prior restraint on publishing material which may constitute contempt is usually more [319] intrusive on freedom of speech than the subsequent punishment of offending publications. There is a high threshold because a court is almost invariably unaware of the precise content of what the media wishes to publish. This means an injunction may cover material, which in hindsight was legitimate. Further, any prejudice to Dr Bouwer was not sufficiently serious to warrant prior restraint. The remarkable coincidence was a

⁴ *Christchurch Press*, 13 June 2001.

⁵ Unreported, Court of Appeal, CA 83/01, 12 April 2001.

matter of interest to the public, but any prejudice through supposed guilt by association could be readily met by an appropriate direction from the trial judge. The judgment demonstrated faith in what it described as the 'perspicacity and conscientiousness of juries.' The court also doubted it could make an injunction which would be wholly effective and referred to the facts already appearing on the internet. Furthermore, it thought publication of the correct facts would do less damage to the appellant than rumours already circulating locally. However, the court concluded with a warning that its decision did not exonerate the respondent or any other publisher from accepting responsibility for any publication that might go beyond the bounds of what is permissible and constitute contempt. This decision illustrates once again that successful applications in such cases will be extremely rare, given the high threshold and now, the impact of the internet.

Bail Act 2000

Under the *Bail Act 2000*, a court may, having regard to the interests of the defendant or any other person and to the public interest, order that the whole or any part of an application for bail or an appeal against a bail decision be heard in private.⁶ It may also make an order prohibiting the publication of any report or description of a bail hearing or any part of the hearing including the identity of the defendant applying for bail, the decision of the court on the application, and the conditions of bail, if bail is granted.⁷

Local Electoral Act 2001

The *Local Electoral Act 2001*, which received the Royal Assent in May 2001 and has yet to come in to force, has attracted some controversy. Section 135, which creates an offence for anyone to publish or broadcast any material promoting the election of any candidate without the written authority of the candidate or the candidate's agent, has been described by a member of the Select Committee which reported on the Act as a 'Media Gag'. The Minister responsible, Sandra Lee, has stated that s 135 does not apply to the publication or broadcast of any news or comment, because s 113 of the

⁶ *Bail Act 2000* s 18.

⁷ *Ibid* s 19.

Act prevails. Section 113 restricts the publication of advertisements promoting candidates except under certain conditions but s 113(5) states:

This section does not restrict the publication of any news or comments relating to an election in a newspaper or other periodical, or on the internet, or in any other medium of electronic communication accessible by the public, or in a radio or television broadcast made by a broadcaster within the meaning of s 2 of the *Broadcasting Act 1989*.

The argument is not compelling. It is difficult to agree that a subsection applying to ‘This section ...’ (s 113(5)) can have any effect on another separate section (s 135). Section 135 is not quite the ‘Media Gag’ described since it requires the material to ‘promote the election’ of a candidate, and ordinary, balanced news reports would not do that. However, it might apply to a situation where a newspaper wanted to [320] publish a list of preferred candidates as a guide for local voters.⁸ The Minister is seeking independent legal advice to ‘make doubly sure of the situation’.

Broadcasting Standards

Balance and reliability

The most recent decision of the Broadcasting Standards Authority⁹ has upheld a complaint of lack of balance and standards of integrity and reliability of information sources in a news, current affairs or documentary program. TVNZ’s *Holmes* current affairs program broadcast an interview with one Richard Poole, a young man who had run an advertisement in the media expressing concern with the ‘brain drain’ effect, whereby many young people in New Zealand appeared to be leaving the country seeking opportunities elsewhere. Although TVNZ had been in possession of a fax containing the information that the advertisement had been sponsored in part by business interests who opposed the economic policies of the government, Poole was only asked on air whether he had a political agenda, and his negative answer was not

⁸ At least one New Zealand newspaper has done this recently, and although it raises issues of fairness, the Press Council did uphold the practice in the 1970s. The practice might not be seen as fair today and it seems is not widely practised in the media.

⁹ BSA Decision re TVNZ *Holmes* Programme on Brain Drain, released 11 June 2001.

questioned in any way. TVNZ has accepted the decision and indicated it will take remedial action.¹⁰

Advertorials, infomercials and programs about therapeutic products

The developing practice of television programs which tend to blur the lines between content which is editorial, advertorial, infomercial and/or advertisements has caused the Broadcasting Standards Authority some concern in relation to the requirements of balance, accuracy and impartiality. Complaints about editorial content are the BSA's responsibility, while complaints about advertisements are the responsibility of the Advertising Standards Complaints Board. In *R F James v Television New Zealand Ltd*,¹¹ the Authority noted its concern that viewers may find this overlap in content confusing. To enable viewers to understand clearly whether a broadcast is essentially a program under the editorial control of the broadcaster, or an advertisement, the Authority signalled that it considered that the Free-to-Air Television Code of Broadcasting Practice should include a provision similar to that in the recently revised Radio Code of Broadcasting Practice which reads: 'Advertisements and infomercials shall be clearly distinguishable from other programme material' (Guideline 7f); and Rule 1 of the Advertising Code of Ethics which states: 'Identification — Advertisements should be clearly distinguishable as such, whatever the form and whatever the medium used; when an advertisement appears in a medium which contains news or editorial matter, it must be presented so that it is readily recognised as an advertisement.' The Free-to-Air Television Code is currently being revised.

Programs dealing with medical breakthroughs may be susceptible to accuracy and balance complaints but cannot be dealt with by the Authority unless they contain factual inaccuracies or deal with controversial matters in an unbalanced manner. *Pharmaceutical Management Agency Ltd (Pharmac) v Television New Zealand Ltd*¹² involved a complaint that a named drug was promoted as being the cure for acne. Pharmac's objection was that a *Holmes* report failed to refer to the known side effects of taking a powerful drug, which was promoted to a teenage audience. It was the

¹⁰ National Radio, 11 June 2001.

¹¹ BSA Decision 148/99.

¹² BSA Decision 82/2000.

Authority's view that the report on acne treatment did not fall into any balance category which could give it jurisdiction as it was not a [321] political matter, did not report on any new development or elaborate on any current news, and did not deal with a question of a controversial nature, but simply provided information about a long-standing treatment regime which was in most cases effective. Noting this technical obstacle to its jurisdiction, the Authority nevertheless again signalled its concerns about programs which deal with therapeutic products.

Privacy

Crimes Amendment Bill (No 6)

The Crimes Amendment Bill (No 6), currently before the Law and Order Select Committee, is intended to make illegal computer hacking, and contains provisions criminalising accessing computer systems for dishonest purposes. However, publicity has been given to the provision made in the Bill to deal with unauthorised interception of private communications, because it allows exemptions and authorisations for state intrusion into computer systems. New Zealand's Privacy Commissioner, Bruce Slane, has stated that although he has misgivings about some of the exemptions, he does in principle accept a case for some appropriately crafted exceptions to the new laws to enable law enforcement agencies, intelligence agencies and service providers to continue the activities they are currently quite lawfully carrying out.¹³ However, the Commissioner is concerned that interception warrants can involve authorised listening into hundreds of conversations involving scores of individuals beyond those targeted, and that remote hacking should not be approved on a speculative basis without evidence of need. The Commissioner perceives a lack of concrete proposals for how such activity could effectively be carried out to produce cogent information of evidential value. He has suggested to the Committee that search warrants should continue to be the only authorisation for access to a computer but only when such warrants are executed in the normal and expected way, that warrants should not provide cover for other officials to carry out covert hacking into computers, and that any exemptions in the Bill should be specifically limited to law enforcement agencies.

¹³ Report by the Privacy Commissioner to the Minister of Justice in relation to the Electoral Amendment Bill (No 2) 2001. See <www.privacy.org.nz/>.

Confidentiality

Confidentiality clause in contract

*A-G for England and Wales v R*¹⁴ was an unsuccessful action in contract and breach of confidence by the British Attorney-General seeking to prevent publication by R of a book describing certain actions in the Gulf War. R had signed a confidentiality contract while in the British SAS, but after the events related in the book took place. He had been ordered to sign the agreement or be deemed unsuitable for duties with the SAS and returned to his ordinary unit, which involved a considerable reduction in remuneration. R contended that the confidentiality agreement had no effect because of duress, lack of consideration, unconscionable bargain and constitutional guarantees. The law applied was British law. The judge found for the defendant on the matters of contract. As to confidentiality, subject to minor exceptions, the judge concluded there was nothing particularly sensitive in the book, and because of this, and the fact that the subject matter had already been fully reported in the [322] public domain, there could be no argument of demonstrable damage to national security. The judge briefly considered the fascinating argument that New Zealand's Bill of Rights applied (which he considered would have been possible if he had found the contract was valid, when considering an appropriate remedy). The defendant had argued that to enjoin publication would constitute a breach of freedom of expression, which must in this case be unlimited by any prescribed law 'as can be demonstrably justified in a free and democratic society' (s 5 of the Bill of Rights), because contractual terms cannot count as law. The judge did not find it necessary to decide, but was of the view that he thought it unlikely the Bill of Rights could invalidate confidentiality provisions in a contract otherwise properly entered into. Commercial documents and settlements allow parties to give up fundamental freedoms all the time. The decision is to be appealed.

Parliamentary privilege and confidentiality

*New Zealand Post Ltd v Prebble*¹⁵ was an unusual but unsuccessful ex parte application by NZ Post. It had announced an intention to establish a bank, popularly known as 'the People's Bank', to operate in the public as well as the private sector of

¹⁴ Unreported, High Court, Auckland, CP 641/98, 6 December 2000.

¹⁵ Unreported, High Court, Wellington, CP 35/01, 23 February 2001.

New Zealand, and a report entitled the 'Business Case Report' was given to the board of NZ Post. Mr Prebble, a Member of Parliament, wished to publicise the contents of the Report, a significant proportion of which had already been disseminated to the public by other Members of Parliament, inside and outside the House. NZ Post sought an order to prevent publication and a declaration that the defendant's actions constituted a breach of confidence. The High court held it had no power to make orders relating to the use by Members of Parliament of their absolute Parliamentary privilege in relation to what they say in the confines of the House. It also affirmed that disclosure of a confidential document may be made in some circumstances where it is in the public interest, even where there is no inequity or wrongdoing on the part of the plaintiff. In determining whether public interest existed in disclosure in this case, the Court noted that taxpayer's money would be appropriated for the proposed bank, the status of NZ Post as a State-Owned Enterprise required some accountability to the public, the proposal for the bank had a significant political element and was not purely commercial, and NZ Post had distributed copies of the report to a number of favoured recipients, including members of Parliament. This substantial disclosure meant NZ Post could not have the fruit without the rind and attempt to block disclosure to selected parties. In any event, because the Court could not interfere with the absolute privilege of Members of Parliament to disclose in the House, an injunction would be futile. A confidence revealed, even in a privileged situation, was gone forever. The application was refused. Prebble, who had represented himself, described the decision as a victory for Parliament and for free speech.¹⁶

Protected Disclosures Act

The *Protected Disclosures Act 2000*, which was introduced in August 1996, is intended to promote the public interest by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organization, and by protecting employees who make disclosures of information about such wrongdoing in accordance with the Act.¹⁷ An employee of an organisation may disclose information under the Act and be protected if the information is about serious wrongdoing in or by

¹⁶ *Christchurch Press*, 24 February 2001.

¹⁷ *Protected Disclosures Act 2000* s 5.

that organization,¹⁸ the employee believes on reasonable grounds that the information is true or likely to be true, the employee wishes to disclose the information so that the serious wrongdoing can be investigated [323] and the employee wishes the disclosure to be protected.¹⁹ The behaviour of both public and private sector organisations is covered by the Act.²⁰ The legislation establishes a general rule that disclosure using internal procedures is required.²¹ Public sector employers are required to establish internal procedures,²² but there is not such duty for the private sector. Alternative disclosure to an appropriate authority, which has an inclusive definition covering bodies such as the Commissioner of Police, the Controller and Auditor-General, the Director of the Serious Fraud Office, the Inspector-General of Intelligence and Security, the Police Complaints Authority, the head of every public sector organization, and private sector bodies comprising members of a particular profession or calling with power to discipline its members,²³ is possible.²⁴ Although the definition is open-ended, it seems it would be unlikely an appropriate authority would be the media, which publishes to a wide audience and would therefore be inappropriate. The definition also specifically excludes Ministers of the Crown and Members of Parliament.²⁵ To make a disclosure to an appropriate authority, an employee must believe on reasonable grounds that the head of the organisation is or may be involved in the serious wrongdoing alleged in the disclosure, or that immediate reference to an appropriate authority is justified by reason of the urgency of the matter to which the disclosure relates, or some other exceptional circumstances, or that there has been no action or recommended action on the matter to which the disclosure relates within 20 working days after the date on which the disclosure was

¹⁸ Ibid s 3. Serious wrongdoing includes an unlawful, corrupt, or irregular use of public funds or public resources; or an act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment; or an act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial; or an act, omission, or course of conduct that constitutes an offence; or an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement: s 3.

¹⁹ Ibid s 6.

²⁰ Ibid s 3.

²¹ Ibid s 7.

²² Ibid s 11.

²³ Ibid s 3.

²⁴ Ibid s 9.

²⁵ Ibid s 3.

made.²⁶ Disclosure instead to a Minister of the Crown and the Ombudsman may be made in certain specified circumstances.²⁷ The person making the disclosure is protected in relation to their employment,²⁸ has immunity from criminal and civil action,²⁹ and their identity may only be revealed where that person consents in writing, or the party receiving the information reasonably believes that disclosure of identifying information is essential to the effective investigation of the allegations, is essential to prevent serious risk to public health or public safety or the environment; or is essential having regard to the principles of natural justice.³⁰ While it creates a fairly specific regime, the Act does not limit any other protection, privilege, immunity, or defence, whether statutory or otherwise, relating to the disclosure of information.³¹ The *Human Rights Act 1993* has also been amended to provide a [324] right of complaint where involvement in disclosure results in victimization.³² The Act facilitates disclosure in a rather straitjacketed form, and in fact would not cover the circumstances of the case that promoted its enactment.³³

Copyright

Copyright in photographs taken in a public place

In August 2000, the film production company filming Tolkein's *Lord of the Rings* trilogy in New Zealand claimed copyright in photographs published in the *Christchurch Press* of various sets erected in the North Canterbury landscape.³⁴ The photographs had been taken by a *Press* photographer from public land and were made available for sale to the public by the newspaper. Copyright of photographs in New Zealand belongs to the photographer unless commissioned by someone else. There is

²⁶ Ibid s 9.

²⁷ Ibid s 10.

²⁸ Ibid s 17.

²⁹ Ibid s 18.

³⁰ Ibid s 19.

³¹ Ibid s 21.

³² Ibid s 25.

³³ Neil Pugmire was a charge nurse who wrote to the Minister of Health documenting concerns about the *Mental Health (Compulsory Assessment & Treatment) Act 1992* which disclosed information about a particular patient. He also sent a letter to the Opposition Spokesperson for Justice that was subsequently released to the media. This led to suspension for serious misconduct in his employment: see *Pugmire v Good Health Wanganui Ltd (No 1)* and *(No 2)* [1994] 1 ERNZ 58, 174.

³⁴ *Christchurch Press*, 23 and 31 August 2000.

also no statute law in New Zealand preventing the taking of photographs without consent from a public place.³⁵ The *Copyright Act 1994* provides that copyright in original works includes literary, dramatic, musical, or artistic works.³⁶ An 'artistic work' includes a work of architecture, being a building or a model for a building.³⁷ This means the film company could have claimed copyright in the three-dimensional models which comprised the film sets. Only an owner of the copyright has the exclusive right to copy the work and to issue copies of the work to the public, whether by sale or otherwise.³⁸ 'Copying' includes, in relation to an artistic work, the making of a copy in 2 dimensions of a three-dimensional work.³⁹ Therefore, the first issue is whether the *Press* photographer copied the three-dimensional work (the film set) by taking a two-dimensional copy of it (the photographs). The photographs did not show detail of the film set, but rather, a long-distance view of the magnificent cliffs and hills containing one aspect of the set erected on the tops. The test would be whether the photograph constituted a true copy in that it reproduced the distinctive features of the set, and came so near to the original as to suggest that original to the mind of every person seeing it.⁴⁰ That test is not easy to apply to these facts, in that it is arguable that while the photograph did show some distinctive features of the film set, it was as a whole a unique original work in its own right, in which the *Press* photographer could claim copyright. However, the matter is complicated because a work is not original if it infringes the copyright in, or to the extent that it infringes [325] the copyright in, another work.⁴¹ This raises the spectre of an argument that the film company had copyright to the parts of the photograph showing the distinctive features of the set and the *Press* photographer had copyright in the remainder, which would prevent publication and sale of the photo by the *Press* without consent. The

³⁵ There is generally no action in the tort of privacy, as taking a photograph of a person in a public place or of their property without consent does not constitute publication of private facts: *Bernstein v Skyviews Ltd* [1978] QB 479; *Australian Consolidated Press Ltd v Ettingshausen* (1991) 23 NSWLR 443. However, in *Bradley v Wingnut Films* [1993] 1 NZLR 415 (which coincidentally also involved a film made by Peter Jackson, the director of *Lord of the Rings*), Gallen J noted that the fact that something occurred in a public place did not mean it should be widely publicised where it was not a matter of public concern.

³⁶ *Copyright Act 1994* s 14(1)(a).

³⁷ *Ibid* s 2.

³⁸ *Ibid* s 16(1)(a)–(b).

³⁹ *Ibid* s 2.

⁴⁰ *Hanfstaengl v W H Smith & Sons* [1905] 1 Ch 519.

Press could possibly, however, claim a fair dealing defence, which allows use of a work for the purposes of reporting current events if such fair dealing is accompanied by a sufficient acknowledgement.⁴² The fact that the defence covers fair dealing ‘with a work (other than a photograph)’ does not create a difficulty because the relevant ‘work’ in this case would be the three-dimensional film set, not the photograph taken of it by the *Press* photographer. These issues were not tested because after some resistance from the newspaper, the film company did not pursue the matter and in fact changed its previously highly secretive publicity policy to a more open one. However, it did succeed in preventing the *Evening Post* newspaper from selling posters made up of images from the movie itself, under threat of an injunction.

⁴¹ *Copyright Act 1994* s 14(2).

⁴² *Ibid* s 42(3).