

**NEW ZEALAND MEDIA LAW UPDATE**

**RECENT DEVELOPMENTS**

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[315] In addition to the defamation law developments, discussed in the previous issue of the *Media & Arts Law Review*, in the area of censorship during the last year, child pornography again wound its way to the Court of Appeal while a government committee continues to review the law, and the French film *Baise-Moi* was the subject of appeal to the High Court after being banned by the Classification Office.

The Broadcasting Standards Authority reluctantly accepted jurisdiction for a complaint about excessive advertising between Christmas programming, and attempted to deal directly with submissions about the Bill of Rights for the first time. The Press Council quietly extended its jurisdiction to members of the print media that have not accepted its jurisdiction.

The media continued to demonstrate confusion about whether to voluntarily suppress the name of a constable who had shot an individual while on duty and later became the subject of a private prosecution for murder by the victim's family, and the Minister of Justice entered the fray to suggest that a voluntary rule be agreed to. Two businessmen were the subjects of false rumours during a delay by the Crown in appealing a suppression order unlawfully made in favour of a businessman who had sought the services of an underage prostitute. A business publication was excluded from a civil trial on the grounds that any report of the matter would breach orders made to protect confidential information.

A District Court considered the first New Zealand action seeking damages for breach of the tort of privacy, and held that lack of identification did not prevent liability arising, and a prominent lawyer announced her intention to sue a business publication for publishing what she argued was incorrect information about her financial status in its annual 'Rich List'.

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The Court of Appeal upheld a contract between an ex-SAS officer and the British Government which included confidentiality clauses, but would not grant equitable relief to prevent publication of a proposed book by the officer.

The Government moved to repeal a provision in the *Local Electoral Act 2001* that appeared to contain an offence which could operate as a media gag.

### [316] **Censorship**

#### ***Child pornography***

*Moonen v Film and Literature Board of Review*, noted previously,<sup>2</sup> continues to challenge the courts. In the decision reclassifying the *Moonen* materials, the Board of Review<sup>3</sup> 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'<sup>4</sup> 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.'<sup>5</sup> That decision was appealed to the High Court on the grounds of bias and irrelevant considerations, and failure to correctly take account of the Bill of Rights.<sup>6</sup> The High Court rejected these arguments, finding that although the Board clearly hoped the Court of Appeal would reconsider the issue of the Bill of Rights in relation to child pornography, it had still correctly understood and applied the instructions of that Court in *Moonen v Film and Literature Board of Review*.<sup>7</sup> *Moonen* appealed that decision to the Court of Appeal, which held that the Board and the Full Court of the High Court correctly applied the law.<sup>8</sup> However, in the face of arguments criticising the five-step process to be used to take account of Bill of Rights issues set out in the original *Moonen* decision (now

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<sup>2</sup> (2000) 5 HRNZ 224. See (1999) 4 *Media & Arts Law Review* 19, (2000) 5(3) *Media & Arts Law Review* 196, and (2001) 6(3) *Media & Arts Law Review* 252.

<sup>3</sup> *Decision of the Board of Review, on reconsideration of the classification of various publications owned by GA Moonen*, 8 September 2000.

<sup>4</sup> *Ibid* 13.

<sup>5</sup> *Ibid* 24.

<sup>6</sup> *Moonen v Film and Literature Board of Review* (Unreported, High Court, Wellington, AP 208/00, 2 October 2001).

<sup>7</sup> [2000] 2 NZLR 9.

<sup>8</sup> *Moonen v Film and Literature Board of Review* (Unreported, CA 238/01, 16 April 2002).

called *Moonen I*), the Court of Appeal emphasised that the process is not prescriptive and that other approaches to weighing the provisions of the Bill are open.<sup>9</sup>

### ***Censorship of the film Baise-Moi***

Describing the controversial film *Baise-Moi* as a ‘provocative comment on the human condition’, the Film and Literature Board of Review unanimously classified it as objectionable only to persons under 18.<sup>10</sup> Although the Office of Film and Literature Classification had classified the work R18 to persons who are students of film studies or for the purposes of screening at a film festival, the Society for the Promotion of Community Standards applied for review by the Board and sought a complete ban on the basis that the film is objectionable. The Board found that the film passed through at least four subject matter gateways set out in the censorship legislation — sex, crime, cruelty and violence,<sup>11</sup> and that those major themes and their presentation of the film were likely to be injurious to the public good. It also had to determine whether the film promoted or supported the activities shown in it, in which case it would be deemed to be objectionable.<sup>12</sup> The Board adopted a test that there must be something about [317] the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity.<sup>13</sup> The Board proceeded to examine aspects of the film, finding in each case, counterbalances or foils to any promoting or supporting effect, and that on the whole, it did not promote or support the horrific activities shown in it. Because the film did not fall within the deeming provision, the Board then assessed it under other provisions,<sup>14</sup> and found an age restriction to be warranted, without more. It thought the work had a degree of merit as a postmodern movie which made a social

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<sup>9</sup> Ibid [15]–[16]. Presumably alternative approaches must not conflict with that in *Moonen I* or lead to a different result. This could be quite hard to judge as the five-step approach is not easy to apply.

<sup>10</sup> *Decision of the Board on an Application for Review by the Society for the Promotion of Community Standards Inc of the film Baise-Moi* dated 13 March 2002. Classification in some other countries was: Australia, R; UK, 18 with rape scene cut; USA, exhibited unrated; Ontario, Canada, banned; Alberta, Canada, 18.

<sup>11</sup> *Films, Videos and Publications Classification Act 1993* s 3(1), *Living Word Distributors Ltd v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570. See (2000) 5(3) *Media & Arts Law Review* 196, (2001) 6(3) *Media & Arts Law Review* 253.

<sup>12</sup> *Films, Videos and Publications Classification Act 1993* s 3(2)(b) and (f), which cover the use of violence or coercion to compel any person to participate in, or submit to sexual conduct, and acts of torture or the infliction of extreme violence or extreme cruelty.

<sup>13</sup> *Decision of the Board on an Application for Review by the Society for the Promotion of Community Standards Inc of the film Baise-Moi* dated 13 March 2002, [47]. The test is from *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

<sup>14</sup> *Films, Videos and Publications Classification Act 1993* s 3(3) and (4).

statement. The final step carried out the Board was to check its decision against the five-step process established to take account of freedom of expression.<sup>15</sup> This it did closely, ultimately finding that the R18 restriction was justified due to society's wish to protect young persons from harm yet providing the minimum interference with the rights under the *New Zealand Bill of Rights Act 1990*.<sup>16</sup>

The decision was appealed to the High Court by the SPCS, giving enormous publicity to the film. While the appeal was pending, the directors of two film festivals were prevented from showing *Baise-Moi* on the grounds that to do so would effectively destroy the purpose of the appeal process.<sup>17</sup> The power to prevent showing of the film was contained in s 67 of the *Films, Videos and Publications Classification Act 1993*, which allows any party to an appeal to apply for an interim restriction order, to be granted if the Court is satisfied it is in the public interest to do so. This was the first time the provision had been judicially considered. The Court did not approach the matter as an interim injunction<sup>18</sup> but concluded that once an error of law was found to support a challenge to the original classification, a Court must still be satisfied that interim restriction was in the public interest, such evaluation requiring consideration of all relevant matters, including freedom of expression. The Court made the practical point that normally it would be quite undesirable allow a film to screen when there was a real possibility that a reconsideration according to law might result in a different or revised classification. After finding sufficient basis for an arguable case of error of law, the Court noted freedom of expression would only be temporarily interfered with, and that there was public interest in the due completion of legal review, in a measured way. Further, a balance of convenience test did not favour the film festival organisers, who would, the Court found, lose less than submitted and had taken an intentional commercial risk that the film might not be able to be screened.

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<sup>15</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9. See (1999) 4 *Media & Arts Law Review* 19, (2000) 5(3) *Media & Arts Law Review* 196, and (2001) 6(3) *Media & Arts Law Review* 252. The steps in *Moonen* are guidelines only, but tend to have dominated freedom of expression discourse in decisions made since that case.

<sup>16</sup> *Decision of the Board on an Application for Review by the Society for the Promotion of Community Standards Inc of the film Baise-Moi* dated 13 March 2002, [74]–[77].

<sup>17</sup> *Film and Literature Board of Review v Society for the Promotion of Community Standards* (Unreported, High Court, Wellington, AP 76/02, 12 April 2002).

<sup>18</sup> As required in *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129. See (1999) 4 *Media & Arts Law Review* 191.

The Court could also find no compelling reasons why the film should be shown immediately.

The test applied does not appear to follow that in *TV3 Network Services Ltd v Fahey*,<sup>19</sup> where the Court of Appeal affirmed its view that an interim injunction will [318] not be granted readily in a defamation case because of the need to preserve freedom of expression, and indicated extreme reluctance to act in a pre-censorship capacity. In that case, the jurisdiction to prevent publication was described as ‘of a delicate nature’ which ‘ought only to be exercised in the clearest cases’.<sup>20</sup> Nor does the decision in *Baise-Moi* indicate any attempt to give precedence to freedom of expression as required in *Moonen*.<sup>21</sup> However, although the Court emphasised in *Fahey* that restraint should only be exercised for clear and compelling reasons, it did note that where the competing rights of freedom of expression and the right to a fair trial could not be balanced, it might be appropriate to curtail media expression temporarily.<sup>22</sup> It is arguable that the need to preserve the process of appeal in the *Films, Videos and Publications Classification Act* falls within this exception. A similar approach is taken in suppression cases to preserve rights of criminal appeal.<sup>23</sup>

## **Broadcasting standards**

### ***Jurisdiction***

*Watson v Television New Zealand*<sup>24</sup> revolved around a complaint which clearly sorely tested the jurisdiction of the Broadcasting Standards Authority (BSA). Mr Watson complained to Television New Zealand Ltd that it was offensive for the commercial breaks during Christmas programs to feature Boxing Day bargains and an exhortation to end prostitution. When the complaint reached the BSA, it ruled that it raised a matter of personal preference, rather than broadcasting standards, and declined to

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<sup>19</sup> (1998) 12 PRNZ 443. See (1999) 4 *Media & Arts Law Review* 191, (2000) 5 *Media & Arts Law Review* 278.

<sup>20</sup> *Wm Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846, 846 (Lord Esher MR).

<sup>21</sup> See above n 2.

<sup>22</sup> *TV3 Network Services Ltd v Fahey* (1998) 12 PRNZ 443, applying *Gisborne Herald Ltd v Solicitor-General* [1995] 3 NZLR 563, 567. However, it declined to do so in *Fahey*. There was no evidence to convince the Court that screening of the program would have a real likelihood of prejudicially affecting the fair determination of the issues in a later defamation trial.

<sup>23</sup> See *R v Burns* [2002] 1 NZLR 387 below. Following the restriction order, the SPCS went on to make complaints about other films to be shown in the film festival in Wellington, which had previously been passed by the Office and shown elsewhere in New Zealand: *The Press*, 14 May 2002.

<sup>24</sup> 2001/14.

reach a determination.<sup>25</sup> Watson appealed to the High Court<sup>26</sup> which ruled that the conjunction of programs and advertisements raised an issue of broadcasting standards, and referred the complaint back to the BSA for reconsideration.

The issue in the case was whether the BSA had any function in relation to quantity and character of advertisements and their placement in relation to programming.<sup>27</sup> The Court examined the meaning of s 4(1) of the *Broadcasting Act* which imposes a responsibility on broadcasters for maintaining standards in programs and their presentation. In its view, the words 'and their presentation' included 'the manner [319] or quality of presenting' programs. This anticipated more than just the content of the program being subject to standards, otherwise there would be no control over the conjunction between programs and advertisements. Ronald Young J ruled that the BSA had made an error of law, and returned the complaint to it for reconsideration, with the direction that the case be heard with the proposition in mind that the conjunction of advertisements and programs is a matter that potentially affects standards of good taste and decency as detailed in the Act.

The BSA therefore asked for submissions on the presentation issues raised in the complaint and the potential effects on good taste and decency, and stressed that it was focusing on the conjunction referred to only. It noted that it found neither the frequency, nor the volume, nor the length of the commercial breaks to be excessive, or in any other way offensive in conjunction with the nominated programs. It considered that the perceived difference in the volume levels of the advertisements was no different on Christmas Eve than on other occasions.

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<sup>25</sup> Section 5(c) of the *Broadcasting Act 1989* states that complaints based merely on a complainant's preferences are not, in general, capable of being resolved by a complaints procedure.

<sup>26</sup> *Watson v Television New Zealand Limited* (Unreported, High Court, Wellington, AP 99/01, 25 September 2001).

<sup>27</sup> The Advertising Standards Authority Incorporated, a voluntary body funded by the advertising and media industries, deals with advertisements and has the stated purpose of ensuring that advertising is socially responsible and truthful in New Zealand. Representatives of the media have voluntarily agreed to abide by codes of advertising and to withdraw advertisements in respect of which a complaints board or complaints appeal board have upheld complaints. The board is a private organization exercising public power, which is reviewable on public law principles: *Electoral Commission v Cameron & Ors* [1997] 2 NZLR 421. The BSA clearly has no function in relation to advertising programs or any credit in respect of a sponsorship or underwriting arrangement entered into in relation to a program except where neither the broadcaster nor the advertiser recognise, in relation to a specific complaint, the jurisdiction of the Advertising Standards Complaints Board: *Broadcasting Act 1989* s 21(3).

The BSA also had to deal with juxtaposition of subject matter. Watson in his initial complaint referred specifically to an ‘exhortation to end prostitution’, and later to an advertisement ‘encouraging safe sex’. When assessing this aspect of Watson’s complaint, the BSA reiterated that it is not the content of the advertisements which were relevant, but the conjunction between the advertisements and the programs. In this regard also the BSA found nothing of concern to accepted norms of decency in taste and language arising out of the conjunction of the named programs with commercial advertisements and socially responsible messages alerting to the dangers of child prostitution and sexual diseases. The advertisements were not highlighted in a way which could threaten the requirement for good taste, nor were they inappropriate in programs which dealt with the celebration of Christmas, as their conjunction was in a package of advertising and did not offend good taste and decency. It concluded that to find a breach of the nominated standards would be to interpret the *Broadcasting Act 1989* in such a way as to place too great a limit on the broadcaster’s statutory freedom of expression in s 14 of the *New Zealand Bill of Rights Act 1990*.

### ***The BSA and the Bill of Rights***

In a series of decisions in 2000 and 2001, the Broadcasting Standards Authority dealt with numerous complaints against the *RadioWorks Ltd* for material broadcast on *The Rock* radio station.<sup>28</sup> In the process, the BSA was compelled for the first time to confront direct arguments about the place of the *New Zealand Bill of Rights Act 1990* (the Bill of Rights) and freedom of expression in its regulatory function.

The current 1999 Radio Code R was developed by the Radio Broadcasters Association and Radio New Zealand Ltd on behalf of commercial broadcasters and Radio New Zealand. It is made up eight principles, each being set over a number of guidelines to be used by broadcasters in applying the principles. The complaints made by R K Watkins in the Rock decisions involved standards of good taste and decency, broadcasts inconsistent with the maintenance of law and order, failure to be socially responsible (denigration of women, discrimination against women, and failure to be mindful of the effect any program may have on children. The requirement not to portray people

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<sup>28</sup> *Watkins v The RadioWorks Ltd* Decisions Nos 2000/182-191, 2001/071-084, and 2001/138-204 — collectively, ‘the Rock decisions.’

in a manner which encourages denigration or discrimination does not prevent the broadcast of material which is by way of legitimate humour or satire.)<sup>29</sup>

[320] The Rock is a radio station that has as its declared target audience a demograph of 18–39 year old male, blue-collar workers. To attract and maintain this audience, the station broadcasts material it describes as legitimate humour, such as jokes about necrophilia, bestiality, incest, sexual behaviour with children, sexual diseases, anti-homosexuality, and violence against women, children and elderly people. The Watkins complaints related to such material that was broadcast in the mornings between 6.00am and 10.30am.

In relation to the nine complaints dealt with by the BSA in 2000,<sup>30</sup> the BSA found 11 breaches. The decision contains no reference to freedom of expression and the Bill of Rights.

Decision Two<sup>31</sup> comprised 14 complaints based on offensive language, offensive behaviour, broadcasts inconsistent with the maintenance of law and order, denigration of women, discrimination against women and unsuitability for children. In its preliminary decision, the BSA found eight breaches. One complaint was upheld on the basis that insufficient action had been taken. Submissions on penalty were called for from the parties involved. At this stage, the BSA received an extensive submission from the *RadioWorks* raising substantive issues about the Bill of Rights and the freedom of expression enshrined in s 14. Although it was not the practice of the BSA to allow the parties to re-litigate matters at this stage, it determined that the submission was a relevant submission that it was required to consider.<sup>32</sup> The BSA also received two letters from the Commissioner for Children commenting on New Zealand's obligations as a signatory to the United Nations *Convention on the Rights of the Child*. The *RadioWorks* submitted that the BSA had not given sufficient weight to freedom of expression, that it had failed to comply with the requirement in s 5 of the Bill of Rights that any restriction on rights and freedoms in the Bill can be subject

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<sup>29</sup> See BSA Website, <[www.bsa.govt.nz](http://www.bsa.govt.nz)> Broadcasting Practice: Codes and Principles, Programme Codes, Radio.

<sup>30</sup> Decision Nos 2000/182-2000/191, 'Decision One'.

<sup>31</sup> Decision Nos 2001/071-084.

<sup>32</sup> *Broadcasting Act 1989* s 10(1)(b).

only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, and generally that the BSA had acted inconsistently with the Court of Appeal decision in *Moonen v Film and Literature Board of Review*<sup>33</sup> and had not taken it into account.

The BSA considered the complaints de novo in the light of all of the new material. The BSA first noted that *Moonen* was concerned with censorship, but did not accept that this was necessarily the issue in BSA decisions. Nonetheless, the BSA then proceeded to apply the five steps in *Moonen*<sup>34</sup> to the complaints. It found that because the limits on freedom of expression imposed by the *Broadcasting Act* were reasonable limits in a free and democratic society, there could be no inconsistency with the rights and freedoms in the Bill of Rights. In Part II of its decision the BSA found nine breaches and upheld one complaint on the basis that action taken was insufficient.

In the process of making orders for costs, the BSA warned that while generally it had regard to the seriousness of the breach in setting penalty, broadcasters who persisted in breaching the standards might expect progressively heavier penalties. Further, the intention of the broadcaster was irrelevant to the question of breach, but might be relevant to penalty (flagrant breaches may lead to a heavier penalty).

In November 2001, the BSA considered a further 67 complaints from R K Watkins against the *Rock*.<sup>35</sup> The BSA then repeated the Bill of Rights analysis referred to above and upheld 21 of the complaints, again on similar grounds. In making an order, the BSA noted it had had regard to the seriousness of the breaches; however, it had also taken account of apparent continued disregard for broadcasting standards for those items broadcast after the release of Decision One. It ordered that the *RadioWorks* pay the sum of \$24,250 in total costs to the Crown.

In all of its decisions, and in its Bill of Rights analysis, the BSA refers to its powers to impose a penalty [321] on broadcasters where it upholds a complaint. This is not correct. The *Broadcasting Act* allows it to make orders to publish statements, refrain

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<sup>33</sup> [2000] 2 NZLR 9 — the leading freedom of expression case in New Zealand.

<sup>34</sup> See (1999) 4 *Media & Arts Law Review* 191 and (2000) 5(3) *Media & Arts Law Review* 196.

<sup>35</sup> Decision Nos 2001/138-204, 'Decision Three'.

from broadcasting, reconsider and redetermine, pay compensation for breach of privacy, prevent broadcast of part of a series, or pay costs to the Crown or to a party.<sup>36</sup> None of these orders are referred to as penalties, though they may of course be seen as such by the broadcaster, and appear to be seen as such by the BSA.

The Rock decisions show the Broadcasting Standards Authority is exploring Bill of Rights issues in the context of its specific regulatory regime. Even though the BSA rarely receives submissions that are legally focussed, let alone focussed on Bill of Rights issues, it is necessary that it properly addresses the nature and effect of its orders in relation to the Bill, in order that freedom of expression be given appropriate weight in the process.

## **Press Council**

### ***Jurisdiction***

The Press Council<sup>37</sup> has been quietly extending its self-regulatory jurisdiction. Five complaints were lodged with the Council against the Auckland University Students' magazine *Craccum*, Issue Two, 2000, over an article concerning suicide and an opinion piece on the same topic.<sup>38</sup> The Press Council generally does not consider complaints against publications such as student magazines. However, in this particular case it did so because of the widespread public notice the magazine reached through the mainstream press and television, even though the editors of the magazine advised the Press Council that the Auckland University Students' Association did not recognise the Council.<sup>39</sup>

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<sup>36</sup> *Broadcasting Act 1989* ss 13 and 16.

<sup>37</sup> See <[www.presscouncil.org.nz](http://www.presscouncil.org.nz)>.

<sup>38</sup> Case Nos 783-787, June 2000.

<sup>39</sup> The two articles were dealt with separately. The first article was an editorial feature. The Press Council upheld a complaint against the introductory page and its headline because it was ill considered, ill advised, irresponsible, and offensive. However, the Council concluded that the article itself was an unvarnished and ugly story about a subject distasteful to many, but informative on more than one level and, because of its grim revelations, might well be a deterrent. The Council had previously commented on the greater need for openness in discussing the issues of suicide, but found the second article an opinion piece whose tone went far beyond measured arguments about the right to die. When referred to the Classification Office the same year, (OFLC Ref 00735) the publication was found to present the infliction of serious physical harm to a high extent and degree but in a variable manner, and to use strong descriptions and graphic photographs. It was found to be injurious to the public good if made available to young people and therefore potentially damaging to society. The publication was classified Objectionable except to those over 16.

In *Immunisation Advisory Centre against Investigate Magazine*,<sup>40</sup> the Press Council clearly confirmed that it has broadened its jurisdiction. The editor of *Investigate* magazine challenged the Council's ability to consider the complaint, saying the magazine did not fall within the Council's jurisdiction. The Council noted that the magazine's owners had not been party to agreements reached between the Council and some magazine publishers that had accepted its jurisdiction. However, it went on to state that the policy now is that the Press Council considers complaints against newspapers, magazines and periodicals in public circulation in New Zealand (including their websites). There are exceptions with a publication of very [322] limited or specialised readership. If the editor of a publication does not respond to the Council concerning a complaint, the Council will proceed to consider the complaint as best it can in the circumstances. The Council based its decision on the very great changes in the expectations of citizens and consumers regarding opportunities to make complaints about products and services, and about their treatment by bureaucracies and institutions of many kinds.<sup>41</sup>

## **Suppression**

### ***The continuing saga of 'Constable A'***

When last referred to,<sup>42</sup> the coroner's inquest into the death of a man killed by a constable on duty whose identity was kept a voluntary secret by most New Zealand media, had been adjourned because the coroner found that there might be some prejudice to the applicants in the inquest proceeding. The family of the deceased had not made up its mind whether to take a private prosecution of any of the officers involved (who had been cleared of any wrongdoing by a police investigation). The family did proceed with a private prosecution against Constable A, which was dismissed by two Justices of the Peace at a preliminary hearing under the *Summary Proceedings Act*, on the basis that the evidence was insufficient.<sup>43</sup> While there was some criticism of that decision, the more important point in terms of media law is that during this period, the name of Constable A was not published by local newspapers and radio stations, nor by national television, although he had been identified on the

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<sup>40</sup> Case No 847, November 2001.

<sup>41</sup> In Case No 764: *Peters against NORTH AND SOUTH* (1999 Annual Report, 68), the Council said: 'Self-regulation of newspapers and magazines in New Zealand requires that the regulator ensures, as far as possible, that the public are not deprived of the right to complain about a publication.'

<sup>42</sup> (2001) 6(4) *Media & Arts Law Review* 318.

internet. However, the national newspapers did publish the name, editors reasoning that freedom of expression outweighed any vague threats to the constable. As a postscript, it is understood the Minister of Justice met with media representatives and encouraged them to withhold the names of any police who have killed in the course of duty for a period of 20 days, as a general rule. The alternative of a legislative duty was mooted as a possibility. It is certainly desirable that a uniform rule is agreed to, to prevent a similar debacle occurring in the future. However, legislative compulsion should be a last resort and would appear to breach the Bill of Rights if out of proportion to the harm involved, which would vary from case to case. Further, a period of 20 days is quite arbitrary and may be inappropriate in some cases. A possible form of regulating editorial behaviour would be to include a guideline in the Press Council's Principles, and in the relevant Radio and Television Codes for broadcasters. This would be somewhat inconsistent also as the latter is part of a statutory regulatory scheme, while the former is a form of self-regulation of the print media without genuinely full coverage.

#### ***Name suppression and delay***

*The Police v M*<sup>44</sup> was an appeal by the Crown against an order for final suppression of name made in the District Court for a respondent sentenced on a charge of attempted involvement in an act of prostitution with a child. The judge exercised his discretion to grant name suppression under the *Criminal Justice Act 1985*,<sup>45</sup> and ordered the suppression of all information that might identify the respondent and the company he operated, on the grounds that he presented a low risk of reoffending and publication of his name would jeopardise the employment of his staff. Subsequent reports about the case stated that the offender was 37 years old and a company director. The matter received considerable coverage in the media and the suppression order was called into question. The Crown appeared to have [323] strong grounds to appeal the matter but a period of almost two months passed before a final decision was made, during which time local media could not make a decision whether to appeal on the grounds of being an interested party. When two local businessmen became the subject of rumours as to possibly being the offender, the *Press* newspaper published clear refutation of the

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<sup>43</sup> *The Press*, 25 February 2002.

<sup>44</sup> (Unreported, High Court, Christchurch, A 9/02, 5 March 2002).

<sup>45</sup> Section 140(1).

claims. The momentum gathered by the case and its coverage presented the High Court with a challenge in considering the issue whether to lift the order for suppression, as allowing identification of the offender would then receive more coverage than it would otherwise have done. The Court lifted name suppression, but expressed a good deal of sympathy for the offender. It took care to present salient information about the criminal behaviour which it saw as mitigating against the now-persistent rumours that the offender was a paedophile, for which there was no evidence. The grounds for lifting the order were that there was a *prima facie* presumption in favour of open reporting,<sup>46</sup> which was not displaced sufficiently by any concerns about how publication would affect third parties. There was some risk of reoffending and that risk related to sexual offending. Where there was an element of risk to children, the public's right to know the identity of the offender prevails.

The statute in this case leaves the matter of criminal name suppression to the judges and their discretion. They have developed guidelines in case law to assist the decision. What worked against justice in this case appeared to be lack of resources leading to a delay in the Crown making a decision to appeal the original order. During the period of delay, damaging rumours grew, arising from the original reporting of the story and the nature of the offence. This made it all the more important that the appeal of the matter be dealt with fully, but it appears there was little the High Court could do to prevent the lifting of the order being worse for the offender than it would otherwise have been. An alternative approach was suggested by MP Stephen Franks, who proposed an amendment to the Sentencing and Parole Reform Bill which would abolish name suppression entirely except when a victim asks for it.

### ***Criminal name suppression***

In *R v Burns (Travis)*<sup>47</sup> Burns was prosecuted for murder, having previously been a witness in another murder trial where he had been granted name suppression. That other trial never took place as the accused committed suicide, leaving material which effectively accused Burns of being the murderer. A magazine intended to publicise these facts but Burns obtained an injunction preventing it from doing so. Other media

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<sup>46</sup> *R v Liddell* [1995] 1 NZLR 538 (CA), *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA), (2001) 6(4) *Media & Arts Law Review* 317.

<sup>47</sup> [2002] 1 NZLR 387.

interests then applied to the trial Judge in Burns' trial for revocation of the order made in respect of the previous trial suppressing Burns' name. The application was heard after Burns had been convicted and had announced an intention to appeal against the conviction. The High Court judge revoked the previous order but granted time for consideration of an appeal. The accused appealed to the Court of Appeal against the revocation of the witness name suppression order. The Crown argued that revocation would open the door to the routine revisiting of ostensible permanent suppression orders where its witnesses later commit serious offences of their own.

The Court of Appeal held that where it had been determined that there was a significant risk that the accused would not receive a fair hearing at a first trial, there was no room for balancing the principles of freedom of expression and open justice [324] against the right to a fair trial — the principles were to be departed from, not balanced against. Nor, in determining whether to continue name suppression after conviction, was the Court to attempt an assessment of the chance of success on appeal. While a Court could refuse to continue name suppression if it considered that the appeal was not genuine but undertaken for the purpose of delaying publication of the accused's name, there was no suggestion in this instance that that was the case. A suppression order could be properly be made after trial while appeal was pending where the prejudice at any possible retrial caused by publication of the identity of the accused would be so great that it could not be met by measures to counter that prejudice and any appeal would be rendered nugatory.

Such cases would be rare but this was such a case. If the suppression order were not continued, the impact of the publication at the accused's retrial would involve a very real risk of substantial prejudice and the appeal would be a futile exercise. The appeal was eventually dismissed and the name suppression orders revoked, on the grounds that there was no real threat to the police secret witness program, it was highly unlikely the police would ever charge Burns with the other murder, Burns could be kept safe in prison, and while the impact on his family would be stressful, it did not match that required in law.<sup>48</sup> These decisions illustrate the emphasis of the courts on

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<sup>48</sup> [2002] 1 NZLR 410. See *R v Liddell* [1995] 1 NZLR 538.

the fact that suppression in such cases is acceptable because it is temporary, but that prima facie, the presumption is in favour of openness.

### ***Suppression in civil cases***

In a civil action for contempt in a trial involving a high-profile biotech research firm and a consultant who worked for the firm, the High Court is reported to have excluded reporters from a business publication from the Court, but not members of the public.<sup>49</sup> The publication sought access to suppressed evidential statements, affidavits, pleadings and submissions which were subject to conventional suppression orders, but was unsuccessful. The reporter was ordered from the Court because the judge thought there would be difficulty editing out confidential material and any report would be lopsided. This apparent blanket ban on reporting goes against the presumption of openness in favour of commercial sensitivity, and most commentators were of the view that the approach was draconian and unnecessary because ordinary suppression orders could protect confidentiality.

### **Privacy**

#### ***Damages for breach of privacy***

Although a lower court decision, *L v G*<sup>50</sup> is of interest because in it, L sought general and exemplary damages against G for breach of privacy on the first occasion where the remedy has been claimed for breach of the tort.<sup>51</sup> The parties had had a sexual relationship in the nature of prostitute and client, during which G took sexually explicit photographs of L, which L contended were taken conditionally. G published a photo in an adult magazine and later argued that no conditions had been imposed on the use of the photo. The Court accepted that the four elements of the tort had been made out: L's genitalia, private facts, had been publicly disclosed,<sup>52</sup> a reasonable person of ordinary sensibilities would find it offensive that such private facts be

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<sup>49</sup> *National Business Review*, 28 March, 5 April 2002. The *NBR* was the publication involved.

<sup>50</sup> (Unreported, District Court, Timaru, NP 202/00, 21 January 2002).

<sup>51</sup> Previous actions have all involved applications for injunctions: *P v D* [2000] 2 NZLR 591; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Tucker v News Media Ownership Ltd* (Unreported, HC Wellington, Jeffries J, CP477/86, 20 October 1986); *News Media Ownership Ltd v Tucker* (Unreported, CA172/86, 23 October 1986). See (2000) 5 *Media & Arts Law Review* 280.

<sup>52</sup> An argument that a prostitute's genitalia were not private facts was rejected.

published,<sup>53</sup> and there was no legitimate public interest in [325] publication of the photo.<sup>54</sup> The Court made an important finding in relation to the extent of the tort. It accepted that the plaintiff was not identifiable from the photo except by a limited number of people who might recognise the distinctive clothing worn, but proceeded as if the plaintiff was unrecognisable. The Court held that lack of identification did not prevent a breach being established because the rights protected by the tort of breach of privacy relate not to issues of perception and identification by members of the public to whom information is disclosed, but to the loss of the personal shield of privacy of a person to whom information relates. However, the extent of identification was a relevant factor in the assessment of damages. Anguish and distress which might result from disclosure of personal information was seen as likely to have a relationship with apprehended identification. In this case, a small award (\$2500) of general damages only was made.

### ***Publication of 'rich lists'***

Lawyer Donna Hall is intending to sue the *National Business Review* (NBR) for publishing what she argues is incorrect information about her financial status in its annual 'Rich List'.<sup>55</sup> Hall and her family featured prominently in the media in April 2002 when her adopted daughter Kahu Durie was kidnapped. The kidnapper, when caught, said he was prompted to target the family after reading a rich-and-powerful list published by another newspaper, the *Sunday Star-Times*, which had repeated figures indicating wealth published originally in the *NBR*. It is unclear what sort of action Hall could pursue. In *Talley Family v National Business Review*<sup>56</sup> it was held that publication of the plaintiff's name as part of the Rich List did not breach a right of privacy under the *Privacy Act 1993*.<sup>57</sup> An action for negligent misstatement appears unlikely to succeed, as does one based on the publication of deliberately misleading statements under the *Fair Trading Act*. The NBR stated it would publish its 17th Rich List in July.

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<sup>53</sup> L was entitled to expect that the prostitute/client relationship and the photos taken within it should remain private.

<sup>54</sup> *P v D* [2000] 2 NZLR 591.

<sup>55</sup> *The Press*, 11 May 2002.

<sup>56</sup> Decision 23/97 of the Complaints Review Tribunal.

<sup>57</sup> In compiling the list, the *NBR* was acting in relation to a 'news activity' which is exempt under the Act, and the contents of the list were 'news' or 'current affairs', also within the exemption.

## **Confidentiality**

### ***Availability of equitable relief***

*A-G for England and Wales v R*<sup>58</sup> was an appeal of an unsuccessful action in contract and breach of confidence by the Attorney General for England and Wales seeking to prevent publication by R of a book describing certain actions in the Gulf War. R, a Kiwi ex-SAS soldier, wanted to publish his memoirs of Bravo Two Zero, an ill-fated mission in Iraq during the Gulf War. The British government wished to stem the flow of books about such exercises and sought to hold R to a confidentiality agreement he had signed. R argued variously that there was no consideration for the agreement, that he signed it under duress because he was ordered to, and that there were grounds of unconscionability or undue influence. The contract was upheld on all grounds but no injunction was issued, nor any form of specific enforcement ordered. In dealing with the matter of relief, the Court recognised the importance of freedom of speech, noting that the plaintiff sought to use private law to restrain the defendant while the latter asserted his public law [326] right to speak freely. It thought there was public interest in contractual obligations being upheld and in freedom of speech not being curtailed. However, the relevant considerations were such that equity should not be available for enforcement of the contract in this case.<sup>59</sup> Nonetheless, the Court noted that if R chose to publish, he would be in breach of his contractual obligations and the Attorney General could claim damages and an account of profits.

## **Legislation**

### ***Local Electoral Act 2001***

The *Local Electoral Act 2001*, which received the Royal Assent in May 2001 and had yet to come into force, was referred to previously because it appeared to contain an offence which would operate as a media gag.<sup>60</sup> The Minister has since obtained legal advice on the matter and concluded that amendment was necessary because there could be room for a suggestion that freedom of expression was limited in breach of

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<sup>58</sup> (Unreported, High Court, Auckland, CP 641/98, 6 December 2000).

<sup>59</sup> The *Spycatcher* cases, in particular *Spycatcher 2: Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283, were persuasive, including *Bill of Rights* principles. There had been some unfairness about how the contract was signed and the information sought to be protected was not really confidential.

<sup>60</sup> See (2001) 6(4) *Media & Arts Law Review* 319. It was to be 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.

the *New Zealand Bill of Rights Act 1990*. The Order-in-Council providing for the Act to come into force therefore excepted the offending provision. Parliament currently has before it a Local Government Bill that brings the provision into effect at the same time as a new section which repeals it.