

NEW ZEALAND MEDIA & ARTS LAW UPDATE

RECENT DEVELOPMENTS

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[317] In addition to the defamation and censorship matters discussed in the previous issue of the *Media & Arts Law Review*, New Zealand has seen noteworthy developments in the areas of broadcasting standards, the Press Council, suppression and privacy.

The High Court dealt with three appeals in relation to the activities of the Broadcasting Standards Authority (BSA). One was a borderline case in which the Court found the BSA had acted within its discretion, another concerned the interesting question of whether privacy principles could apply to subjects unknown or unrecognisable in New Zealand, to which the answer was in the affirmative, and in the third, the Court observed that the BSA did not have to attempt to make its decisions consistent with the *Bill of Rights Act 1990*.

The Press Council issued its latest annual report in which it responded to criticisms that it has a rather low rate of upholding complaints.

Suppression issues dominated the media to an extent. Constable A, whose name had previously been controversially revealed, was tried before a jury in a private prosecution brought by the family of the young man he had shot on duty. He was found not guilty, and was later granted a permanent injunction to prevent publication of the details of his location. It would be fair to say that the media featured prominently in all aspects of this incident and its aftermath. Other suppression issues discussed include the limiting of coverage of a murder trial involving children, the gagging of a euthanasia campaigner using bail conditions, the publication of the name of a victim of a bizarre kidnap plot, and the release of the name of a convicted paedophile in a manner which appeared to identify an alleged victim of his crimes.

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Privacy matters were again to the fore, when a media personality attempted unsuccessfully to pursue an action for breach of the tort of privacy based on the threatened publication of photographs taken in a public place. Finally, the Privacy Commissioner issued the long-awaited Telecommunications Privacy Code.

Broadcasting Standards

Jurisdiction of Authority

*Hooker v TVNZ*² was an unsuccessful appeal by Hooker, representing himself, against two decisions of the BSA. Hooker contended certain broadcasts identified [318] by him obviously involved an adult theme and should have been classified AO and not screened before 8.30 pm. He also complained about an episode of a programme which he contended offended current norms of decency and taste. It was held by Smellie J that the BSA's decision, which was to be treated as an exercise of a discretion, was not wrong or open to attack on any other basis. The Court could not simply substitute its own view as to what the classification should have been. However, the judge was at pains to emphasise that both matters were borderline and the appeal could not be described as frivolous or vexatious.

*TV3 Network Services Ltd v Ecpat New Zealand Inc*³ was an unsuccessful appeal by TV3 against a finding by the BSA that it had breached privacy standards and the Free-to-Air Television Programme Code. This decision made an important finding as to the extent of the BSA jurisdiction. The breach arose from a documentary on poverty and child prostitution in Fiji in which the faces of children who had allegedly been sexually abused or were prostitutes were clearly visible. The issue central to this appeal was the significance of the fact that none of the children were known by anyone in New Zealand. Chambers J upheld the decision of the BSA and found that its privacy principles must be adhered to by those who broadcast in New Zealand regardless of whether individuals portrayed in a broadcast lived in New Zealand. Further, the Court held the BSA had not attempted to exercise extraterritorial powers, it simply dealt with a complaint concerning a New Zealand broadcast which allegedly breached the privacy principles. Those principles did not differentiate between nationals and non-nationals. Because the *Broadcasting Act* did not limit who may

² [2002] High Court, Wellington, AP 138/01 (unreported, 13 June 2002).

³ [2002] High Court, Auckland, AP46/02 (unreported, 20 December 2002).

complain, there was no error on the BSA's part when dealing with the complaint from ECPAT, a New Zealand organisation which campaigned to eliminate child prostitution and child pornography. The BSA's application of its privacy principle was correct, and the decision did not infringe the *Bill of Rights* because the restriction on freedom of expression was minor and clearly proportionate. The BSA did not ban the documentary outright — it merely declared wrongful the identification of the children.

Bill of Rights

*TV3 Network Services Ltd v Holt*⁴ was a successful appeal by TV3 arising from a news item which Ms Holt had watched with her child containing footage of a store proprietor being stabbed. Ms Holt contended the actual stabbing should have been edited out. TV3 argued the scene as not graphically violent or distressing, nor gratuitous or sensationalist, but the Broadcasting Standards Authority upheld the complaint. On appeal, the High Court held that the Authority's findings had been based on a standard in the relevant code of practice which provided no foundation in law for its conclusion. As it would not be just for the BSA to reconsider the matter, the decision was simply quashed. This case is also interesting for observations made by Rodney Hansen J as to how the shadow of the Bill of Rights falls on the BSA. The judge noted that the BSA uses the same or a similar form of words in its decisions when dealing with Bill of Rights issues, but did not infer from this that the approach was necessarily inadequate. *Vixen*⁵ might not support such a stance. However, the judge went on to suggest that the BSA does not need to test its decisions against the Bill of Rights, but only the standards in the broadcasting codes themselves. It followed that a standard could only be challenged if it involved an unreasonable degree of interference with freedom of expression, and a standard imposing an unreasonable limit would be ultra vires. This observation (it was unnecessary to the decision) goes against a commonly held view of Bills of Rights, that the decisions of bodies themselves subject to such Bills must also be Bill of Rights consistent.⁶

⁴ [2002] NZAR 1013.

⁵ [2002] High Court Wellington, AP 101/00 (unreported, 11 April 2002).

⁶ See *Lange v Atkinson* [1997] 2 NZLR 22, 32 and the Court of Appeal in *R v H* [1994] 2 NZLR 143, 147 (Richardson J); the proposition is supported by other authority: *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48, 58 and *Duff v Communicado Ltd* [1996] 2 NZLR 89, 99.

[319] Finally, the judge made reference to the standards upon which a complaint must be considered. In this case, the complainant did not specify a standard in her original complaint to the broadcaster. It was TV3 which chose the applicable standard. The judge thought that it would have been quite in order if the BSA had determined the complaint by other standards it considered appropriate, provided the parties had sufficient notice of this.⁷ The judge thought at least three other standards should have been considered in this case. However, as the BSA had confined itself to a standard which provided no foundation in law for its conclusion, the decision could not stand. Rodney Hansen J noted a different situation in the *Hooker* case referred to above. There the judge found the appellant could not introduce allegations before the BSA that he had not based his original complaint on to the broadcaster.⁸ This was intended to prevent complainants changing the essential nature of the complaint when it came before the BSA, and was therefore distinguishable on the facts, according to Rodney Hansen J. The result of these decisions is that a complainant may not try to argue before the BSA using standards which he or she has not raised when sending the original complaint to the broadcaster. However, if the complainant happens not to have nominated a standard, and the broadcaster has done so instead, the BSA is able, when it considers the complaint, to nominate and consider other standards it thinks relevant, as long as the parties have proper notice. Such an approach is appropriate, as it equalises the positions of the parties before the BSA. Although it is assumed broadcasters choose the appropriate standards, there is the appearance of conflict of interest in allowing a party responding to the complaint to determine the perimeters of the grievance before it determines the outcome.

Press Council

The 2002 Annual Report of the New Zealand Press Council arrived with a letter asking the question 'Is the Council too soft?'. In the report, the Council responds to questions raised about its effectiveness, following a major opinion piece by one critic that a Press Council that upheld only one complaint in the 2001 year and part upheld only three (out of a total of 47) cannot be doing its job and must be too 'soft' on the

⁷ Rodney Hansen J referred to s 10(2) of the *Broadcasting Act 1989* (NZ), which requires that in considering complaints, the BSA shall provide for as little formality and technicality as is permitted by the requirements of the Act, a proper consideration of the complaint and the principles of natural justice: [27].

⁸ Referring to s 10(1)(a) and (b) of the *Broadcasting Act 1989* (NZ). See *Hooker* [2002] High Court, Wellington, AP 138/01 (unreported, 13 June 2002) [10].

media.⁹ The Council suggests a more contextual approach, and reports that on average over the four years from 1999 to 2002, nearly a quarter of complaints were upheld or partly upheld.¹⁰ And the aforesaid letter points out that in 2003, of the 18 complaints considered, seven have been upheld and two part upheld. The Press Council suggested an average 25 per cent rate compares to the Broadcasting Standards Authority, which has averaged a complaints uphold rate of nearly 27 per cent over a similar period.

Suppression

Yet more on 'Constable A'

This update has previously referred to suppression issues associated with the matter of a private prosecution against Constable A for the shooting of a young man, Stephen Wallace.¹¹ The media continued to play a significant role in these [320] proceedings. After the prosecution 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, Wallace successfully applied to the High Court for consent to file an indictment, on the grounds that the Justices of the Peace had been under a misrepresentation as to their proper function.¹² Among other pre-trial applications then made was one by Wallace for change of venue from New Plymouth to Wellington on the grounds that a fair and impartial trial could not otherwise take place.¹³ The application was granted because a combination of factors convinced the judge. The private prosecution was unusual and had attracted enormous publicity throughout the country, in particular in New Plymouth. A local paper had run a poll on the issue of whether Constable A's identity should be kept secret by the media even though this was not legally required, and had received a record response (80 per cent favoured secrecy). Chambers J considered that this newspaper had clearly aligned itself with the constable's position. Many of the letters from local people to the newspaper on the poll also clearly took such a position. The poll was interpreted by most, the judge considered, as a poll on guilt, not just name suppression. Public meetings had also been held after the shooting, giving it local prominence. The case had also developed a racial overtone, and the judge noted that the jury pool in the area

⁹ *The 30th Report of the New Zealand Press Council*, 17.

¹⁰ The inclusion of part-uphold figures does make the resulting average somewhat deceptive.

¹¹ See (2002) 7(4) *Media & Arts Law Review* 22.

¹² *Wallace v Abbott* [2003] NZAR 42 (Elias CJ).

¹³ *Wallace v Abbott*, High Court, New Plymouth, T9/02 (unreported, 16 September 2002).

would be relatively small. Chambers J went on to note that the JP's who had refused committal for trial, both well known in the area, had also spoken to the media, one after the decision, and the other after the reversal of that decision by the High Court, publicly aligning themselves with the defence. The Wallace family had also conducted a visible media campaign for their case and were well known in the area. There were no arguments as to prejudice for Constable A. All of these factors supported a change of venue and were in conformity with precedent.¹⁴

During the trial, Constable Abbott was granted bail and lived at a safe secret house, for his own protection. Although his name was not suppressed, he was granted an order which suppressed his then-current address, and prohibited publication of the local body area or island within New Zealand in which he was living. Constable Abbott was eventually acquitted of the charges by the jury. A newspaper sought to clarify suppression issues in wanting to publish an article about the trial. In *Abbott v The Press*¹⁵ the trial judge, Chambers J, granted an ex parte injunction on the same terms of the original order, on the grounds of the tort of breach of privacy. Abbott's counsel argued that his whereabouts were a private affair in which the public had no legitimate interest. He still faced threats. The Court accepted these arguments without testing the facts against any definition of privacy, including the publication of private facts which would be offensive to the ordinary, reasonable person.¹⁶ There is some doubt such a definition would be satisfied, in that while arguably the address and other aspects of location might be private, it is uncertain the publication of such facts would be offensive — rather, it is possible harassment which might follow publication which could be offensive. The type of privacy being argued for here is in fact a right to be left alone, and that aspect of developing privacy law in New Zealand has been cast in some doubt by the decision of the High Court in *Hosking v Runting*,¹⁷ discussed below. In any event, Mr Abbott's injunction was made permanent three days later and was not opposed by *The Press*.

¹⁴ *R v Middleton*, Court of Appeal, CA218/00 (unreported, 26 September 2000).

¹⁵ High Court, Christchurch, T9/02 (unreported, 13 December 2002).

¹⁶ This seems to be the definition of the tort which had gained some acceptance in New Zealand. See (2000) 5 *Media & Arts Law Review* 280 and (2002) 7(4) *Media & Arts Law Review* 324 and the discussion of the *Hosking* case below.

¹⁷ High Court, Auckland, CP 527/02 (unreported, 11 February 2003).

Media coverage of trial of children

In the *Queen v Kaukasi*¹⁸ the High Court dealt with an application by two television broadcasters, a [321] newspaper and the state radio broadcaster for expanded media coverage of a forthcoming murder trial involving a number of young people ranging in age from 13 to 21 years. The common law supports an emphasis on freedom of information and the associated open reporting of court hearings.¹⁹ The matter is also regulated in New Zealand by a set of guidelines agreed by a subcommittee of the Courts Consultative Committee, chaired by the Chief Justice.²⁰ In the absence of reasons to the contrary, television, radio coverage and still photography during criminal trials are usually permitted. Names of accused are also usually published.

In this case, however, television coverage was restricted to after the point in the trial when all the evidence had been presented, to allow the young accused to deal with the trial and their defence with as little stress as possible. Justice Fisher also made reference to s 25(i) of the *Bill of Rights Act*, which establishes minimal rights of criminal procedure, in this case the right, in the case of a child, to be dealt with in a manner that takes account of the child's age. Radio coverage was seen by the judge as less intrusive and was therefore allowed, subject to a requirement that the voices of the accused (defined as those below 17 years of age at the date of the trial) not be broadcast. Still photographs of the accused in the courtroom were declined absolutely, including any adult accused, because of association within the group of accused. Lifting of name suppression was also refused, although it was accepted that this could be revisited if conviction occurred. Names of witnesses who gave evidence establishing a relationship with the accused would also be suppressed.

Gagging order using bail conditions

A prominent pro-euthanasia campaigner was charged with the attempted murder of her mother who was ill with cancer, after she promoted sales of a book discussing her mother's death.²¹ Among six bail conditions were those which prevented her from giving media interviews, promoting her pro-euthanasia views publicly or privately, and promoting her book. Such gagging by way of bail was seen as extremely

¹⁸ High Court, Auckland, I 014047 (unreported, 4 July 2002).

¹⁹ *R v Liddell* [1995] 1 NZLR 538 and *Proctor v R* [1997] 1 NZLR 295.

²⁰ The Expanded Media Coverage Guidelines, obtainable from offices of the High Court.

²¹ *New Zealand Herald*, 15 March 2003.

vulnerable to appeal as the conditions were not within the legislated purposes for bail.²² The conditions also attracted much comment from civil liberties groups and the media. A variation of the conditions was subsequently agreed by counsel, which still prevented comment on the case itself, but allowed comment on euthanasia generally.

The naming of victims

Mr X was the target of a bizarre kidnap plot which received intense media coverage, both at the time of arrest of the three men involved and at the trial of two of them in the High Court. Mr X's name was originally suppressed on the grounds of stress to him and his family and on the basis that he was not to give evidence at the trial (Mr X did not know the accused and had no knowledge of the planned kidnap until told by the police and taken into safe custody.)²³ Wellington Newspapers Ltd applied to [322] set aside the order, on the grounds, among others, that the identity of Mr X was a matter of public interest, and that in any event, his identity and that of his family had been published by the 'Online Sun' in the United Kingdom, which was accessible in New Zealand. The application was dismissed in the High Court.²⁴ However, during the jury trial, the same judge initiated a process of review on the grounds of change of circumstances, and set aside the suppression order. The matter went to the Court of Appeal,²⁵ which held that it did not have jurisdiction to decide the appeal. The judge had made a final order, and once this was done, another (or indeed the same) judge could not in general rehear or review the order in absence of a legislative provision to that effect. The section under which the order was made conferred no power 'rehear' or review a final decision to set aside a suppression order. The decision stood unless set aside on appeal. However, there was no basis for bringing appeal within the *Judicature Act 1908* (NZ).²⁶

²² Section 31 of the *Bail Act 2000* (NZ) allows other conditions to be imposed, but only if they are necessary to ensure appearance in court, prevent interference with witnesses, and prevent offending.

²³ Section 40 of the *Criminal Justice Act 1985* (NZ) empowers a court exercising jurisdiction in a criminal case to prohibit the publication in a report of the name of the person accused or convicted of the offence or any other person connected with the proceedings. It was clear Mr X was a person connected with the proceedings.

²⁴ *Re X* [2002] NZAR 938.

²⁵ *Victim X v Television New Zealand, Wellington Newspapers Ltd and the AG*, CA 91/03 (unreported, Judgment 26 May 2003; Reasons 29 May 2003).

²⁶ *Judicature Act 1908* (NZ) s 66.

The Court went further and stated it would have dismissed the appeal on the merits in any event, because the judge had not erred in his approach to the basic principle of open justice and the limits on it. As a starting point principle, open justice can still be outweighed by other interests, such as privacy. However, the appeal attempted to argue that the judge had not given sufficient weight to privacy concerns, which amounted to the difficult task of challenging the exercise of a discretion. The Court of Appeal considered there had been no error of principle in relation to privacy, in particular in making a comparison between the situation of Mr X and his family at the time of the suppression order and at the time the suppression order was set aside. Mr X's identity was revealed in the High Court when he was called to give evidence in the continuing criminal trial. He issued a statement saying he had no desire for publicity about the event and neither he nor his family would be giving interviews. Mr X's face was not broadcast on television in coverage of the trial because witnesses are able to ask that their faces not be shown in television coverage. However, television broadcasters published a photo of Mr X when reporting the trial, as well as giving his name and occupation.

The decision to name Mr X following the lifting of the suppression order was criticized in some quarters as legally correct, but ethically wrong, because the public interest argument was not seen as a strong one. However, the alternative argument is that a presumption of open justice requires the onus to be on those who wish to make a compelling argument for secrecy.

Disclosure of name of released paedophile

A broadcaster, TV3, attracted considerable criticism in June 2003 for revealing the name of a convicted sex offender who had been released into the community after serving a 10 year prison term. The man was reported in other media as having committed a sex crime against his sister and having raped a 23 month old baby girl although he was not identified. Under the *Criminal Justice Act 1985* (NZ)²⁷ it

²⁷ Section 139 provides that:

...No person shall publish, in any report or account relating to any proceedings commenced in any court in respect of an offence against any of sections [of the *Crimes Act 1961* which cover the relevant sexual offences]...the name of any person upon or with whom the offence has been or is alleged to have been committed, or any name or particulars likely to lead to the identification of that person.

The offence is punishable by a fine of \$1000.

appeared TV3 had breached suppression requirements in providing the man's name because it could be used to identify the man's sister, a victim of his sexual crime. The television broadcaster argued that it had found a loophole in the legislation because it had only released the man's name, not commented on [323] the relationship between the man and his victim. However, this ignored completely the other media context at the time of the broadcast. Arguably, the name was sufficient in that context to be 'particulars likely to lead to the identification of the victim' as prohibited by the legislation. To interpret the legislation any other way would allow members of the media to behave atomistically to simply avoid its effect, while the purpose of protecting victims would be completely undermined.

In the event, it transpired other members of the media had released similar details earlier in the year in articles about another sexual offender, and further, that there had been no conviction for the alleged offence against the man's sister in any event, and therefore no suppression order existed for TV3 to breach. However, the episode raised troubling issues about how effective suppression is in relation to sexual offences. In this case, the man's sister ultimately had no protection at all, while the infant victim of the rape for which he was convicted did. Further, the fines for breach of such orders are very low, and therefore may encourage a calculated approach to the release of any information.²⁸ Finally, the stance taken by the broadcaster before it was discovered to be acting quite legally was arguably unethical and somewhat disingenuous.

Privacy

Photos taken in a public place

A decision of the High Court which has attracted considerable publicity was released in May 2003. *Hosking v Runting*²⁹ arose from photos of the Hoskings' twin daughters which were taken while they were being pushed in a pram by their mother on a Christmas shopping trip, on a public footpath, in a busy shopping mall. Mr Hosking is a New Zealand media celebrity and has courted publicity to some degree in the past, making public the fact that his children were the product of IVF treatment. The magazine *New Idea* had commissioned the photos, taken without Mrs Hosking's

²⁸ There was no suggestion at all that such an approach motivated TV3 in this instance.

²⁹ High Court, Auckland, CP 527/02 (unreported, 30 May 2003).

knowledge. The magazine planned to use the photos to illustrate a proposed article in its Christmas edition, but agreed to hold publication until the proceedings, issued in the Hoskings' names, but treated as being about the privacy of the children, were disposed of. Because the proceedings were regarded as having great relevance to media interests, leave was granted for two non-parties, the New Zealand section of the Commonwealth Press Union, and ACP Media Ltd, the largest magazine publisher in New Zealand, to intervene.³⁰

Randerson J issued a lengthy, conservative, but overall unsatisfying judgment. After surveying the New Zealand law, and the English breach of confidence cases, as well as the Australian and North American developments, the judge concluded the court should not recognise a privacy tort covering the public disclosure of photographs taken in a public place. However, the reasons given to support this finding are somewhat contradictory.

The judge thought that the legislature had been cautious in dealing with privacy, in that the *Bill of Rights Act 1990* (NZ) does not include a right to privacy, and the *Privacy Act 1993* (NZ) does not create tortious rights and duties. Further, he considered that a tort based on photographs taken in a public place went beyond the previous High Court decisions on privacy. Randerson J went on to say that existing remedies could meet most claims to privacy based on public disclosure of [324] private information, and the rights of children in this context. He referred to the United Kingdom developments in the action of breach of confidence in this regard, and expressed concern with developing a tort of privacy which could properly deal with matters such as prior constraint and freedom of expression. He considered that the previous High Court decisions³¹ which appear to support a developing tort in New Zealand would have been decided differently had the courts involved seen the English developments and heard the submissions put in the *Hosking* case, and he respectfully

³⁰ *Hosking v Runting*, High Court, Auckland, CP 527/02 (unreported, 11 February 2003).

³¹ Apart from one District Court claim for damages: *L v G* [2002] DCR 234, previous actions have all involved applications for injunctions at High Court level: *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*, CP477/86 (unreported, High Court, Wellington, Jeffries J, 20 October 1986); *News Media Ownership Ltd v Tucker*, CA172/86 (unreported, 23 October 1986). See (2000) 5 *Media & Arts Law Review* 280 and (2002) 7(4) *Media & Arts Law Review* 324.

differed from those decisions. Finally, the judge considered that any gaps existing in the law should be filled by the legislature.

In his conclusion, the judge confined his rejection of a privacy cause of action to the publication of photographs taken in a public place, and also found that the case did not fulfil the criteria set out in previous High Court cases which accepted there is a tort of invasion of privacy arising from the public disclosure of private information. This impliedly accepts the existence of some sort of tort of breach of privacy in New Zealand. However, most of Randerson J's arguments (which are almost all challengeable) go to rejecting the existence of any sort of privacy tort, and he accepts instead that the tort of breach of confidence should be developed to protect any deserving interests in this area. These two positions cannot be reconciled. The appeal has been heard and a decision is awaited from the Court of Appeal. This is the first time that Court will face such issues so directly. It is hoped the resulting judgment will deal with the issues substantively and in a principled manner, in particular, the issue whether a tort of breach of privacy exists in New Zealand and what basic form it takes.

Telecommunications Privacy Code

After many years in the making, the Privacy Commissioner has issued a Telecommunications Information Privacy Code.³² The code affects telephone companies, publishers of telephone directories, Internet service providers, mobile telephone retailers and call centres handling personal information. Among other benefits it prohibits the use of traffic data gained from interconnection for unauthorised direct marketing, and provides more control to subscribers about how names and addresses appear in the telephone book. However, it does not cover issues such as monitoring of staff telephone calls and emails, telemarketing, the use of location data associated with cell phones, and anonymity and pseudonymity.

³² (May 14 2003). See *Private Word*, News from the Office of the Privacy Commissioner, Issue No 48 (April-June 2003) 1.