NEW ZEALAND MEDIA LAW UPDATE

RECENT DEVELOPMENTS — DEFAMATION, CENSORSHIP AND CONTEMPT

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[237] Introduction

The last 12 months have once again seen numerous developments in media law in New Zealand. Surprisingly, defamation law has not been at the forefront of this ever-cresting wave, although useful judgments on defence against attack, defamation and negligence, and damages, are noted. In the area of censorship, the Race Relations Commissioner discovered his free speech is also limited in some important respects, the censorship and broadcasting regimes were found to have surprising lack of overlap, and the District Court dealt with an important issue about viewing but not downloading objectionable material on a computer. Mel Gibson's *The Passion of the Christ* had its classification reviewed and subsequently reduced, the console game, *Manhunt*, was controversially banned from publication in New Zealand, and the government moved the first major amendments to the *Films, Videos and Publications Classification Act 1993*. In a high profile case, the High Court found an MP and two broadcasters guilty of contempt, including 'scandalising the court'. The Developments in the areas of broadcasting standards, the Press Council, suppression and privacy will be covered in a forthcoming issue of the *Media & Arts Law Review*.

Defamation

Qualified privilege — defence against attack

Recent case law demonstrates that the manifestation of the qualified privilege defence, whereby if a party is attacked, he or she is entitled to publish a rebuttal and provided the rebuttal goes no further than reasonably necessary for the purpose of defence and is not actuated by malice, any imputations cast on another are privileged,[2] [238] still has some life in New Zealand.[3] The defence was unsuccessfully pleaded in

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[2] See *Turner v Metro-Goldwyn-Mayer* [1950] 1 All ER 449, 470–1 (Lord Oaksey):

> There is, it seems to me, an analogy between the criminal law of self-defence and a man's right to defend himself against written or verbal attacks. In both cases he is entitled, if he can, to defend himself effectively … If you are attacked by a prize fighter you are not bound to adhere to the Queensberry rules in your defence.

[3] See *Keith v Christchurch Press Co Ltd* [1972] High Court, Christchurch, A 259/71 (unreported, 4 August 1972); *Buck v Brownlee & TV3 Network Services Ltd* [1992] High Court, Christchurch, CP 64/92 (unreported, 29 July 1992); *Fraser-Armstrong v Hadow* [1995] EMLR 140.

Chinese Herald Ltd v New Times Media Ltd,[4] where Harrison J described it as a 'shield of defence, not a weapon of attack' and emphasised that its special type of protection was only available where the content of the response was related and restricted to answering the original charge.[5] However, the Court of Appeal has stated more recently in *Alexander v Clegg* that the question of excessive retaliation is not to be examined narrowly.[6] What must be examined closely are the circumstances giving rise to the privilege and the features of the attack.[7] In this case, the Court referred not to a shield of defence, but to a 'privilege to hit back when one's reputation is attacked',[8] which is altogether more assertive. One may not just defend then, but can use a lawful 'counterpunch'.[9]

Truth and lesser meanings

In the previous update, I referred to the lack of clarity as to whether the *Defamation Act 1992* has relaxed the strict approach the New Zealand courts have previously taken to whether a defendant can plead lesser meanings than those advanced by the plaintiff, and then attempt to establish the truth of those lesser meanings.[10] Most recently in *Haines v Television New Zealand*,[11] a High Court decision, Venning J agreed with the previous conservative approach and affirmed that any defence should relate to and answer the plaintiff's imputations. The judge held also that the purpose of s 8(3)(a) of the Act is simply to allow a defendant to plead and prove truth even when a publication contains errors which turn out to be immaterial, not to allow lesser meanings.[12] The defendants had broadcast a number of items over a period of a month on a current affairs programme about a dispute between the plaintiffs and some

[4] [2003] High Court, Auckland, CP 366-SW000 (unreported, 31 October 2003).
[5] Ibid, [54]. See also Salmon J in *Wilcox v Health Funding Authority* [2001] High Court, Auckland, CP 368-SD/00 (unreported, 7 December 2001).
[6] [2004] Court of Appeal, CA 168/2 (unreported, 25 March 2004) [59].
[7] Ibid.
[8] Ibid [61].
[9] Ibid [62]. *Alexander* arose from a dispute between competitors in the business of network marketing. A circular sent to a network of distributors in New Zealand and Australia in response to publications attacking the financial stability of the defendant's company, which also called into question the financial stability of the plaintiffs and their ventures, was held to be protected in its entirety by qualified privilege. See also *Reeves v Saxon* [1992] Court of Appeal, CA 134/89 (unreported, 17 December 1992).
[10] See (2003) 8(3) *MALR* 227, 229.
[11] [2004] High Court, Auckland, CP 89-SD02 (unreported, 12 March 2004).
[12] Ibid [49]–[52]. In *Haines*, once again the lesser meanings asserted by the defendant were found by the judge not to be materially distinct from those asserted by the plaintiff: [57]. The judge did confirm that if the plaintiff's allegations are general, the defendant can attempt to justify the general meaning: [59].

clients. Among the allegations arising from the programmes pleaded by the plaintiff were that the plaintiffs had ripped off their customers, were dishonest, operated in a thuggish manner, were not to be trusted and were unprofessional, and incompetent. The defendants pleaded imputations that the plaintiffs had failed to deal with the clients' home in a proper workmanlike manner, had acted unprofessionally in their dealings and had operated in a threatening or intimidating manner towards the clients. In *Haines*, once again the lesser meanings asserted by the defendant were found by the judge not to be materially distinct from those asserted by the plaintiff in any event.[13] The judge did confirm that if the plaintiff's allegations are general, the defendant can attempt to justify the general meaning.[14]

[239] ***Defamation and negligence***

King v TV3 Network Services[15] discussed previously, has been overturned by the Court of Appeal and rightly so. Mr King ran a motor repair business which was given a poor evaluation on the defendant's consumer television show *Target* when it was secretly filmed. After complaining, Mr King was allowed to tune another car but no concession was made or any apology published. The plaintiff had filed a cause of action in negligence together with a defamation claim. Wild J allowed both claims to stand in the High Court. However, when the matter reached the Court of Appeal, it pointed out that the duty being argued for would have to be a duty not to publish a programme in respect of which the research or other preparation had been done carelessly.[16] In the *King* case, this extraordinary duty was said to arise because TV3 had filmed Mr King covertly. However, the Court stated that while this fact might be relevant to the issue of the availability of the qualified privilege defence, and to the issue of damages, it did not justify imposing a duty where none existed before, nor did it outweigh any of the policy reasons articulated in *Midland Metals Overseas Pty Ltd v The Christchurch Press Company*[17] for not imposing a duty.[18] The matter therefore appears to be settled — the behaviour of the media in researching, filming or

[13] Ibid [57].
[14] Ibid [59].
[15] [2002] High Court, Wellington, CP86/01 (unreported, 1 October 2002). See (2003) 8(3) *MALR* 227, 228.
[16] *King v TV3 Network Services* [2003] Court of Appeal, CA221/02 (unreported, 14 October 2003).
[17] [2002] 2 NZLR 289. See (2001) 6(3) *MALR* 250.
[18] *King v TV3 Network Services* [2003] Court of Appeal, CA221/02 (unreported, 14 October 2003) [12]–[14].

interviewing, or reporting news or current affairs, is not subject to any duty based on the tort of negligence if damage to reputation results. In the main, defamation covers the ground.[19]

Damages

Levels of damages in New Zealand are regarded as not being excessive. The largest single award to date was made in *Columbus v Independent News Auckland Ltd*[20] where the jury awarded a record $675,000 in damages. More recently a plaintiff defamed in three Chinese newspaper articles was entitled to an award of $125,000, while a co-plaintiff, less well known and defamed in only one article, was awarded $25,000 by a High Court judge.[21] The plaintiffs had sought $250,000 for each article. Punitive damages were not awarded, being identified by the judge as rare.[22] The case came close to the threshold but the compensatory damages awarded were seen as sufficient to punish and deter the defendants.

Although New Zealand no longer has a right of appeal to the Privy Council, a recent decision of the Privy Council in an appeal from the Court of Appeal of Jamaica is of interest to New Zealand. In *Gleaner Company Ltd v Abrahams*[23] the publisher and editor of two Jamaican newspapers appealed an award of £105,000 for admitted defamatory articles as excessive and a curtailment of the right to [240] freedom of expression guaranteed by the Jamaican Constitution. In this case, the newspapers had resisted the attempts of the plaintiff to clear his name over a period of sixteen years, and had maintained their allegations even before the Board, when it was clear years earlier that they would not be able to prove them. Lord Hoffman for the Board noted that in Jamaica, as in New Zealand, no reference is made to awards in personal injury cases, and declined to interfere with that approach. The Privy Council recognised the deterrent effect of awards, stating that: '[a]wards in an adequate amount may also be necessary to deter the media from riding roughshod over the rights of other citizens.'[24]

[19] Complaints about covert filming may also be covered by the tort of privacy or may come under the complaints regime of the Broadcasting Standards Authority.
[20] [2000] High Court, Auckland, CP 600/98 (unreported, 7 April 2000). See (2003) 8(4) *MALR* 317, 319.
[21] *Chinese Herald Ltd v New Times Media Ltd* [2000] High Court, Auckland, Civ 2000-404-1568 (unreported, 11 March 2004).
[22] Ibid [63].
[23] [2003] UKPC 55.
[24] Ibid [53].

The Board also took a conservative view of the chilling effect argument, noting that the Court of Appeal was entitled to the view that if their award had a chilling effect on irresponsible journalism, that would be no bad thing. The appeal was dismissed.[25]

Censorship

Limits on the exercise of free speech by the Race Relations Commissioner

In December 2002, New Zealand's Race Relations Commissioner, Mr Joris De Bres, made a speech in which he compared the country's record of colonial interaction with indigenous Maori to that of the Taliban destruction of the Bamiyan Buddhas. National MP Murray McCully complained that the speech was a form of incitement of racial disharmony under the *Human Rights Act*.[26] Mr De Bres resisted the complaint on the ground that he was provided with full immunity under the *Human Rights Act*.[27] The matter was removed to the High Court on the preliminary issue of the scope of the immunity conferred. In *De Bres v McCully*,[28] the High Court held, using straightforward interpretation techniques, that the protection was intended to cover only duties relating to complaints and investigations. Apart from this, it did not grant the Commission or its staff any greater protection from the law than other members of the community. Choosing to make a speech required no statutory authority and involved no duty — it was therefore a voluntary exercise of free speech, and could therefore be limited by the ordinary operation of the racial disharmony provision. Mr McCully did not pursue the original complaint, which appeared unlikely to come within the terms of the incitement provision in any event.

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[25] Ibid [61]–[72].

[26] Section 61 of the *Human Rights Act 1993* makes it unlawful to publish or broadcast threatening, abusive or insulting matter likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand, on the ground of the colour, race or ethnic or national origins of that group. Section 131 of the Act provides civil sanctions for published racist remarks. Complaints based on this racial disharmony provision may be made to the Race Relations Conciliator, whose office is part of the Human Rights Commission. The remedies are not punitive, but if the matter is not settled through conciliation, it can be referred to the Complaints Review Tribunal, which may among other remedies uphold the complaint, issue a declaration that the Human Rights Act has been breached, award damages or make a restraining order. Damages may be significant, covering pecuniary loss, loss of benefit, and humiliation, loss of dignity and injury to feelings.

[27] *Human Rights Act 1993* (NZ) s 130.

Relationship of broadcasting and classification regimes

In *Re Society for the Promotion of Community Standards Inc*[29] the Society appealed a second determination by the Film and Literature Board of Review of the film *Baise-Moi*. Among other findings which demonstrate that it continues to be very difficult to successfully challenge the findings of a body regarded as expert in the matter of classification,[30] the High Court also confirmed that the *Films, Videos* [241] *and Publications Classification Act 1993* (the Act) and the *Broadcasting Act* do provide two distinct regimes, apart from one area of express overlap.[31] The second arm of the appeal centred on the impact of television on the classification process because in *re Baise-Moi v Society for the Protection of Community Standards*[32] Hammond J found the Act required consideration of the particular way the video (film) might be shown, including on television. The Board of Review in looking at the film a second time noted Hammond J's concern at the possibility of publications being screened on television, but found it had no jurisdiction to deal with television. Goddard J has confirmed this. Under s 4(2) of the *Broadcasting Act*, a publication classified as objectionable under the Act can only be screened on television with permission of the Chief Censor. However, any other classification, including restricted (where the film is classified as objectionable except in the hands of specified individuals or groups) does not require such permission. The second determination of the Board made the film a restricted publication. In theory, then, *Baise-Moi* can be shown on television in New Zealand and that broadcast would be subject to the post-broadcast complaints jurisdiction of the BSA. It would fall to be judged according to the relevant code provisions dealing with good taste and decency, and the depiction of sexual material and violence.

Viewing objectionable material on computer screen

In *Department of Internal Affairs v Young*,[33] the District Court dealt with an issue much pondered by legal academics — whether accessing, looking at and closing, but

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[28] [2004] 1 NZLR 828.

[29] [2003] High Court, Wellington, CP 300/02 (unreported, 11 November 2003). See (2003) 8(3) *MALR* 227, 232.

[30] See also *Re Visitor Q* [2004] NZAR 329.

[31] See also the views of the Chief Censor, Bill Hastings: *Annual Report of the Office of Film and Literature Classification* (2003) 16 <www.censorship.govt.nz>.

[32] [2002] NZAR 897.

[33] [2004] DCR 231.

not saving, unlawful images on a computer screen, can be 'possession' of objectionable material in terms of the *Films, Videos and Publications Classification Act 1993*.[34] In this case, forensic examination of a school computer revealed objectionable material involving unlawful depictions of children or young persons, which led to an admission by the accused that he had looked at the material and had gone to newsgroups looking for them. Young accessed the files, opened and viewed them, then closed them, not realising that a copy was saved without his knowledge to the hard drive of his computer. Proof of possession in New Zealand requires some element of knowledge,[35] and for this reason, Young was not charged on the basis of the material found on the hard drive, but rather for possessing by opening, viewing and closing the material. After noting that the point does not appear arguable in the United Kingdom,[36] Judge Ryan held that the context of this charge did amount to possession within the Act because the publication was tangibly present on the computer screen, the defendant had sought it out with full knowledge of it and had full control of it during the limited time he opened, viewed and closed it.[37] The judge adopted a narrower view of the purpose of the Act than had been taken previously,[38] holding that any reasonable construction which inhibits any use of material exploiting children or young persons for sexual purposes is to be preferred.[39] The judge noted that his view might capture the [242] emergence of unlawful material on a computer by unsolicited E-mail by a sidewind. However, he considered that such an occurrence would rarely come to the attention of prosecutors and would, without more, be de minimus. Furthermore, Judge Ryan noted, the offence cannot be prosecuted without the consent of the Attorney-General although that power can be delegated to an Inspector of Police. Although such safeguards could not be used to justify an inappropriate interpretation of the possession offence, in this case, the judge considered his interpretation was not inappropriate.[40]

Recent classification decisions

[34] Section 131 provides that every person commits an offence against the Act, who, without lawful authority or excuse, has in that person's possession an objectionable publication.
[35] *Goodin v Department of Internal Affairs* [2003] NZAR 434; see (2003) 8(3) *MALR* 227, 231.
[36] *Atkins v Director of Public Prosecutions* [2000] 2 All ER 425.
[37] *Department of Internal Affairs v Young* [2004] DCR 231, 234.
[38] *Goodin v Department of Internal Affairs* [2003] NZAR 434.
[39] *Department of Internal Affairs v Young* [2004] DCR 231, 235.
[40] Ibid.

Mel Gibson's controversial film, *The Passion of the Christ*, was given an R16 classification by the Classification Office, which was reduced by one year by the Board of Review after receiving submissions from the New Zealand Association of Rationalists and Humanists, the Media Office of the Catholic Bishops Conference, Vision Network of New Zealand, the Society for the Promotion of Community Standards, the Classification Office and many individuals.[41] The Board deals with applications de novo and reaches an independent conclusion from the Classification Office and the original decision. The Board therefore did not articulate its finding so as to justify why a classification of R15 was preferable to that of R16. It found that to view the film, persons must be able to process the content to the extent that they can recognise its historical foundation, and have the maturity to be able to start to analyse and reject ideas.[42] The Board thought young persons of 15 and above were required to start taking responsibility for their own decisions and that they had the capacity to decide if they wished to see the film.

In December 2003, the Classification Office classified the DVD-ROM console game, *Manhunt* objectionable.[43] This was the first such game to be so classified and New Zealand is reportedly the first country to ban this particular game.[44] *Manhunt* is a third-person action/adventure style game formatted for the PlayStation 2 Platform. It places the player in the position of a killer, Cash, who must kill or be killed. Cash is rewarded as he moves through the levels of the game using ever-more violent methods of dispatching other killers. Killings are graded by an unseen character, Starkweather, who is also killed by Cash at the end of the game. The game uses high quality graphics and potent sound effects. The Office found the game did not actually promote or support the extreme violence and cruelty in it, and so could not be deemed objectionable without more.[45] However, the game was classified objectionable by the Office taking into account the extent and degree to which it dealt with violence, torture and cruelty, and giving weight to its dominant effect on the player who is required to direct the violence, the impact of the console medium requiring the player to interact with the images and to identify with Cash, the character of the publication,

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[41] Decision of the Board of Review, '*The Passion of the Christ*' (2004/001, 15 March 2004).
[42] Ibid [171].
[43] *Manhunt* (Classification Register No 302023, 11 December 2003).
[44] Sally McKechnie, 'Censorship and video games' [2004] *NZLJ* 153.
[45] Under s 3(2) of the Act.

which is as an action game based on killing, the audience or likely audience, being adults but also young people, and the purpose of the game, which was to entertain.[46] The decision contains an almost meaningless recitation attempting to show that freedom of expression and the Bill of Rights was taken into account. It is states that: '[The *Bill of Rights* has] been used to give any ambiguity in the provisions relevant to the classification of *Manhunt* a meaning that permits as much expression as possible without undermining the intention of Parliament to prevent injury to the public good'. But ultimately freedom of expression is seen by the Office as outweighed by likelihood of harm, because the game requires the player to acquiesce in, tolerate and enjoy the violence inflicted, described as an antisocial attitudinal shift.[47] The game was also seen as being possibly being disturbing and distressing [243] to young people and adults, and as having potential to inure players to brutal violence generally. Sally McKechie has criticised the decision as being inconsistent with American decisions, although she acknowledges that the constitutional basis of freedom of expression in the two jurisdictions is different.[48] McKechie states correctly that the decision regards a serious negative impact on players as determinative and self-evident. In the US, the courts require a high standard of scientific proof of harm. However, McKechie's critique ignores the fact that all of the Office's classification decisions are predicated on presumed harms flowing from published material — classification legislation is both an Act and an act of a Parliament which believes it can capture the collective view of a society about harms which flow from the availability of certain sorts of material. In short, a presumption about harm is built into the legislation. It is the classifiers who are obliged, under the *Bill of Rights* and in terms of natural justice, to more fully articulate the nature of those harms in individual decisions — no easy task. The *Manhunt* decision may be wrong in terms of actual harm or cause and effect, but it cannot be challenged legally on those grounds. It is the *Bill of Rights* treatment which is poor and which should be challenged.

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[46] Under ss 3(3) and 3(4) of the Act.
[47] *Manhunt*, above n 42, 11–12.
[48] McKechnie, above n 43, 154.

Amendments to the Films, Videos and Publications Classification Act

A previous update noted the Government response to the select committee inquiry into censorship matters.[49] The Government Administration Committee is now hearing submissions on the resulting Films, Videos, and Publications Classification Amendment Bill. The Bill creates a distribution offence with no requirement of financial gain and extends other offences; increases penalties up to 10 years imprisonment; makes child pornography an aggravating factor in relevant offences; creates a new offence of possession with knowledge, and clarifies that child nudity and offensive language can attract restriction. The latter amendments are intended to overcome the obstacle caused by the *Living Word* decision which created a classification 'gateway' through which material must pass before it can be classified.[50] The Bill also amends the classification criteria so that the use of urine or excrement in association with degrading or dehumanising or sexual conduct will not cause a publication to be automatically deemed objectionable,[51] but will be instead a factor to be given particular weight in the classification process. This removes an anomaly in the legislation, whereby material depicting such acts was deemed to be objectionable though the acts themselves were not criminal in any way. The amendment does not deal specifically with hate speech or covert filming, and the Minister of Justice noted that the former was a human rights issue, while the latter was an invasion of privacy.[52] It is hoped the government leaves the matter of hate speech alone, and, at least where covert filming involves nudity of children or young persons (such as the filming of children undressing in gym changing rooms or at theatrical shows), it may in fact be covered by the amendment. A separate report has been commissioned by the Government into the privacy issues associated with secret filming, in particular in relation to new technologies such as cellphones.

[49] See (2003) 8(3) *MALR* 235, discussing the Government Response to Government Administration Committee Report On its Inquiry Into The Operation Of The Films, Videos, And Publications Classification Act 1993 And Related Issues.
[50] See (2000) 5(3) *MALR* 196; (2001) 6(3) *MALR* 253. See also *Annual Report of the Office of Film and Literature Classification* (2003) 12–14 <www.censorship.govt.nz>.
[51] Under s 3(2) of the Act.
[52] Media Statement of Minister of Justice, Hon Phil Goff, 2 December 2003.

[244] **Contempt**

The High Court has recently found an MP and television and radio respondents in contempt of court in *Solicitor-General for New Zealand v Smith*.[53]This case revolved around a custody dispute being dealt with in the Family Court, whereby parents were seeking the return of their son who had been given by them into the care of a relative during a time of difficulty. The caregiver had been given interim custody when the parents approached their MP, Nick Smith, to express their concern with the process leading to the full hearing of the custody order. Dr Smith carried out his own fact finding expedition, and after further contact with the distressed parents, alerted National Radio as to a possible story, telephoned the caregiver on the other side of the dispute twice, and was interviewed on radio with the mother, and for a proposed TV3 documentary, as were the parents. Dr Smith also issued two media releases, and paid for the parents' representation at the custody hearing. Aspects of this behaviour were in breach of s 27A of the *Guardianship Act 1968*,[54] but were also found to be contempt of court.

Dr Smith was found guilty of putting improper pressure on the particular litigant in this case, and on potential litigants. As to the first, Dr Smith was found to have deliberately rung the caregiver with the intent of influencing her, because he rang her directly rather than tried to talk to her lawyer, and because he had asked her if she felt guilty about stealing the child and told her he was a Member of Parliament which was the highest court in the land. It made no difference that the MP had acted in good faith.[55]

As regards Dr Smith's public comments in his media releases and on radio, these were found to be one-sided, inflammatory and intimidatory in effect. They failed the test in *Duff v Communicado Ltd*[56] in going beyond fair and temperate comment, and by either having a real likelihood of inhibiting a litigant of average robustness from availing itself of its constitutional right to have the case determined by the court, or by being actually intended by the maker of the statement to have that inhibiting effect on

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[53] [2004] High Court, Wellington, CIV 2003 485 1811 (unreported, 24 March 2004).

[54] Which provides: 'No person shall publish any report of proceedings under this Act …except with the leave of the Court which heard the proceedings…Nothing in this section shall limit …[T]he power of any Court to punish for any contempt of Court.' No prosecution on the section was before the Court.

[55] Ibid [52]–[53].

a litigant. The Court construed this test taking account of the s 14 freedom of expression in the New Zealand *Bill of Rights*,[57] but confirmed that free expression must not be in contempt of court. In fact, the Court thought that besides being beyond fair and temperate, the releases and comments had the effects on litigants in both limbs of *Duff*. Further, the Court found that Dr Smith did not have any public interest defence, as his primary purpose was to interfere with the administration of justice, though ventilation of questions of public concern about the Family Court may have been a subsidiary purpose.[58]

Dr Smith was also found guilty of placing pressure on the Court by acting to influence the Family Court decision,[59] and of attempting to influence its position by undermining confidence in it by the public as potential suitors by trying to lessen public acceptance of its decision.[60] Finally, Dr Smith was found to have 'scandalised the Court' by the same public comments and statements which undermined public confidence in its decision.[61]

In dealing with the documentary programme broadcast by TV3, the Court took the same approach. The allegation was that TV3 actually intended to put pressure on the caregiver to forgo custody, or that the documentary had the likely tendency to have that effect. The Court noted that television has a more powerful reach than radio or the print media because it has power to manipulate the emotions of [245] viewers.[62] It went on to find the programmer biased, selectively edited and compiled, and manipulative.[63] Therefore the intention to pressure the caregiver was present, or at the least, that effect was present. That real risk would also dissuade similarly placed litigants of the Family Court.[64]

TV3 was also alleged to have intended to influence the Family Court in its decision, or to have created a real risk of this occurring. The broadcaster had advanced what it

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[56] [1996] 2 NZLR 89, 98.
[57] See above n 125, [59].
[58] Ibid [75].
[59] Ibid [86]–[90].
[60] Ibid [91]–[92].
[61] Ibid [93]–[95].
[62] Ibid [97].
[63] Ibid [98].
[64] Ibid [99]–[102].

saw as a correct solution to the case, and called for accountability and public scrutiny. On this aspect, the Court found that although it did not intend to undermine public confidence in the decision, the programme did carry the real risk of this effect.[65] TV3 argued there was public interest in the broadcast. However, the Court held that the fact a case gives rise to issues of public importance does not legitimise publication of case details which prejudice the hearing. TV3 also attempted to argue that the Chief Family Court judge had released many of the case details in an interview to Radio New Zealand in any event. This was also rejected by the Court as the comments of the judge were found to be entirely proper and not as represented by TV3.

As to Radio NZ, the Court found only that the comments made by Dr Smith exceeded the bounds of appropriate comment in relation to having an improper effect on litigants. It acknowledged that the Courts must not be over-sensitive to criticism. The parts of broadcasts which included an interview with the mother, and with the Chief Family Court judge, were not, in themselves, in contempt, although a possible breach of s 27A may have occurred. The Court did criticise the interviewer for not steering the interview participants away from the facts of the case while it was sub judice,[66] and for naming the child.[67] The interviews with Dr Smith were also found to have a real tendency to influence the Family Court in its decision, and therefore to undermine confidence in the decision. Radio NZ argued forcefully that in the light of the s 14 freedom of expression, the common law offence of ‘scandalising the court’ could not survive. However, the Court did not accept that the offence could not be justified as a reasonable limitation on the freedom. The latter was fundamental, but so were other rights, in particular, the right to justice and the right not to be arbitrarily arrested or detained. The common law offence was not so uncertain and arbitrary as to create an unacceptable chilling effect — the Court thought there was no evidence that it had. The Court suggested that there is more freedom of expression today in relation to what can be said about Courts, judges and judgments than there has ever been.[68]

Although it seems clear that the statements made by Dr Smith in their various forms were contemptuous, the judgment does not deal well with the arguments suggesting

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[65] Ibid [107]–[109].
[66] Ibid [123].
[67] Ibid [124].

'scandalising the court' cannot survive a *Bill of Rights* analysis. The offence has become rarely prosecuted, to the extent that it would be very difficult to find any evidence at all of its effects in recent times. The Court itself even acknowledges the abeyance of the offence in calling it 'a little quaint' at the very start of the judgment,[69] but does not put forward any actual evidence to support the finding of lack of chill, or of the presence of more freedom of expression. There is inconsistency, also, in finding in censorship cases that freedom of expression [246] trumps other rights,[70] while in contempt cases, finding it does not. The difference appears to flow from the view that contempt findings tend to result in temporary limitations on freedom of expression. It is clear, then, that the common law offence of scandalising the court has life still.

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[68] Ibid [132]–[136].
[69] Ibid [4].
[70] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570. See (2000) 5(3) *MALR* 196; (2001) 6(3) *MALR* 253.