



Welcome to *Media Law Update*, a regular review of issues and developments in this area of New Zealand law from Bell Gully.

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Access to Court files: Camera shy French agents oppose release of videotape footage of *Rainbow Warrior* committal proceedings - *Mafart & Prieur v TVNZ*

The Court of Appeal has been asked to prevent the release of videotape footage showing the committal proceedings of the two French Agents, Alain Mafart and Dominique Prieur. The footage was taken in 1985 and has been subject to a non-search order since the mid-1980s. TVNZ requested access to the material so that it could incorporate parts of it into a documentary film it was preparing for the 20th anniversary of the sabotage of the Rainbow Warrior. Mafart and Prieur opposed TVNZ's application for access to the relevant material.

TVNZ sought leave of a High Court judge to search and copy the video tapes so that they might be included in a documentary film for broadcast. Notice was given to the appellants, who objected. Simon France J heard the application and directed the Registrar of the High Court to make the video tapes available to TVNZ for inspection and copying.

Mafart and Prieur appealed.

However, the Court of Appeal considered there was a very real issue as to whether it had jurisdiction to hear an appeal against a grant of leave to search, inspect and copy the criminal records of a court. As that very issue had been raised but left undetermined by the Court of Appeal on at least two previous occasions, *R v Mahanga* [2001] 1 NZLR 641 and *Jackson v Canwest TVWorks Ltd*, the Court of Appeal directed that the issue be argued and determined before dealing with the appeal substantively.

Accordingly, the Court of Appeal's judgment was confined to the issue of jurisdiction.

President Anderson indicated that in his view a jurisdictional issue arose because of the difficulty in identifying the nature of a Judge's decision to grant leave pursuant to rules 2(3) and (5) of the Criminal Proceedings (Search of Court Records) Rules 1974. He considered that the Court needed to ask whether such a decision is:

- (a) an administrative one made pursuant to a statutory power of decision vested in a Judge; or
- (b) a judicial decision in proceedings and, if it is, is it in the nature of a criminal or a civil order?

After an extended analysis, Anderson P came to the conclusion that the order made by Simon France J could not be considered a judgment or decree or order in civil proceedings and that it must either have the character of a judgment, decree or order in criminal proceedings or the character of a purely administrative decision. In either case an appeal from it would not lie to the Court of Appeal. In Anderson P's view, the Court did not have jurisdiction to entertain Mafart and Prieur's appeal.

Chambers and O'Regan (delivering a joint judgment) considered that the appeal could be disposed of simply. They both considered that Simon France J's decision could not be the subject of an appeal under s 66 of the Judicature Act 1908, as that section authorises appeals only in civil proceedings: *Re Victim X* [2003] 3 NZLR 220. Nor did they consider that Parliament had conferred any right of appeal under the Crimes Act or any other Act.

Neither Chambers J nor O'Regan J found the fact that there is no right of appeal to the Court of Appeal surprising. They gave three reasons for this lack of surprise:

- (i) A decision as to whether court records can be inspected is, in the High court context, a very low level decision, that being reflected in the fact that generally speaking it is made by the registrar.
- (ii) The rules themselves provide for a right of appeal in normal circumstances – to a High Court judge.
- (iii) It is essentially a matter for the High Court as to how it keeps its records and to whom access should be permitted.

Having regard to these reasons, Chambers and O'Regan JJ said it was by no means surprising that Parliament did not see the Court of Appeal as needing to exercise supervisory control of the High Court's record-keeping function.

Mafart and Prieur sought leave to appeal to the Supreme Court and this has now been granted. At the time of writing, this final appeal has not yet been determined.



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Broadcasting: The amenability of a broadcasters' editorial and operational decisions to judicial review – *Mangu v TVNZ*

Broadcasters will have breathed a sigh of relief at Justice Lang's decision in Mangu as he held that, in general, broadcasters' editorial and operational decisions regarding the content of their programmes are not amenable to judicial review. In essence, Lang J was not prepared to endanger the media's right to freedom of expression and editorial independence. However, his judgment did not go so far as to say that judicial review will never be available against a broadcaster exercising a statutory power and he expressly chose not to comment on Justice Ronald Young's recent decision in Dunne and Anderton v Canwest TVWorks Limited.

Mangu was standing as an independent candidate in the Te Tai Tokerau electorate in the general election. *One News* broadcast an item about the electoral contest for the Te Tai Tokerau electorate which focused on the closeness of the contest between the sitting member, Dover Samuels, and the candidate for the Maori Party, Hone Harawira. During the course of the item, the presenter made reference to the results of a recent poll. Mangu was not mentioned in the item.

Subsequently, Mangu brought proceedings against TVNZ alleging that the combined effect of the use of the poll (which she claimed was unsatisfactory) and the fact that she was not mentioned in the item was to undermine her chances of being elected. She alleged that when it broadcast the item TVNZ breached its duties as a broadcaster, that it acted in an arbitrary, capricious or unreasonable manner and that it failed to take into account mandatory relevant considerations.

Mangu sought interim relief, namely:

- (a) an order requiring TVNZ to remove material relating to the item from its internet website; and
- (b) an order restraining TVNZ from publishing or disseminating the results of the poll in the future without also referring to the fact that the result of the poll was subject to challenge in the Courts by her.

Lang J's decision really turned on the question of whether the Court had the power to issue an injunction. In considering this question he reached the clear view that in the case before him:

...at the micro level of gathering news and presenting the news item that [was] the subject of this proceeding, TVNZ was carrying out a function that [was] not amenable to judicial review.

His reasons for coming to this conclusion included:

- the consistent reluctance of the Courts to trammel the media's right to freedom of expression and editorial independence (unless there are exceptional and compelling reasons for doing so);
- the fact that Mangu's request was one that effectively sought the Court to interfere with an editorial decision relating to the gathering and presentation of news;
- the existence of an alternative means of redress, namely the structured complaints and appeal process within the scheme of the Broadcasting Act 1989; and
- the difficulty of determining where to draw the line in individual cases if judicial review was available in respect of day-to-day programming and editorial decisions.

Importantly, Lang J did also say:

In reaching this conclusion I have deliberately restricted my comments to the issues that are directly relevant to the present case. I do so because I recognise that TVNZ exercises statutory powers in many ways. The fact that judicial review may not be available in the present case does not mean that judicial review may not be available in relation to other situations in which TVNZ is exercising a statutory power.

Immediately after making this statement Lang J mentioned that he had not made reference to *Dunne and Anderton v Canwest TVWorks Limited* because the principles applied by Justice Ronald Young in that case did not assist in determining the issues raised by the case that was before him.

This of course begged the question of whether the decision in the *Canwest* case was correct and leaves the point to be decided another day. Notwithstanding this, the *Mangu* case is to be welcomed; not least because it clarifies that day-to-day editorial and operational decisions of broadcasters are most unlikely to be overturned by the Courts.

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Broadcasting: The Broadcasting Standards Authority's jurisdiction to order apologies – *Radio New Zealand Ltd v Peter Ellis*

The High Court has recently considered the ambit of the Broadcasting Standards Authority's jurisdiction to order a broadcaster to apologise when it has breached the Codes of Broadcasting Practice. The Court also considered the BSA's obligation to comply with natural justice when imposing sanctions on broadcasters for breaches of the Code.

This was an appeal from a determination of the Broadcasting Standards Authority (BSA). The broadcast concerned was an interview on Radio New Zealand (RNZ) with a young man and his mother on its *Nine to Noon* programme on National Radio. The subject of the interview was their claim that Peter Ellis had sexually abused the young man in 1985.

The BSA had held that the broadcast was unfair to Mr Ellis and lacked balance. It ordered RNZ to publish a statement summarising its decision and apologising to Mr Ellis. Importantly, the statement was to be broadcast by RNZ and published in the four major metropolitan newspapers.

RNZ took issue with the BSA's order that the statement include an apology and that it be published in media other than RNZ itself. It contended that the BSA did not give notice that it was contemplating either order and that the BSA's powers under the Broadcasting Act did not extend to forcing a broadcaster to apologise. It appeared that underlying RNZ's opposition to an apology was a belief that an apology would prejudice its defence to a defamation action the issue of which Mr Ellis was then considering.

The BSA had issued a "Decision in Part", in which it concluded that the interview had breached the relevant broadcasting codes of practice in that it was both unfair and unbalanced but left the question of sanctions for later decision. In essence, the BSA concluded that the broadcast had consisted of an unidentified young man and his unidentified mother accusing an identified person of unspecified criminal offending of a very serious kind and that such a programme was likely to be inherently unfair to the person accused.

The BSA then invited submissions from RNZ and Mr Ellis with respect to the orders it should make. RNZ requested that Mr Ellis make his submissions first and that they then have the opportunity to respond. The BSA agreed to this request for sequential exchange of submissions. Submissions were then duly made.

The BSA then issued its decision which required RNZ to apologise and to publish the relevant statement in the four major daily newspapers. RNZ appealed to the High Court where the matter was heard before Chief High Court Judge Randerson and Miller J.

Counsel for RNZ argued that the BSA had erred by going beyond the penalty that Mr Ellis sought, without notice to RNZ that it was considering an apology or publication of a statement in media other than Radio New Zealand itself.

The High Court held that the BSA does have jurisdiction to order an apology as part of a statement under s13(1)(a), where such apology is limited to the issues upon which the BSA has made findings adverse to the broadcaster. The Judges considered that the only constraint in the language of the empowering section of the Broadcasting Act was that the statement the BSA can order must relate to the complaint. Accordingly, nothing in the language of the relevant section suggested that a statement ordered by the BSA may not include an apology.

Counsel for RNZ also contended that there was a breach of natural justice, as the BSA did not inform RNZ that it was considering ordering relief beyond what Mr Ellis had sought in his submissions. The High Court disagreed, accepting counsel for the BSA's submission that the BSA is not confined to the sanctions sought by a complainant.

The Court also considered that the apology ordered would not amount to an admission that the publication was untrue for the purposes of the possible defamation proceedings that Mr Ellis had been considering. This was because the BSA had expressly declined to deal with Mr Ellis' complaint

that the content of the interview was untrue (on the basis that it is not the BSA's function to determine the truth or otherwise of allegations of criminal behaviour).

In relation to RNZ's complaint that the apology had to be published in other media than itself (i.e. the newspapers), the Court considered that it ought to have been in the reasonable contemplation of RNZ that the BSA might think publication in other media was necessary to remedy the damage done by the interview. On this basis the Court held that there was no obligation on the BSA, in the particular circumstances of the case, to give RNZ express notice that it was considering an order requiring advertising in other media.

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Confidential information: TVNZ and the “Butcher Report” – *Berryman v The Solicitor-General (No. 3)*

The release by the Berrymans’ lawyer of the New Zealand Defence Force’s (NZDF) confidential “Butcher Report” into the construction of the suspension bridge which collapsed on his clients’ farm led to this application by the NZDF. The NZDF sought an injunction restraining TVNZ from publishing the report or its contents - notwithstanding the fact that the Berrymans’ lawyer had also posted the report on the internet so that it was “well and truly” in the public domain. As the Berrymans’ lawyer appeared to have done so in contempt of Court, the Court faced a dilemma; should it restrain TVNZ’s use of the report in order to uphold the administration of justice (and, in particular, the Court’s discovery process which the Berrymans’ lawyer appeared to have deliberately undermined) or should it recognise the reality that the material was now “out there” and allow TVNZ to use it for the purposes of its telecasts?

In what was alleged to be a “calculated, deliberate and extreme” breach of the Court’s rules the Berrymans’ counsel, Mr Moodie, was alleged to have provided a copy of the Butcher Report to TVNZ and to have posted a copy of it on the internet in breach of the Court’s rules relating to discovery.

The Court was then faced with the submission from the NZDF that it (the Court) should grant the application in order to uphold the administration of civil justice with which it is entrusted and, in particular, the Court’s discovery process which is fundamental to the just determination of civil proceedings. Wild J did not overlook the importance of this process saying:

If parties to a civil proceeding cannot rely on the protection the Court’s discovery process gives against wider publicity than is necessary for the proper conduct and determination of the proceeding, then it will militate against full and frank discovery.

However, Wild J felt that the focus should really be on freedom of expression and that the real issue before the Court was whether TVNZ should be restrained from using the “Butcher Report”, given that it was now in the public domain (and was not put there by TVNZ).

Wild J considered that the pivotal factor in deciding the application was the fact that the report was “well and truly” in the public domain because of its publication on the internet. That fact brought to an end the confidentiality which had attached to the Report.

The Court considered that it would be futile to restrain TVNZ from using the report when it was already in the public domain and to be “blind to the realities of the situation”.

A further point of interest in the case was the comment Wild J made on the question of whether TVNZ and any other media outlet would be in contempt of Court if they used the report, now that it was in the public domain. Wild J indicated that the following passage in the leading judgment of Lord Nicholls in *Attorney-General v Punch Ltd* [2003] 1 All ER 289 at 301 indicated that they would not be:

Disclosure of information which is already fully and clearly in the public domain will not normally constitute contempt of court in the type of case now under discussion. Contempt lies in knowingly subverting the court’s purpose in making its interlocutory order by doing acts having some significant and adverse effect on the administration of justice in the action in which the order is made. If the third party publishes information which is already fully and clearly in the public domain by reason of the acts of others, then the third party’s act of publication does not have this effect. It does not have an adverse effect on the administration of justice in the action. The court’s purpose in making its interlocutory order has, by then, already been defeated by the acts of others. This is so, whether those acts occurred before or after the court made its order.

The NZDF’s application accordingly failed.

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Contempt of Court: Improper pressure: the use of advertising campaigns to criticise an opposing party's stance in litigation – *Progressive Enterprises Limited v North Shore City Council & The National Trading Company of New Zealand Limited*

This case arose in the context of Progressive's and National Trading Company's (NTC) long-standing litigation over the development of a Pak'nSave supermarket in Wairau Road in Glenfield. Progressive and the second plaintiff applied to have NTC held in contempt of court as a result of an extensive media campaign it launched following an earlier judgment of the High Court which held that the decision granting resource consent for the proposed supermarket was invalid. It was alleged by Progressive that NTC's media campaign was intended to deter the plaintiffs from pursuing their objection to NTC's application for resource consent and was not "fair and temperate" and was therefore a contempt. NTC denied the allegations.

The tenor of NTC's advertising campaign was captured in the flyer that was part of it. It stated:

"WE'D LOVE TO LOWER YOUR GROCERY BILL BUT PROGRESSIVE'S COURT ACTION WON'T LET US

18 years ago we decided to build a PAK'nSAVE on Wairau Road.

Unfortunately our policy of New Zealand's lowest food prices posed a threat to our competition – the Australian-owned Progressive Enterprises Ltd's stores: Foodtown, Woolworths and Countdown. For years they've been trying to stop us opening a PAK'NSAVE in Wairau Road. Building finally started last year, but their latest court action will keep you waiting even longer. Now, a half-built PAK'NSAVE stands on Wairau Road and it looks like the people of Glenfield and the surrounding areas won't benefit from our low prices for the time being.

But don't worry.

As a 100% New Zealand-owned and operated company, we're determined to bring you lower prices and after 18 years, we not going to give up now.

PAK'nSAVE

Not opening in Wairau Road. Yet."

NTC's media campaign ran for 25 days and comprised seven newspaper advertisements, 378 radio advertisements on eight radio stations, 27,000 flyers distributed to households on the North Shore and 29 bus shelter posters.

Baragwanath J considered the numerous authorities on the topic of engaging in contempt by improperly pressuring another party. He referred to the important recent statements on this topic in *Duff v Communicado Limited* and *Solicitor-General v Smith* and emphasised the following statement from the Australian decision of *Harkianakis v Skalkos* (because of its significance in the case before him):

... the central legal and factual issue in the present case [is]...the balancing of the free speech and fair trial principles in the context of an alleged contempt by imposing improper pressure on a litigant in ... proceedings.

... In the oft-cited passage in the *Bread Manufacturers* [case] Jordan CJ said:

It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a Court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a

party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.

Having reviewed the authorities, Baragwanath J considered that this particular case fell outside the precedents and as a result he would have to determine it by reference to first principles. As a result, he concluded that cases such as this must always be resolved by reference to the following questions:

- whether as a matter of practical reality there was a real risk, as distinct from a remote possibility, of interference with the administration of justice;
- whether in the circumstances the conduct was improper;
- whether it is proportionate to characterise the conduct as criminal; and if so:
- what penalty, if any, should be imposed.

Baragwanath J then considered the nature of NTC's campaign. In this regard he said:

...the vigorous campaign and language employed by NTC was in the context of a heavy trade dispute and in the battle, which had already attracted media attention, for the hearts and minds of potential customers. While the language used in the flyers and other campaign material did not in terms invite Progressive to withdraw its objection, and NTC could have no real expectation that it would have done so, I do not doubt that NTC sought in the course of explaining its case to customers to embarrass Progressive in their eyes

However, despite this perceived intention, Baragwanath J then concluded that given the respective parties' economic power and their previous positions in the litigation, the risk of the administration of justice being interfered with by NTC's campaign was "fanciful".

Accordingly he was not satisfied that NTC's conduct could be said to infringe any standard of "impropriety" that could justify a finding of contempt. He also indicated that in his view the facts were such that the Court would not have imposed any penal consequences had there been a theoretical contempt saying that in "the actual circumstances that would [have been] a disproportionate response to NTC's conduct".

The plaintiffs' application was therefore dismissed.

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Defamation: Scrapping over the *Beckham* defamation case.

A British tabloid newspaper seeks wide-ranging discovery of documents to support claims made against David and Victoria Beckham.

In September 2004 the News of the World published an article headed "*Posh and Becks on Rocks*" which suggested that David and Victoria Beckham cynically and hypocritically portrayed their marriage as a happy one - for PR reasons and for personal gain - when in fact their marriage was on the rocks.

The Beckhams sued for defamation, claiming that the article wrongly accused them of trying to convince the public that their failed marriage was perfect; wrongly claimed that their rows had brought Victoria to the verge of a nervous breakdown; and wrongly asserted that while presenting herself as a loyal wife in public, in private Victoria is insulting and disloyal about her husband David, telling everyone that he is a "vain, arrogant and ranting Essex yob" who has "lost the plot".

In England it is possible for a defendant to seek to justify a lesser defamatory meaning than that relied on by the plaintiff, and in its defence the newspaper sought to justify as true the following alleged meaning of its article:

Because their substantial fortunes depend on their public perceptions, the Beckhams have been cynically and hypocritically trying – for financial reasons – to convince the public that they continue to enjoy a happy marriage, whereas the true position is that their marriage has been rocked and seriously damaged by David Beckham's infidelity and betrayal of Victoria Beckham leading to inevitable tensions and rows between them.

[Note that the New Zealand Court of Appeal has just ruled (in *TVNZ v Haines*) that this form of defence to a defamation claim is not available in New Zealand; i.e. it is not permissible here to attempt to justify a meaning which is different from the meanings alleged by the plaintiff - see the related article on *TVNZ v Haines* elsewhere in this Update.]

In order to support its defence, the newspaper sought discovery of a number of categories of additional documents which it believed might assist it to prove that the Beckhams had been presenting a misleading perception of their marriage, in particular:

- (a) Documents relating to the Beckhams' public relations strategies;
- (b) Documents relating to the Beckhams' decision not to sue either the newspaper or Rebecca Loos over an earlier article alleging that David Beckham had had an affair with Ms Loos, and all documents relating to the PR consequences of those publications;
- (c) All mobile phone records relevant to allegations about David Beckham's alleged affairs with Ms Loos and with a Ms Esther Canadas (a Spanish supermodel);
- (d) All documents relating to Victoria Beckham's move to Spain and search for a property there;
- (e) All documents relating to the Beckhams' alleged commercial arrangement with a paparazzi photographer;
- (f) All documents relating to the termination of Ms Loos' appointment (and that of her agency) as the Beckhams' PA in Spain;
- (g) Documents relating to a holiday taken by the Beckhams in France (allegedly relevant to an allegation that David Beckham had not originally planned to participate in that family holiday, but later did so at the last moment, as part of a "staged" event); and
- (h) All documents relating to a "fly on the wall" documentary entitled "*The Real Beckhams*" including unedited versions of the programme and each day's filming in full (said to be

relevant because of an allegation that Victoria Beckham insisted on certain footage being cut which showed her arguing with David Beckham and screaming at him).

The newspaper failed in its application for discovery of nearly all of these documents. The Beckhams' lawyers agreed to attempt to find out whether a particular telephone number had been used by the company which employed Ms Loos, and to request itemised bills for that number for the relevant period. The Beckhams were also directed to try to locate the "argument scene" amongst the unused footage from "*The Real Beckhams*" (although the Judge noted the limited probative value that it would have even if it could be located). In respect of the other documents sought the Judge ruled that they need not be provided, either because their relevance had not been established, or because he accepted that such documents did not exist or were not in the possession of the Beckhams.

The Beckhams had better luck with their counter-application for further discovery from the newspaper. They sought provision of the tape recordings made by the newspaper's journalists of their interviews with the Beckhams' former nanny, Ms Gibson, on which the relevant story was largely based. The newspaper resisted disclosure of those tape recordings, but was ordered by the Court to provide them to the Beckhams.

At the end of the first half the Beckhams are accordingly ahead, but there is clearly more action to come before the final whistle, and it won't be over until the thin lady sings.....



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Defamation: The Court of Appeal's decision in *TVNZ v Haines* – A party sued for defamation in New Zealand cannot say "*This is what I meant, and that meaning was true*"

The Court of Appeal has ruled that the "Polly Peck" form of truth defence to a defamation claim does not exist in New Zealand.

When the March Hare told Alice: "*You should say what you mean*", Alice hastily replied: "*I do, at least I mean what I say -- that's the same thing, you know*"; to which the Mad Hatter replied: "*Not the same thing a bit! Why, you might just as well say that 'I see what I eat' is the same thing as 'I eat what I see'!*"

Whatever it might have meant, Alice was entitled to say: "*I mean what I say*".

The meaning that is actually conveyed by particular words is at the very heart of defamation law. A plaintiff who claims to have been defamed must state the defamatory meaning which he or she claims the published words bear. If - as is usual in defamation - the case is tried before a jury, it is for the jury to decide whether the words in fact have that meaning, or some other meaning, and therefore whether the plaintiff has been defamed. A defendant however has a complete defence to a defamation claim if the published words were true.

Often the published words can have more than one possible meaning, and the plaintiff and defendant will usually contend for different meanings of the relevant words. In those circumstances, which meaning must be true for the defendant to be entitled to the defence of truth?

In a series of decisions which began in 1986 with *Lucas-Box v Newsgroup Newspapers*, the English Courts held that a defendant was entitled to say that the words published had a meaning which was different from the meaning alleged by the plaintiff, and that the different meaning was true. The leading case was *Polly Peck Holdings v Trelford*, and this form of truth defence, in which the defendant justifies its own meaning, is usually known as the "*Polly Peck*" defence. It is well established in England, and has also been adopted in Canada and in a number of the Australian states.

In a defamation case a plaintiff will often allege a series of alternative defamatory meanings of the published words, hoping that the jury will find the most serious meaning and award substantial damages, but being able to fall back on lesser defamatory meanings if necessary. It is however possible that *none* of those alleged meanings will be what the defendant intended to convey by the published words. In those circumstances the defendant will wish to put forward what it says the words actually meant and, if that meaning is true, prove their truth as a defence to the claim.

In one sense this is unnecessary, because if the words do not bear one of the plaintiff's alleged meanings the plaintiff should fail in its claim, and to permit the defendant to seek to justify an alternative meaning is therefore said to extend and complicate the trial unnecessarily. In other senses it is however very important to permit that, because a defendant who simply denies the plaintiff's alleged meanings and does not say what the words actually meant has far less credibility before a jury than a defendant who can put forward the intended meaning of the publication and then show that it is true. Where a plaintiff is itself advancing multiple alleged meanings it may not extend the trial unduly to permit the defendant also to advance one. The availability of the defence is also very important in any jurisdiction where a plaintiff is entitled to amend its claim during the trial to rely on a different or lesser defamatory meaning than those it originally relied on, because the new meaning may be one to which the defendant might have wished to raise a truth defence. A jury is entitled to consider all possible meanings in deciding what the published words meant, and if one of those meanings is true the defendant will naturally wish to say so and the jury will equally naturally wish to know that. It is for these sorts of reasons that the "*Polly Peck*" form of truth defence has been developed at common law and recognised by various - although not all - Courts overseas (including Australia, although it was recently heavily criticised in Australia by a minority of the High Court of Australia in *Chakravarti v Advertiser Newspapers*).

The leading New Zealand case on the issue, dating from 1986, was the decision of the Court of Appeal in *BCNZ v Crush*, which essentially held that a defendant could only prove the truth of the meanings alleged by the plaintiff, and could not set up and prove the truth of alternative meanings. In 1990, however, a new Defamation Act was enacted, including s.8(3)(a) which outlines a statutory defence of truth, the natural construction of which would permit a defendant to plead a "Polly Peck" truth defence.

In several cases in the High Court it has since been argued that this was not the effect of s.8(3)(a), and that *Crush* remains the law in New Zealand, notwithstanding the apparently clear words of s.8(3)(a). The Court of Appeal has now considered that issue in *TVNZ v Haines*.

In *Haines*, the plaintiff was a house moving company which sold a house to a customer and relocated it to the customer's property in Kamo. The roof leaked, a dispute arose, and the customer refused to pay the balance owing to the plaintiff, which claimed that it was entitled to take the house away again. TVNZ broadcast a series of programmes which were critical of the plaintiffs. The plaintiffs sued, alleging that the broadcasts meant that they rip off their customers, are dishonest, operate in a thuggish or intimidatory manner, are not to be trusted, and are unprofessional, incompetent or incapable of performing their work in a workmanlike manner. TVNZ contended that the broadcasts had different meanings, i.e. that the plaintiffs failed to re-erect the house in a proper workmanlike manner, acted unprofessionally, and operated in a threatening or intimidating manner. In the High Court Justice Venning held that TVNZ was not entitled in its defence of truth to allege and prove lesser defamatory meanings than those alleged by the plaintiffs.

The Court of Appeal has now ruled on the issue. The Court of Appeal considered that there was nothing in the legislative history of s.8(3)(a) of the Defamation Act to indicate an intention to overrule the effect of *Crush*, and approved the view expressed in Australia by the minority in *Chakravarti* that a "Polly Peck" form of truth defence is procedurally undesirable. The result is that the word "imputations" in s.8(3)(a) has been held to mean "the imputations pleaded by the plaintiff", and there is consequently no "Polly Peck" form of truth defence in New Zealand.

The decision is perhaps controversial because:

- (iv) It takes an unusual approach to statutory interpretation. Normally it is permissible to consider the legislative history in order to resolve an *ambiguity* in a statutory provision. In this case however the provision is clear, and the uncertainty only arises *as a result of* the analysis of the legislative history. Such an approach is wrong in principle - where the words used in a statute have a natural and ordinary meaning, and there is no apparent ambiguity, that is the law, and it ought not to be necessary for anyone to have to investigate the legislative history in order to check whether something else might have been intended.
- (v) In deciding what a New Zealand statutory provision means, this decision draws support from an Australian judgment which is dealing with the common law position in that jurisdiction and not with an analogous statutory provision; and that judgment is a minority judgment which may not even be the law in that jurisdiction (it was an appeal from South Australia).
- (vi) Defamation law is an arcane and complex field having its own peculiar rules of pleading and practice. The "Polly Peck" form of truth defence has evolved as part of a coherent body of defamation law and practice. Rules regarding how a defendant can plead are intimately related to rules about how a plaintiff can plead. A rejection of the "Polly Peck" defence has ramifications for the applicability of other case law which may not immediately appear to be affected but which it would now be wrong to apply in New Zealand (eg decisions which permit a plaintiff to amend its claim to rely on lesser defamatory meanings at trial). This issue does not appear to have been considered in *Haines*.

Although the Court of Appeal denied it, the result gives a distinct tactical advantage to plaintiffs in this area; distances New Zealand's defamation law from that in much of the rest of the Commonwealth; and is a potentially dangerous statutory interpretation precedent. It will make pleading in defamation simpler in some cases, but not necessarily fairer.



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For more information on any of the cases, articles or issues featured in Media Law Update, please email alan.ringwood@bellgullycom or call on 64 9 916 8925.

Name suppression in civil cases – the principles: *Brown v Attorney General*

The Court of Appeal has recently outlined the principles governing the granting of name suppression in civil cases. We take a look.

This was an appeal from a decision of Miller J in the High Court which upheld the decision of Judge Ongley in the District Court that Mr Brown's application for an order suppressing publication of his name and identifying details not be granted.

The background facts of the case were these: On 14 August 1998 Mr Brown was sentenced to five years' imprisonment on charges of kidnapping and indecent assault of a boy under 12. He was released on parole in July 2001 and was directed by his probation officer to live at an address in Strathmore, Wellington. According to Mr Brown, in August 2001, two police officers visited him at his home and persuaded him to let them in. They allegedly enquired about the conditions of his parole and photographed him. The police then circulated pamphlets in the Strathmore area headed "Convicted Paedophile Living in your Area". The pamphlet recorded that Mr Brown, "a convicted paedophile", had recently moved into Strathmore Avenue after being released from Rimutaka Prison where he served "a 3½ year sentence for sexual crimes against children". In fact, the sentence was in respect of one child. The pamphlet contained a photograph of Mr Brown and a physical description of him.

As a result of the circulation of the flyer Mr Brown became the subject of intense media scrutiny. Mr Brown alleged that he also suffered verbal abuse and physical threats and was compelled to move from the area.

Mr Brown then commenced legal proceedings against the Attorney-General (who was sued in respect of the actions of the police). He alleged that the actions of the police were in contravention of police policy and of the Privacy Act 1993 and were an abrogation of his rights under ss 9, 21 and 26(2) of the New Zealand Bill of Rights Act 1990.

Mr Brown applied in the District Court for an order suppressing publication of his name and identifying details. That application was declined both in the District Court and on appeal. However, Miller J gave Mr Brown leave to appeal to the Court of Appeal.

The Court of Appeal began by indicating that as any order on an application for suppression of name and identifying particulars necessarily involves the exercise of a discretion, the scope for successful challenge is therefore narrow.

The Judges (William Young, Chambers and Robertson JJ) then considered the relevant principles which were summarised in the following passage from *Lewis v Wilson and Horton Ltd* [2003] 3 NZLR 546:

The principle of open justice in criminal proceedings is affirmed by s 138(1) of the Criminal Justice Act 1985 and s 25(a) of the New Zealand Bill of Rights Act 1990, but it is far older in observance and extends beyond criminal proceedings (although it is of particular importance there). It yields only where the application of the general rule in the particular circumstances of the case would frustrate the interests of justice, and then only to the extent necessary.

The Court of Appeal was satisfied that both Judge Ongley and Miller J approached their respective decisions in conformity with the principles referred to in *Lewis*.

The Court of Appeal then turned to consider whether Miller J had made any errors of principle in coming to his decision.

Mr Brown alleged that he had in accepting that Mr Brown faced a risk of further assault and threats from publication but finding that the form of publication was unlikely to result in those consequences. While the Court of Appeal considered that there would be a risk that Mr Brown may be threatened or assaulted as a result of publicity surrounding his case, it did not consider that risk to be any greater than that faced by many litigants who are alleged to have done evil or despicable deeds. In this regard they said:

The risk of assault from vigilantes has to be balanced against the public's right to be informed of what is happening in their courts. The fact that we do not agree with Miller J's assessment of the likely degree of publicity does not render his decision wrong. Our different assessment of likely publicity does not cause this case to topple into the "exceptional circumstance" category.

For this and other reasons, the Court of Appeal held that Mr Brown had not established that Miller J's decision was plainly wrong.

The appeal was accordingly dismissed.

 Need more information?

For more information on any of the cases, articles and features in *Media Law update*, please email garry.williams@bellgully.com or call on 64 9 916 8661.

Name suppression: The challenge of name suppression orders

We take a look at how the public interest is balanced against private prejudice in the context of name suppression.

Suppression of publication of a person's name and identifying details arises automatically under some statutes. In other cases name suppression is ordered at the Court's discretion, usually on the application of the defendant concerned. Courts similarly have discretion to order suppression of other matters relating to Court proceedings, including verbal and documentary evidence.

In some circumstances applications can be made to the Court to reverse an order for name suppression, after a specified time or when the proceedings have been determined. Such an application is generally made on the grounds that public interest (in the identity of the defendant or defendants) warrants the lifting of the suppression order. The success of an application will depend on the reasons for the suppression in the first place, and whether it was made at the discretion of the Court or by statute.

Statutory suppression orders

Criminal Justice Act 1985

An example of statutory suppression is contained in the Criminal Justice Act 1985. That Act automatically prohibits publication of the names of victims of certain sexual offences, or of any name or particulars likely to lead to the identification of victims. This provision can include suppression of the name of the perpetrator of the sexual offence, because publication would lead to identification of the perpetrator's victim.

In the case of such statutory suppression, it is the victim who must apply for an order lifting suppression to permit publication. If a victim wishes to have his or her story published, the publisher intending to report the story must ensure the person concerned has obtained the relevant Court order permitting his or her name and identifying details to be published. Before it can reverse a suppression order, the Court must be satisfied that the victim concerned understands the nature and effect of the Court doing so.

The Crimes Act 1961

In the case of sexual offending, it is likely that suppression orders may also have been made by the Court under the Crimes Act, which prohibits publication of details of the criminal acts performed on a complainant, or any acts a complainant was alleged to have been compelled or induced to perform. If an application is made to lift suppression of that information, the Court must also be satisfied it is in the complainant's interest to revoke the suppression order.

In the case last year of *Brenda Chan v The Attorney General of New Zealand*, Mrs Chan applied to have the order suppressing her name revoked. Mrs Chan, her husband and son had been the victims of a brutal home invasion by three offenders, during which she was subjected to horrific and vicious sexual violation. Orders were made under the Criminal Justice Act prohibiting publication of her name, and under the Crimes Act prohibiting publication of the details of the criminal acts performed on her.

Subsequently, one of the three offenders involved sought damages against the Crown in relation to treatment he had received in prison (following the success of plaintiffs in similar proceedings in *Taunoa v Attorney General* (2004) 7 HRN 379). In Mrs Chan's case the Court observed that in the *Taunoa* case "The extent of public interest in the case can be demonstrated by noting that the Government has proposed to introduce legislation to enable victims to recover compensation from damages awarded to prisoners in similar circumstances."

Mrs Chan wanted to contribute to the ongoing public debate on this issue by publishing her story - of the offending she had suffered and the effects of that on her and her family. She accordingly sought orders lifting the suppression orders which had been imposed for her benefit. The Court decided that

it had inherent jurisdiction to revoke the statutory suppressions made under the Criminal Justice and Crimes Acts, and that it was appropriate to do so in the circumstances. In cases such as these, although public interest may be intense, it is the consideration of the victim's interest which is considered as paramount by the Court.

The Immigration Act 1987

Another example of statutory suppression is found in the Immigration Act, which imposes confidentiality requirements on its officers, but not necessarily on the media. An incident involving name suppression under this Act was the subject of complaints to the Press Council last year.

The New Zealand Immigration Service (NZIS) filed complaints with the Council against The Press and The New Zealand Herald for publishing the name of a man claiming refugee status (Case 984, June 2004). The complaints raised questions of statutory interpretation.

The claimant had previously been identified by Winston Peters in the House in the course of a Parliamentary debate. A suppression order of the claimant's identity was made when he appeared in the Manukau District Court on 19 November 2003. By that time both newspapers had published reports of the parliamentary debate which included his name. On the same day as the suppression order was made, there was a further debate in the House when Mr Peters again repeated the claimant's name. The following day The New Zealand Herald published the claimant's name in the course of reporting the 19 November parliamentary debate, and in a separate part of the same edition, a report of the Court proceedings and that the suppression order had been made.

The NZIS claimed that such publication was in breach of the claimant's rights to confidentiality and was prohibited by s129T(5) of the Act. It also claimed The New Zealand Herald was in contempt of Court in publishing the claimant's name after a court order had prohibited publication.

Section 129T of the Act provides that confidentiality as to the identity of the claimant and particulars of the case must be maintained at all times by the NZIS, refugee status officers and others involved in the administration of the Act; and that any person who, without reasonable excuse, publishes information in contravention of the section, commits an offence.

As the complaint involved a question of statutory interpretation, the Press Council sought the opinion of Mr W.M. Wilson QC. In some circumstances it will be prudent for publishers to obtain their own legal advice regarding responses to the Press Council. In this case, however, Mr Wilson's advice was that the relevant section of the Act only imposes prohibition against disclosure of a person's name by those explicitly noted in the section, and does not impose a blanket prohibition.

The Press Council's decision

The Press Council held accordingly that the newspapers did not come within the specified categories in section 129T of the Act. The Council still had to decide, under subsection (5) of that section, whether the newspapers "*had a reasonable excuse*" for publishing the name. Mr Wilson QC considered this was for the Council to decide, but noted that, as a matter of law an accurate report of Parliamentary proceedings could constitute a "*reasonable excuse*" for the purposes of s129T (5). The Council agreed and held that no breach was committed in publishing the name.

The Council observed that the contempt of Court issue, of publishing the name following a Court order, was somewhat more complex. Although, the NZIS had asked the Solicitor-General to prosecute for the alleged contempt of Court, the Council stated in its judgment, "*Legal advice is that in such circumstances the reporting of Mr Peter's comments amount to a prima facie case of contempt*", and, "*The Crown Law Office have advised that contempt prosecutions are rare and reserved for the most serious of breaches*", and "*In the circumstances they have advised that they do not intend to proceed with prosecution in this case.*"

Mr Wilson QC had confirmed the law is uncertain as to how any conflict between the legislature and the Courts is to be resolved in a situation where there is an accurate publication of what was said in Parliament which could otherwise amount to a contempt of Court. The Council, citing Burrows and Cheer's Media Law in New Zealand, noted that "*A matter yet to be determined is the effect of parliamentary privilege on name suppression orders.*"



Need more information?

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