

Media Law Update 2008

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INTRODUCTION

It has been a typically busy period for New Zealand media law in the year or so under review. In defamation, the High Court decision which appeared to extend the constitutional qualified privilege defence with little explanation as to why has been settled by the media, and the judgment survives, leaving some uncertainty as to developments in the future.

The Supreme Court delivered a long-awaited privacy decision, which unfortunately added little clarity to the state of the developing tort, or to privacy law generally. However, the Court also delivered an important Bill of Rights judgment which media lawyers should familiarise themselves with, as constitutionalisation of both statute and common law continues apace. Further, the Supreme Court applied this case in a further decision where it discussed both freedom of expression and privacy in relation to the right to protest, finding that the former trumped the latter in a close decision.

The Broadcasting Standards Authority struggled with matters of good taste and decency, but continued to be protective of privacy. The Press Council appears to still have a low uphold rate, but made strong decisions against the use of misleading headlines, and inaccuracy and discriminatory content. However, it also made contrastingly weak decisions and its effectiveness remains questionable.

DEFAMATION

The *Lange* litigation is the strongest recent example of development of the common law motivated by concerns about freedom of expression. Remarkably, *Lange* privilege has been slow to consolidate and grow from there, with only two significant reported cases so far, years apart. In *Vickery v McLean*¹ the Court of Appeal refused to apply the defence to statements about local council employees, but the judgment contained obiter dicta that it might apply to local as well as national politicians.² As many predicted, the subject matter of the defence is apparently open to expansion. However, the Court also stated a limitation, that allegations of serious criminality did not attract the defence, because they should not be disseminated too widely. Overall, that judgment is cautious.

Most recently, *Osmose New Zealand v Wakeling*³ apparently extended the coverage of the defence to a matter of public interest. Osmose made and supplied timber preservative products, and it alleged two individuals, Dr Wakeling and Dr Smith, made false and damaging statements about those products. Although some of the statements were published in the media, unusually, Osmose did not pursue any media interests, alleging instead that the first and second plaintiffs were responsible for the chain of publication. However, Wakeling and Smith joined Television New Zealand, Radio New Zealand, APN New Zealand and Fairfax New Zealand as third parties, in a procedure rarely used for defamation. This decision of Harrison J dealt with applications by the media to have the third party notices set aside.

The judge made a strike out order, because he was in no doubt that the articles published by the newspapers were published on an occasion of qualified privilege, and that the broadcasters which published would be protected by the defence of qualified privilege if the plaintiff had sued them directly. Harrison J found the articles were published on occasions of qualified privilege because the material published was of public concern. This was based on the fact that New Zealand has significant home ownership, and in recent years has had to confront the leaky homes crisis, which suggested some systemic failure in the building industry and resulted in government intervention. The government had endorsed Osmose's product for protecting timber following the leaky homes inquiry.

¹ Unreported, Court of Appeal, CA 125-00, 20 November 2000.

² *Ibid*, [17], per Tipping J.

³ [2007] 1 NZLR 841.

The finding of public interest in the judgment appears to break down the limitation imposed in *Lange*, that the subject matter to which the defence of constitutional qualified privilege can apply is discussion about politicians, past, present or future.⁴ Harrison J did not justify his decision on the basis of extending *Lange*, but spoke instead in generalised terms about public interest, as if that were already sufficient to trigger the defence. However, it is a significant jump from *Lange* to *Osmose*, and the latter does not appear to take the leap on the basis of precedent.

The decision was to be appealed, but has now been settled by the media. However, in spite of the lack of detailed reasoning in the High Court judgment, I do support this aspect of it. This is because if more than lip service is to be paid to freedom of expression, the political discussion defence should not be interpreted in a restrictive way. There was genuine public interest in the *Osmose* publications, and the topic of leaky buildings is exactly the sort of subject matter to which the defence should be extended in New Zealand, thus drawing our law closer to that in the United Kingdom. There, in *Jameel v Wall Street Journal*,⁵ privilege has metamorphosed into a true 'public interest' defence,⁶ indicating that the material, and not the occasion, is protected, and that the defence is being developed with the media in mind. The context of the article as a whole is used to determine public interest,⁷ so if an allegation is serious, the article has to make a real contribution to that.⁸ It was accepted in *Lange* that our media is more responsible than that in the United Kingdom, and so it is incongruous for our law to be more restrictive of freedom of expression. It is to be hoped that our senior courts will take the opportunity to open out the *Lange* defence to become one which is available for publication of material which is the public interest generally. I note that it appears to have been pleaded in other cases.⁹

For the same reasons, New Zealand courts should adopt the concept of reportage, as developed in the United Kingdom in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd*¹⁰ and *Roberts v Gable*,¹¹ allowing the neutral reporting, even without verification, of both sides of political and other disputes of public interest, so long as there is no adoption or embellishment. The defence should be interpreted liberally, allowing for the nature of the publication and devices of language which give colour, such as sarcasm or strong description, so long as this does not amount to adoption of one side's position over the other.¹² Unlike the *Lange* defence, reportage should also be capable of applying to serious allegations, including criminality,¹³ because it requires the position of both sides to be presented in a neutral way. The reportage defence is likely to be applied restrictively, in part because on one view it modifies the repetition rule,¹⁴ but also because although some leeway should be allowed, it requires rigorously balanced reporting. A useful recent decision is by Woodhouse J in the epic pleadings contest currently being fought in *Peters v Television New Zealand*,¹⁵ where the judge analyses whether a TVNZ broadcast had the meaning that TVNZ itself was asserting there were grounds for suspicion that Mr Peters had been involved in misconduct. In the programme, the TVNZ journalist had reported Mr Peters' strenuous denials, but then added the statement: 'But the story just wouldn't go away'. The programme also contained other direct challenges by TVNZ rather than others, to statements of denial made by Mr Peters. These were clearly seen by the judge as embellishment or adoption of a clear position.¹⁶ Although the discussion was in the context of argument about meanings, the decision usefully indicates what the New Zealand courts would not accept as neutral reporting.

⁴ *Lange v Atkinson* [2000] 3 NZLR 385, at 390-391, and 400.

⁵ [2006] UKHL 44, [2007] 1 AC 359.

⁶ *Ibid*, [46], per Lord Hoffman, [146], per Baroness Hale.

⁷ *Ibid*, [48] per Lord Hoffman, [111] per Lord Hope.

⁸ *Ibid*, [51].

⁹ See eg: *Kerr v Dominion Post*, Unreported, High Court, Wellington, CIV-2007-485-2243, 28 January 2008.

¹⁰ [2001] EWCA Civ 1634.

¹¹ [2007] EMLR 457. See also Mr Justice Eady in *Prince Radu of Hohenzollen v Marco Houston & Sena Julia Publications Ltd* [2007] EWHC 2735.

¹² See *Roberts v Gable*, n. 65 above, [61].

¹³ *Ibid*.

¹⁴ See eg: Sedley LJ in *Roberts v Gable*, n. 65 above, [74]. But cf, Ward LJ in the same case, who thought the two do not conflict: [54] – [59].

¹⁵ Unreported, High Court, Auckland, CIV-2004-404-3311, 20 December 2007.

¹⁶ *Ibid*, [26].

The other aspect of *Osmose* which is challenging is the treatment of the question of loss of the privilege. Under s 19 of the Defamation Act 1992, and as discussed in *Lange*, a defendant must not be motivated by ill-will against the plaintiff, must not take improper advantage of the occasion of publication, and should not be reckless, in the sense of irresponsible, in publishing the statements.¹⁷ On the question of misuse of the occasion, Rhys-Harrison J accepted that the content of the publications by TVNZ, APN and Fairfax contained a range of views, not just those of Dr Wakeling and Dr Smith, and therefore this did not indicate misuse of the opportunity to publish. An alternative argument was raised that the media might have known that Dr Wakeling had previously been engaged by Osmose's leading competitor and that Dr Smith was politically motivated. The judge thought that such arguments, if accepted, amounted to admitting that the defendants themselves had ulterior motives, which would deprive them also of qualified privilege as a defence to the main action. A final argument sought to establish that the media third parties had published with reckless indifference to the truth or otherwise of the statements of Wakeling and Smith. Here the judge considered the defendants faced the same problem of being themselves tainted by such arguments, which suggested they were not trustworthy and reliable despite being an apparently well-qualified scientist and a senior politician. The judge would not deprive the media of the defence. Unfortunately, this approach absolves the media of any responsibility at all, is inconsistent with media ethics, and allows the character of the originator of allegedly defamatory statements to determine the question of irresponsibility of the media, when it is the specific behaviour of the media which should determine the issue. *Lange* made it very clear that the privilege must be responsibly used: 'There is no public interest in allowing defamatory statements to be made irresponsibly – recklessly – under the banner of freedom of expression'.¹⁸ The first duty of the media is to get the facts right if at all possible, not simply to republish press releases, whether they come from reputable sources or not. Even reputable parties are perfectly capable of getting things horribly wrong, so it may clearly be irresponsible not to check the reliability of sources. The Broadcasting Standards Authority in fact found so in dealing with separate complaints from Osmose about TVNZ's coverage, holding that the items lacked balance and the broadcaster had not taken steps to ensure that its sources were reliable.¹⁹ Furthermore, the repetition principle in defamation makes it clear that liability flows from repeating what others have said, and it matters not that you believed or trusted the originator of the statement.

The court in *Osmose* was prepared to accept that none of the media third parties conducted any inquiries. While I would not wish the investigation of media methods to become a series of hurdles for the media to overcome to retain the defence, as happened for a short while in the United Kingdom,²⁰ I do think it appropriate that media behaviour come under some scrutiny in New Zealand. The question which should have been asked in *Osmose* was not how apparently reputable the defendants were, but what it was reasonable for the media in question to do in all of the circumstances. The reputation of the defendants would be but one feature of this inquiry. The issues which should also have been considered were the degree of public interest in the story and any risk of public alarm it might cause, the risk to the commercial and reputational interests of the plaintiff, and how easy it would be to check accuracy and get the other side of the story. Taking such matters into account in *Osmose* may have made a difference to the eventual outcome. From the BSA complaint, it appears that TVNZ actively refused to give Osmose an opportunity to participate in the

¹⁷ *Lange v Atkinson* [2000] 3 NZLR 385, 400-401.

¹⁸ *Lange v Atkinson* [2000] 3 NZLR 385, at [48].

¹⁹ See *Osmose New Zealand v Television New Zealand*, BSA Decisions 2005-115, and 2005-140. Standard 4 of the Free-to-Air Television Code of Broadcasting Practice requires reasonable efforts to be made to achieve balance in preparation and presentation of news, current affairs and factual programmes, Standard 5 requires accuracy, with Guideline 5(e) requiring reasonable steps to be taken to ensure sources are reliable, and Standard 6 requires fairness.

²⁰ In the United Kingdom, the question asked is whether steps taken to gather the information were responsible and fair, but the 10 criteria identified in *Reynoldsv Times Newspapers*[2001] 2 AC 127 are pointers only, not a series of hurdles to be overcome: *Jameel v Wall Street Journal* [2006] UKHL 44, [2007] 1 AC 359. Weight is to be given to the professional judgment of the editor or journalist in the absence of evidence of any slipshod approach. Thus, one inaccurate fact in a generally true article might not be irresponsible. Regard is still had, however, to matters such as the steps taken to verify information and the opportunity to comment.

programme even though it requested this,²¹ and this is a feature of media behaviour which should not have been ignored.

Had the plaintiffs in *Osmose* pursued Dr Wakeling and Dr Smith and the media parties jointly, I believe these difficulties with the qualified privilege defence would not have arisen. All defendants would have raised the qualified privilege defence, and it would have fallen to the plaintiffs, not Wakeling and Smith, to plead particulars of ill will or misuse of the opportunity to publish.²² The Defamation Act recognises that the ill will of a joint defendant does not infect another so as to lead to loss of qualified privilege,²³ and the approach of the court should reflect this. Because of the unusual form the proceedings took in *Osmose*, it is arguable the judge treated the behaviour of media and non-media parties as too much alike and in too generalised a fashion – in other words, he failed to give due weight to the special position of the media as the fourth estate which was, I believe, recognised in *Lange*, in particular by Tipping J. Therefore, it is my hope that courts, when required to investigate media behaviour under s 19 of the Defamation Act, will do so in a generous manner which does not involve retrospective editorialising and which is based on a realistic view of contemporary newsgathering.

PRIVACY

On 16 November 2007, the Supreme Court released its long awaited decision in the *Rogers* case.²⁴ As is well-known, this prior-restraint case concerned the anticipated broadcast of a police videotape of Noel Rogers confessing to and reconstructing the murder of Katherine Sheffield. The videotape was intended to be used as evidence in Mr Rogers' murder trial, but it was ruled inadmissible in an earlier decision of the Court of Appeal because it was obtained in breach of Mr Rogers' constitutional rights. At the later murder trial, Mr Rogers was acquitted. TVNZ, which had received a copy of the videotape from police, wanted to broadcast it soon after Mr Rogers' trial. The High Court issued a permanent injunction restraining the broadcast on the grounds of a tortious invasion of Mr Rogers' privacy. In the Court of Appeal, the judges unanimously accepted the existence of a tort of invasion of privacy, but held that the defence of public interest outweighed any privacy interests of Mr Rogers. It is clear the fact that this was a prior restraint application had a strong part to play in the Court of Appeal decision, indicating that in this context the Court was appropriately aware of freedom of expression issues.

In the Supreme Court, a majority of Blanchard, Tipping and McGrath JJ allowed Television New Zealand to broadcast the videoed confession of Mr Rogers. The minority of Elias CJ and Anderson J would have sent the matter back to the High Court for a substantive hearing of the matter because that court had originally heard the application for injunctive relief without requiring pleadings to be filed and had not been in a position to grant the substantive relief sought.²⁵

Two forms of privacy featured in the judgment, although nothing really substantive has been added to the law. The majority avoided dealing with the place of the privacy tort by simply referring to it as set out in *Hosking*, because the parties in *Rogers* accepted the existence of the tort in that form.²⁶

Only one judge, McGrath J, applied any real formula as set out in *Hosking*.²⁷ However, all three of the majority concluded that Mr Rogers had no real expectation of privacy because the videoed confession was produced for a public court process where anyone could have attended, including the media.²⁸

This rejects the approach of the Court of Appeal that a reasonable expectation could arise because showing the video on national television would give greater exposure than in the court room.

The court then dealt with the matter as one involving a hypothetical search of the court record – as if TVNZ had made an application in the normal way to gain access to the video it already had. Here another form of privacy was weighed in the process – this involved consideration and weighing of Mr

²¹ *Osmose New Zealand v Television New Zealand*, BSA Decision 2005-115, paras 5, 6 and 11.

²² Defamation Act 1992, s 41.

²³ *Ibid*, s 20(2).

²⁴ *Rogers v Television New Zealand* [2007] NZSC 91.

²⁵ *Ibid*, paras [6], [42] (Elias CJ), and [140] and [151] (Anderson J). The claim had been heard in a summary way and in spite of lack of evidence about such matters as how TVNZ had obtained a copy of the video.

²⁶ See paras [63] and [99].

²⁷ *Ibid*, paras [98] – [106].

²⁸ *Ibid*, paras [48], [63], and [104].

Rogers' potential loss of dignity, and the vulnerability of Mr Rogers trying to fit back into society.²⁹ No formulaic approach was taken as with the tort, and McGrath J said: 'The relative weight to be given to privacy interests must always depend on all the circumstances, even where they involve a vulnerable acquitted defendant.'³⁰ In the end, open justice prevailed because of the need to preserve public confidence in the legal system, and the media was entitled to have access to primary sources in order to try and explain why Mr Rogers was acquitted in spite of the existence of the videoed confession.³¹ The programme about Rogers was shown on TVNZ two days later on its Sunday programme. Extracts from the videoed confession were used a number of times in the broadcast, and the full seventeen minute interview was made available on the TVNZ website.³²

This 'other' form of privacy considered in the *Rogers* case is one whose rightful place is as yet, unknown in the law. Our judges are having to consider privacy more broadly in other contexts. *Mafart and Prieur v Television New Zealand Ltd*,³³ for example, concerned an appeal arising from a successful application by the state broadcaster to search court records and was fought by French secret agents Alain Mafart and Dominique Prieur on the basis of privacy. The agents attempted to prevent the broadcast of the videotape of committal proceedings in which they pleaded guilty to a charge of manslaughter for their part in blowing up the Greenpeace ship the *Rainbow Warrior* in Auckland Harbour in 1985.³⁴ In this case, freedom of information prevailed over the agents' privacy, because the Court of Appeal accepted little weight should be attached to the latter. It was held that the appellants had not suffered any significant damage to their privacy interests, and would not do so in the future due to broadcast of the material, even if the video was constantly repeated.³⁵ This was because Mafart and Prieur had largely destroyed their privacy rights by each publishing a book with a detailed account of the moment when they pleaded guilty to the charge. Those accounts showed no humiliation arising from the moment itself.³⁶ Furthermore, the public interest in film of what was in New Zealand, a moment of great historical significance, was very strong. The *Mafart* case demonstrates that aspects of privacy are arising for consideration more regularly in cases outside of the ordinary tort claim, and that the judiciary are prepared to consider its broader aspects.

Most recently, privacy featured strongly in *Brooker v Police*,³⁷ a Supreme Court decision dealing with the constitutional impact of s 14 of the New Zealand Bill of Rights on the interpretation of an offence of disorder. Mr Brooker had protested outside the house of a female police officer whom he believed had abused police powers in relation to him. The protest took place at 9.20am, and consisted of playing a guitar, singing in a normal voice and displaying a placard with messages such as 'Freedom from unreasonable search and seizure'. Mr Brooker was arrested for loitering with intent to intimidate, but the charge was substituted in the lower court with behaving in a disorderly manner.³⁸ Mr Brooker represented himself throughout in this appeal against his conviction and fine of \$300.

The majority of Elias CJ, and Blanchard and Tipping JJ allowed the appeal and set aside the conviction, largely because primacy was given to freedom of expression. However, two judges in the majority accorded considerable weight to privacy, though did not find it engaged in this case. Elias CJ thought it was consistent with the right of freedom of expression that restrictions on it may be imposed where necessary to protect interests such as privacy or residential quiet, in accordance with our international obligations. However, in this case, she concluded that the offence of disorder was not designed for that end, but rather to preserve public order.³⁹ Blanchard J noted that 'the common law has long recognised that men and women are entitled to feel secure in their homes, to enjoy residential tranquillity — an element of the right to privacy. They are justifiably entitled not to be

²⁹ Ibid, paras [103], [127].

³⁰ Ibid, para [134].

³¹ Ibid, para [136].

³² http://tvnz.co.nz/view/tvone_minisite_index_skin/tvone_sunday_group

³³ Ibid. See also *McCully v Whangamata Marina Society Inc* [2007] 1 NZLR 185.

³⁴ *TVNZ v Mafart and Prieur* [2006] 3 NZLR 534. Burrows notes that this case is evidence of a tendency for the tort to spread its influence 'like oil on the waters': see Burrows, n. 101 above, 8.

³⁵ Ibid, at [67].

³⁶ Ibid, at [57]-[59].

³⁷ [2007] 3 NZLR 91.

³⁸ Under s 4(1)(a) of the Summary Offences Act 1981.

³⁹ *Brooker v Police*, n. 161 above, para [41].

subjected there to undue disturbance, anxiety or coercion'.⁴⁰ Although he thought that privacy may be an important consideration in assessing whether the conduct of a defendant has disturbed public order,⁴¹ in finding that even allowing for the fact that Mr Brooker intended to wake the constable in a protest targeted at her, it would not be a justified limitation of his right of freedom of expression to hold that such a protest, of short duration and during daylight hours, was proscribed by the criminal law.⁴² Finally, Tipping J carefully avoided any reference to privacy, and determined the matter as a clash between freedom of expression and a need to proscribe conduct in a public place which is disorderly because, as a matter of time, place and circumstance, it causes anxiety or disturbance at a level which is beyond what a reasonable citizen should be expected to bear.⁴³

The minority of McGrath and Thomas JJ would, in contrast, have elevated a right to privacy in one's home above any free speech rights being exercised by Mr Brooker. The minority judgments are interesting, because they acknowledge and reveal the increasing stature being accorded to privacy generally by some of our senior judiciary. McGrath J applied a balancing process under s 5 of the BORA, and even appeared prepared to extend the concept of privacy beyond informational to interference with solitude. The police woman in *Brooker* was disturbed while resting in her home, yet although a state official, she was entitled to a private life.⁴⁴ He considered that the interests of New Zealand citizens in being free from intrusion in their homes was a value close to being as compelling as freedom of speech,⁴⁵ and concluded that the detriments to the policewoman's privacy values outweighed Mr Brooker's free speech rights.⁴⁶

Like McGrath J, Thomas J also appealed to US law to argue that there is a very compelling right or interest in privacy in the home.⁴⁷ Using freedom of expression theory, Thomas J concluded that Mr Brooker's protest action did not merit the full protection of the law, because the 'fabric of our democratic and civil society would lose nothing if the right to freedom of expression were required to give way to a reasonable recognition of privacy and the interest of being left alone in the seclusion of the home.'⁴⁸

The minority judgments in *Brooker*, and in particular, that of Thomas J, reveal the significant status issues attaching to privacy. All of the judgments variously and sometimes interchangeably refer to privacy as a right,⁴⁹ a value,⁵⁰ an interest⁵¹ and a consideration.⁵² In a recent paper, I examine the issue of the nature of this 'other' form of privacy in more detail.⁵³ I tentatively suggest that if privacy is only a 'value', whatever that might be, it may now be in transition to a right or something so close to a right that it will eventually make no difference. The appropriate legal ambit of that right is a topic for further examination, but is also one which is receiving close examination by the New Zealand Law Commission, in its comprehensive review of the law of privacy in New Zealand announced in 2006. The Review has four stages and has gone back to first principles to cover the nature of privacy values, technological change, and international trends, and their implications for New Zealand law.⁵⁴ The Commission has just published the first study paper, in which it has carried out a literature review and a series of consultations, to investigate what privacy means and to establish a framework for analysing privacy claims.⁵⁵ The paper is very broad, and the Commission notes accordingly that a

⁴⁰ Ibid, para [60].

⁴¹ Ibid.

⁴² Ibid, para [69].

⁴³ Ibid, para [90]. Blanchard J simply did not take privacy into account at all, for reasons which are not explained.

⁴⁴ *Brooker*, above n. 161, para [122].

⁴⁵ Ibid, para [129].

⁴⁶ Ibid.

⁴⁷ Ibid, paras [255] – [270].

⁴⁸ Ibid, para [276].

⁴⁹ Ibid, para [60] per Blanchard J, paras [122], [129], [135] per McGrath J, paras [209]-[230] per Thomas

J.

⁵⁰ Ibid, para [11] per Elias CJ, paras [231]-[233] per Thomas J

⁵¹ Ibid, paras [122]-[123], [129] per McGrath J, paras [233], [255]-[273], per Thomas J.

⁵² Ibid, para [60] per Blanchard J.

⁵³ See Cheer, 'The Future of Privacy: Recent Legal Developments in New Zealand, (2007) 13 *Canta LR* 169.

⁵⁴ See <http://www.lawcom.govt.nz/ProjectTermsOfReference.aspx?ProjectID=129>

⁵⁵ 'Privacy: Concepts and Issues,' *Law Commission Review of the Law of Privacy: Stage 1* NZLC SP 19, January 2008.

comprehensive, all-embracing approach to privacy would be a mistake. It prefers a careful analysis of each topic where the issue arises, with careful targeting of relevant legal reform.⁵⁶

I think that if things are left as they are, the judiciary may continue to develop the privacy tort, perhaps into a more substantive judicial privacy right. This 'right' may eventually unite the various 'rights' 'interests' and 'values' which are emerging from the case law generally. However, such continued development would have to take appropriate account of the BORA and freedom of expression. Other possibilities the Law Commission will probably identify include the passage of a statutory tort,⁵⁷ or of a broader statutory legal right, or constitutionalisation of privacy by inclusion in the BORA with all the attendant advantages and disadvantages. The media in particular is ambivalent about this process because although it does not like the uncertainty associated with the privacy tort, it is most suspicious of any form of state regulation, and hence, apprehensive about the possibility of any major statutory reform. Such an attitude overlooks the fact that statutory reform would have to import a requirement that the Bill of Rights (and hence, freedom of expression) be taken account of in every case, which does not always occur as it should at present. It is appropriate, at this point, to consider the leading

BILL OF RIGHTS

I have argued recently that both the torts of privacy and defamation are becoming, and should become, more constitutionalised.⁵⁸ Although there is no statutory requirement to carry out a human rights or bill of rights analysis in relation to actions between private citizens, I accept that a process of constitutionalisation of our private law has begun. The New Zealand judiciary appears to accept it must take account of the rights in the Bill somehow when resolving disputes between private citizens and when developing the common law, and I consider that the argument of Rishworth and others that indirect horizontality in the common law is not only inevitable, but desirable,⁵⁹ is compelling. Both defamation and privacy claims are suffused with a very high level of public interest, and freedom of expression is directly engaged. Therefore, it is my thesis that in every privacy case, at the very least, some sort of application of s. 5 of the New Zealand Bill of Rights Act should be openly articulated to balance freedom of expression and privacy 'rights,' and the relative public interests which exist in both. Some form of balancing is always required, but s 5 suggests a useful methodology because it requires that the rights and freedoms contained in the Bill may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁶⁰

Media lawyers therefore need to become adept at dealing with arguments arising from the constitutionalisation of private law. Although it concerned the interpretation of misuse of drugs legislation and the presumption of innocence, *Hansen v R*⁶¹ is currently the leading case dealing with the application of the Bill of Rights. In it, Tipping and Anderson JJ suggest similar methodologies for applying s 5. That suggested by Tipping J is based on the leading Canadian decision *R v Oakes*,⁶² and would ask:

(a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom? (Anderson J asks instead whether the limitation relates to concerns which are pressing and substantial in a free and democratic society)⁶³

(b)

(i) is the limiting measure rationally connected with its purpose?

⁵⁶ Ibid, 12.

⁵⁷ As in some of the Canadian provinces, although the Canadian Privacy Commissioner has indicated that these used much: Jennifer Stoddart, Privacy Commissioner of Canada, 'Developing a Canadian Approach to Privacy,' *Isaac Pitblado Lecture* 2004, <http://www.privcom.gc.ca/speech/2004>

⁵⁸ Cheer, 'The Future of Privacy: Recent Legal Developments in New Zealand,' (2007) 13 *Canta LR* 169, and Cheer,

⁵⁹ Rishworth, n. 228 above, 104.

⁶⁰ See Andrew Butler, 'Limiting Rights', (2002) 33 *VUWLR* 537, 537-540, for a discussion of the history and purpose of the section

⁶¹ [2007] 3 *NZLR* 1.

⁶² [1986] 1 *SCR* 103.

⁶³ Ibid, [272].

- (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
- (iii) is the limit in due proportion to the importance of the objective?⁶⁴

In a forthcoming book,⁶⁵ I suggest my own methodology, which is a combination of these approaches. My concern is not so much the form and detail of the questions asked, but rather that these questions, or questions like them, be asked in every case from now on in defamation and privacy law, and indeed, in every case where freedom of expression is engaged. What I would like to see is a consistent and explicit reference to the Bill even though it requires balancing and judgment at almost every level. This does not happen currently. For example, no Bill of Rights analysis was carried out in *Brash v John and Jane Doe*,⁶⁶ where Opposition Leader Don Brash successfully applied ex parte for an interim injunction restraining persons unknown from communicating the contents of emails belonging to Mr Brash which may have come into their possession. The order was very broad, requiring all copies of the emails to be given into the custody of the Registrar of the High Court by persons served with a copy of the order, although leave was reserved to any defendant to apply to the Court for rescission or variation.⁶⁷ The impact of the order on the media and freedom of expression was not considered. Although the judge referred to a previous New Zealand intellectual property case where unknown defendants had been the subject of an injunction,⁶⁸ that case did not involve the media as potential parties. However, Mackenzie J applied the basic tests for applications for interim injunctions – whether there was a serious question to be tried and whether the balance of convenience favoured the granting of the injunction. The Court did not require the applicant to proceed on notice because that would cause undue delay and prejudice.

The Bill of Rights has already influenced the law relating to prior restraint. *TV3 Network Services Ltd v Fahey*⁶⁹ requires the Court to go further than applying the ordinary tests, and instead look to the plaintiff to show clear and compelling reasons why an injunction should be granted. One effective way to do this would be in the context of a Bill of Rights analysis. The Court in the *Brash* case might have done this by hearing from the media as a clear potential defendant. Media interests had been recognised about a week earlier by Mr Justice Eady in the United Kingdom in an application to vary a 'John Doe' order he had made previously on privacy grounds.⁷⁰ That judge indicated that interested media parties should have been given notice of the application. The *Brash* decision is generally defective because it contains no reference to freedom of expression issues or the Bill of Rights.⁷¹ A clear and consistent approach to the Bill of Rights in prior restraint cases would avoid such outcomes

THE BSA

The Broadcasting Standards Authority continues its regulatory work based on the Broadcasting Codes. Uphold rates for viewer complaints have tended to hover around 25% but recently this has fluctuated. In the year to June 2006, the BSA issued 156 decisions. Of these, 12 percent were upheld in full or in part. In year to June 2007, that rate increased to 22 percent.⁷² Most complaints are usually about good taste and decency or fairness and accuracy. But the former are upheld less and less often now.⁷³

⁶⁴ Ibid, [104].

⁶⁵ *Law, Liberty and Legislation, In honour of John Burrows QC*, LexisNexis, August 2008.

⁶⁶ Unreported, High Court, Wellington, CIV-2006-485-2605.

⁶⁷ *Brash v John and Jane Doe* Interim Injunction and Related Orders, 16 November 2006.

⁶⁸ *Tony Blain Ltd v Splain* [1993] 3 NZLR 185.

⁶⁹ (1998) 12 PRNZ 443. See also *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46.

⁷⁰ See *X & Y v Persons Unknown* [2006] EWHC 2783 (QB).

⁷¹ CanWest Mediaworks indicated that it intended to challenge the order. However, Mr Brash asked the Court to withdraw it as soon as it became clear that an author, Nicky Hager, was intending to publish a book which contained information from emails provided by members of Mr Brash's party. In a press release, Mr Brash stated that this book was a surprise to him and was not the target of the injunction. Mr Brash resigned as Leader of the National Party following the publication of Mr Hager's book.

⁷² *BSA Annual Report 2007*, 11.

⁷³ Ibid, 10.

A number of decisions stand out in the last year. The BSA has ordered cessation of advertising only twice in its history, and although it did favour imposing the penalty in relation to Radio New Zealand in the Peter Ellis complaint, it recognised that this would be pointless.⁷⁴ In the same decision, the Authority declined to order RNZ to refrain from broadcasting, either at all or specifically in relation to the *Nine to Noon* programme because it thought listeners, rather than the broadcaster, would be primarily disadvantaged.⁷⁵ However, recently the BSA did order a small television station, Alt TV, to stop broadcasting briefly. *Barnes v Alt TV Ltd*,⁷⁶ *Groove in the Park* involved a complaint about a live broadcast on Waitangi Day 2007 of an annual event called "Groove in the Park" which was held at the Western Springs Stadium in Auckland. During the live music broadcast of performances by international and local artists Alt TV, which was broadcast both free-to-air in the Auckland region and on channel 64 through the Sky Network, displayed the content of text messages received from viewers along the bottom of the screen. Some of these messages included: 'All niggers must die,' 'Don't snigger nigger the KKK are getting bigger,' '[name] loves sucking cock,' and '[name] cunt smells like fish.' It was held that the use of expletives in graphic sentences was contrary to the code requirements of good taste and decency, that the text messages encouraged denigration of and discrimination against sections of the community based on race, and as the broadcast was G-rated and children were likely to be watching on a public holiday, the content was highly unsuitable for children.

The Authority regarded the breaches as very serious. It clearly saw the broadcast as a misuse of licensing rights and was influenced by the broadcaster's casual approach to the complaint and to its responsibilities. In particular, Alt TV had admitted that although it had employed the services of a moderator/censor to look at the text messages before they were broadcast, the person who had been employed had become intoxicated on the day and had failed to perform this role. In its decision, the BSA thundered that:

'access to the public airwaves carries with it a responsibility to adhere to broadcasting standards, and this responsibility is equal for all broadcasters. Moreover, under the Broadcasting Act 1989, broadcasters are required to establish a proper procedure for dealing with formal complaints. The Authority notes that Alt TV failed to retain a copy of the broadcast complained about, and it did not respond to Ms Barnes' formal complaint. The Authority intends to follow up this matter with Alt TV.'⁷⁷

The Authority clearly attempted to tailor the penalty to 'fit the crime'. It ordered Alt TV to refrain from broadcasting for a period of five hours (between the hours of 12pm and 5pm) on Labour Day, Monday 22 October 2007, under section 13(1)(b)(i) of the Act. The BSA considered such serious breaches of broadcasting standards had occurred that such an order was warranted. It also considered that the five-hour period was justified because the text messages went unmonitored by the broadcaster for that same period on Waitangi Day.⁷⁸ The BSA also ordered Alt TV to silently display a statement summarising the Authority's decision and apologising to viewers for the serious breaches of broadcasting standards during the period it was off the air.⁷⁹ Finally, because the breaches of broadcasting standards were at the highest end of the scale, the Authority made a maximum award of costs to the Crown of \$5,000.⁸⁰

Section 13 allows the Authority to order cessation 'for such period, not exceeding 24 hours, in respect of each programme in respect of which the Authority has decided the complaint is justified, and at such time as shall be specified in the order.'⁸¹ It is unclear whether this allows the deliberate specification of Labour Day, although this could be covered by the reference to 'such time'. And although the Authority carried out its usual Bill of Rights analysis in relation to the actual decision, it

⁷⁴ *Radio New Zealand v Ellis* 2004-115, [165].

⁷⁵ *Ibid*, [164].

⁷⁶ 2007-029

⁷⁷ *Ibid*, [29].

⁷⁸ *Ibid*, [31].

⁷⁹ *Ibid*, [32].

⁸⁰ *Ibid*, [33].

⁸¹ Broadcasting Act 1989, s 13(1)(b).

did not address the question of proportionality of the penalty directly in the same way. There is reference to an argument by Alt TV that a costs order would jeopardise its future, but no further investigation of this. The penalty would surely have been appealed by the mainstream national broadcasters.

Good taste and decency complaints continue to test the Authority. *Harang v Television New Zealand Ltd*⁸² concerned an item on One News which reported an admission by an Australian politician that he had visited a strip club while in New York. Footage was shown of female strippers. The complainant argued that the item was broadcast during "family viewing time" and that the scenes from the strip club were offensive. The Authority took into account the relevant contextual factors which included that One News is unclassified and targeted at an adult audience, that the footage was relevant to the news item, that it was dark and grainy, and no nudity was shown. On that basis, no breach of standards was found. However, it is clear the footage provoked a variety of opinions among Authority members. Two members of the Authority (Joanne Morris and Tapu Misa) took the opportunity to record that the footage was not "relatively discrete" or "inexplicit" as argued by the broadcaster. They found that the stripper's movements were sexual and provocative in nature. Further, although no nudity was shown, Ms Morris and Ms Misa considered that some of the footage shown was unnecessarily protracted.⁸³

In contrast, the line was crossed in TVNZ's *Balls of Steel* containing a segment called "Pain Men", where two men devised various methods of inflicting pain on each other. The Authority noted the contextual factors, but took the view that the degree of pain and injury inflicted in the programme, purely for the purpose of entertainment, overstepped the limits of good taste and decency. In particular, the man who had his buttocks sanded was plainly in considerable pain and his buttocks were clearly skinned and bloodied. Furthermore, the programme also glamorised and condoned assault, in breach of the law and order standard. Many other programmes contain potentially dangerous stunts where participants try to beat the odds. However, the Authority distinguished the "Pain Men", because the sole purpose of the *Balls of Steel* "challenge" was to inflict considerable pain for entertainment. The penalty imposed in this case was largely symbolic, however. No order was made, because the Authority thought that the publication of its decision was sufficient in all the circumstances, as it clarified the Authority's expectations in respect of broadcasts of this kind.

A more serious case resulted in the upholding of complaints by Dr Lynley Hood about breach of privacy and fairness.⁸⁴ A documentary entitled *Sex and Lies in Cambodia* examined the case of a New Zealand man who was serving a 20-year sentence in a Phnom Penh prison for the rape of five teenage girls. The documentary featured an interview with a Swiss man, RK, who had been accused of rape and paedophilia one year before, but whose case had been thrown out due to a lack of evidence. Stating that RK was "reluctant to speak on camera", the reporter said that they had filmed him with a hidden camera "in the public interest". RK was seen giving his view about a particular Cambodian judge. The reporter stated that everything RK said was "already on the public record in newspapers and on Inquisition 21st Century, a controversial website that questions state control of sexual behaviour". However, RK had been assured, both verbally and in writing, that he would not be filmed or quoted and that his comments were "off the record". Emails between RK and the reporter stated "of course that is our understanding...we would only report what is on the record". A strong public interest defence was argued in relation to the privacy breach. However, the BSA found that the fact that the information was already in the public arena meant there was no public interest in RK's opinions, and furthermore, his personal opinions about the Cambodian justice system and the rape case were not of such importance to justify broadcasting the hidden camera footage in breach of his privacy. The penalty was broadcast of an approved statement, and payment of \$500 to RK and \$5,000 to Crown. The decision is consistent with the careful approach the BSA takes to hidden camera footage. Public interest has to be very high to overcome the presumptive unfairness of secret filming.

The future of the BSA is somewhat uncertain although there is no immediate threat. The Ministry for Culture and Heritage is carrying out a major review of broadcast regulation and issued two Discussion

⁸² 2007-097.

⁸³ *Ibid*, [15].

⁸⁴ *Hood v Television New Zealand* 2007-028.

Papers in January this year.⁸⁵ This review has been prompted by the rapid technological changes taking place in broadcasting, producing ever-more forms of communication and entertainment which look like broadcasting, but which do not behave like broadcasting as we have known it. Digital broadcasting, for example, provides platforms outside of conventional television and radio. Many in the media now look to a magic moment called 'convergence' when the new technologies and old forms of broadcasting will miraculously meld together. Many of the new platforms are not currently subject to regulation. This review is considering what can be regulated, what should be regulated, and what part existing regulation should play in the new landscape. The Ministry is holding a series of workshops on the Discussion Papers this week and I assume the media is very involved in the process.

Press Council

The Press Council's own survey has recently confirmed that it is seen as biased, inconsistent, lacking in resources, and ineffective.⁸⁶ The number of complaints received by the Council remains steady - it receives between 75-85 complaints a year and adjudicates about half of them. Currently, the uphold rate appears to be falling although it has yet to return to a low point achieved in 2001 of 8%. In 2003, 36% of the 52 adjudications released were upheld or part upheld, but this rate fell to 26% in 2004 and 19% in 2005/2006.⁸⁷ This does not compare well with the Council's sister bodies. The Australian Press Council upheld in whole or part 56.7% of its adjudications in 2005/2006. The United Kingdom Press Complaints Commission upheld approximately 35% of its 2005/2006 adjudications.

One recent decision demonstrates the difficulties faced by the Council. In *Trina Stevens against Women's Day*,⁸⁸ the Council upheld a complaint that a headline on the cover of an edition of Women's Day was misleading. The two large headlines stated: 'POSH pregnant AGAIN!' and 'JEN'S PREGNANT!' over photographs of Victoria Beckham and Jennifer Aniston. A circle enclosing the words 'SHOCK BABY NEWS' accompanied the material relating to the latter. The articles about each celebrity inside the magazine made it clear the statements were speculation, not fact. The magazine's editor argued that freedom of expression would interfere with the 'fun and gentle escapism' readers expected of women's magazines. The Council upheld the complaint by a majority of 7, which, while recognising freedom of expression and accepting that some latitude might be given to escapist stories about celebrity figures and some licence for inventiveness to headline and caption writers, thought it would be going too far to allow the making up of claims in headlines which were not substantiated by the copy inside the publication. The minority of 4 expressed strong opposing views, because it saw the very fare of such magazines as being gossip, which, by its nature, might not be true. It would not apply an acid test of accuracy to a diet of gossip and escapism. Thus, the minority thought the principle of accuracy simply had no application to this sector of the media. The market would provide a solution because unhappy readers could simply cease buying the magazine. The Council was between a rock and a hard place in adjudicating this complaint. It treated this sector of the magazine market as subject to the same rules as the rest of the print media, as required by its Principles. However, it is unclear that this has had any effect whatsoever.⁸⁹

Perhaps a more useful decision is *Asia New Zealand Foundation v North & South*,⁹⁰ in which a discrimination complaint was unusually upheld. An in-depth article was published in magazine *North & South* written by Deborah Coddington, reporting on Asian immigration and crime. The Council upheld three complaints that the article breached its principles on accuracy and discrimination. In the article, Ms Coddington stated that in 2001 Asians made up 6.6 percent of the population but were responsible for just 1.7 percent of all criminal convictions. The writer then went on to say that total offences by Asiatics aged 17 to 50 rose 53 percent in the years 1996 to 2005. The article spoke of 'the gathering crime tide' and 'the Asian menace ...steadily creeping up on us'. The cover line was 'Is it time to send some back?'. The three complaints all argued successfully that the presentation of the

⁸⁵ See <http://www.mch.govt.nz/publications/digital-tv/index.html#workshops>

⁸⁶ See *Review of the New Zealand Press Council*, Ian Barker and Lewis Evans, NPA, EPMU, MPA, November 2007, Part VI.

⁸⁷ *Annual Report of the Press Council* 2006, 19.

⁸⁸ Case No 1060, 2006.

⁸⁹ See eg: *New Idea*, February 16, 2008.

⁹⁰ Cases No. 1090-1092, 2007.

statistics was inaccurate, and that taking account of the increased Asian population over the period revealed that the overall crime rate had actually fallen. This was not refuted by the publication or the author. The Council also held that there was a gratuitous emphasis on dehumanising racial stereotypes and fear mongering. The decision is striking because the conclusion begins with a strong statement that freedom of expression, although 'affirmed by the New Zealand Bill of Rights and central to all Press Council considerations, is not unlimited.' Although *North & South* had published many letters critical of the original article, any ameliorating effect had been cancelled out by negative comments and failure to acknowledge the statistical inaccuracies.

Steven Price, in his blog, *Media Law Journal*,⁹¹ has recently criticised further decisions of the Council which he thinks lack rigour in relation to balance and accuracy.⁹² He thinks the Press Council should look at its sanctions, among other things, for example, it might uphold complaints without necessarily ordering the paper to publish a summary of the decision, reserving the publication penalty for more serious lapses. It is very clear the Council still faces a credibility problem. The recent independent Press Council Review has tried to address these difficulties in 2006.⁹³ The recommendations are focussed on giving the Council more kudos and credibility but maintaining self-regulation. They include better resourcing, adoption of mediation and conciliation processes, a review of the statement of Principles, and a graduated system of publication sanctions. Self-regulation will always be susceptible to charges of bias, so that any changes will have to be significant to overcome this. Furthermore, as the print media is moving onto other platforms and itself becoming part of 'convergence', any reform of the Press Council may well be taken over by the other major review of broadcasting I have mentioned.

⁹¹ <http://www.medialawjournal.co.nz/>

⁹² See Case Nos 2016, 2010 and 2015, (2008).

⁹³ *Review of the New Zealand Press Council*, Ian Barker and Lewis Evans, NPA, EPMU, MPA, November 2007.