

The *Rainbow Warrior* bombers, the media and the judiciary

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Abstract

In July 1985, the Greenpeace environmental flagship Rainbow Warrior was moored in Auckland's Waitemata Harbour, about to embark on a protest campaign voyage against French nuclear testing at Moruroa Atoll in French Polynesia. Secret agents of the French external intelligence service DGSE planted two limpet mines on the ship's hull on the night of July 10, sinking it and killing Portuguese-born photojournalist Fernando Pereira. Two of the secret agents were arrested on July 12 during an exhaustive police investigation. The Rainbow Warrior affair, involving state terrorism by a friendly nation, became iconic in New Zealand history because it highlighted NZ opposition to nuclear testing in the Pacific. New Zealand High Court closed circuit television (CCTV) footage of the criminal proceedings showed the two French agents – Major Alain Mafart and Captain Dominique Prieur – pleading guilty to manslaughter after being charged with murder. During the next two decades, five separate attempts were made to gain legal access to the videotape for news and current affairs programs. For the first four attempts, lawyers acting for Mafart and Prieur succeeded in blocking public release of the footage on privacy and administration of justice grounds. However, the fifth attempt, by state-owned public broadcaster Television New Zealand, was finally successful in the Court of Appeal and the footage was broadcast on August 7, 2006. A further appeal to the Supreme Court by the agents was dismissed. This article analyses a case study of the 20-year struggle to broadcast this historic footage and how a remarkable triumph in the public right to know was achieved and balanced against privacy values.

Introduction

Moruroa, Mon Amour, the celebrated and damning indictment of French nuclear colonialism in the Pacific, by the late Tahiti-based authors and campaigners Marie-Thérèse and Bengt Danielsson (1977), was republished with new sections in 1986 under the title *Poisoned Reign*. At the time, French intransigence over nuclear testing and demands for independence in Tahiti were at a peak. The Greenpeace environmental campaign flagship *Rainbow Warrior* had been bombed by French secret agents the previous year. It seemed unlikely then that less than two decades later,

nuclear testing would finally be abandoned in the South Pacific, and Tahiti’s leading nuclear-free and pro-independence politician, Oscar Manutahi Temaru, would emerge as the territory’s new president, ushering in a refreshing “new order” with a commitment to pan-Pacific relations.

In January 2006, then French President Jacques Chirac threatened to use nuclear weapons against any country that carried out a state-sponsored terrorist attack against it (cited in Robie, 2006). During his missile-rattling defence of a €3 billion-a-year nuclear strike force, Chirac said the target was not “fanatical terrorists”, but states that used “terrorist means” or “weapons of mass destruction” against France. The irony seemed lost on him that the only example of state-backed terrorism against New Zealand, codenamed Operation Satanic, had been committed by the French secret service on July 10, 1985. French authorities initially covered up the attack with a litany of lies and hypocrisy (Amery, 1989; King, 1986; Lecompte, 1985; Robie, 1986; 1989; 2005; Szabo, 1991; The Sunday Times Insight Team, 1986).

Chirac made the threat at a naval base near Brest while addressing the crew of one of four nuclear submarines that carry almost 90 per cent of France’s nuclear warheads. It came a few months after documents published in France showed the *Rainbow Warrior* attack had been conducted with the “personal authorisation” of the late President François Mitterrand. On July 10, 2005, a *Le Monde* newspaper article published extracts from a 1986 handwritten account by Admiral Pierre Lacoste, former head of France’s DGSE secret service (France’s Mitterrand authorised 1985 bombing of Greenpeace boat, 2005). Lacoste said he had asked the President for permission to embark on a plan to “neutralise” the *Rainbow Warrior* and would never have gone ahead without his authorisation.

I asked the President if he gave me permission to put into action the neutralisation plan that I had studied on the request of Monsieur [Charles] Hernu [Defence Minister at the time]. He gave me his agreement while stressing the importance he placed on the nuclear tests. (Ibid.)

Figure 1: Chronology of key cases involving the *Rainbow Warrior*

July 10, 1985	<i>Rainbow Warrior</i> bombed in Waitemata Harbour, photographer Fernando Pereira drowned
July 12, 1985	French secret agents Alain Mafart and Dominique Prieur arrested as “Swiss honeymooning couple”
July 16, 1985	Three French secret agents on board the bomb supply yacht <i>Ouvea</i> released by Australian authorities on Norfolk Island, set sail and disappear – apparently picked up by the French nuclear submarine <i>Rubis</i> in the Coral Sea.
July 24, 1985	French secret agents Alain Mafart and Dominique Prieur charged with murder, arson and conspiracy to commit arson
September 23, 1985	French Prime Minister Laurent Fabius admits DGSE agents had sunk the <i>Rainbow Warrior</i> and they were acting under orders
November 4, 1985	Mafart and Prieur plead guilty to manslaughter in the High Court at Auckland
November 22, 1985	Mafart and Prieur sentenced to 10 years’ imprisonment
April 23, 1986	High Court overturns ruling allowing NZBC to broadcast guilty plea tape
July 23, 1986	Mafart and Prieur transferred to Hao Atoll, French Polynesia
October 30, 1987	Law student Colin Amery seeks release of the “guilty” tape for thesis research
April 28, 1988	Amery unsuccessfully seeks release of the tape for a planned book

March 1, 2000	Lawyer Amery's third application for the tape (for a TV documentary) fails
August 7, 2006	TVNZ succeeds when Court of Appeal upholds right to show guilty plea footage – clips broadcast on same day's news bulletins
August 11, 2006	Online clips of footage on TVNZ website withdrawn after four days in the public domain when French agents seek further appeal
September 26, 2006	Final Supreme Court victory for TVNZ when French agents' final appeal dismissed

After being awarded by the International Arbitration Tribunal NZ\$8 million from France in compensation for the attack, on December 12, 1987, Greenpeace finally towed the *Rainbow Warrior* to Matauri Bay and scuttled it to create a living reef off Motutapere, in the Cavalli Islands. Its namesake, *Rainbow Warrior II*, formerly the *Grampian Fame*, was launched in Hamburg on July 10, 1989, four years to the day after the bombing. On July 15, 1990, a memorial by Kerikeri sculptor Chris Booth was unveiled at Matauri Bay, featuring an arched creation incorporating the bombed ship's brass propeller.

An earlier compensation deal for New Zealand, mediated in 1986 by United Nations Secretary-General Javier Perez de Cuellar, awarded the Government \$13 million (\$US7 million). The money was used for a nuclear-free projects fund and the Pacific Development and Conservation Trust. The agreement included an apology by France and the deportation of jailed secret agents Major Alain Mafart and Captain Dominique Prieur after they had served less than a year of their 10-year sentences for manslaughter and wilful damage of the bombed ship.

Mafart and Prieur, posing as a Swiss honeymooning couple, "Alain and Sophie Turenge", had been arrested on July 12, 1985, just two days after the bombing, as an exhaustive police investigation escalated. Police came close to arresting four more French suspects who crewed on an 11m sloop, *Ouvéa*, chartered in Noumea, New Caledonia, to transport the explosives to New Zealand. Detectives flew to Norfolk Island in an attempt to retrieve incriminating forensic evidence. But without cooperation from Australian authorities, the secret agents were released and the *Ouvéa* and its crew subsequently vanished in the Coral Sea – three of the agents were believed to have been picked up by the nuclear-powered submarine *Rubis* and smuggled into French Polynesia.

The attack on the *Rainbow Warrior*, involving state terrorism by a friendly nation, became iconic in New Zealand history because it highlighted NZ opposition to nuclear testing in the Pacific. New Zealand High Court closed circuit television (CCTV) footage of the criminal proceedings showed Mafart and Prieur pleading guilty to manslaughter after being initially charged with murder. During the next two decades, five separate attempts were made to gain legal access to the videotape of their guilty pleas, for media purposes. For the first four attempts, lawyers acting for Mafart and Prieur succeeded in blocking public release of the footage by invoking privacy and administration of justice grounds (see Akel, 2007; Pearson, 2007, pp. 371-409; Price, 2007 for evolution of general privacy principles in Australia and New Zealand). However, the fifth attempt, by state-owned public broadcaster Television New Zealand, was finally successful in the Court of Appeal and the footage was broadcast on August 7, 2006. A further appeal to the Supreme Court by the agents was dismissed. This article analyses a case study of the 20-year struggle to broadcast this historic footage and how a remarkable triumph in the public right to know was achieved and balanced against privacy values.

Mafart and Prieur: "Club Med" celebrities

Alain Mafart and Dominique Prieur were a support team as part of Operation Satanic – they "were responsible for picking up and removing one of those responsible for the placement of the

explosive devices” (*R v Mafart & Prieur*, Summary of Facts, 1985). They were transferred from New Zealand on July 23, 1986, to Uvea, Wallis and Futuna, en route to Hao Atoll in French Polynesia, to serve three years in exile at a nuclear and military base – regarded by some as a defence establishment “Club Med” (Robie, 2005, p. 168). The pair was attached for duties with the 57th Battalion of Pacific Support Command.

But the bombing scandal did not end there. A campaigner who later studied law and became a barrister with a penchant for human rights cases, Colin Amery, filed a private prosecution of Mafart and Prieur in an attempt to prevent them leaving New Zealand. He also made three attempts to gain access to the court footage of the pair’s guilty pleas. He recalled in his 1989 book *Ten minutes to midnight* that legal issues raised by the *Rainbow Warrior* case were “totally novel” for New Zealand. First, it was the country’s first “head-on collision with international terrorism”. Second, NZ’s counter intelligence agency, the Security Intelligence Service (SIS), “failed totally to uncover the espionage going on in its midst”.

Trying to pinpoint deficiencies within an organisation such as the SIS is not an easy task for the researcher. He meets with a blank wall of official silence when he uses the provisions of the *Official Information Act*, as I tried to do. The New Zealand Prime Minister who is also political head of the SIS pleaded s10 of the said Act which allows him to neither confirm nor deny the existence of a particular fact. Add to this the pleas under s6(a) and (b) which deal with withholding information to prejudice the security of defence of New Zealand and the wall of silence is complete. (Amery, 1989, p. xi)

Amery concluded that the only alternative way to “get at the truth” would be through “a mole within the organisation who might be persuaded to turn Queen’s evidence” (Ibid). Incensed by the “seven-minute trial” in the High Court in Auckland, Amery filed his private prosecution against Mafart and Prieur, seeking, as he explained 21 years later in his autobiography *Always the Outsider*, to make the French agents serve the full time for their crime – “namely assisting in the murder of the photographer Fernando Pereira” (2007, p. 154). He also brought charges against Lieutenant-Colonel Louis-Pierre Dillais, the ringleader of the French state terrorists allegedly involved in the sabotage operation. He accused the saboteurs under the *Crimes Act 1961* of wilfully damaging a boat, knowing danger was “likely to ensue” (1989, p. 88), an offence punishable by up to 14 years’ imprisonment. Dillais surfaced two decades years later – exposed by a TVNZ current affairs program as an arms dealer in Washington, DC (*Sunday*, June 26, 2005). He was chief executive of the US subsidiary of a Belgian arms manufacturer, FN Herstal. According to a *Guardian* report, FNH’s office was “just down the road from the CIA” and the company’s business in federal contracts turned over almost \$US2.5 million in 2005 alone (Goldenberg, 2007). The report prompted a protest letter to the editor about the “act of horror” carried out by Dillais and his fellow plotters, pointing out that the ship “was not moored ‘off’ Auckland”:

[It] was in fact at one of the wharves [Marsden] in downtown Auckland, a few hundred metres from the main ferry terminal and the business centre. Not dissimilar in effect to someone trying to blow up *HMS Belfast* in the Pool of London. (Cooper, 2007)

A hearing for Amery’s Dillais case was set for the Auckland District Court for October 10, 1986. But like those for Mafart and Prieur, it never happened. The charge against Dillais “remains dormant and will probably sleep forever” (Amery, 1989, p. 88). Amery recalled:

This trial within a trial was almost over. The jury had been given very little of the true facts surrounding the case. This, despite a promise given by Mr Lange, the Prime Minister, on 5 November 1985 that police evidence gathered during the *Rainbow Warrior* Inquiry, would be made public. He saw no reason at that time

why the material gathered by the police should not be put into the public arena ...
[T]he public still awaits for this promise to be fulfilled. (p. 89)

Two days after the *Rainbow Warrior* was scuttled on December 12, 1987, Major Mafart was repatriated to a military hospital in Paris with a “serious stomach complaint” (Robie, 1987). French authorities smuggled him back to France (on a fake passport as a carpenter, Serge Quillan) in defiance of the terms of the United Nations agreement and in spite of protests from the Lange Government (*Les Nouvelles de Tahiti*, 19 December 1987 Not referenced in endnotes). Prieur had been repatriated back to France six months earlier. Colin Amery was particularly annoyed over the failure of the Lange Government to be more determined in its opposition to French duplicity over the agents. He observed:

Despite [Amery’s] legal injunctions, the *Rainbow Warrior* sank to the bottom of Matauri Bay ... to become a permanent spectacle for scuba divers and a refuge for local marine life. The Lange government - and its chief helmsmen in particular - no doubt heaved a collective sigh of relief when [she] hit Davey Jones’ locker: a permanent memorial to the success of French state terrorism in Aotearoa waters. (Amery, 1988, p. 4)

For Amery, many questions remained unanswered: “Our own homegrown anti-terrorist squad, the SIS, appear to have known nothing of the French plans to bomb the *Rainbow Warrior*, even though the *Ouvéa* crew members painted the town of Whangarei red in the week before” (Ibid). Amery was a constant critic of Lange for the Prime Minister’s perceived “surrender” to French pressure. Although Amery’s two attempted prosecutions failed to be fully heard, the legal encounter propelled him into studying for a law degree and becoming a barrister.

The two convicted criminals, [whom] the Chief Justice had said should not be allowed to return home as heroes, in the end did just that, each being rewarded with medals from the French government within the short space of one year. (Amery, 2007, p. 156)

Previous *Rainbow Warrior* evidence cases in brief

High Court at Auckland, April 23, 1986: The then NZ Broadcasting Corporation (NZBC) prepared a 50-minute television documentary on the *Rainbow Warrior* affair, which it intended showing at the Cannes international film festival of television programs on April 24-29, 1986. The NZBC gained permission from the District Court judge to include an excerpt from the court videotapes totalling 1min 22sec, showing Mafart and Prieur pleading guilty to the charges. Mafart and Prieur successfully sought a High Court judicial review of the judge’s decision. They also sought an interim order under s8 of the *Judicature Amendment Act 1972* to prevent NZBC from showing the documentary while it included excerpts from the preliminary proceedings against them. The judge granted an interim injunction and NZBC appealed. Justices Cooke, Richardson and Casey noted in their judgement that no previous defendant in NZ had been exposed to “international visual publicity” of the guilty pleas [*Mafart v Gilbert*, 1986, p. 434]. The judges dismissed the appeal, after “weighing the public interest in knowing ... the result of the NZ court proceedings, and the right of the accused to be treated no differently from other NZ defendants”.

Court of Appeal, August 14, 1987: Justice Cooke dismissed an appeal by Amery against a stay of proceedings by the Solicitor-General, in his case seeking to prevent the transfer of the imprisoned French agents Mafart and Prieur from New Zealand to French Polynesia. He said:

Perhaps [Amery’s] real complaint might be said to be that the agents were removed from New Zealand without serving their sentences here. That is a political matter outside the scope of these proceedings. [*Amery v Solicitor-General*, 1987, p. 6]

High Court at Auckland, December 18, 1987: Justice Thorp ruled on an application by Amery for “a loan” of the video tape recording the guilty pleas of Mafart and Prieur after this recording had been declared to be part of the documents forming part of the court criminal record by an order made by Justice Grieg on October 15, 1987. The first two grounds of opposition by the agents’ legal counsel to any disclosure of the tape included:

It is a tenet of New Zealand law that court records relating to criminal proceedings between the crown and a convicted person should not be disclosed to third parties except in exceptional circumstances. The present application involves issues of principle which are of fundamental importance to the administration of criminal justice in New Zealand. [*Amery v Mafart*, 1987, p. 3]

Justice Thorp dismissed Amery’s application, saying he was satisfied the Deputy Registrar’s refusal to release the tape was justified on the grounds the applicant had not shown himself to have “genuine or proper interest” in the material.

High Court at Auckland, July 19, 1988: Justice Gault noted Amery’s grounds for application to search records for the sentencing of Mafart and Prieur as a law student producing a thesis for the Legal Research Foundation Inc. on legal aspects of the *Rainbow Warrior* case. He also noted Amery’s alternative grounds that he was writing a book to be called *The end of the Rainbow Warrior* as a bona fide legal historian, citing publications such as *New Atlantis* – a work of history on the oldest civilisation in the world. Saying the full text of remarks by the Chief Justice on sentencing would be available from press records, the judge agreed to Amery accessing the sentencing notes so he would have “an accurate record” [p. 762 at 8].

High Court at Auckland, March 1, 2000: Justice Randerson ruled in *Amery v Mafart* [2000] that recently introduced protocols for extended media coverage in the courts (including television) had not been in force at the time of the Mafart and Prieur trial. Thus Amery could “not reasonably have anticipated that a videotape would be made in the courtroom and subsequently released”. The judge said such an issue was unlikely to arise today “because, in all likelihood, television coverage of the proceedings would be permitted” [at 20]. Randerson added, however, that this was “no reason to permit the release of the tape”, which had been prepared for different purposes, under a different regime from today. The judge said that while Amery had an interest in the *Rainbow Warrior* affair, “his book has already been completed” [21] and he was concerned the court would “lose effective control” over use of the videotape [23]. He rejected Amery’s request to inspect the tape.

The disputed “visual images”

Documentary footage from the videotape of the criminal proceedings in which Mafart and Prieur pleaded guilty to manslaughter eluded the public domain for two decades. As detailed above, lawyers, media groups and law student Colin Amery, while writing a book about the *Rainbow Warrior* affair, made four unsuccessful attempts to gain legal access to the footage. Reflecting on what he regards as an abuse of the legal system by the French spies, Amery observed: “They really had no right to claim the privilege of privacy once their books were published and it was arrogant of them to persist.” (Amery, personal communication, October 26, 2007)

The fifth attempt to access the footage, by Television New Zealand (Cooke, 2005), was for a planned *Sunday* documentary marking the 20th anniversary of the bombing – described by senior Simpson Grierson litigation partner William Akel as a “defining moment in New Zealand international affairs” (McNabb, 2005a). Justice Simon France, on May 23, 2005, in the High Court at Auckland, authorised the “searching and copying of the videotapes taken at the time of the committal and guilty plea” under the *Criminal Proceedings* (Search of Court Records) Rules

1974. Use from the copying was unrestricted. The judge explained when dismissing the privacy argument of the secret agents' lawyers:

I have been most influenced by the significance of the event in New Zealand history, the essentially public nature of a plea, and the corresponding lack of privacy, and the reality that the very existence of the Search Rule discretion is because the respondents consented to the tape becoming part of the record. This seems to me to lessen unfairness issues. ([2005] DCR 640 [92])

Writing in *The Independent*, Denise McNabb (2005b) described TVNZ's success as a "pyrrhic victory – a crucial tape is missing, showing the pair full frontal as they entered guilty pleas". Mafart and Prieur won leave to appeal to the Supreme Court in September 2005 (McNabb, 2005c). Although the phrase "videotapes" gives an impression of extensive footage, in fact TVNZ was seeking a brief segment of 1min 20sec comprising the images of Mafart and Prieur appearing in the Auckland courtroom and pleading guilty. This information was already in the public domain through news reports at the time, and both Mafart (1999) and Prieur (1995) had written about the events in their own books published in France. The objects in dispute were the actual visual images of the guilty pleas.

At the time of the agents appearing in court, live recordings of proceedings were not permitted in the New Zealand justice system. However, in recent years New Zealand has become one of the Commonwealth's innovative jurisdictions in media use of courtroom video footage.

Mafart and Prieur were originally charged with murder. The committal proceedings were transferred to the High Court at Auckland because of more suitable facilities, but the two agents remained within the jurisdiction of the District Court. An estimated 150 journalists were expected to cover the hearing, and it was planned to provide closed circuit television (CCTV) in an adjoining courtroom. One of the reasons for this procedure was to close the courtroom's upstairs gallery and allow the agents to "sit in a dock without a bullet-proof cage" ([2006] CA92/05 [18]). However, instead of the authorised CCTV system, a court-ordered closed circuit video system was used. The contentious videotapes became part of the committal court record. Mafart, Prieur and their lawyers were not served with the court order and were not aware of it until five months later. Journalists were caught by surprise with the brief proceedings, which included charges being amended from murder to manslaughter, the taking of guilty pleas, and the reading of a summary of facts. The videotapes were collected by the Court Registrar and delivered to the judge in a sealed envelope.

Several weeks after the guilty pleas, BCNZ applied to the court for access to the videotapes. Although Mafart and Prieur objected, the tapes were handed over. But an interim injunction was upheld on appeal (*Mafart v Gilbert, 1986*). BCNZ's planned documentary at the 1986 Cannes film went ahead, stripped of the courtroom footage. At the time of these proceedings, the videotapes were considered by the High Court to be "documents" according to s182 of the *Summary Proceedings Act 1957*. They were transferred to the High Court as part of the committal record. The order included no leave to search, inspect or copy any part of the committal proceedings without the judge's ruling, and for the agents to be given 42 days' notice.

On October 30, 1987, Auckland barrister Colin Amery, then a law student researching a thesis on the *Rainbow Warrior* bombing, brought a case seeking access to the videotapes. Justice Thorp rejected the application (*Amery v Mafart, 1987*). The following year, on April 28, 1988, Justice Gault considered a revised application by Amery (*Amery v Mafart, 1988*). This was also turned down. Amery then filed a third application more than a decade later – linked to a planned documentary about his life – and on March 1, 2000, Justice Randerson rejected it (*Amery v Mafart, 2000*). Among the Search Rules principles cited by the judge:

The principle purpose of the rules [*Official Information Act 1982*: s2(6)(a)] is to ensure that, from the conclusion of the trial, with its necessary publicity, the pri-

vacy of the defendants will be protected by the Court unless there is some sufficient reason for disclosing material on the file. (*Amery v Mafart* [No 1] at p. 750)

Justice Randerson said the information was already in the public arena and “nothing new” would be added by granting the application. The argument that the public had a “right to see” was rejected as lacking in substance. The judge added that, in view of unsuccessful applications by the media and others about this section of the videotape, any new search application was “unpromising”.

However, a 2000 judgment (*R v Mahanga*) overruled earlier High Court decisions that had identified the “protection of privacy” as the primary purpose of Search Rules. Mahanga was convicted of child murder and his trial was filmed by TVNZ. One item of evidence was a videotaped interview of the accused, conducted by police. TVNZ recorded the showing of the videotape during the trial, but the result was poor quality. TVNZ then applied for access to the original videotape for use in a documentary. Although TVNZ was not successful in its appeal, the Court of Appeal reappraised searches of criminal records and ruled that privacy was no longer the primary consideration (cited in *Mafart & Prieur v TVNZ*, 2006, at 40). The judges held that the principles of open justice and freedom of expression were satisfied by the court being open to the public and by the media being able to report normally without restriction. But they also ruled that the application was governed by the Search Rules, which required a court to weigh the competing interests. Factors such as the principle of freedom of information, protection of individual privacy and protection of the administration of justice needed to be weighed up.

Privacy: In the Mafart and Prieur case, both secret agents had published books detailing their accounts of their involvement in the *Rainbow Warrior* bombing. These books undermined their argument for privacy. Dominique Prieur’s book, *Agente secrète*, written in collaboration with Jean-Marie Pontaut, was published in 1995, a decade after the sabotage. Her account said:

A little dazzled, I can make out the judge in front of me and the lawyers who are sitting on the side. I also notice, from the corner of my eye, in the first row, Joel [*Prieur, her husband*] to whom I make half a gesture. In the fog of the moment I don’t pay any attention to the public or the journalists who are there. Daniel [*Soulez-Lariviere, her lawyer*] will tell me later that there were 147 journalists who had come from around the world to cover the trial. However, only a dozen could actually be present at the hearing; the others follow the events from outside of the court room on a screen.

I had just put on the translation headphones when the Solicitor-General, Neazor (the prosecutor) rises to his feet. He announces that the prosecution has agreed to amend the charges. From now on we are only being charged with involuntary homicide (manslaughter) and “causing deliberate damage with explosives”. Daniel [*Soulez-Lariviere*] and Gerard Curry smile discretely. The court clerk then turns to us and asks whether we wish to plead guilty or not guilty. There is immediate silence once again. I feel that everyone is staring at me, but I wait in turn for the translation, involuntarily raising the suspense. Then, in a voice which I hope is as clear as possible, I answer first:

“*Guilty*”

I hear Alain [*Mafart*] booming the same reply.

Then there is an enormous “brouhaha” in the court room. Those in attendance seem stupefied [*stunned*]. The judge, Ron Gilbert, who is presiding over the proceedings, silences the public with an authoritative gesture and the Solicitor-General reads a brief summary of the case. “The Crown’s (the prosecution’s) inquiries reveal that

the accused had no other role than to support those who planted the bombs and whose identities have not been established,” he explains. Victory! Daniel [*Soulez-Lariviere*] has won! We will only be judged for manslaughter (involuntary homicide). We can hold out some hope. I look at Joel [*Prieur*] in triumph. But an internal voice reminds me that the sentence has not yet been imposed ... Too early to celebrate! (pp. 187-189, translation cited in court)

Four years later, Alain Mafart (1999) also published a book giving his account, *Carnets secret d'un nageur de combat: du Rainbow Warrior aux glaces de l'Arctique*:

... The hearing ... before the High Court is very brief. For us it is the main event since our arrest. The transfer [*from prison to the court*] takes place in a concert of sirens under the “protection” of heavily armed elite police. The prison van drops us off in a little cell that communicates directly with the courtroom via a spiral staircase. We are told to go up and enter, brutally, in the middle of the courtroom onto a stage. Silence is immediate and all eyes turn to us, the curious beasts that no one had yet seen. All these curious glances make me feel very uneasy. The courtroom is beautiful with dark and majestic wood panelling. I force myself to concentrate, trying to ignore the weighty public interest ...

In the first row of the public seating, behind us, I notice the head of Greenpeace, David McTaggart, and the head of the police enquiry, Allan Galbraith. French and international press reporters are present and are in such great numbers that the building had to be altered, with TV screens set up in neighbouring rooms so that all the members of the press could watch the spectacle. In front of us are our New Zealand lawyers. On the side, Joel Prieur, Dominique’s [*Prieur*] husband is sat next to Daniel [*Soulez-Lariviere*]. This last person does not defend us officially, as he is not qualified at the New Zealand bar. He dominates the situation. In this auditorium no one suspects the strategy that he has concocted. The Court is declared open. Judge Ron Gilbert enters, looking extremely formal, wearing a robe and an Elizabethan-style wig. I have an impression of being a mutineer from the *Bounty* ... but that in this case the gallows would not be erected in the village square. Three courteous phrases are exchanged between [the judge] and our lawyers, the charges are read to us and the Court asks us whether we plead guilty or not guilty, our replies are clear “guilty!”. With that one word the trial is at an end.

There is total surprise among the journalists. As soon as they realise what has happened, they rush outside on their telephones all of a sudden, breaking the oppressive silence and solemnity of the courtroom. Against all expectation, they have just found out, dumbfounded, that the huge trial that was due to take place had, in some way, evaporated before their eyes - in one instant and without warning. They now knew that as far as the judicial phase was concerned, our affair was closed. On 4 November 1985 [sic], we knew the verdict: “Ten years”, the judge, the Honourable Justice Davison, declared. Even if Maître Soulez-Lariviere had forewarned me, it is still a massive blow: We had not avoided the maximum sentence, but at least I know, with the remission of sentences, that I would probably get away with only half of that time. I place all my hope in a vigorous effort by France to get us out of this black hole. [An] optimist by nature, I always believe that something positive can come out of the worst moments that a man can live. I will now be able to test, hour by hour, the validity of that principle. (p. 192, translation cited in court)

According to Justice Hammond in the Court of Appeal: “These passages, out of the mouths of the appellants themselves, are very significant. They do not portray humiliation in front of onlookers. If anything, there appears to have been vast relief and even a sense of ‘victory’ that the appellants would ‘only be judged for manslaughter’.” (*Mafart & Prieur v TVNZ, 2006*, at 59)

When a “breach of privacy” is claimed to have happened, courts and statutes usually require that the intrusion must have impinged to an “unreasonable extent upon the personal affairs of the individual concerned”. In *Hosking v Runting* (2005), Justice Tipping said the act complained of must “cause substantial offence to a reasonable person”. In *Australian Broadcasting Corporation v Lenah Game Meats* (2001), Chief Justice Gleeson said: “The requirement that *disclosure or observation of information or conduct would be highly offensive* to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private” (judge’s emphasis added). Judge Hammond noted that one aspect of privacy was that “it was necessary to protect everybody from misinterpretation or misportrayals” by the media (at 61). But this needed to be weighed up in relation to the French spies who did not seem to have been “afflicted by any concerns of that kind”. Rather, it was more of a case of the agents “seeking to ... control the coverage” (at 63).

For Mafart and Prieur, lawyer Gerard Curry argued that there could well be harm in this case, due to the “constant ‘repetition’ of this rather iconic image over visual media” – perhaps around the world. Justice Hammond cited the example of a ten-second clip of the infamous head-butt by French football star Zinedine Zidane during the 2006 World Football Cup. The judge observed: “The visual media are not infrequently drawn to such things, like a moth to a candle.” (at 65)

Freedom of information: In the judgment upholding the broadcast of the footage, Justice Hammond highlighted the historical significance of the *Rainbow Warrior* bombing and the importance of enduring images for a new generation of New Zealanders:

It is incontrovertible that this bombing was an extraordinary event in the history of New Zealand, and even internationally. It involved covert criminal activity by the security forces of one state on a friendly state’s territory, and against the friendly state’s interest. It is an event that has been, and will remain, important in New Zealand’s history. As time passes, there will be new generations of New Zealanders who have not lived through the *Rainbow Warrior* affair and so will not have personal knowledge of it. Their knowledge of this important event in New Zealand’s history will come through what they are told, through what they read and through what they see in the visual media.

A visual image of the kind at issue in this case may be a very powerful mechanism for conveying information about events. Who can forget the graphic force of the film images of the defendants in the dock at Nuremberg? (at 68, 69)

Justice Hammond said there was a strong public interest in conveying the information in the visual image, not simply through the spoken or written word, but through the image itself. The footage was finally broadcast by Television New Zealand on news programs on August 7, 2006. But the saga did not end there. Four days later, all footage stored on TVNZ’s website was withdrawn when the spies made one last bid for an appeal to the Supreme Court (Breakfast, August 8, 2006). The court dismissed the appeal application on September 26, ordering the pair to pay \$2500 costs to TVNZ and permanently freeing up broadcast of the footage. TVNZ’s then head of news and current affairs, Bill Ralston, said:

This is a significant triumph for media freedom and hopefully demonstrates to the French (and any other government, corporate or individual) that the New Zealand media will not be intimidated into submission by legal stonewalling. Best of all, a whole new generation of New Zealanders will now get to be an eyewitness to a pivotal moment in our country’s history. (TVNZ wins *Rainbow Warrior* battle, 2006)

Conclusion

Infringement of privacy is one of the “fastest developing areas of media law” (Price, 2007, p. 257). But its boundaries are still far from clear and change has been fairly rapid. The rules apparently being developed by the courts parallel the “public disclosure of private facts” principles applied by the Broadcasting Standards Authority. The main difference is that the courts can award substantial damages for breaches of privacy and there is limited potential for an injunction to stop an unjustified breach of privacy. Price summarises the general principles for the media in New Zealand as not disclosing private facts where both of the following tests apply:

- There is a reasonable expectation of privacy; and
- The disclosure is highly offensive to a reasonable person.

There is a defence if the facts are of public interest (meaning they are of legitimate concern to the public, not merely titillating). However, in the case of the *Rainbow Warrior* bombing, for the best part of two decades the courts surprisingly upheld privacy and administration of justice rights of the French secret agents, Mafart and Prieur, at the expense of the New Zealand public’s right to know. It took the Mahanga case in 2000 to establish the legal principle that balancing competing interests should supersede the notion that court search rules were primarily about protection of privacy. The bombing was an iconic event of considerable historical importance in New Zealand dealing with state terrorism. While it is remarkable that privacy issues and judicial procedures weighed heavily for so many years in preventing the spies’ guilty pleas footage being broadcast – especially when the agents had written about their court appearance and guilty pleas in their own books – it was a critical success for the functions of Fourth Estate scrutiny that this visual record eventually became part of the public domain. The issue was under-reported in the media, yet the campaign was vitally important. The public had every right to see full images of these guilty pleas from this example of state terrorism. The persistence of counsel William Akel – and also Colin Amery in earlier years – was vindicated when the Court of Appeal finally upheld the public’s right to know about the *Rainbow Warrior* bombers.

In an important legal footnote – also involving Akel as lead counsel – the Supreme Court ruled on November 16, 2007, that TVNZ could show the confession of Noel Rogers over the 1994 murder of Katherine Sheffield. This brought closure to the television network’s two-year struggle with Rogers’ lawyers, who had argued this breached his right to privacy (TVNZ broadcasts murder confession, 2007; Little piece of justice for Kathy, 2007). The Court of Appeal had ruled that the confession tape could not be used as evidence because police had breached the accused man’s rights to legal counsel and silence. Rogers was subsequently acquitted of murder. Both the Rogers and *Rainbow Warrior* video footage cases are regarded as press freedom legal landmarks in New Zealand. They are about greater transparency of the justice system. They are also pointers to the growing complexities of media law education for journalism schools as they address the evolving New Zealand tort of interference with privacy. New generations of New Zealanders will now indeed benefit from public images of the *Rainbow Warrior* state terrorism pleadings, and the media and legal case study will remain an exemplar.

Note

1. About 13 French secret agents were believed to have been involved in the 1985 *Rainbow Warrior* bombing in New Zealand, but only two – Alain Mafart and Dominique Prieur – were brought

to justice. In 1991, Swiss authorities detained Gerald Andries, one of four agents who crewed the yacht *Ouvéa*, which reportedly ferried the explosives to New Zealand from New Caledonia. Interpol had a warrant for their arrest. The National Party government of the time moved to extradite Andries, but dropped the case when France again applied trade pressure. Paris also argued that the 1986 agreement covered all its agents. Attorney-General Paul East stayed “all outstanding charges” and the *Rainbow Warrior* case was closed. In October 2006, during the lead-up to the French presidential election, *Le Parisien* reported that French Socialist presidential candidate Segolene Royal’s brother, Gerard, had been named as a suspect as one of the two frogmen who planted limpet mines on the environmental ship (Martin, 2006).

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