Conference 2000: Media Law

Update to Media Law. A report of Professor John Burrows' presentation to the Christchurch JEANZ conference, November 30, 2000, By Jim Tucker.

Note: Larger type is written material handed out; smaller type in boxes is additional comment made by Prof Burrows.

A Defamation

1 Media privilege at common law:

Lange v Atkinson [2000] 3 NZLR 385 reaffirms that there is a qualified privilege for the media to discuss politicians. However, the 2000 decision tempers to some extent the generosity of the earlier 1998 judgement.

• Not every statement about a politician is privileged. The statement must be one which is made on a privileged occasion. That depends on the circumstances and context in which it is made, including the identity of the publisher, the audience, the content, etc.

• Privilege is lost if "improper advantage is taken of the occasion of publication". This can be constituted by reckless or irresponsible journalism.

David Lange underlined 16 paragraphs of the Joe Atkinson column in North & South that he felt defamed him. Examples were accusations of false memory syndrome and gaps between promise and performance.

Progress of the case:

1 High Court/Court of Appeal

Established that this form of qualified privilege (coverage involving national politics) existed. Decided that MPs (past, present or would-be) can be criticised, on the following conditions: a Must be relevant to their ability to do the job (not private life) b The media loses the privilege if ill will is proved or they have taken improper advantage. The protection applies even if the media gets the facts wrong. Some people thought the ruling went too far.

2 Privy Council

Britain had just dealt with a similar case (Reynolds v Times) and the finding was less generous than in NZ. The Privy Council suggested the NZ Court of Appeal should revisit the case and reconsider.

3 NZ Court of Appeal (2nd decision)

Reaffirmed that the NZ situation was different from that in the UK, partly because of MMP (which requires people to be informed so they can cast a vote for their preferred party, not just vote for an electorate candidate); partly because the UK has no Bill of Rights (which protects freedom of expression) or an Official Information Act; and partly because the UK tabloid press is less responsible than the NZ media.

However, the second Court of Appeal judgement added two new and important qualifications:

a Not all statements are privileged - only what the public has a real interest knowing about. That depends on the circumstances. For example, a one liner reference to a politician in a sports magazine would not qualify for privilege. The courts will now need to decide the extent of this qualification on a case by case basis. So now it is not as clear as it was after the first Court of Appeal ruling.

b Privilege is lost if the media shows ill will or takes improper advantage - acts in a reckless way or with cavalier disregard for the truth, or is irresponsible. It is up to a jury to decide. Juries may be expected to treat MPs rigorously.

So far, the new privilege applies to MPs only. However, in the UK any public figure may be criticised, so that is bound to be

tested here.

2 Media privilege by statute:

The Defamation Act 1992 confers privilege on "a report of a statement issued for the information of the public by a government department". It has been held that that extends to information supplied by a police communications officer to a reporter (Ferrymead Tavern v Christchurch Press HC Christchurch, CP 184/98, 11 August 1999).

B Court Reporting:

1 Suppression: Billionaire case:

The Court of Appeal has said a District Court judge was wrong to suppress the name of the American billionaire found guilty of importing cannabis. The status of the person was no reason for suppression; that would create a privilege for those who were prominent which was not available to others. An argument that charities and businesses with which the appellant was associated might suffer if his name was published, was wholly speculative and unsubstantiated. Moreover, the requirements of open justice meant that the judge should have given reasons for his decision: he had failed to do so.

The case gives very strong weight to the principles of open justice and freedom of speech (Lewis v Wilson & Horton [2000] 3 NZLR 546).

2 Suppression: No fault:

It has been confirmed by the High Court in Karam v Solicitor General (HC Auckland, AP 50/98, 20 August 1999) that although breach of a suppression order is an offence of strict liability, a news medium may escape conviction if it can show a total absence of fault on its part.

3 Suppression: Police Officers:

In A v Wilson & Horton (HC Auckland, CP 7/00, 5 May 2000) the court declined to uphold an injunction prohibiting publication of the name of the police officer involved in the Waitara shooting. There were no arguments in defamation, contempt of court (no case was pending) or privacy. It might be conventional practice not to publish a name in such circumstances, but it had no legal backing. In a similar case where a man had died in police custody, Robertson J refused to make an order prohibiting the broadcast of an item regarding the circumstances of the death. The Coroner had made an order (by telephone) suppressing the names of the police officers: Robertson J treated that order as irregular (Beckett v TV3 Network Services HC Whangarei, CP 10/00, 18 April 2000).

4 Suppression: Diversion:

It is common for names to be suppressed when an offender is given diversion in the District Court. The Registrar has power to make such an order. But it has recently been held that such an order is by no means automatic: it is, as with all cases of suppression, within the judge's discretion (Younger v Police HC Auckland, A169/00, 31 October 2000).

5 Bail:

The rules relating to reporting of bail cases have always been unclear. The new Bail Act 2000 clarifies the matter. Bail hearings may take place in private (s18); and the court can in any bail hearing make an order prohibiting the publication of any part of the hearing (219).

6 Contempt:

There have been no significant contempt cases since Wickliffe in 1998. But there have been a number of cases where a mistrial has been ordered. One was R v Paniani (HC Auckland, T 923511, 21 March 2000) where a newspaper, in reporting a retrial, had summarised the reasons why the Court of Appeal had ordered the retrial; the report recounted evidence which the Court of Appeal had held to be wrongly admitted at the original trial. The jury was discharged, and the retrial aborted.

Diversion

Suppression is not automatic. If nothing is said, no suppression applies. Diversion is covered by the Summary Proceedings Act, but the only mention is the section dealing with the power of registrars. Some courts release a list of people dealt with under diversion. The registrar's hearing is an open court, even though it may occur in his/her office.

Bail

The danger with bail was in revealing a defendant's record. That is now tidied up in amending legislation.

C

Privacy 1 Common law tort:

P v D [2000] 2 NZLR 591 confirms that there is a tort of privacy in New Zealand. An injunction was ordered against a newspaper, prohibiting it from publishing a story that a well known professional person had had psychiatric treatment. Richardson J listed the following four factors which have to be established:

a The disclosure of private facts must be a public disclosure.
b The facts disclosed must be private facts.
c The matter must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.
d The nature and extent of legitimate public interest in having the information disclosed.

2 Secret filming:

TV3 Network Services Ltd v Fahey [1999] 2 NZLR 129 suggests that the secret filming of a doctor's conversation with a former patiently probably included an element of trespass. (The patient entered the surgery for a purpose she must have known would not have been agreed to by the doctor.) But, given the public importance of the matter, the Court of Appeal refused to continue an injunction against broadcast of the film.

3 Broadcasting Standards Authority:

The BSA now has power to approve a code of privacy (Broadcasting Amendment Act 2000). It currently uses seven privacy principles. It exercises its privacy jurisdiction quite frequently, although with one exception the "penalties" it imposes have been fairly light. The exception was Diocese of Dunedin v TV3 (1999) (where privacy was only one of a number of grounds of complaint): it made monetary orders totalling around $100,000. The BSA has shown increasing concern for the privacy of young children, and has recently amended its statement of principles to note that a parent's consent is not alone enough: the broadcaster must also satisfy itself that the child's best interests are being looked after when a programme investigates private matters affecting the child.

Concerns

1 Uncertain terms - private facts; objectionable material; public interest.
2 Extent of the tort.

3 The threshold for an injunction - must be a strong case.
4 The relationship with defamation. Before, a defence of truth always enabled publication, but under the privacy tort something that is true could be suppressed by injunction.

Author Bio

Jim Tucker (53) has been teaching journalism since 1987. He was a working journalist in New Zealand from 1965 until 1987, when he resigned as editor of the Auckland Star to take over the journalism course at Auckland Institute of Technology. He taught there at diploma, undergraduate and masters levels, before departing to his hometown, New Plymouth, to take over the Western Institute of Technology Diploma

of Journalism course in 1998. He completed an MA in communication studies in 1999. He has written two journalism textbooks, Intro (1999) and Kiwi Journalist (1992).

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