CASE NOTES

Rethinking Political Expression

***Lange v Atkinson and Australian Consolidated Press Ltd* [1997] 2 NZLR 22. High Court, Auckland, Elias J.**

Joe Atkinson, a lecturer in Political Studies at the University of Auckland, wrote an article that was published in the magazine *North and South*, which is owned and operated by Australian Consolidated Press Ltd. The article was highly critical of the activities of former Prime Minister David Lange during his term of office. Mr Lange was, at the time of publication, the Member of Parliament for Mangere. He sued the author and the publisher of the article for defamation, seeking general and exemplary damages in respect of sixteen extracts that allegedly portrayed Mr Lange as "irresponsible, dishonest, insincere, manipulative and lazy".[1]

In response to the statement of defence, counsel for Mr Lange applied to strike out references to a defence of "political expression" (both as a separate defence and as a species of qualified privilege) on the basis that it did not exist in New Zealand law. For their part, counsel for the defendants maintained that the defence was reasonable and tenable, albeit somewhat novel. In reaching a decision on the application, Elias J went beyond merely considering whether such a defence may be argued, and in doing so delivered an extensive exegesis on the rationale, extent, and elements of the defence of "political expression".

The foundation for the defence derives from the necessity for the unimpeded exchange of political information to and from the citizens in a representative democracy. In order for the electorate to participate in the political process in an informed manner, the law should refrain from restraining legitimate criticism of candidates and policies. The Court relied upon ss 12 and 14 of the New Zealand Bill of Rights Act 1990 ("Bill of Rights") to illustrate legislative recognition of the importance of a functioning democratic government. Justice Elias was emphatic in her application of the Bill of Rights to the judicial development of the common law:[2]

> The New Zealand Bill of Rights Act 1990 is important contemporary legislation which is directly relevant to the policies served by the common law of defamation. It is idle to suggest that the common law need not conform to the judgments in such legislation.

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1 [1997] 2 NZLR 22, 26.

2 Ibid, 32.

However, the right to political free speech must be balanced against the protection of human dignity, which is the cornerstone of the tort of defamation. The Court considered the interaction between the Canadian Charter of Rights and Freedoms and the right to human dignity, noting that the protection of the latter in respect of political officials was also central to the smooth functioning and integrity of democratic government.[3]

Justice Elias examined the ability of the existing defences of truth, honest opinion, and qualified privilege to give sufficient protection to political expression. With the enactment of the Defamation Act 1992, the defences of honest opinion and qualified privilege were realigned towards the protection of freedom of expression, so that a defendant does not need to demonstrate that his or her statement is either reasonable or not motivated by malice. Consequently, the Court considered that there were already significant protections for the freedom of expression in general, but not for political speech per se.

Rather than develop a wholly new defence predicated on the express freedoms in ss 12 and 14 of the Bill of Rights, the Court attempted to widen the scope of the defence of qualified privilege, following in essence the decisions of the High Court of Australia in *Theophanous v The Herald & Weekly Times* and *Stephens v West Australian Newspapers Ltd.*[4] Integral to the defence is the requirement of a duty (on the part of the defendant) to publish the information and a reciprocal interest, vested in the recipient, in receiving the same. In broad terms, an article that deals with an issue of public interest will not in itself be sufficient to support a claim to privilege.[5] In particular, "the mere fact that the plaintiff was a declared parliamentary candidate cannot be treated as imposing on the defendant a social or moral duty to make a defamatory statement".[6] The Court acknowledged that there were "strong arguments" for this position, but did not directly address them. The broad basis for the defence is the protection of communications that are "for the common convenience and welfare of society".[7] The categories of duties and interests that may give rise to a defence of qualified privilege are not closed. The development of the scope and content of the defence is a matter for the common law and should, in the opinion of the Court, be in accordance with the democratic rights expressed in the Bill of Rights. Such a view therefore justified a re-evaluation of the current scope of qualified privilege.

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3 *Campbell v Spottiswoode* (1863) 3 B & S 769; *The Globe and Mail Ltd v Boland* (1960) 22 DLR (2d) 277 (SCC).

4 (1994) 182 CLR 104; (1994) 124 ALR 80. In these two decisions, referred to in *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA), the High Court of Australia recognised an implied freedom of political expression in the Australian Constitution. For further criticism concerning the decision of the Court to adopt the Australian model, see Huscroft, "David Lange and the Law of Defamation" [1997] NZLJ 112.

5 *Truth (NZ) Ltd v Holloway* [1960] NZLR 69.

6 *Templeton v Jones* [1984] 1 NZLR 448, 459.

7 *Toogood v Spyring* (1834) 1 CM & R 181, 193.

The Court briefly examined the approach adopted in the United States with respect to plaintiffs who are "public figures", and concluded that the requirement on the part of the plaintiff to establish "malice" and "falsity" would tip the balance too far in favour of the defendant.[8] It was accepted, however, that the current state of the law did not redress the "chilling effect" of the tort, which inhibits "not only false speech made in good faith but true speech as well".[9] To ensure that the right of the public to receive information on political issues is not impaired, greater protection would need to be given to defendants to assuage the fear of liability in publishing such information. In seeking to find a compromise between the United States position[10] and the defence of qualified privilege as it stood in New Zealand, the Court examined at length the judgments of the High Court of Australia in *Theophanous* and *Stephens*. The majority in the former decision held that a defendant who sought to claim the defence of qualified privilege in respect of political expression would need to demonstrate that publication was "reasonable" in the circumstances. Whether publication was reasonable would depend on the measures taken to ensure the accuracy of the information published. If such measures were inadequate, the defendant would need to show that publication of the unverified material was warranted. In what can only be seen as a movement away from the position in *Templeton v Jones*,[11] the Court drew the conclusion that in cases of political expression there may be a relationship of duty and interest between the media and the public at large, sufficient to found a defence of qualified privilege:[12]

> What is striking is that all the Judges, with the exception of Dawson J ... accepted in principle that statements which are part of the political discourse which informs judgments by the public about the conduct of high public office may be privileged even if communicated by modern media to all citizens.

Both *Hyams v Peterson*[13] and *Templeton v Jones* were found to have left the scope of the qualified privilege defence open for future elaboration. *Truth (NZ) Ltd v Holloway*[14] was interpreted narrowly, standing for the proposition that no general privilege may be claimed simply in respect of something considered to be in the public interest. The "interest" in political expression is therefore both

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8 Furthermore, the Court heeded the opinion of Deane J in *Theophanous*, who considered that such requirements would actually exacerbate the "chilling effect" of defamation by contributing to the uncertainty of litigation.

9 Supra at note 1, at 36. The "chilling effect" has been the subject of judicial discussion abroad. The recognition accorded to it in the current case can be usefully compared to the opinion expressed by the Court of Appeal in *Hyams v Peterson* [1991] 3 NZLR 648, 657: "It has to be remembered that if the media can prove that what they say is true, they have under the present law nothing to fear."

10 This view is exemplified in *New York Times Co v Sullivan* 376 US 254 (1964).

11 Supra at note 6.

12 Supra at note 1, at 43.

13 Supra at note 9.

14 Supra at note 5.

defined by and confined to that information which is necessary for the effective functioning of democratic government. In the opinion of the Court, the legislature has indicated in broad terms the importance to be attributed to the free flow of information to electors: "[the] relevant legislative background includes the New Zealand Bill of Rights Act 1990, the Defamation Act 1992, the Electoral Act 1993 and the Official Information Act 1982."[15]

With regard to claims for damages, as before the Court in this case, it was held that the common law defence of qualified privilege should be extended to political discussion, be it of elected or appointed officials. The defence was clearly applicable on the facts of the case, and the contested references within the defendants' statement of defence could remain. Moreover, on a principled approach, the defence cannot be denied to the media - it is the content of the speech, rather than the capacity to disseminate, which determines the extent of the defence.

The Court then went further and attempted to "indicate some tentative views" as to the substantive particulars of the defence.[16] It rejected the suggestion that the availability of the defence be conditional on an inquiry into the fault of the defendant, on the basis that such an inquiry would be inconsistent with the Defamation Act 1992.[17] The Court, however, indicated that the development of the New Zealand defence might not necessarily follow the reasoning adopted by the High Court of Australia. In particular, the Court found that a requirement of "reasonable publication" would engender disparity between the defences of honest opinion and qualified privilege without alleviating the "chilling effect", and as such was both unnecessary and contrary to established authority. The argument of the Court on this point suggested a possible avenue towards unifying the two defences in relation to political expression:[18]

> In addition, such conformity [between honest opinion and qualified privilege] has particular merit in the area of political discussion about government and the exercise of government powers where the distinction between fact and opinion may often be difficult ... that would suggest that once the circumstances of legitimate political discussion have been established, the only appropriate condition for raising qualified privilege should be honest opinion.

At the time of writing, the decision is on appeal to the Court of Appeal. Since the decision, the High Court of Australia has revisited the status of *Theophanous* and *Stephens* in litigation involving a familiar plaintiff. In *Lange v Australian Broadcasting Corporation*,[19] the Court reiterated the implied requirement for

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15 Supra at note 1, at 45.

16 Supra at note 1, at 49.

17 Section 19 of the Act states that malice on the part of the defendant will not rebut a claim to qualified privilege unless the defendant was predominantly motivated by ill will or otherwise takes improper advantage of the occasion of publication.

18 Supra at note 1, at 50.

19 High Court of Australia, 8 July 1997, S 109/1996.

freedom of political expression in the Australian Constitution, and the need for the tort of defamation to be interpreted in conformity with the Constitution. The defence was defined broadly to encompass political matters involving the activities of other nations. The prerequisites of the defence were refined to the simple touchstone of "reasonableness of conduct", and the more favourable test of honest publication (as preferred by Elias J) was rejected in light of the extensive damage that could be wrought by honest publication in the mass media of defamatory material.[20] The standard of conduct necessary to meet the test of "reasonableness" is therefore quite high: the defendant must have had honest and reasonable grounds for believing the material's veracity, taken proper steps to ensure its accuracy, and (perhaps most importantly) must where practicable have sought a response from the defamed party and published any response obtained. Whether or not the Court of Appeal accepts the formulation of the defence as given by Elias J, or moves in a more conservative direction towards the Australian position, there is now substantial support for the future development of a defence relating to political expression.

Scott Abel

Future Earnings, Matrimonial Property, and the Role of the Court of Appeal

Z v Z [1997] NZFLR 241. Court of Appeal, Richardson P, Gault, Henry, Thomas, Keith, Blanchard, Barker JJ.

In *Z v Z*[1] the Court of Appeal considered whether a spouse's earning capacity could be considered "property" in terms of the Matrimonial Property Act 1976 ("the Act"). This question not only allowed the Court to comment on the scope of the statutory matrimonial property regime, but also on the constitutional role of the judiciary itself.

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20 The Court discarded the other separate requirements established in *Theophanous*, namely ignorance of the falsity of the material published and not publishing recklessly.

1 *Z v Z* [1997] NZFLR 241.

Factual and Judicial History of the Case

The appellant and respondent ("the husband" and "the wife" respectively) were married in 1966 and separated in July 1994. At the date of marriage, both parties were employed - the husband as a low ranking civil servant, and the wife, on a higher income than her spouse, as a secretary. Shortly after the marriage, due to the couple's decision to have children, the wife left paid employment. After that time she worked in the family home, caring for their three children (one of whom had a "mild physical disability"[2]), and supporting her husband. Meanwhile, the husband continued to work in the public service, and studied for further educational qualifications part time.

In 1987, the husband was "head-hunted" by an international accounting partnership. From that time his income increased dramatically, such that, in the year that the parties separated, he earned in excess of $300,000. It was also recognised that the husband gained a number of other benefits from his involvement in the professional partnership. For example, he was eligible for retirement benefits from age fifty-five.[3]

By contrast, the Court accepted that due to recurring health problems "it [was] unrealistic to assume that the wife [would] return to remunerated employment".[4] At the time of separation the wife's income was derived from a social welfare benefit ($7,000 per annum), and interim maintenance paid by the husband. All three of the children were financially independent at the date of separation.

On 3 April 1996 the husband applied to the Family Court for an order determining the parties' property interests in terms of the Act.[5] Judge Robinson divided the couple's property and, more controversially, accepted the wife's argument that the husband's enhanced earning capacity could be considered matrimonial property in terms of the Court's discretion under s 9(4) of the Act. Consequently the wife won an order to that effect.

The Appeal

The husband appealed from the Family Court to the High Court and, after some discussion as to jurisdiction, the matter was referred directly to the Court of Appeal.[6] The four issues argued on appeal concerned:[7]

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2 Ibid, 247.

3 Retirement within the firm was mandatory at age sixty.

4 Supra at note 1, at 247.

5 A commentary on this judgment (*B v B* [1997] NZFLR 217) can be found at (1996) 8 Auckland U L Rev 234.

6 In terms of s 64(e) of the Judicature Act 1908.

7 Supra at note 1, at 254.

(i) Whether future earnings could be the subject of an order under s 9(4) of the Act. (As noted above, this section formed the basis of Judge Robinson's decision in favour of the wife);

(ii) Whether enhanced earning capacity could be considered matrimonial property in terms of ss 8(e) or 8(ee) of the Act. (This issue was also argued before Judge Robinson, but his Honour rejected the application of the Act to earning capacity in this way);

(iii) Whether the husband's entitlement to a retirement benefit (arising out of the partnership agreement):
(a) was encapsulated in s 8(i) of the Act; or
(b) merely formed one part of the "bundle of rights" held by thehusband under the partnership agreement which, it was accepted, was matrimonial property by virtue of s 8(e) of the Act; and

(iv) Whether the value of the "bundle of rights" flowing from the partnership agreement should include recognition of the husband's future income and other benefits.

With regard to the final issue, the Court released the wife from a concession made earlier to the effect that the husband's partnership interest had no value.

The Court also went on to discuss the law relating to spousal maintenance, although this was not directly at issue in the case.

Introductory Comments

The seven member Court of Appeal began its judgment by making general comments regarding the "legislative setting".[8] Emphasis was placed on the assumption of equality within marriage inherent in the Act. This principle had been recognised judicially a short time after the Act's passing,[9] and formed the basis of its interpretation.

Notwithstanding this legislative assumption, the Court recognised that "[the wife's] contribution [to the marriage partnership] has not been adequately reflected in the remedial regime which was adopted in [the Act] to achieve a division of the property of the parties at the end of the marriage".[10]

The Court also recognised four key features of the Act. First, that property formed the basis of the Act's subject matter. Second, that there was a strong presumption toward equal sharing of matrimonial property. Third, it was said that the Act applied only to property acquired (at the latest) at the time of the hearing. This point would prove very important in the Court's later discussion. Finally, the clean break principle - after separation, the operation of the Act should be such as

8 Ibid, 248.

9 See, for example, *Reid v Reid* [1979] 1 NZLR 572 and *Martin v Martin* [1979] 1 NZLR 97.

10 Supra at note 1, at 249.

to allow the spouses to "go their separate ways, without any competing demands on the property of each other".[11]

Future Earnings and s 9(4)

As noted above, s 9(4) - which vests in the Court a discretion to treat property acquired by either spouse after separation as matrimonial property - formed the basis of Judge Robinson's judgment in the Family Court. Notwithstanding this fact, however, the Court of Appeal took little time to explain their reasons for allowing the husband's appeal on this point.

Judge Robinson had found that it was "entirely appropriate for the Court in the exercise of its discretion to treat as matrimonial property such part of the future earnings of the husband as the Court considers appropriate."[12] The Court of Appeal viewed this as the statement of someone who had "fallen into the error of equating the ability to earn or produce income with the income itself."[13] Accordingly, it held Judge Robinson's decision to be "in effect an award of lump sum maintenance, designed to address a future income imbalance as between the parties",[14] and entirely outside the scope of s 9(4). In the Court of Appeal's eyes, s 9(4) was limited in scope to property in existence at the time of the proceedings.

Enhanced Earning Capacity as "Matrimonial Property"

Perhaps in response to the extensive arguments of counsel, or perhaps due to the potential social ramifications of their decision, the Court of Appeal devoted the bulk of its judgment to a discussion of this issue.

Professor Maxton who, with Graham Austin, assisted Deborah Hollings for the wife, argued that the definition of "property" in s 2 of the Act was wide enough to accommodate enhanced earning capacity. She cited a number of cases where nontraditional interests were recognised as being encompassed by the Act.[15] Further, it was asserted that assignability was not a necessary characteristic of "property" under the Act.[16] Rather, tangibility or the ability to attract a monetary value[17] were the defining features of "property".

Professor Maxton further asserted that Parliament had intentionally left the definition of "property" in the Act wide, so as to allow emerging property interests to be caught without revision of the Act becoming necessary. An inclusive

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11 Ibid, 251.

12 Ibid, 265.

13 Ibid, 266.

14 Ibid.

15 For example, *Baumber v Mazzola* (1980) 3 MPC 7; *Haldane v Haldane* [1981] 1 NZLR 554; *Ellerton v Ellerton* (1978) 1 MPC 72, etc. See ibid, 256.

16 *Ellerton v Ellerton*, ibid, was cited for this proposition.

17 As recognised by Casey J in *Godfrey v Godfrey* (1979) 3 MPC 64, 66.

definition of "property" was also fundamental to ensuring that the Act's principal goals[18] were attained. Accordingly, it was entirely appropriate for the husband's enhanced earning capacity to be considered "property" under s 2 of the Act. Other jurisdictions had taken this step,[19] and it was suggested that New Zealand should follow their lead.

In support of Professor Maxton's arguments, the wife's counsel asserted that, if confined to conventional items of property, the equal division prescribed by the Act would lead to inequality. This was because, while the husband had left the marriage with the potential to earn a substantial income, the wife, due to "the role which she had assumed in the marriage",[20] had no such prospects. This meant that, after separation, both parties would have access to the same amount of capital, but the husband would nevertheless be able to recover in a much shorter period than the wife.

Research from New Zealand and overseas was proffered to show that the wife's predicament in this case was not unique. Indeed, it revealed that a huge inequality of earning capacity between spouses after separation was commonplace. In short, women were not being served by the restrictive interpretation of a statutory mechanism which had been enacted, at least partially, to effect their equality.

In response to the wife's arguments on this point, Rayner Asher QC and R Knight for the husband, asserted that "property" had to be "transferable or capable of having an exchange value".[21] Enhanced earning capacity clearly did not meet these criteria. Further, it was submitted that the dramatic change in interpretation required to accept the wife's proposal should be left to Parliament and not the courts.

The Court began its reasoning by reiterating the age-old distinction between rights in the person and rights in things. This, it stated, formed the foundation of any analysis of the concept of property. The Court noted that the s 2 definition of "property" was contained within a number of statutes.[22] This fact, as well as aspects of the Act itself, and the existence of separate legislation to deal with property division and maintenance,[23] led the Court to conclude that "essentially personal characteristics which are part of an individual's overall make up such as the person's level of intelligence, memory, physical strength or sporting prowess are not to be seen as 'property' within the meaning of [the Act]".[24] In saying this,

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18 "[T]he just division of matrimonial property and the ... economic independence and equality of women"; supra at note 1, at 256.

19 See, for example, *O'Brien v O'Brien* 498 NYS 2d 743 (1985), *McGowan v McGowan* 535 NYS 2d 990 (1988), and *Elkus v Elkus* 572 NYS 2d 901 (1991).

20 Supra at note 1, at 257.

21 Ibid, 260.

22 For example, the Child Support Act 1991, Crimes Act 1961, Domestic Actions Act 1975, etc. See ibid, 261.

23 Family Proceedings Act 1980.

24 Supra at note 1, at 261.

the Court accepted that "property" in the Act had a wider meaning than that traditionally ascribed to it.[25] For example, it did not depend on the concept of transferability proposed by the husband. It was not so wide, however, as to incorporate those rights indistinguishable from the person, such as earning capacity.

The Court could have left its discussion of this issue there. It went further, however, and its comments at this stage are perhaps more enlightening in terms of the relationship between Parliament and the judiciary, than its discussion of the Act.

The Court was clear that the limited interpretation it felt bound to assign to "property" was, in the circumstances of this case, contrary to the "policy and spirit of the legislation".[26] Indeed, it went so far as to suggest that, in effect, its decision "perpetuates the injustice the Act was aimed at remedying."[27] Clearly the wife, in their Honours' view, *should* have been able to share in the husband's increased earning capacity. After all, her contribution to the marriage partnership had partially led to this capacity. Yet, even in the face of this gross inequity, the Court felt obliged to adhere to the "conventional concept [of property] which Parliament chose to endorse".[28]

The Court did not assert that it was impossible to give the term "property" a definition inclusive of earning potential. Indeed, such a definition has been adopted in at least one jurisdiction.[29] Rather, its decision was based on, and fettered by, the intention of a Parliament sitting in the early 1970s. Should this be so? Should the highest court in the land be prevented from correcting a manifest injustice merely because the specific inequity was not foreseen by Parliament (even when to do so would actually be consistent with the "policy and spirit of the particular legislation",[30] and congruous with the words of the Act)? It is submitted that such an attitude is too conservative a view of the judicial function. Clearly the courts are more able than Parliament to reinterpret statutes when such revision is necessitated by social evolution. This is particularly true of legislation which is concerned with the area of relationships and the family, where fundamental change can happen relatively quickly. The courts have the luxury of seeing individual cases, while Parliament can only speculate when enacting laws what society will be like in fifteen or twenty years time. With this luxury the courts must bear certain responsibilities - one of which is to ensure that the wife in this case, and people like her, do not "fall through the cracks".

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25 Justice Murphy's dissent in *Dorman v Rogers* (1982) 148 CLR 365, 372-373, was cited for this proposition.

26 Supra at note 1, at 262.

27 Ibid, 262.

28 Ibid, 264.

29 See the United States' cases, supra at note 19.

30 Supra at note 1, at 262.

In this case the Court could, and should have defined "property" so as to include earning potential. If Parliament did not approve of such an interpretation, it could have specifically amended the Act so as to exclude earning capacity. Given, however, the earnestness with which the Court of Appeal reviewed the wife's claim, it is unlikely that Parliament would have done so, or indeed even felt the need to do so.

The Husband's Interest in the Accounting Partnership, and its Valuation

The Court of Appeal discussed the particulars of the husband's partnership interest. Their Honours concluded that it was matrimonial property[31] and that it in fact was constituted of a "bundle of rights".[32] One of those rights was the husband's entitlement to an income upon retirement.

After hearing conflicting arguments on the issue, the Court then commented on the value of the husband's interest. It was stated that the husband's share of the partnership was worth at least the value of the benefit due to him upon retirement. Whether or not it was worth anything more was a matter for argument. Mr Eriksen, the wife's valuer, submitted that account should be taken of the husband's entire future earnings until retirement. Mr Frankham, for the husband, contended that only the retirement benefit was relevant to such a valuation. The Court rejected both of these approaches and invited the parties to file evidence on the matter with the High Court in the future. The Court made it clear that such future submissions should be careful to differentiate between value ascribable to the partnership, and that resulting form the husband's own effort. Only the former could be regarded as matrimonial property. The Court also commented that any value calculated as arising from the partnership would have to be adjusted both for contingencies, and because the wife's share would be payable as at the date of separation (rather than at the actual date of the realisation of the value).[33]

Maintenance

The Court of Appeal took the opportunity of this case to restate (or perhaps reassess) its approach to maintenance under the Family Proceedings Act 1980 ("FPA"). The Court was conscious that since its decision in *Slater v Slater*,[34] the principles it laid down in that case may have been "misconstrued or applied with undue rigidity".[35] This discussion may also have resulted from the Court's view of

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31 In terms of s 8(e) of the Act. This point was not contested by either party.

32 Supra at note 1, at 267.

33 A similar calculation was undertaken in *Haldane v Haldane*, supra at note 14, with respect to s 8(i) of the Act's superannuation scheme.

34 [1983] NZLR 166.

35 Supra at note 1, at 276.

Judge Robinson's award in favour of the wife under s 9(4).[36]

The Court noted that while the maintenance provisions of the FPA were intended to "give effect to the clean break principle and encourage the former spouses to become independent and self-sufficient after the dissolution of the marriage",[37] they should not be applied such that they operate "unfairly and harshly on one or other of the spouses".[38] The implication of this statement seems to be that the Court could foresee a spouse receiving maintenance from the other for an indefinite period of time, even following divorce.

The Court noted that the liability of a party was determined with reference to the reasonable needs of the other party, and only arose where the applicant party was not able to meet their own needs for a number of specific reasons.[39] Having discussed how the liability to pay maintenance arose, the Court then discussed the quantum of such payments. The reasonable needs of the parties, which may vary wildly in different cases, were relevant to this determination, as were other factors. It was noted, in a section particularly relevant to this case, that in ascertaining a party's reasonable need, s 65 of the FPA only allowed the courts to consider the standard of living in the common household in "special circumstances". On this matter the Court stated that a marriage of long duration in which the parties had disproportionate earning capacity may constitute "special circumstances".

Conclusion

This case is not only important for the guidance it gives on two extremely important statutes,[40] but also for its illustration of the Court of Appeal's orthodox view of its own constitutional role. It is interesting that a forum which once mooted the possibility of protecting fundamental rights even in the face of clear Parliamentary intention to the contrary,[41] now feels unable to interpret an Act in a way which, although not foreseen by the legislature, is not entirely outside the scope of the legislation, and may be necessary to do justice. What this means for future cases can only be speculated upon,[42] however, it seems clear that litigants may now have to place all of their trust in Parliament to enact equitable laws (or amendments), rather than in the court for the protection of their interests.

Kelby Harmes

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36 See the text, supra, accompanying note 14.

37 Supra at note 1, at 276.

38 Ibid.

39 See s 64, Family Proceedings Act 1980.

40 The Matrimonial Property Act and the FPA.

41 See, for example, *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 per Cooke P.

42 Note, for example, the (at the time of writing) Court of Appeal's pending decision in the *Quilter v AG* [1996] NZFLR 481 appeal, which will consider the correct interpretation of the Marriage Act 1955, and whether it can be seen to apply to gay and lesbian couples.

The Legacy of *R v Grayson* - Do the Ends Justify the Means?

***R v Grayson and Taylor* [1997] 1 NZLR 399. Court of Appeal, Richardson P, Keith, Neazor, Gault, Henry JJ.**

Earlier this year, *R v Grayson*[1] was criticised as marking the end of the courts' principled approach to the application of the New Zealand Bill of Rights Act 1990 ("Bill of Rights"), in particular to s 21, which guarantees freedom from unreasonable search and seizure.[2] This commentary examines the effect of *Grayson* on subsequent criminal appeals based on s 21 breaches. It is argued that *Grayson* has marked the beginning of a trend of ad hoc judgments and results-oriented reasoning. This approach has allowed the courts to use the Bill of Rights to ratify unlawful police action using analysis that lacks principle and takes account of questionable considerations.

The *Grayson* Decision

The s 21 Background

To understand the significance of the *Grayson* decision, the law relating to s 21 prior to *Grayson* must be explained. Section 21 of the Bill of Rights provides that everyone has the right to be free from unreasonable search and seizure. Virtually all search powers are legally conferred by statute. These legal powers allow the police to commit acts while investigating crime which would normally be unlawful, such as trespasses to land and property, and conversion. The search warrant procedure under s 198 of the Summary Proceedings Act 1957 allows a judicial officer to issue a warrant to search where there are reasonable grounds to believe that evidence of a crime is to be found at a specified place. Where a warrant application is not supported by sufficient evidence, but is nonetheless issued, it will be invalid. That is, it will confer no legal authority to search. Some provisions do not require the police to apply for judicial authorisation, such as those in the Misuse of Drugs Act 1975. Such powers, however, must meet the precondition of "reasonable grounds" before a search may be lawfully commenced.

The Court in *R v Laugalis*[3] held that if a search is found to be commenced without legal authority, such a finding will compel the conclusion that it is also unreasonable for the purposes of s 21. The majority in *R v Jefferies*[4] distinguished

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1 [1997] 1 NZLR 399.

2 For detailed criticism of the judgment, see Optican, "Rolling back s 21 of the Bill of Rights" [1997] NZLJ 42.

3 (1993) 10 CRNZ 350.

4 [1994] 1 NZLR 290.

the question of reasonableness as separate to that of lawfulness. The approach to be taken was to balance the reasonable expectations of privacy of individuals against the interests of the community in the detection and prevention of crime: reasonableness was a matter of time, place, and circumstance. This was extended in *R v Faasipa*.[5] After an automotive crash, the defendant's blood alcohol was tested at hospital by taking a sample of arterial blood. The statute provided that only venous blood be taken, and thus the search was without legal authority. The search was held to be not unreasonable. The Court observed that in the circumstances of the case a further intrusion would have been necessary to comply with the statute, since the arterial line used was already in place for medical purposes. The privacy of the defendant would have been subject to greater infringement if the statute was complied with strictly. It was also noted that the unusual circumstances of the case contributed to a finding of reasonableness.

Whether a search infringes s 21 is important because it is that infringement that triggers the prima facie exclusion rule. This is a judicially created remedy for Bill of Rights breaches[6] that excludes from evidence any material gained through an infringement. The rationale is that the Bill of Rights should vindicate rights, and therefore where a right is infringed the results are tainted, and should be excluded as if the infringement had not occurred. This will often mean the failure of the prosecution.

The Court of Appeal's Decision

The judgment in *Grayson* concerned an appeal from a pre-trial ruling that a search warrant was valid, and that the resulting evidence of a significant cannabis growing operation was admissible. The Court found a manifestly unlawful trespass by police on the defendant's property to be reasonable. There was no balancing of interests undertaken in analysing reasonableness in line with previous authority. Instead, the Court "weighed" a non-exhaustive list of "factors". It was not explained how it was determined which factors were relevant, and no analysis justifying the factors was provided. The Court went on in obiter comments to look at what the position would have been if the initial trespass had been unreasonable. It was accepted that the search warrant application would not meet the statutory requirements without the information from the trespass, thus rendering it invalid and making a subsequent search pursuant to it unlawful. Another ad hoc list of factors was given, followed by a bare assertion that the search was reasonable when these factors were weighed. The police could "reasonably assume that the warrant was valid for their purposes"[7] according to the Court. The "factors" approach contains no hard reasoning justifying how the decisions are reached. It was not explained why each factor was included. Factors that weighed in favour of

5 [1995] 2 HRNZ 50.

6 See *R v Butcher* [1992] 2 NZLR 257.

7 Supra at note 1, at 410.

reasonableness of particular importance to this commentary are:

(i) Undisclosed information available to police;
(ii) Significant real evidence obtained;
(iii) Seriousness of the crime suspected; and
(iv) Reasonable execution of search.

The suspect's interest in privacy was acknowledged in comments that the trespass was quick and did not result in breakage or seizure. It did not, however, form a real part of the determination of whether the search was reasonable. What had once been the central inquiry was now relegated to the status of a mere factor to be considered.

The Court proceeded to comment on remedies for infringements of the Bill of Rights. The Court dwelt on the varying degrees of breaches of rights and stated that remedies should be proportionate to the degree of the infringement. Alternatives to the exclusion of evidence, including police disciplinary proceedings, civil action for damages, and allowances in sentencing were mentioned but not analysed.[8] The Court concluded by stating that in an appropriate future case it would be willing to "re-examine" the prima facie rule.[9]

There is yet to be such a "re-examination", and this commentary focuses on what *Grayson* has meant for decisions in cases where the reasonableness of a search has been in issue, particularly those commenced without lawful authority.

Legality and Reasonableness

Grayson continued the expansion of the category of reasonable but unlawful searches started in *Faasipa*. A distinction can be made between the legal authorisation that allows a search to be started, and that which governs the conduct of searches. *Grayson* held a search commenced without legal authority to be reasonable. The older authorities of *R v Laugalis* and *R v Wojcik*[10] held that a search commenced without legal power will be presumed unreasonable. Only extreme circumstances will rebut the presumption. There was no analysis of these older authorities in *Grayson*, but the courts have since been content to accept *Grayson* as the last word on the point. Indeed it would be difficult to use older authorities in conjunction with *Grayson*, because there is no chain of reasoning in *Grayson* explicitly supporting or rejecting the older judgments.

After *Grayson*, valid legal authority to search does not determine

8 This suggestion of flexibility in remedies in criminal procedure under the Bill of Rights has been applauded by some; see Mathias, "The Bill of Rights & the Common Law" [1997] NZLJ 46, and Allan, "Hoisting Grayson with Baigent's Petard" [1997] BOR Bulletin 13; and criticised by others; see supra at note 2.

9 Supra at note 1, at 412.

10 (1994) 11 CRNZ 463.

reasonableness. All judgments subsequent to *Grayson* dealt with by this commentary, start with this point. *Grayson* held reasonable a search that the police must have known was a trespass, unauthorised by statute. Some lawful authority to search, although clearly distinct from reasonableness since *Jefferies,* was previously an anchor in s 21 analysis. *Grayson* has cast reasonableness adrift; it has become an uncertain weighing exercise based on questionable factors.

Legality no longer being a touchstone, the substantive question is whether or not a search is reasonable.

The New Analysis of Reasonableness

The core of s 21 analysis before *Grayson* was said, in *Jefferies*, to be a balancing of the privacy interests of individuals against the community's interest in the detection and prevention of crime. In *Grayson* a balancing on principles was replaced by an unjustified list of factors, which led to an asserted, rather than reasoned result. Several of these factors have been employed in subsequent judgments.

Undisclosed or Other Police Information

In *R v Loh*[11] police concerns about gang violence made reasonable a search subsequent to an otherwise unlawful stopping of a car. The only facts supporting the stopping were that the car was the type thought to be driven by young Asian gang members, and the untested police apprehension of violence. This reasoning tends to give the police the ability to authorise themselves to commence searching, and subverts statutory requirements.

The assertion that there was "other information" (even if it is undisclosed, as in *Grayson*), has provided a basis for the courts to find searches, unauthorised by law, reasonable. In *R v Wildermoth,*[12] a warrant to search for stolen goods was accidentally issued for the wrong address. The wrong home was searched and drug evidence completely unrelated to the subject of the warrant was found. The evidence was excluded as the invalid warrant gave no justification for the police presence on the premises. Despite this, Gallen J suggested that if there had been other information linking the address to the drug evidence (as in *Grayson*), the search may have been held reasonable.[13] In *Horne v Police*[14] a warrantless search under the Misuse of Drugs Act 1975[15] after a domestic violence call-out led to the

11 (1997) 3 HRNZ 504, (1997) 14 CRNZ 469.

12 (1997) 14 CRNZ 531

13 Ibid.

14 (1997) 14 CRNZ 687.

15 Pursuant to s 18(3) the police may search without warrant when there is reasonable cause to believe that an offence against that Act is being committed.

finding of video recorders. Knowing of a theft involving such recorders the police seized the machines, and retrospectively obtained a warrant for them. Justice Doogue rejected a submission that since it was possible to first obtain a warrant the police should have done so. His Honour did this on the basis that the seizure was a "trifling consequence" of the lawful presence of police at the home of the defendant.[16] Undisclosed information regarding informant reliability also weighed in favour of reasonableness in the execution of an invalid search warrant in *R v Hooker*.[17] Another warrantless search under the Misuse of Drugs Act without the requisite reasonable grounds for belief, was held not unreasonable in *McRobie v Police*[18] because of other information made available to the police.

The prescribed laws of search and seizure have procedures and tests to determine what facts will authorise a search. The police may well have other information which leads to the wish to search, but the courts have not explained how such information will make searches more objectively reasonable if the information actually known or disclosed has not passed the statutory tests. If information not disclosed in warrant applications can make an unlawfully commenced search reasonable, the whole warrant procedure itself is undermined. The court's use of this factor encourages the police to push the boundaries of investigative technique, on the strength of their own unscrutinised suspicions.

Obtaining Significant Real Evidence

The fact that real (rather than confessional) evidence was obtained favoured the reasonableness of an unauthorised search in *R v Hooker*.[19] The judgment did not, however, explain how this distinction, which was also made in *Grayson*, is relevant to balancing privacy and community interests.[20] The rights centred approach adopted in New Zealand focuses on the infringement of rights, not whether evidence exists independently of an infringement. A breach of someone's rights is not made more reasonable by the nature of the evidence produced. The ends do not justify the means. Results oriented decision-making is anathema to civil rights jurisprudence which dictates that rights must be vindicated by upholding procedural protections.

16 Supra at note 14, at 690.

17 Court of Appeal, 16 June 1997, CA163/97, Richardson P, 6.

18 High Court, Dunedin, 12 February 1997, AP 6/97, Chisholm J.

19 Supra at note 17, at 4 per Richardson P, approving of the trial judge's reasoning.

20 See Mahoney, "Evidence" [1997] 1 NZ Law Rev 57, at 100-103.

Serious Crime Suspected

Justice Gault, in *R v Fraser*, said:[21]

> While we accept that the reasonableness of the search is not to be assessed by the results, it is entirely appropriate to have regard to the known circumstances in which the search is undertaken. It is not an abstract enquiry into what the ordinary citizen might reasonably be subjected to by the police.

Justice Gault's first statement seems to accept that the results of a search should not make it reasonable. However, the rest of his Honour's statement seems to be a thinly veiled assertion that people who turn out to be criminals should have lower expectations of privacy than other citizens. It echoes the comments in *Grayson* that the police were justified in their unwarranted trespass because the defendants had acted suspiciously. "Known circumstances" seems to be a composite of the character of the defendant, any activity that is suspicious, and the actual crime under investigation. The implication here is that the reasonableness of a search can depend on what was suspected and then found, and the character of a defendant.

The gravity of the crime involved was cited in *R v Gardiner*[22] and *R v Fraser* as a factor in establishing whether a search was reasonable, and specifically the degree to which privacy interests had been infringed. Both cases related to serious drug trafficking, apparently something of a family business, as Mrs Gardiner turned out to be Mr Fraser's daughter. Houses were kept under video surveillance for extended periods of time without warrants being issued. The Court found, however, that the general search warrant procedure in the Summary Proceedings Act 1957 was not applicable, and held both searches to be legal. In *Gardiner* the camera was placed to actually look into the house and was equipped with a zoom lens, whereas in *Fraser* it was accepted that the videotape could show no more than would have been visible to passersby. The Court made no definitive ruling in either case as to whether such videotaping constituted a search. The Court went as far as admitting that *Gardiner* was borderline, but made it clear that even if there was a search, it was not unreasonable precisely because of the serious drug trafficking the defendant was involved in.[23] Again, this reflects the results-oriented reasoning of *Grayson*. The holding is contrary to the ideal that investigations of the most serious crimes should be the most impeccable from a procedural point of view, as these are the cases where the police are most likely to be tempted to push the boundaries of their power.

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21 Court of Appeal , 20 March 1997, CA159/97, at 12.

22 Court of Appeal, 16 July 1997, CA239/97, Blanchard J.

23 Ibid, 7.

Reasonable Execution

Good faith and reasonableness in the execution of searches has been a factor leading courts to find searches to be nevertheless reasonable. Justice Williams considered the polite conduct of an illegal search to be relevant to its reasonableness in *Te Amo v Police*,[24] and the reasonable execution of an invalid warrant in *Hooker* somehow told for the reasonableness of the search. The statement of Richardson J in *R v Jefferies*,[25] that a search could be unreasonable because of the circumstances that initiated it or through the unreasonable way in which it was carried out, seems to have been misinterpreted. From a rights centred perspective, an invasion of privacy without justification cannot be ameliorated by carrying out the invasion politely. It has not been explained how an unreasonable search can become reasonable because of reasonable execution.

From the point of view of a defendant, it is irrelevant to their rights that the police are acting in good faith in an unlawful search. If police are excused for unknowingly commencing searches without legal power, they are encouraged to be ignorant of the law governing their actions.

The Position of Search Warrants

The holding in *Hooker* was presaged by obiter in *Grayson* that even if the search warrant had been invalid, a search pursuant to it would have been reasonable. A warrant was obtained from a High Court Registrar in *Hooker* despite inadequate evidence to satisfy the statutory requirements. The search was executed reasonably, and produced the expected material relating to a hydroponic cannabis cultivation operation. The Court found the search unlawful because the defective information in the warrant application meant that it was invalidly issued, and thus conferred no legal powers of search. Nevertheless, using the broad discretion of the *Grayson* approach, and the "factors" discussed above, the Court found the search to be reasonable: it was a search of known criminals, politely done, and ultimately the police "caught the bad guys". The fact of obtaining a warrant, even where any reasonably informed police officer would know that there was no sufficient evidential basis for it, and executing it reasonably, remedied the unlawfulness of the exercise. Subjecting the defective evidential basis to the scrutiny of a judicial officer effectively turned an unjustified search into a reasonable one. Search warrants are commonly issued by deputy registrars, and it is obvious that mistakes will be made. The Court allowed the police to capitalise on such a mistake in *Hooker*.

President of the Court of Appeal, Sir Ivor Richardson went as far as stating that "all procedural safeguards were complied with by the police and their conduct was

24 High Court, Rotorua, 16 April 1997, AP15/97 and AP16/97.

25 Supra at note 4, at 301.

professional throughout".[26] His Honour was referring to the police's reasonable conduct, and cautioning of the defendant regarding other rights, during the search. The fact that the key procedural safeguard that permits a search in the first place, namely a satisfactory warrant application, was not met, was ignored. The Court was content to adopt the dicta in *Grayson* that police with a warrant, however issued, can reasonably assume it to be "valid for their purposes". Even though properly instructed police would have known that the statutory requirements were not met, this assumption of validity was upheld.

The Bill of Rights was used to remedy a defect in lawful authority to search. This cannot be reconciled with its role as a negative restraint on state power.[27] The Court in *Wildermoth*, although finding a search pursuant to an invalid warrant unreasonable, was careful to distinguish the situation where "other information" would have justified the search. The expediency of police operations made an easily obtainable warrant in *Horne* unnecessary, confirming the erosion of the principle that prior judicial scrutiny through the warrant procedure should be observed whenever possible.[28]

The idea that an independent person, shown sufficient evidence, should sanction the exercise of powers over the liberty of others has always been central to the integrity of criminal procedure. These decisions subvert the warrant procedure by using the *Grayson* approach to make it unnecessary to meet the statutory tests for the issue of warrants. The very fact that a warrant was obtained has become a telling factor in the assessment of whether a search was reasonable, even when the police should have known that a warrant should not have been issued.

Conclusion

Since the judgment in *Grayson* the analysis in s 21 cases has been severed from inquiry into lawful authority and based on weighing of dubious factors. The role of the statutes that actually authorise searches has been significantly eroded; this should sound alarm bells for those who believe in Parliamentary supremacy. Maclin's description of the approach to reasonableness under the Fourth Amendment to the US Constitution seems appropriate:[29]

> The Court wants us to believe that the provision merely commands that law enforcement officers act rationally and pursue reasonable goals when they intrude upon individuals and their possessions.

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26 Supra at note 17, at 6.

27 Even the *Grayson* decision considers restraint of power to be the proper role of the Bill of Rights, supra at note 3, at 407.

28 A preference for warranted searches was expressed in *R v H* [1994] 2 NZLR 143.

29 Maclin, "The Central Meaning of the Fourth Amendment" (1993) 35 William and Mary LR 197, 198-199.

The "factors" approach means that law enforcement officers can justify a search by pointing to anything that led them to the decision to search. Just because the police had a reason for searching should not make a search reasonable without an analysis of the interests involved and whether the reason given is appropriate to satisfy the courts that rights have not been infringed. This expansion of the class of unlawful but reasonable searches has meant that the Bill of Rights has been used to authorise reasonable searches.

There is a significant bias against criminal defendants in the approach after *Grayson*. The ad hoc analysis is rich with discretion to consider things like the character of defendants, the results, and what the police suspected at the time. These essentially retrospective considerations that pervade the new approach have not been justified in the context of the procedural rules that are affected. True procedural rules contain the distinction that final outcomes are irrelevant, and it is adherence to the process that ensures the integrity of the system.

If the Bill of Rights is to be used to empower reasonable searches, the analysis of reasonableness must be principled and justified with respect to the rights-centred role of the Act. Principles and a cogent structure for their analysis have not arisen from the ad hoc weighing of factors approach heralded by *Grayson*.

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