The overall intention is to discern the major differences between decisions made on complaints against the electronic media and decisions made on complaints concerning the printed media. Arguments will be advanced as to the reasons for these differences, and specific proposals for improvement will be made where appropriate.

A. *Substantive Aspects*

1. *Accuracy and Balance*

A fundamental tenet of news and current affairs reportage in all media is that it must be accurate, objective, and impartial, and free from bias and unfairness. The Press Council has adjudicated on more than 40 complaints relating to alleged breaches of this principle, and the Broadcasting Corporation and the Broadcasting Tribunal have both devoted many hours to consideration of complaints made under this head.[21] All three bodies have been unhesitating in upholding legitimate complaints on this subject, particularly where the complaint relates only to one or two articles or programmes. The full protection of the complaints procedure is accorded regardless of whether the injustice has been done to a private individual, a public figure,[22] a group, organisation or movement,[23] or an ethos.[24]

An interesting comparison may be drawn between a Press Council adjudication[25] and a decision of the Broadcasting Tribunal[26] on what was essentially the same matter, namely an inaccurate news report on the Contraception, Sterilisation and Abortion Bill as reported back to the House from the Committee of the Whole. The reports stated that the mental or physical state of the mother would not be considered when deciding whether an abortion should be granted. The Press Council took the view that, while the statements may well have been inaccurate, it was much too late to ask for a correction six months after the event, and the complaint was therefore dismissed. The Tribunal reached the opposite conclusion, holding that news had been inaccurately presented and that Television One should have publicly acknowledged its error. Considering the matter after 11 months had elapsed, the Tribunal conceded that a correction of the inaccurate report was no longer practical, but stated that it was possible ". . . even now for Television One to broadcast a programme which might help to explain the criteria laid down in the Act."[27]

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[21] The Committee of Private Broadcasters has received very few complaints on this subject; the reasons for this are not clear.

[22] For example, *Stevenson* v *Gore Ensign* (1979) 6 NZPC Rep. 13; *Young* v *BCNZ*, BCNX Board decision of 12/9/80; *Gill* v *BCNZ*, Tribunal decision 10/78, 23 November 1978.

[23] For example, *Philip* v *N.Z. Truth* (1974) 2 NZPC Rep. 4, *NZ Truth* 9/4/74 p.20, (South African Consulate); *Everett* v *BCNZ*, BCNZ Board decision of 12/9/80 (Worldwide Church of God); *Astons Ltd* v *BCNZ*, Tribunal decision 16/78, 4 December 1978 (Astons Ltd).

[24] *Philips* v *Auckland Star and New Zealand Herald* (1979) 7 NZPC Rep. 23 *S.P.U.C.* v *BCNZ*, Tribunal decision 9/78, 23 November 1978.

[25] *Pryor v Evening Post* (1978) 6 NZPC Rep. 9.

[26] *S.P.U.C.* v *BCNZ*, Tribunal decision 9/78, 23 November 1978.

[27] Ibid., p.5.

Three significant points may be noted from this comparison. First, the Tribunal generally upholds a complaint whenever the appropriate standards have been breached, whereas the Press Council is reluctant to uphold a complaint merely because there has been a technical breach of the relevant standard. One of the reasons for this difference is that the Tribunal is under a statutory duty to act judicially,[28] whereas the Press Council is not. The Tribunal has indeed chided the Corporation for failing to uphold a complaint after it found itself to have been in breach of the *Standards and Rules*.[29]

The second point is that the Tribunal was here prepared to go much further than the Council in strongly suggesting that a new programme be produced to rectify the previous inaccuracy, despite the fact that it is much easier for a newspaper to print a story than for television to produce a programme.

The third point is that the complainant undoubtedly would have felt better served by the Tribunal than by the Press Council on this occasion.

These three differences arise in part from the difference between a statutory body with compulsory jurisdiction and subject to judicial review, and a voluntary body whose jurisdiction rests upon the consent of its constituents. The comparison also provides evidence of the greater demands made of the electronic media by the complaints procedure, and it may indicate that higher standards are demanded from television than from newspapers with regard to accuracy and balance in news and current affairs.

This last proposition finds support in the decision of the Tribunal in *Curran* v *BCNZ*,[30] where the Tribunal recommended that the Broadcasting Corporation establish a regular procedure for ensuring objectivity, impartiality and balance in the long term coverage of controversial overseas issues such as violence in Northern Ireland.[31] Newspapers are not required to maintain such monitoring systems, and they generally do not do so except in connection with election coverage.[32] No distinction is drawn in either the Broadcasting Act or the *Standards and Rules* between the standards of accuracy and balance required of radio and those required of television. While the absence of any distinction may be desirable on policy grounds, it may be argued that the vastly greater verbal throughput of radio stations would justify their being judged according to a standard more akin to that applied to newspapers. Some support for this proposition may be found in the Tribunal decision in *Ehrhardt* v *BCNZ*,[33] but in

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[28] *Broadcasting Act*, s. 67(6).

[29] *Curran* v *BCNZ, Tribunal* decision 6/79, 2 October 1979, p.5. The Tribunal's approach appears more objective and hence is more likely to satisfy complainants.

[30] Ibid.

[31] Compare the Press Council decision in *S.P.U.C.* v *New Zealand Herald* (1978) 6 NZPC Rep. 7, especially at p.9.

[32] The Christchurch *'Star'*, for instance, does not monitor its long-term coverage of any issue except at elections where it analyses the number of column inches allowed to each party each day. See also the decisions of the Council in *Little* v *Sunday Times* (1980) NZPC Rep. 7 and *West Coast Futures Inc.* v *Christchurch Press* (1980) 8 NZPC Rep. 7.

[33] Tribunal decision 7/78, 6 September 1978.

general it seems that no distinction will be drawn between radio and television standards.

It is not intended to suggest that inaccuracy and imbalance are readily tolerated in any medium with respect to individual items, for this clearly is not so. Reference should be made to the diligence with which the Council, the Tribunal and the Corporation investigate allegations of inaccuracy, imbalance, bias and unfairness. Examples are the Council's decision in *Tirikatene-Sullivan* v *Dunedin Evening Star*,[34] where two full meetings of the Council were taken to hear the complaint; the Tribunal's decision in *O'Neill* v *BCNZ*,[35] where a special hearing was held in Dunedin; and the adjudication of the Corporation in *Fraser* v *BCNZ*,[36] where a complaint and supporting material concerning the Waipara Full Gospel Mission involved the Corporation in a detailed study which took three months to complete. However, it does seem that the Tribunal is prepared to go further than the Council in demanding rectification of mistakes, and in upholding complaints for technical breaches of the relevant standards. The Tribunal also demands long-term balance from television stations, and it is likely that, if a suitable case arose, similar demands would be made of radio stations. These high standards are apparently not matched by the standards which the Press Council requires of newspapers.

Assuming that balanced and accurate reporting is in the public interest, it may be said that in simple terms the public interest is served better by the broadcasting complaints procedure than by that of the press. However, this is not to say that the broadcasting complaints procedure should be applied to the press; that is a separate question which is discussed in the conclusion of this paper.

2. *Editorialising"*

Expression of the views of an individual reporter in the form of commentary or opinion is clearly permissible in both the electronic and printed branches of the media. This freedom runs far enough to permit patently one-sided expressions of opinion on political matters provided it is clearly the opinion of the reporter and not, for instance, that of the warrant-holder which is being expressed.[37] However, a sharp divergence appears on the question of the right of the newspaper or warrant-holder to express its own editorial opinion on controversial matters.

The Press Council is vigorous in its assertion of the right of newspaper editors to express any view on any subject, provided that the editorial view is not masquerading under the guise of objective presentation of the news. Thus the *"Christchurch Star"* is entitled to express its view of a ban on "Down Under the Plum Trees"[38] and *"N.Z. Truth"* is allowed to cam-

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[34] (1975) 3 NZPC Rep. 8.

[35] Tribunal decision 5/77, 22 December 1977.

[36] BCNZ Board decision of 12/5/81.

[37] See *33 Minginui Forest Residents* v *N.Z. Truth* (1979) 7 NZPC Rep. 20; *James Dean* v *Rutland Weekend Radio Ltd.*, Committee of Private Broadcasters decision 4/80, 5 March 1980 (names changed so as not to lead to the identification of the parties).

[38] *Rush* v *Christchurch Star* (1978) 6 NZPC Rep. 19.

paign to preserve the Whirinaki State Forest.[39] The strength of the Council's support for the right to editorialise is exemplified by the decision in *Guery* v *Better Business*, where the Council, in dismissing a complaint against a highly inflammatory editorial, said

> The language of the article is considered to be extravagant, unrestrained and lacking in dignity, but the Council must uphold the right of an editor to express opinion fiercely. This is a part of the history of European and New Zealand polemics. Hyperbole and even invective unquestionably have their traditional place in political disputation. The Council cannot accept that the forcefulness of a writer's argument should be subject to restriction because intemperance in expression might cause offence.[40]

The one qualification is that newspapers expressing editorial views on controversial matters are obliged to provide reasonable opportunity for the presentation of opposing views.[41]

Broadcasters, on the other hand, must not only distinguish comment from news,[42] but they must also adhere to the rule that "Editorials stating the opinion of the warrant holder on political and religious matters, on industrial disputes and on matters of public controversy are not permitted."[43] Thus newspapers can campaign but broadcasting stations can not. This is another illustration of the tighter rein under which broadcasting is held.

The different rights of newspapers on the one hand and broadcasting stations on the other to make statements of editorial opinion exemplifies the difference between the positions of the printed media and the electronic media in New Zealand. Reasons for the greater public accountability of the electronic media have been advanced in Part I above. The reasons for the greater restriction on editorial rights are similar, and they are essentially political in character.

First, broadcasting is relatively new technology which has still not won the unqualified trust of politicians or the public. Second, the electronic media are instantaneous, and they rely on direct person-to-person communication. They may become potent motivators of men when used by skilled operators. There is a risk that the broadcasting of editorial opinions could have adverse effects on public order, public institutions or the popularity of the Government. This risk is not so great in the case of the printed media, and it is certainly much less than the risk involved in any attempt to interfere with the established peacetime freedom of the press. A third consideration arises from the decisions of successive Governments that broadcasting (particularly television) should be retained substantially in

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[39] *33 Minginui Forest Residents* v *N.Z. Truth* (1979) 7 NZPC Rep. 20.

[40] (1980) 8 NZPC Rep. 17, 18.

[41] *Hutt* v *Thames Star* (1980) 8 NZPC Rep. 17.

[42] *Radio Standards and Rules*, Programme Rule 4.2(a); *Television Standards and Rules*, Programme Rule 5.1(a).

[43] *Radio* and *Television Standards and Rules*, Programme Rule 2.3. See *Large Co Ltd* v *Radio Intermission*, Committee of Private Broadcasters decision 3/78, 11 December 1978, upholding an allegation of a flagrant breach of this rule (names changed). A certain latitude in the interpretation of this rule is allowed to religious stations such as *Radio Rhema*.

section 1(3) was to prevent unjust enrichment, and assessed the just sum on a reimbursement basis, "that is to say, by ensuring as far as was practicable that the plaintiffs (B.P.) got back what they had paid out on the defendant's (Hunt's) behalf before the frustrating events happened." That sum was calculated by adding together the cost of development, and various "farm-in" payments that B.P. had made on Hunt's behalf, a total of around $34,000,000 which the judge ordered to be paid partly in U.S. dollars and partly in sterling.

Hunt appealed and B.P. cross-appealed. The Court of Appeal held that Robert Goff J.'s decision was not clearly wrong, and that there was no ground for interfering with it on appeal. The following comments suggest themselves.

First, as to point (i) on page ?? of this note, the Court of Appeal took what may be described as the "traditional" view of the role of an appellate court in an appeal against the exercise of a discretion.[13]

> "The responsibility lies with the judge: he has to fix a sum which he, not an appellate court, *considers* just. This word connotes the mental processes going to forming an opinion. What is just is what the trial judge thinks is just. That being so, an appellate court is not entitled to interfere with his decision unless it is so plainly wrong that it cannot be just."

That seems a rather less robust view than that taken by the New Zealand Court of Appeal. By those criteria interference by an appellate court with a lower court's decision will be rare. In that way inconsistent decisions will have greater opportunity to multiply.

Secondly, as far as concerns point (ii) on page ??? above, Robert Goff J.'s judgment at first instance contains useful guidance on the policy and purpose of the Frustrated Contracts Act, and on the mode of calculating the just sum. The Court of Appeal was remarkably reluctant to either affirm or deny any of the guidelines he laid down. As far as the purpose of section 1(3) was concerned, the Court of Appeal did not find it helpful to say, as Robert Goff J. did, that its purpose was to prevent unjust enrichment. It got "no help from the use of words which are not in the statute."[14] Nor was there anything in the Act to indicate any different purpose, for example that it is the Court's function to apportion losses or profits, or to put the parties in the position they would have been in if the contract had been fully performed or never made.[15] Robert Goff J. also treated the philosophy of section 1(3) as being that a plaintiff should be reimbursed for the work he had done before the frustrating event. Again the Court of Appeal was non-commital. It treated its function as being to reverse the judge only if he was clearly wrong.[16]

> "In our judgment it cannot be said that the judge went wrong, and certainly not palpably wrong, in assessing a just sum by reference to the concept of reimbursing the plaintiff."

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[13] [1981] 1 WLR 232 at 238, C.A. per Lawton L.J.

[14] Ibid at 243.

[15] Ibid at 242-243.

[16] Ibid at 243.

As far as the actual mode of assessing the just sum was concerned there were several possible modes of approach: to base the assessment on the value of the undelivered oil, or on the value of the oil actually delivered, or on the basis that the respective benefits received by the parties should be balanced. Robert Goff J. adopted the second of these. Again the Court of Appeal refused to lay down any clear principles. Unless the judge could be shown to be *wrong* in his approach there was nothing the Court of Appeal could do.[17]

> "In our judgment, this court would not be justified in setting aside the judge's way of assessment merely because we thought that there were better ways."

These aspects of the judgment leave the reader with two uneasy thoughts. One is that although the court did not think Robert Goff J.'s approach was clearly wrong, nor did it say it was clearly right, or the only possible way; indeed on the question of assessment, the court admitted that there might be other ways, even "better ways". Thus, not only does the precedent value of Robert Goff J.'s judgment evaporate; one is left believing that if other courts use quite different modes of approach in future, their judgments too will be allowed to stand unless their approaches are clearly "wrong". That way consistency does not lie. The Court of Appeal faces the prospect of conflicting decisions was apparent equanimity:[18]

> "The concept of what is just is not an absolute one. Opinions among right thinking people may, and possibly will, differ as to what is just in a particular case. No one person enjoys the faculty of infallibility as to what is just."

The other thought which lingers after the *B.P.* case is that the litigants cannot have been satisfied with the outcome of their litigation. The case involved one of the largest money awards to be found in this history of English law reporting, and was fully argued by counsel in a hearing lasting nine days. It does not seem a satisfactory outcome for the parties to be told that because the decision of the judge below does not seem obviously unjust, and because his approach was not clearly wrong, the Court of Appeal can do nothing about it. That is no doubt acceptable in the context of our Small Claims Tribunal, but it seems far less satisfactory in the context of such expensive litigation where the parties expect their dispute to be resolved according to law.

Conclusions

(i) The English and the New Zealand cases seem to take a quite different view of the power of an appellate court to vary the exercise of a lower court's discretion, the English court exhibiting a most restrictive attitude, the New Zealand court a much more generous one. The New Zealand attitude manifested in *Brown* is in accordance with that in an earlier decision where the court varied an award under section 7 of the Illegal Contracts Act 1970.[19] There are dangers in both approaches if taken to

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[17] Ibid at 243.

[18] Ibid at 238.

[19] *Broadlands Rentals Ltd* v *R. D. Bull Ltd* [1976] 2 NZLR 595.

extremes. A reluctance as rooted as that in *B.P.* v *Hunt* can lead to inconsistent decisions remaining inconsistent and uncorrected; a too ready willingness to reverse, unshackled by principle, can lead to inconsistency at appellate level—as happened to some extent in *Brown*. There is, hopefully, a middle way between the extremes.

(ii) In both cases there is an evident unwillingness, particularly strong in the *B.P.* case, to lay down principles to guide future courts in the exercise of their discretion. If the statute itself lays down such principles, or if they may be extracted from the statute by a legitimate process of construction, well and good, but there is a reluctance to go beyond this and judicially create principles. The New Zealand Court of Appeal has said this before in relation to the Illegal Contracts Act 1970:[20]

> "Clearly this court should not impose on the statutory discretion fetters not based on the Act itself, considered in the light of he mischief it was intended to cure. We would not attempt to lay down any principles beyond what has already been said. Obviously each case must be decided on its own facts."

One detects in the English case something amounting almost to resistance. If the legislature will not lay down principles, the court can see no reason why it should accept the task. That attitude may not matter so much in relation to the Frustrated Contracts Act, for cases on it so seldom arise. (*B.P.* v *Hunt* is the first reported decision in either England or New Zealand in the 38 years it has been in existence.) But it will be unfortunate in New Zealand if some guidance is not given early on the discretion in section 9 of the Contractual Remedies Act 1979. Problems under that section will be of very frequent occurrence, and some of them will be extremely basic: when, for instance, will a defaulting purchaser be entitled to get his deposit, or part of it, back from the vendor?[21] Unless the common law, which has been swept away by the new legislation, can be replaced with a set of reasonably coherent guidelines, some believe that something approaching chaos will reign in the conveyancer's office. A set of decisions on the facts, little more than arbitral in nature, with no discernible principles for the future, is not everyone's idea of a law of contract. Yet, it may be argued, the courts are technically correct in refusing to go further than the legitimate process of interpretation leads them; if there are no principles that is the legislature's fault. It is clear that that is already the view of many members of the profession. The next few years of judicial activity will be crucial to the acceptance of this new style of legislation. In the end, this reviewer believes that the courts will make it work. Indeed in the very case where it avowed reluctance to lay down principles, the New Zealand Court of Appeal in fact, under the guise of interpretation, gave much helpful guidance.[22] Moreover, still looking on the bright side, *B.P. Exploration Co. (Libya) Ltd* v *Hunt (No. 2)* is proceeding to the House of Lords, which may take a more constructive approach than did the Court of Appeal; indeed it may have been the certain knowledge that the

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[20] Ibid at 600 per Woodhouse and Cooke J.J.

[21] See *Worsdale* v *Polglase* M 541/80, High Court, Wellington, 25 June 1981, Davison C.J.

[22] *Broadlands Rentals Ltd* v *R. D. Bull Ltd*, supra n.19.