IN THE SUPREME COURT OF NEW ZEALAND

SC 68/2006
[2007] NZSC 91

BETWEEN	NOEL CLEMENT ROGERS Appellant
AND	TELEVISION NEW ZEALAND LIMITED Respondent

Hearing: 14 December 2006

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: M J Corry and J Edgar for Appellant
W Akel and T J Walker for Respondent

Judgment: 16 November 2007

JUDGMENT OF THE COURT

The appeal is dismissed with no order for costs.

REASONS

Para No

ELIAS CJ

[1] Can Television New Zealand Limited be restrained from using a police evidentiary video in a proposed broadcast? That is the question for determination on the appeal. The video records a July 2004 police interview with Mr Rogers. It contains admissions that he was responsible for the death of Kathy Sheffield in 1994. It shows a re-enactment of the way in which Mr Rogers in the interview says he killed her. Mr Rogers was found not guilty of Ms Sheffield's murder in December 2005. The jury had evidence of a number of confessions made by Mr Rogers. They included evidence by police witnesses of a similar re-enactment and admissions by Mr Rogers in 2001 when he described cutting Ms Sheffield's throat "like a sheep" after initially stabbing her in the chest, in the manner also described in the 2004 video. The jury did not however have the 2004 video played to them. It had been ruled inadmissible by the Court of Appeal on the basis that it had been made in "such a substantial breach of proper standards" under the New Zealand Bill of Rights Act 1990 that its use in evidence would be "unprincipled".[1]

[2] Television New Zealand was given a copy of the video shortly after it was made by the police officer in charge of the case. It is not at all clear that he had authority to provide the video to the company, but that question has not yet been resolved. It is critical to understanding the legal status of the video and in particular whether it is confidential information. Nor has the basis upon which Television New Zealand received the video from the police been determined. Again, the circumstances in which the video was supplied are critical to whether Television New Zealand is itself under any duty of confidence in relation to it. There is an unresolved dispute on the evidence about whether the use Television New Zealand proposes to make of the video accords with the conditions upon which the video was provided to it.

[3] Television New Zealand proposes to use the excluded video in a documentary which will ask whether the admissions made on the video by Mr Rogers have the appearance of truth or delusion (the explanation given by the

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1 *R v Rogers* [2006] 2 NZLR 156 at para [73].

defence at trial for the other confessions which were in evidence). Inevitably, the thrust of the documentary will question whether the acquittal of Mr Rogers was justified and whether the jury might have found him guilty if the video had been shown to them. Mr Rogers seeks to restrain the use of the video in this way. He says such use would injure his privacy and dignity and would impede his efforts to rebuild his life by calling into question the jury verdict. He raises concerns about his safety, pointing to anger and threats directed against him in the Northland community from which he comes. He says the broadcast of the video would deprive him of effective vindication of his New Zealand Bill of Rights Act entitlements to a lawyer and to refrain from making statements, which the Court of Appeal held to have been breached by the police conduct in making the video.

[4] In the High Court, a Full Court comprising Venning and Winkelmann JJ granted Mr Rogers an injunction restraining Television New Zealand from broadcasting the whole or any part of the video.[2] The Court also required Television New Zealand to deliver up to the Court all copies of the video it held. The injunction was granted on the basis that broadcast of the video would amount to wrongful interference with Mr Rogers' privacy, a wrong held to be actionable under the tort recognised by the Court of Appeal in *Hosking v Runting*.[3] The Court entertained the application for injunction without requiring pleadings to be filed, as the High Court Rules require. That course was unfortunate. It has inevitably led to uncertainty as to the basis of the claims and the facts upon which they rest. It has no doubt contributed to the fact that the police have not been joined as a party to the proceedings, which has I think inhibited proper analysis of the case and appreciation of the important public interest considerations at stake. The injunction was not an interlocutory one, such as would have preserved the status quo until trial of the claim of injury to privacy on proper pleadings. It was final relief appropriate to meet a substantive determination of rights.

[5] The Court of Appeal allowed an appeal by Television New Zealand.[4] It set aside the orders made in the High Court. O'Regan and Panckhurst JJ, in a joint

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2 *Rogers v Television New Zealand Ltd* (2005) 22 CRNZ 668.
3 [2005] 1 NZLR 1.
4 *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156.

judgment, accepted that Mr Rogers had an expectation of privacy in the video once it had been ruled inadmissible at trial. They held however that the public interest in the information it contained outweighed any privacy interest of Mr Rogers. William Young P, while concurring in that conclusion, doubted whether there was sufficient expectation of privacy in the video to support a claim in tort on the principles recognised in *Hosking v Runting*.

[6] Mr Rogers appeals further by leave to this Court. The ground approved is whether the Court of Appeal erred in setting aside the orders made by the Full Court. I am of the view that the orders made by the Full Court should not have been made in the form granted. The Full Court was not in a position to grant substantive relief, as it purported to do. The underlying competing claims for privacy and the defence of public interest should not have been considered in the absence of pleadings and on a summary basis which left unresolved conflicts of evidence critical to the legal position and the overall merits. The President of the Court of Appeal was right to be troubled by the fact that the Full Court had determined "on a substantive basis" that the proposed publication would amount to the tort of breach of privacy and had treated the hearing as "the substantive trial of the proceedings".[5] It seems to me however that there is the same vice in the Court of Appeal's conclusion that Television New Zealand had established a defence of legitimate public concern which outweighed the injury to Mr Rogers' privacy.

[7] I am of the view that the proceedings in the High Court and Court of Appeal have gone astray and that the case should be remitted for further consideration by the High Court. It would be open to the High Court to expedite the substantive hearing on proper pleadings and completion of any further interlocutory steps. I would hold the position by interlocutory injunction until further order of the High Court in the meantime.

[8] I do not consider that the appeal can be disposed of at this stage on the hypothetical basis of an application to access the video through the court record.

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5 At paras [106] – [107].

That approach would leave the status of the video in the hands of Television New Zealand unresolved on no very principled basis and assumes court control of a copy on no very sound foundation.[6] More importantly, it would I think be wrong to pre-empt the substantive determination of important and well-arguable legal rights by resorting to such strategem. In addition, the unresolved and disputed facts are highly relevant to any discretion to grant access. Nor do I think that, except in exceptional circumstances, this Court should act as decision-maker of first and last resort in the exercise of a discretion in respect of which a trial judge is generally acknowledged to have a particular advantage.[7]

[9] As mine is a minority view, I give my reasons briefly. Because some of the facts I think important are not stressed in the fuller account given by McGrath J, it is however necessary for me to refer to the background. And since other members of the Court have expressed views on the proper scope of claims for privacy and the considerations relevant to access to court records (matters which it is unnecessary for me to consider on the view I take), I record my reservations. It should not be necessary to say that open justice and freedom of information are fundamental considerations. But I do not think the first is significantly engaged in the present controversy, for reasons I explain. And both are necessarily affected in any particular case by other fundamental principles, including the interests of privacy and confidence, and the public interests in the proper exercise of police powers, vindication of breached rights, the administration of justice, and the re-integration as private citizens of those who have been publicly tried. These are important matters which deserve more measured consideration.

Background

[10] Mr Rogers' uncle, Lawrence Lloyd, was convicted in 1995 of manslaughter in respect of the death of Ms Sheffield. From 2001, largely as a result of pressure

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6 Stevenson J in *Vickery v Nova Scotia Supreme Court (Prothonotary)* [1991] 1 SCR 671 at p 682 raised questions about the property in exhibits. On one view, exhibits remain the property of the party producing them and in many cases they are not retained on the court file after delivery of judgment.

7 *R v Mahanga* [2001] 1 NZLR 641 at para [36] (CA) per McGrath J.

from Mr Lloyd's family and admissions to them by Mr Rogers, the police re-interviewed Mr Rogers, who had been questioned at the time of the earlier police investigation in 1994. He made further admissions of responsibility to them in interviews in November and December 2001. In one of these interviews, Mr Rogers participated in a visit to the scene of the death and there described in some detail how he said he had killed Ms Sheffield by cutting her throat. This reconstruction was not filmed.

[11] The police were initially sceptical about the confessions. They seem to have thought that the confessions of responsibility were false because they did not fit with police understanding of the facts. They may have been wary of a background of family pressure on Mr Rogers. No further steps were taken until a statement made to the police by a cousin about a further confession caused a new investigation to be undertaken by a fresh police team headed by Inspector Taare. Mr Lloyd's conviction was quashed by consent by the Court of Appeal in 2004 and a new trial was ordered.[8] Mr Lloyd had by then already served eight years of his sentence of 11 years and had been released on parole in January 2002. The Crown elected not to proceed with the retrial of Mr Lloyd. By that stage, the investigation led by Inspector Taare had formed the view that Mr Rogers was responsible for Ms Sheffield's death, as members of the family had maintained.

[12] The video was made by the police as a record of an interview and reconstruction of the events with Mr Rogers as part of the further investigations and for potential use as evidence. At the time it was made Mr Rogers had been charged with murder and was in custody. His counsel had asked the police to have no contact with Mr Rogers at which he was not present. Without notice to counsel, the police arranged for Mr Rogers to be taken from prison for three days for the purposes of the interview and reconstruction at the property at which Ms Sheffield died. The video was ruled by the Court of Appeal to be inadmissible as evidence at trial, overruling on the question of admissibility the decision of Cooper J in the High Court.[9]

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8 *R v Lloyd* (CA 72/02, 25 August 2004, Chambers, Williams and Panckhurst JJ).

9 *R v Rogers* (High Court, Auckland, CRI 2004-004-013121, 2 August 2005).

[13] The Court of Appeal took the view that Mr Rogers had been denied his rights under the New Zealand Bill of Rights Act to consult and instruct a lawyer[10] and to refrain from making any statement.[11] It ruled the video inadmissible on the basis that its procurement was in "such a substantial breach of proper standards" under the Bill of Rights Act that its admission would be "unprincipled".[12] The differently-constituted Court of Appeal in the present appeal seems to have thought that an explicit "Shaheed" balancing[13] would have been a more conventional way to have dealt with the question of admissibility.[14] But elements critical to such balancing were identified and considered by the Court in excluding the evidence. The Court plainly considered the breach to be very serious. The video was not essential to the Crown case because, as the Court of Appeal noted, although "important", it was "not the sole evidence in support of the charge".[15] (The admissible evidence of course included the other confessions, including the detailed explanation in the 2001 interview of how the killing was said to have been carried out.) The seriousness of the breach and the non-essentiality of the evidence are identified in *Shaheed* as important considerations in striking the appropriate balance on exclusion of evidence.

[14] It is worth remembering in connection with the exclusion of confessional evidence that apparently reliable confessional evidence has led to significant miscarriages of justice.[16] That is the experience behind the strict requirements of the New Zealand Bill of Rights Act. Blanchard J, in the leading judgment in *Shaheed*, accepted a difference between real evidence and confessional evidence when considering exclusion.[17]

[15] Before the Court of Appeal ruling and shortly after the video was made, a copy had been given by Inspector Taare, the police officer in charge of the investigation of the homicide, to Television New Zealand. A Television

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10 Sections 23(1)(b) and 24(c).
11 Section 23(4).
12 At para [73].
13 *R v Shaheed* [2002] 2 NZLR 377 (CA).
14 At paras [27] and [127] per O'Regan and Panckhurst JJ.
15 At para [73].
16 For a summary of the reasons why defendants may make false confessions, see *R v Oickle* [2000] 2 SCR 3 (per Iacobucci J).
17 *R v Shaheed* at para [151].

New Zealand reporter and cameraman had been present when the police brought Mr Rogers from prison to the property where Ms Sheffield was killed, for the purposes of the reconstruction. How they came to be there has not been explained. The filming Television New Zealand undertook of the reconstruction was at a distance and was of poor quality. Television New Zealand later asked Inspector Taare for and was given a copy of the police video. The video would seem to have been confidential information in the hands of the police,[18] although its exact status has not been determined to date by the courts which have considered the matter. Whether Inspector Taare had authority to give the video to Television New Zealand has not been established. On its face, some explanation for the action seems necessary if it is to be reconciled with the Police Regulations 1992. They require police officers to observe secrecy in relation to information obtained through their duties unless the release of such information serves some proper police purpose.[19] Similarly, in protection both of confidentiality and good public administration the common law requires police officers to maintain confidence in information obtained in the course of their duties unless release of the information serves some proper operational purpose.[20]

[16] The basis upon which Television New Zealand received the video is controversial upon the affidavit evidence and has not been resolved. It is acknowledged to have been provided upon conditions. In themselves the imposition of conditions as to use may be thought indicative of an assertion by the police of confidentiality in the video and would be relevant to the knowledge of Television New Zealand if confidence in respect of it is claimed. There is disagreement about the conditions. Inspector Taare has deposed that the arrangement at the time the video was supplied was that Television New Zealand was not to broadcast the video until such time as Mr Rogers had been convicted of murder. (There seems to have been some expectation that he would plead guilty.) He deposes that later, after the video was ruled inadmissible by the Court of Appeal, he advised Television New Zealand it could not be used "in any material way". On either of these bases,

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18 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at p 810 (HC) per Laws J.

19 Regulation 7.

20 In relation to confidentiality, see *Hellewell* at pp 810 – 811 per Laws J. In relation to good public administration, see *R v Chief Constable of North Wales Police ex p AB* [1999] QB 396 at pp 409 – 410 per Lord Bingham CJ (HC); p 429 per Lord Woolf MR (for the CA).

the proposed broadcast could arguably be restrained as a breach of confidence, at least by the police and probably by Mr Rogers.[21] Television New Zealand does not accept such restrictions were imposed however. Mr Wells, a television producer for Television New Zealand, says the original understanding was that the video could be used in a broadcast when the trial was over, whether or not a guilty verdict resulted. He acknowledged that after the jury had retired there was a variation of the arrangement by which broadcast would be delayed following a guilty verdict to allow rights of appeal to be exercised and would be delayed in the eventuality of a hung jury until after retrial. He said it remained understood that broadcast could follow an acquittal.

[17] It is impossible to read these apparently casual arrangements, and the disagreement about them, without a sense of unease. Information gathered as part of their duties is not information police officers are entitled to deal with as they see fit.[22] They cannot provide it or withhold it from private interests at whim. There must be some criminal justice or operational reason for its use. There may well be good explanation for what happened. It is however impossible to know because of the preliminary stage the proceedings have reached.

Substantive determination was premature

[18] It was understandable that the initial application for injunctive relief by Mr Rogers was rushed. He learned on a Sunday two days after his acquittal that the video was to be used in a broadcast that same day. His counsel made an oral application for interlocutory injunction which was heard on a *Pickwick* basis.[23] The application was granted by Winkelmann J, the trial Judge, pending further consideration at a hearing on notice. It was commendable that the Full Court expedited a hearing four days later, on 15 December, and that it delivered its decision so promptly on 22 December. But it was unfortunate that the hearing was permitted to proceed under r 624 of the High Court Rules without a statement of

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21 On the basis discussed by Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at p 281.

22 *Ex p AB* at pp 409 – 410 per Lord Bingham (HC) and p 429 per Lord Woolf MR; *Hellewell* at p 810 per Laws J.

23 An ex parte application at which the respondent is present.

claim, as r 628 required. Pleadings would have enabled proper identification of the basis of the claim and would have brought important issues into focus. They include the status of the video and the authority on which it came into the possession of Television New Zealand. Proper constitution of the claim would also have focused attention on whether the claim was appropriate for summary determination and, if not, whether Mr Rogers' position should have been protected by interlocutory injunction in the meantime.

[19] It was argued on behalf of Mr Rogers that Television New Zealand could be restrained from broadcasting the video on three bases:

- to prevent Television New Zealand tortiously injuring the privacy of Mr Rogers

- in application of the Court's powers under s 138 of the Criminal Justice Act 1985

- to provide vindication for the breaches of the New Zealand Bill of Rights Act which led to exclusion of the video from evidence at trial.

[20] Although I am of the view that the Court of Appeal was right to set aside the permanent injunction, I think it was necessary for it to consider whether the position should have been held by interlocutory injunction to enable these claims to be properly constituted and heard in the High Court. The decision of the Court of Appeal amounted to a summary rejection of the underlying substantive claims. It was effectively a strike-out of the indicated claims. The Court is not to be criticised for this approach on the way the matter was presented to it. But I think the urgency of the initial application may have obscured appreciation on appeal that summary dismissal was warranted only if there was clearly no prospect that the appellant could succeed at trial in obtaining an injunction to prevent broadcast. And, in that assessment, allowance needed to be made for the lack of pleadings and the novelty and importance of the legal issues raised. If summary rejection of the claims was not open, the Court of Appeal should have considered whether an interlocutory injunction should have been granted until trial, on the principles applicable to such temporary relief. As it is, I am left with the view that there may well have been an injustice.

[21] Only one of the suggested bases for claim was, I think, appropriate for summary rejection. I think it clear that the argument based on s 138 of the Criminal Justice Act could not be used to grant Mr Rogers the relief he sought. Section 138 provides powers to forbid publication of reports of evidence or submissions at any hearing. It is a power ancillary to hearing which has no application to the video in the possession of Television New Zealand, as all members of this Court agree.

[22] The other bases for claim were not however appropriate for similarly peremptory resolution for two reasons. First, the claims in privacy and for vindication of breaches of the New Zealand Bill of Rights Act are clearly not untenable as a matter of law. Although the facts which would substantiate a claim have not been formally pleaded, they are sufficiently identified (even if some remain unresolved) on the evidence before the Court. And in these under-developed areas of law it would be wrong to be definite about the boundaries of claim. Secondly, since the substantive relief sought depends ultimately on balancing disparate interests, it is not possible to be confident that the balance falls one way or the other until all interests are identified and their strength can be assessed in context. That stage has not yet been reached. Indeed, on the face of it there are a number of serious questions affecting the public interest which need to be addressed but which so far appear to have been overlooked in an over-simplistic analysis which pitches the private interests of Mr Rogers against the public interest in freedom of access to information. Other public interests need also to be brought into the balance.

(i) The scope of the claims

[23] Dealing first with the scope of the underlying claims, I think it unfortunate that without pleadings and proper identification of the issues the courts have been led into expressions of opinion on the scope of the tort of privacy and the defence of public interest. This Court should I think resist being drawn on the same basis into expressing views on such questions. They have so far been explored only slightly in New Zealand case law. In *Hosking v Runting,* Gault and Blanchard JJ emphasised that the scope of the tort they there recognised required consideration on a case by

case and fact-specific basis.[24] They did not purport to establish the limits of the tort in all circumstances. I do not agree therefore with the suggestion made by McGrath J at para [99] that it should be accepted for present purposes that the limits of the tort of privacy are those stated in the majority opinions of the Court of Appeal in *Hosking v Runting*, even though the parties were apparently content to approach the matter on that basis.

[24] *Hosking v Runting* was a very different case from the present one. It had none of the background circumstances of confidence or questions about proper use of police authority which are present here. In *Hosking v Runting,* Gault P and Blanchard J recognised that privacy overlapped with confidence. Indeed, they took the view that the right of action of breach of privacy was "essentially the position reached in the United Kingdom under the breach of confidence cause of action".[25] It would therefore not be right in my view at this preliminary stage to ignore the "overlapping" claim in confidence.

[25] In view of developments in other jurisdictions since *Hosking v Runting* was decided, it is necessary to be cautious. I believe this Court should, for example, reserve its position on the view expressed in *Hosking v Runting* (applying a test suggested by Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats*)[26] that the tort of privacy requires not only a reasonable expectation of privacy but also that publicity would be "highly offensive". The test has been doubted by members of the House of Lords in *Campbell v MGN Ltd.*[27]

[26] As indicated, *Hosking v Runting* did not purport to answer all questions about liability where privacy interests are adversely affected. One that remains open and which is of significance in the present case is the time at which expectations of privacy must be assessed. Members of this Court seem to be of the view that the relevant expectation of privacy must have been present at the time the video was filmed.[28] On the approach they take, that view largely determines the question of

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24 At para [118].
25 At para [148].
26 (2001) 208 CLR 199.
27 [2004] 2 AC 457 at paras [94] – [96] per Lord Hope; para [22] per Lord Nicholls.
28 At para [48] per Blanchard J; para [63] per Tipping J; paras [104] and [105] per McGrath J.

expectation here because it must have been understood by Mr Rogers that the interview could be admitted in evidence in the public forum of the Court. (Indeed, the standard police caution warns as much.) The Court of Appeal took a different view of the time at which an expectation of privacy should be assessed. O'Regan and Panckhurst JJ considered the expectation at the time the video was ruled inadmissible, and as a result concluded that there was a reasonable expectation of privacy in it.[29] The Canadian Supreme Court case of *Vickery v Nova Scotia Supreme Court (Prothonotary)*[30] (which was also concerned with post-trial publication of an interview ruled inadmissible at trial) and the English cases of *R v Chief Constable of North Wales Police ex p AB*[31] (concerning the provision of information about the fact of conviction, after prisoners had served their sentences) and *Hellewell v Chief Constable of Derbyshire*[32] (where the question concerned the use of a photograph taken by the police with consent in the course of an inquiry) consider expectations of privacy at the time of proposed publication. I mention these differences to indicate that there are important points in issue which have not yet been resolved in New Zealand law and which should not be resolved by this Court on a summary basis. A conclusion that Mr Rogers can have no expectation of privacy in the video may be inconsistent with the overseas authorities. I think it premature.

[27] Given the absence of proper identification of issues in the case, I also take the view that the assertion of privacy should not be treated as precluding a potential public law claim against the police. An interest in privacy can provide standing for public law remedies, as the *Ex p AB* litigation illustrates. And where a third party obtains information in breach of public law obligations, duties of confidence may arise directly between the third party and the person affected by breach of public law duties.[33]

[28] Nor do I think it is appropriate to determine on a peremptory basis what is or is not sufficient vindication of established breaches of the New Zealand Bill of

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29 At para [52].
30 [1991] 1 SCR 671.
31 [1999] QB 396 (HC and CA).
32 [1995] 1 WLR 804 (HC).
33 The basis upon which such confidence can arise outside a confidential relationship between the parties is discussed by Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2*) at p 281, in a passage relied upon by Gault P in *Hosking v Runting* at para [27].

Rights Act. Vindication is contextual. And the scope of the relief available for breach of rights guaranteed under the Bill of Rights Act depends upon the harm suffered, as *Baigent's Case* illustrates.[34] It would I think be wrong to conclude that exclusion of evidence is always complete redress for breach of ss 23 and 24 of the Bill of Rights Act. Such conclusion is not required by existing authority in New Zealand and is a point of considerable importance which should not be resolved within the limitations of the present appeal.

[29] It is far from clear that exclusion of evidence is full vindication of the rights here found to be breached. They are expressed in the New Zealand Bill of Rights Act as stand-alone entitlements, not simply as rights instrumental in securing fair trial or any other consequential interest. They provide freedom from oppression by those exercising authority and recognise the vulnerability of those detained or questioned, a vulnerability demonstrated by experience.

[30] In addition, consequential damage may include not only unfairness at trial but also damage to interests of privacy and public interests such as the encouragement of co-operation with the police. It is convenient to note here that I do not think this Court should assume without more that police-facilitated media access to evidentiary videos would not have an adverse impact on cooperation with the police. William Young P in the Court of Appeal was prepared to accept there could be a deterrent effect (although he thought such consideration had "comparatively little to do with privacy").[35] There is an affidavit before the Court by experienced defence counsel that she would not advise participation in such video interviews if the material could end up being broadcast on the decision of the police officer in charge. Any apparent police practice (as referred to in *R v Mahanga*)[36] could not be determinative. The public interest in the wider aspects of the administration of justice prompts care.

[31] There may be further public interest in the re-integration into the community of those who have been interviewed by the police. They may be convicted offenders,[37] those who have been investigated and not charged, or those who have

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34 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).
35 At para [119].
36 [2001] 1 NZLR 641 (CA).
37 As in *Ex p AB* and *Hellewell.*

stood public trial and been acquitted.[38] In *Vickery*, Stevenson J for the majority of the Supreme Court of Canada made the point that those who have stood trial must do so publicly but:[39]

> [s]omeone who has been accused and convicted on the basis of self-incriminating evidence obtained in violation of his Charter rights should not be made to bear the stigma resulting from unrestricted repetition of the very same illegally obtained evidence.

[32] Nor is it clear that the Court would not be able to grant relief against Television New Zealand for breach by the police of the New Zealand Bill of Rights Act. Duties of confidence can arise in respect of unrelated parties, as indicated at para [27]. Television New Zealand may not be directly bound by the Bill of Rights Act, but whether the courts can grant injunctive relief against it may turn on the basis upon which it obtained the video from the New Zealand Police, who clearly are so bound. Those circumstances remain contentious.

[33] The Court, which is bound by the New Zealand Bill of Rights Act, should be careful not to complete or exacerbate the harm caused by breach of the rights secured under it. I do not think it is right that the question of vindication of the breaches of the Bill of Rights Act rights should be determined on the present appeal.

(ii) Open justice, freedom of information, and the other interests engaged

[34] Whether substantive injunctive relief is ultimately available depends on a balance between the different interests engaged. Three matters are relied upon by the majority in this Court in concluding that injunctive relief could not be available on substantive determination. They are the approach taken to prior restraint in defamation cases (which is suggested to be analogous), and the transcendent interests of open justice and freedom of information. These considerations overlap.

[35] I accept that the requirement that court proceedings be conducted in public is essential to the maintenance of confidence in the courts and the rule of law. As foreshadowed, I do not consider that the interests of open justice are properly

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38 As in *Vickery*.
39 At p 685.

determinative here. The trials of Mr Lloyd and Mr Rogers and the interlocutory arguments which preceded them have been conducted in public, in hearings to which the news media were admitted. The decisions as to the admissibility of the video are publicly available. The decision of Cooper J in the High Court, ruling the video admissible, contains a description of what it contains. Access to the video itself is not necessary to permit others to make up their own minds whether the Court of Appeal was right to exclude the video (or to dispel any mischievous suggestion that restraining Television New Zealand from broadcasting the video is prompted by concerns to protect the courts from criticism). The decision of the Court of Appeal on admissibility did not turn on whether the video was compelling or believable or obtained by direct oppression, considerations in respect of which the contents of the video could well be relevant to the decision to exclude.[40] Here, the exclusion was based on breaches of the New Zealand Bill of Rights Act which preceded the making of the video and which are not illuminated by viewing it. Indeed, the Court of Appeal did not view the video at all in making its decision that the police breaches of the Bill of Rights Act were so substantial that it would be "unprincipled" to admit it. The circumstances that led the Court to that view are set out in its judgment. The correctness of the Court's decision can be fully considered in its own terms. There is no question of protection of the judicial process from question. It has been openly conducted throughout. The important principle of open justice would not in these circumstances be impeded by protection of privacy or confidences in the video.

[36] I accept that restraining the broadcast of the video would restrict the right contained in s 14 of the New Zealand Bill of Rights Act to "seek, receive, and impart information and opinions of any kind in any form". Section 14 affirms art 19 of the International Convention on Civil and Political Rights. The exercise of the right in art 19 is expressed to "carry with it special duties and responsibilities". It is subject to such restrictions as are necessary "for respect of the rights or reputations of others". As Keith J pointed out in *Hosking v Runting*, one limit given content by the

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[40] Oppression was the basis of the violation in the Canadian case of *Vickery*. Even so in that case publication was restrained to protect the privacy of the accused following the quashing of his conviction and the entry of an acquittal.

Convention is the freedom from arbitrary or unlawful interference with privacy.[41] In *Campbell*, Lord Nicholls emphasised that the right of freedom of information does not have priority over other rights. That was the basis on which he rejected the "highly offensive" test for restraining publication. He considered it gave an unwarranted weighting to an unqualified freedom of expression.[42]

[37] Other rights and interests which may qualify the right under s 14 are the rights under ss 23 and 24 of the Bill of Rights Act held to have been breached here by the police conduct which led to the obtaining of the video. Their observance and vindication are matters of public importance. It is proper to take into account the protection of these rights in considering whether and to what extent it is necessary to limit freedom of information or expression in the particular case. And in *Vickery* the protection of the Charter right violated was the reason the Supreme Court, by a majority, held that the confessional video should not be broadcast. In permitting publication the court may complete the harm resulting from breaches of rights the court is bound to uphold.

[38] In defamation cases, courts have been alert to the impact on s 14 of prior restraint where interlocutory restraint is sought before trial, especially if the publisher has indicated reliance on truth, qualified privilege, or honest opinion. In such cases there is a greater willingness to decline interlocutory relief and rely on vindication through damages, should the plaintiff succeed at trial. As Gault P and Blanchard J pointed out in *Hosking v Runting*, however, a claim for privacy differs from a claim for protection of reputation in defamation. As in confidence, the harm is in the disclosure, which may be of information that is true. The analogy with interlocutory restraint in defamation proceedings is imperfect and needs to be treated with caution. Injunctive relief may well be appropriate.[43] Whether freedom of information considerations should prevail depends on the circumstances of the particular case and all interests properly engaged. There are public interests in play here beyond the simple clash in issue in *Hosking v Runting.*

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41 At para [180].
42 At para [134].
43 As Gault P and Blanchard J in *Hosking v Runting* acknowledge at para [149].

[39] In *Hosking v Runting* the harm suggested for breach of privacy was regarded by the Court as remote and speculative. The photographed images showed no more than could have been seen by anyone present on the street and the privacy interest was not considered to be high. The publication, like that in the Kingston matter there referred to, "was unaccompanied by any private details or material that might embarrass or inconvenience the child" whose privacy was in issue.[44] Here, on the other hand, it is acknowledged that publication will be harmful to Mr Rogers. The concerns he has expressed cannot be dismissed as remote and speculative.

[40] There is public as well as private interest in the re-integration of Mr Rogers after the inevitable notoriety resulting from his public trial and acquittal. In *Ex p AB* Lord Bingham described it as "not acceptable" that those who had completed their sentences should be "harried from parish to parish like paupers under the old Poor Law":[45]

> It is not only in their interest but in the interest of society as a whole that they should be enabled, and if need be helped, to live normal, lawful lives.

Similarly, it is in the interest of society as a whole that those who have stood public trial and been acquitted should not be harassed by publication of information obtained in breach of rights. The risks of harassment after trial were acknowledged by Stevenson J for the majority in the Canadian Supreme Court in *Vickery*:[46]

> Those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.
>
> …
>
> Fair, accurate, contemporaneous reports are likely to be balanced, to display the full context, and to expose the arguments on both sides. The subsequent release and publication of selected exhibits is fraught with risk of partiality, with a lack of fairness. Those policy considerations which form our attitude towards the openness of the administration of justice are relevant to an application such as this. Nugent cannot escape from proceedings in which he was involved, nor from the fair and accurate reporting of them, but the courts must be careful not to become unwitting parties to his harassment by

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44 At para [168].
45 At p 414.
46 At pp 684 – 685.

> facilitating the broadcasting of material which was found to have been obtained in violation of his fundamental rights.

[41] Whether these considerations should prevail if the court hearing the substantive claim gets to the point of considering relief is not something I express any view on. What matters for present purposes is that the claims for privacy and confidence are serious ones and the risk of real harm is high. There are questions touching on the administration of justice in relation to police actions and the role played by Television New Zealand which are relevant to the merits of the claim and which cannot be resolved without investigation of the facts.

[42] Whether substantive injunctive relief is ultimately appropriate depends on balancing disparate interests. It is not in my view possible to come to a clear view on the necessary outcome of the substantive claim for injunctive relief on the basis of summary consideration and without resolution of the conflicts in evidence about matters highly relevant to the eventual balance to be struck. In particular, it is difficult to see that any balancing of interests can properly be undertaken without resolving key conflicts on the affidavit evidence filed as to the circumstances in which Television New Zealand came into possession of the video and the conditions it accepted as to its use.

In the interim, the position should be held by interlocutory injunction

[43] For the reasons given, I would allow the appeal and remit the substantive claim to the High Court. On that basis, the interim position needs consideration. If the matter had been considered as one for interlocutory relief, as was appropriate, it would have been addressed on the basis of conventional principles applicable to such relief, not distinctly discussed by the Full Court or the Court of Appeal. Of particular importance would have been the extent to which a decision to grant or withhold interlocutory relief would determine the substantive proceedings. That consideration here favours restraint. If the video is used as proposed, any privacy or confidentiality in it is lost.

[44] I am of the view that if the matter were to be remitted the balance of convenience would clearly favour interlocutory restraint on publication. I accept that the video conveys more information to viewers than appears in the descriptions of it in the public domain, but the facts are largely within the public domain and comment upon them is not restricted. It is the additional depiction which will cause the harm to Mr Rogers. The video was obtained in breach of his rights under the New Zealand Bill of Rights Act. It was excluded and therefore did not need to be answered at trial, as the other confessions were to the apparent satisfaction of the jury. He is therefore open to the claim that he would have been convicted if the video had been admitted in evidence, undermining his acquittal and impeding his re-integration into society. The circumstances in which the video came into the hands of Television New Zealand are not known. On the face of things they may well give rise to a claim of confidence which would be pre-empted by publication at this stage. No urgency in publication is put forward. I would grant an interlocutory injunction restraining the publication of the video until further order of the High Court, on remission to it of the claim.

BLANCHARD J

[45] I gratefully adopt McGrath J's account of the facts and of the court processes in this case. The Court of Appeal has found that the videotape was made in breach of the rights of Mr Rogers under ss 23 and 24 of the New Zealand Bill of Rights Act 1990. The Court ruled that the consequence of the breach should be that the evidence on the tape was not admissible at his trial.[47] Should the breach of his rights receive further vindication in the form of an order denying Television New Zealand Ltd (TVNZ) the ability to broadcast any part of the tape? Or is the likelihood of some prejudice to Mr Rogers, including disturbance to that aspect of his right to privacy often called the right to be let alone, outweighed by the requirements of open justice – the general right of the public to know what has occurred in a courtroom – and by TVNZ's right to receive and impart information in accordance with s 14 of the Bill of Rights Act?

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47 *R v Rogers* [2006] 2 NZLR 156.

[46] A disturbing feature of the case is the manner in which the tape came into the hands of TVNZ. That feature has attracted very little attention in the lower courts. In releasing a copy of the tape to TVNZ the police would appear to have acted beyond their powers, in that their action does not appear to have been taken with a view to investigating the death of Ms Sheffield or prosecuting the case against Mr Rogers. However, the police and TVNZ do not seem to have been afforded the opportunity of giving an explanation. I have considered whether the proceeding should be remitted to the High Court for this to occur. But as, for the reasons I shall give, I am of the view that TVNZ would have succeeded if the proceeding were an application by it under the rules governing search of court records in criminal cases[48] for access to a videotape held by the High Court, I prefer to deal with the matter on that hypothetical basis and avoid further delay in resolving the case. In this way any improper advantage which may in fact have been obtained by means of the circumstances in which the tape came into the possession of TVNZ is negated. I therefore examine and determine the matter as if the application were by a broadcaster which had never had possession of the tape. Proceeding on that basis, I am of the view that TVNZ should be permitted to use the tape. I can briefly explain how I come to that conclusion.

[47] Someone who has been acquitted at a criminal trial – against whom the Crown case was not proved to the requisite high standard – cannot expect to be thereby freed from public discussion of the events which led to the trial and at the trial itself, though they may of course have the benefit of the law of defamation if anyone asserts that they were in fact guilty of the crime of which they have been acquitted.

[48] Mr Rogers claims that his privacy will be invaded by any broadcasting of the videotape. I do not accept that proposition. Anyone who agrees to be interviewed for the purpose of a criminal investigation, and in that connection elects to make a statement to the police, cannot persuasively claim to have had a reasonable expectation of privacy concerning that occasion. The very purpose of the police, which must be well understood by the person who makes the statement, is to obtain material from the statement with a view to putting it in evidence before a court,

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48 Criminal Proceedings (Search of Court Records) Rules 1974.

where it will become public knowledge. It is fanciful to suggest in this day and age that the maker of such a statement will not know this or will be influenced in deciding whether or not to make a statement by the belief that the evidence may possibly be ruled inadmissible and will then not be given in court. As a court record it will remain available for search in accordance with the rules. Further, persons suspected of offending are unlikely to be deterred from giving videotaped interviews by the apprehension that the tapes might be publicly broadcast by television. The Court of Appeal in *R v Mahanga*[49] rightly saw the suggestion that suspects might be deterred as a speculative proposition. It observed that there had at the time of that case been recent incidents in which the police had themselves facilitated access to such interviews, which indicated that they had no such concerns. The conduct of the police in the present case in making a copy of the tape available to TVNZ reinforces that observation.

[49] Obviously enough, a refusal to grant Mr Rogers the relief he seeks (or, on the basis on which I am approaching this case, to allow the broadcaster access to the tape) will be to his disadvantage. It does not "wind the clock back" by putting him where he would have been if no breach of his rights had occurred. In the circumstances, which included grave breaches of Mr Rogers' rights to the assistance of counsel and to be silent, the tape should never have come into existence. But Mr Rogers has already had a very large measure of vindication by means of the order of the Court of Appeal which prevented the content of the tape being admitted in evidence against him at his trial. Normally that is the only vindication necessary for a breach of this nature. There will usually be little or no further publicity and so no residual prejudice to a defendant who, post trial, may well have an expectation of being let alone. In this case, however, it must be assumed there will be prejudice to Mr Rogers if the tape is broadcast, but that has to be balanced against other important considerations, namely TVNZ's right to freedom of expression under s 14 of the Bill of Rights Act and, rather more significantly in the particular circumstances, the principle that the administration of criminal justice should be done openly. The Court of Appeal remarked in *Mahanga*,[50] and I agree, that openness in the operation of the criminal justice system provides a form of judicial

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[49] [2001] 1 NZLR 641 at para [44].
[50] At para [18].

accountability to informed public opinion and an incentive to sound and principled exercise of judicial power. Whenever information regarding a criminal proceeding is suppressed that accountability and that incentive may be weakened.

[50] In *Mahanga* the Court in fact upheld the High Court's refusal to give TVNZ access to a videotape of Mr Mahanga's police interview. It did so because the tape had already been played at his trial, to which the public had at all times been admitted. What the Court called the right to open justice had thereby been satisfied. Granting TVNZ access to the tape would not have added to the substance of publicly available information. The role of the media in informing the public, as an important means of securing open justice, was for that reason not accorded significant weight.[51]

[51] The present case is different. The evidence of the tape was not made public at the trial of Mr Rogers. To my mind, it is important that where evidence has been excluded the public should afterwards be able to learn what that evidence was, and why the jury was not permitted to know of it and to take it into account in arriving at a verdict. The public may come to lack confidence in a criminal justice system which, without very good reason, such as the desire to protect the reputation of a victim,[52] permanently suppresses such information. In the absence of information about what a jury could not be told, a significant component will be absent from public discussion concerning the operation of the legal system in the particular case. Ill-informed commentary is likely to occur if the public is left to speculate about the nature of the material in question and why it was excluded from the evidence seen and heard by the jury. Such speculation is not in the interests of the administration of justice. Suppression may itself promote distrust and discontent, as the Court of Appeal pointed out in *Television New Zealand Ltd v R.*[53]

[52] Some of the information on the Rogers videotape has already been made public through the High Court admissibility judgment.[54] That might be seen as a reason for concluding that the combination of the s 14 right and the open justice

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51 At para [39].

52 See s 138 Criminal Justice Act 1985.

53 [1996] 3 NZLR 393 at p 397 per Keith J.

54 *R v Rogers* (High Court, Auckland, CRI 2004-404-013121, 2 August 2005). Other statements containing admissions by Mr Rogers, not necessarily consistent with the videotape, were put in evidence at the trial.

principle does not require the release of the tape to a broadcaster. In many cases a description in a judgment of the inadmissible evidence will effectively paint the whole picture. Open justice will not require more. But I am not satisfied that it will do so in this very unusual case where the tape contains, as well as the verbatim record of what Mr Rogers said, images of his reconstruction of the circumstances of Ms Sheffield's death. I agree with McGrath J's conclusion that there is significantly more information on the tape than in the textual description given by Cooper J. Indeed, that is something of an understatement. The Court of Appeal judgment on admissibility gives no account at all of the content of the videotape, save mentioning that it included "a detailed account of the manner in which Mr Rogers killed Ms Sheffield".[55] Cooper J's judgment in the High Court on admissibility does give a short account, in total dealing with the content in about one page of description, including some brief quotations.[56] In contrast, the full transcript is 11½ pages and the video itself is about 20 minutes long and shows Mr Rogers demonstrating to a police officer the way in which he said Ms Sheffield was killed. While the images, given their subject, are not especially dramatic – Mr Rogers's demonstration is almost matter-of-fact – they do have a dimension which obviously cannot be captured by a judge's summary.

[53] It may be suggested that the public do not need to know the content of the videotape because the decision to rule it inadmissible was made on the basis of events which preceded its creation. That is why the Court of Appeal's judgment on admissibility contained no description of that content. The tape did, however, contain material which, if heard and seen by the jury, may have assisted the prosecution case.

[54] I have said that this case is very unusual. It has attracted great public interest, but not because the killing of Ms Sheffield was in itself out of the ordinary. It is an unfortunate commentary on our society that it was, as an incident, simply another homicide, seemingly as a consequence of consumption of alcohol and drugs. What makes the case unique, in this country at least, is that, first, one man was found guilty of the manslaughter of Ms Sheffield and years later was held to have been

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55 At para [32].
56 At paras [62] – [65].

wrongly convicted and, then, another man was tried for her murder and acquitted, notwithstanding what might have appeared to be a confession which was ruled inadmissible. I am not indicating any doubt about the legal soundness of that ruling when I say that public concern at this state of affairs is very understandable. It is appropriate for the media, representing the public interest, to seek to scrutinise how it has come about. In these circumstances the media, and through them the public, should have all the relevant facts available.

[55] I entirely concur in the following observations of William Young P in the Court of Appeal:[57]

> [128] I agree that the underlying issues can be debated without the videotape being shown on national television. But experience shows that arguments are usually more easily understood where they are contextualised. An esoteric argument about the way the New Zealand Bill of Rights Act is applied by the Courts becomes far more accessible to the public if the implications can be assessed by reference to the concrete facts of a particular case. In that context, to prohibit the proposed broadcast of the videotaped confession and reconstruction would necessarily have the tendency to limit legitimate public discussion on questions of genuine public interest.

[56] The President added that there may be some public scepticism about the way the criminal justice system as a whole has dealt with the case. He considered that in this context it would be very damaging to the judiciary if the courts were perceived, or could be portrayed, as seeking to shut down public discussion about what happened. The important point the President was making, I think, is that if confidence in the judiciary is diminished by such a perception or portrayal, the whole of our system of justice is thereby damaged.

[57] In the present case, in which there may, rightly or wrongly, be public disquiet about the outcome of the judicial process, it is proper that all the visual and oral information on the videotape be publicly available.

[58] I would dismiss the appeal with the consequences as stated by McGrath J.

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[57] *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 157.

TIPPING J

[59] The background to this appeal has been set out in McGrath J's reasons. I agree with him that Mr Rogers' appeal should be dismissed. I do not propose to comment on the circumstances in which Television New Zealand Ltd gained possession of the videotape. I will regard those circumstances as having no influence on whether TVNZ should be restrained from broadcasting the tape or excerpts from it. Whether the police behaved improperly is not a matter I would wish to address in the absence of properly pleaded allegations. There are also no properly pleaded allegations against TVNZ in relation to its acquisition of the tape.

[60] Mr Rogers based his case for restraining TVNZ from broadcasting the tape on three grounds. The first was the tort of invasion of privacy; the second was s 138(2) of the Criminal Justice Act 1985; and the third was the need for further vindication of the breach of his rights under ss 23 and 24 of the New Zealand Bill of Rights Act 1990. Both for the reasons McGrath J has given and those which I give later in these reasons, I am of the view that each of these three grounds must fail. Strictly speaking that is all that needs to be said.

[61] It is nevertheless appropriate, for the reasons given by Blanchard J,[58] to examine the case on the premise that TVNZ did not have possession of the videotape and was seeking access to it under the ordinary rules which apply to the search and use of court records. TVNZ's position is then the same as any other person seeking to gain access to and use the tape for the purpose of a public broadcast. This approach was signalled at the hearing and the parties were given an opportunity to address it. There is sufficient material before the Court for the point to be satisfactorily assessed on this basis. I will examine the matter in this way without prejudice to what influence the circumstances in which TVNZ came into possession of the videotape might have had on the outcome of this case if those circumstances had been the subject of fuller factual and legal examination.

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[58] See Blanchard J's reasons at para [46].

[62] When the case was heard in the High Court, Mr Rogers had not filed any statement of claim, as he should have done. But the grounds upon which he sought permanently to restrain TVNZ from broadcasting the video were articulated in some detail in the application for the injunction which he sought. They did not include any reference to breach of confidence or any other equitable or tortious basis for the restraint. No application has been made for remission. Nor has Mr Rogers expressed any concern that there was an evidentiary shortfall in his case.

[63] When Mr Rogers took part in the reconstruction which the videotape records, he must have known that it was intended that the videotape would be shown to the jury in a public courtroom. He must also have known that the public would thereby become aware of what he was saying and doing during the reconstruction. Whether he appreciated the prospect of excerpts from the tape being shown on national television as part of the reports of the case or a later documentary is not known. I do not consider Mr Rogers had any reasonable expectation of privacy in the reconstruction or the videotape which recorded it, whatever date is taken for that assessment. The Court of Appeal's ruling that the evidence should be excluded cannot alter the essentially public nature of the reconstruction exercise. We are not dealing with private facts. Nor can the position here logically be any different if the assessment is made at the time of the intended broadcast. Hence the tort of privacy cannot assist Mr Rogers. The question whether restraint of the broadcast should be ordered as further vindication of the breach of Mr Rogers' rights is a separate issue.

[64] The videotape was ruled inadmissible at Mr Rogers' trial for the reasons which McGrath J has explained. In short, the police breached the right he had, as a person charged, to counsel (ss 23 and 24 of the Bill of Rights Act) and his right to silence (s 23). The ruling of the Court of Appeal does not, however, of itself mean that the videotape became "inadmissible" for other purposes. The weight that should be given to the inadmissibility of the videotape for the purposes of the murder trial, when assessing the competing interests of TVNZ and Mr Rogers for present purposes, is one of the central issues before us. How far should the breach of the Bill of Rights Act which led to inadmissibility at the murder trial influence the use which should be permitted of the videotape for other purposes?

[65] In my view the breach of Mr Rogers' rights was fully vindicated by the order preventing the videotape from being given in evidence at his trial. I do not consider ss 23 and 24 of the Bill of Rights Act, which affirm the rights of persons arrested or detained or charged with an offence, are designed to protect an accused person's privacy or reputational interests. Those interests are protected by the tort of invasion of privacy and by the tort of defamation. Each of those torts represents a careful working out of the public interests at stake, both generally and in the area of prior restraint. Sections 23 and 24 and the closely related s 25 are designed to protect the interests of those accused of crimes by ensuring that both police processes and trial and pretrial processes are fair.

[66] Understandably, Mr Rogers made much of the fact that he was acquitted. An acquittal is not, however, a declaration of innocence. It means no more than that the case against the accused person has not been proved.[59] An acquittal does not bar allegations that the person concerned is actually guilty. Anyone making such an allegation will of course be liable to pay damages in defamation unless they can prove the truth of what they allege. It is a cardinal feature of defamation law that a defendant who undertakes to justify (prove truth) will not be made the subject of prior restraint by interim injunction unless the case for justification could not possibly succeed.[60] That view is seldom, if ever, taken against a responsible news media organisation. The plaintiff has a remedy in damages if the plea of truth fails. This approach to prior restraint in such cases has been carefully worked out so as not to encroach in advance on rights to freedom of expression. The position is broadly analogous in relation to the tort of invasion of privacy. In any broadcast of the videotape or parts of it TVNZ will have to be careful to avoid giving the impression that Mr Rogers is in fact guilty of the murder of which he was acquitted, unless TVNZ is prepared to justify or run the risk of paying heavy damages.

[67] I come now to address the matter on the basis foreshadowed in para [61]. The rules relating to the search of court records envisage the balancing of competing interests.[61] It is difficult to posit a case in which the principle of open justice will

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59 See *R v Degnan* [2001] 1 NZLR 280 at para [34] (CA).

60 See *Gatley on Libel and Slander* (10th ed, 2004), ch 25.6; *Bonnard v Perryman* [1891] 2 Ch 269; *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129 (CA).

61 *R v Mahanga* [2001] 1 NZLR 641 at paras [32] – [33] (CA).

not, to a greater or lesser extent, be a factor in favour of release. It is therefore generally appropriate to administer the rules on the basis that unless there is some good reason for withholding the material concerned, members of the public, or at least those with a bona fide purpose in obtaining the information, should be entitled to it. The freedom of information culture which exists in New Zealand, and its counterpart, the right to freedom of expression, both justify this general approach. In practical terms the effect of this approach is that if the balance of competing factors is even, the material in question should be released.

[68] What then is the case which Mr Rogers presents against disclosure? Essentially his case rests on privacy considerations and a concern that the videotape was brought into being in circumstances which breached his rights under ss 23 and 24 of the Bill of Rights Act. For reasons already mentioned I consider Mr Rogers' privacy interests are not of great weight. The fact that prior restraint under the tort of invasion of privacy is clearly not available does not of itself mean that Mr Rogers cannot rely on privacy considerations to resist disclosure. But the absence of any reasonable expectation of privacy suggests that any residual case in favour of Mr Rogers' privacy interests must be slight. Furthermore, the general subject matter, that is, Mr Rogers' confession to the murder, is already in the public arena. The public already know that he confessed and that his confession was ruled inadmissible. As counsel accepted, the privacy interest must therefore be found in the manner and circumstances in which the confession was made rather than in the confession itself. It is only the "enhancement" of the confession by showing "live" the circumstances in which it was made that can be the basis of any privacy concern.

[69] I accept that from Mr Rogers' point of view the enhancement dimension is a material factor. I have carefully considered the weight which should be given to it. I have also considered whether further vindication of the breach of Mr Rogers' rights requires the Court to restrain TVNZ. I do not consider that is so. The purpose for which the relevant rights exist has been fully vindicated. Mr Rogers can never be retried. The further jeopardy in which he may stand, if the videotape is screened, is reputational. But, as I have said, a verdict of acquittal is not a complete bar to future allegations of guilt, however dangerous they may be for their maker.

[70] I have also carefully borne in mind the submission that Mr Rogers wishes to be able to rehabilitate himself without further public intrusion and scrutiny. His submission is that it would be unfair to interrupt or set back the rehabilitative process which he has undertaken over the past 18 months. It is important in this respect to remember that the issue which must ultimately be addressed is whether the High Court was right to deny TVNZ the ability to screen the video. At that time the verdict had very recently been given and TVNZ was intending to screen its programme in close proximity to the conclusion of the trial. Had that been done the effect on Mr Rogers would have tended to merge with the effect of the trial itself and its associated publicity. The fact that nearly two years have now elapsed will naturally cause Mr Rogers greater personal cost. But that is the result of his having taken steps to prevent TVNZ from showing the video. He cannot be in a better position now than when the matter was before the High Court.

[71] On the other side of the ledger there are strong points which favour allowing TVNZ to broadcast the videotape. The public have a legitimate interest in being informed about the whole course of the investigation and the trials in relation to the death of Ms Sheffield. Two people have been charged and ultimately neither has been found guilty. The Court of Appeal differed from the High Court over whether the videotape should be admitted in evidence. The conduct of the police in setting up the reconstruction in circumstances which led to its being declared inadmissible is also a justified subject of public scrutiny, as is whether the Court of Appeal was correct in reversing the High Court.

[72] It was said in argument that the public did not need to see the videotape when they already have the judgments of Cooper J and the Court of Appeal explaining their differing conclusions as to whether the videotape should be admitted. I do not consider that argument carries much weight. In the first place the showing of the videotape is what is important for a visual medium like television. In the second I do not consider that legitimate public debate about the admissibility ruling and the circumstances of the case generally can take place effectively without the public being fully informed by access to the video itself. I say that because the public are entitled to be satisfied that the courts have, in their judgments, fairly portrayed the substance of what Mr Rogers said and did during the videotaped reconstruction. The

public are also entitled to assess for themselves whether the law generally and its application to this case strike the right balance between vindicating breaches of the Bill of Rights Act and the effective prosecution of crime. I am not expressing any view about that issue myself. I am simply pointing out that this is a matter of legitimate public interest and unless the videotape is released the public will be less than fully informed. Only if the case for withholding the material in question is of sufficient strength should the public have to consider the matter on a less than fully informed basis.

[73] Concerns were also expressed that TVNZ might wish to present the video or selected aspects of it in a "sensationalist" rather than a dispassionate and balanced way. That argument invites the Court both to speculate and to enter into the murky waters of presentational censorship and editorial control. I would decline the invitation. The videotape should either be made available to TVNZ or it should not. Matters of presentational and editorial judgment should be left where they belong. If it transpires that there are concerns about how the videotape has been used, they can be addressed by recognised causes of action or by reference to the Broadcasting Standards Authority.

[74] One final point should be mentioned. The courts must be careful in cases such as the present lest, by denying access to their records, they give the impression they are seeking to prevent public scrutiny of their processes and what has happened in a particular case. Any public perception that the courts are adopting a defensive attitude by limiting or preventing access to court records would tend to undermine confidence in the judicial system. There will of course be cases when a sufficient reason for withholding information is made out. If that is so, the public will or should understand why access has been denied. But unless the case for denial is clear, individual interests must give way to the public interest in maintaining confidence in the administration of justice through the principle of openness.

[75] After balancing all the competing considerations, I have reached the view that the balance comes down clearly on the side of allowing TVNZ to use the videotape in its proposed programme. Mr Rogers' privacy and allied personal interests are relatively slender as against freedom of information concepts and the

presence in this case of a legitimate public interest in how the law has operated. Mr Rogers has not, in my view, demonstrated that there is good cause for withholding the video from TVNZ.

McGRATH J

Introduction

[76] In 2005 the appellant, Mr Rogers, was tried by a jury for the murder in 1994 of Kathy Sheffield. Prior to the trial, in the course of a police interview at the site of the homicide, he had admitted to killing her. The Crown's intention was that a videotape of the interview should be played to the jury at the trial but, on a pretrial application, the admissibility of the videotape was challenged by Mr Rogers. The Court of Appeal decided that the interview had been conducted in breach of Mr Rogers' rights under the New Zealand Bill of Rights Act 1990, as a person charged, to have the assistance of counsel and to be silent.[62] It held that the videotape should not be admitted at the trial. The trial on the murder charge proceeded and Mr Rogers was acquitted.

[77] Soon after the interview, and well before the trial, the respondent, Television New Zealand Ltd (TVNZ), obtained a copy of the videotape from the police. Immediately after his acquittal Mr Rogers learned that TVNZ proposed to broadcast a current affairs programme concerning the death of Ms Sheffield and subsequent court proceedings relating to the homicide. The programme was to include excerpts from the videotape of the police interview.

[78] Counsel for Mr Rogers immediately took steps to restrain TVNZ from including any images from the videotape in its programme. He was successful in the High Court, but the Court of Appeal reversed that decision on appeal. The issue directly raised in Mr Rogers' appeal to this Court is whether he has a right to prevent TVNZ from broadcasting the videotape on the ground that the broadcast would

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62 *R v Rogers* [2006] 2 NZLR 156.

breach his rights to privacy.[63] A copy is, of course, already in the possession of TVNZ. If it is decided that he has no enforceable privacy rights a further issue arises as to whether the Court has any jurisdiction to control the future use of the videotape. If there is such a jurisdiction, the Court must decide the basis on which it should be exercised in this case.

[79] In this Court Mr Corry, on behalf of Mr Rogers, based his argument that the videotape should not be broadcast on three grounds. The first ground was centred on the tort of privacy. The second was that broadcast should be prevented using s 138(2) of the Criminal Justice Act 1985. The third ground was that further vindication was needed for the breach of Mr Rogers' rights under ss 23 and 24 of the Bill of Rights Act. I address the first and third grounds in this judgment. The second ground, under section 138(2) of the Criminal Justice Act, cannot succeed. This section confers on a court the power to control what may be published concerning what has happened in court. It cannot be used by a later court to prevent the broadcast of evidence which was introduced in earlier separate proceedings. In other words, the power to forbid the publication of evidence conferred in subs 138(2), in the context of s 138 as a whole, can only sensibly relate to evidence in a proceeding the court is then hearing.

Background

[80] In September 1994 the body of Kathy Sheffield was found in a shallow grave on the property of Mr Lawrence Lloyd at Mangonui in Northland. He was charged with her murder. At his trial, in 1995, he was acquitted of murder but convicted of manslaughter and sentenced to 11 years imprisonment.

[81] In August 2004 the Court of Appeal gave Mr Lloyd leave to appeal against his conviction out of time. The Court allowed his appeal by consent and quashed his

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[63] The basis of Mr Rogers' proceeding was that the broadcast of the videotape would be a wrongful publication of private information under principles stated in *Hosking v Runting* [2005] 1 NZLR 1 (CA).

conviction for manslaughter.[64] Mr Lloyd subsequently pleaded guilty to a charge of improperly offering an indignity to the dead body of Ms Sheffield.

[82] The appellant, Mr Rogers, is the nephew of Mr Lloyd. Mr Rogers had originally been interviewed by the police about the homicide in September 1994 and was further interviewed on three occasions in the latter part of 2001, when the police were conducting a fresh investigation into the circumstances of Ms Sheffield's death. In the course of these interviews Mr Rogers confessed to having murdered Ms Sheffield. He visited the property where she was killed with the police and indicated where he believed he had disposed of a knife. Because, however, they saw inconsistencies between his admissions and known facts concerning the homicide, the police decided not to charge Mr Rogers at that time.

[83] During 2003 Mr Rogers was interviewed once more in the course of a further police investigation, this time headed by Inspector Taare, and he was interviewed again on 15 March 2004. On the latter occasion he told the police that his admissions in 2001 had come to him in a dream but later, in the same interview, he repeated his confession and described the circumstances of Ms Sheffield's death in some detail. He also told the police that he had thrown cloth that he had used to clean up blood down a long-drop toilet. The police undertook excavation and located blood-stained clothing at the bottom of what had been a toilet on the property.

[84] On 30 June 2004, nearly ten years after her death, Mr Rogers was charged with the murder of Ms Sheffield.

[85] The following morning Mr Rogers appeared in the Auckland District Court on the murder charge. Counsel representing him, Mr Corry, spoke with Inspector Taare prior to the Court sitting and asked him not to have any further conversations with Mr Rogers without first notifying counsel. Nevertheless, Inspector Taare and another police officer met with Mr Rogers in prison during the day without informing Mr Corry. On encountering Mr Corry, when leaving the prison, they maintained that they had not discussed the case with Mr Rogers. Mr Corry wrote to

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64 *R v Lloyd* (CA 72/02, 25 August 2004, Chambers, Williams and Panckhurst JJ).

Inspector Taare the next day reiterating his earlier request that he cease to have contact with Mr Rogers.

[86] The police officers also spoke to Mr Rogers the following day, when he asked that they get a message to his aunt, a Mrs Lloyd, asking her to contact him. The message was passed on and on 4 July 2004 Mrs Lloyd told the police that, in a telephone conversation with her, Mr Rogers had confessed to murdering Ms Sheffield. Subsequently, after she and another relation had visited Mr Rogers in prison, a visit facilitated by the police, Mrs Lloyd advised Mr Taare that Mr Rogers wished to be taken by the police officers to Mangonui and that he would assist the police with their investigation. Mrs Lloyd was provided with, and later obtained Mr Rogers' signature on, a form of consent which the police had prepared, to his being taken to Mangonui to assist the police with their inquiries.

[87] On 13 July 2004 Mr Rogers was taken by the police from prison to the property at Mangonui. There he participated with a detective sergeant in a reconstruction of the events leading to the death of Ms Sheffield, which the police recorded on videotape. In the course of the reconstruction, Mr Rogers gave a full description of what happened in response to questions. He admitted that he had killed the victim, saying that he had initially inflicted stab wounds to Ms Sheffield's stomach and that, after she had fallen to the ground, he had cut her throat. He demonstrated on the detective what he was describing, with gestures, which were recorded on the videotape. Reporters, a field producer, and a cameraman from TVNZ were also present on the property during the reconstruction, separately filming what was happening from a distance. The following day the appellant was taken back to prison in Auckland.

[88] Later, Inspector Taare was approached by the TVNZ producer and asked to provide a copy of the police videotape. Inspector Taare agreed. The police provided TVNZ with a copy of the tape in late July 2004. There was a difference between Inspector Taare and the producer concerning what conditions were placed by Mr Taare on when TVNZ might broadcast the tape. It is, however, common ground that they agreed it was not to be broadcast before the conclusion of the criminal proceedings that had been brought against Mr Rogers.

[89] Prior to his trial in the High Court Mr Rogers challenged the admissibility of the videotaped record of the reconstruction at Mangonui. On 2 August 2005 Cooper J ruled that the videotape was admissible evidence.[65] Mr Rogers appealed to the Court of Appeal against the High Court's ruling. In its judgment the Court of Appeal accepted the submissions made on behalf of Mr Rogers.[66] The Court decided that the reconstruction at Mangonui amounted to a breach of an arrangement which the police had reached with Mr Rogers' counsel concerning any further interviews. It also found that the police had not told Mr Rogers why they wanted him to go with them to Mangonui for a three-day period. At the time he agreed to go Mr Rogers was in a position of distinct vulnerability. The Court decided that Mr Rogers had not waived his right to silence, nor his right to counsel, in agreeing to go to the place where Ms Sheffield had been killed and assist the police with their inquiries there. His protected rights had been breached by the police in such a substantial manner that admission of the important evidence of what took place at Mangonui would be unprincipled. Mr Rogers' appeal was accordingly allowed and the videotape held to be inadmissible at his trial.

[90] At Mr Rogers' trial the Crown called evidence of other admissions he had made. Mr Rogers' defence was that these were the result of his confusing elements of what had been a dream with reality. This confusion, he said, had led him to make false admissions to the police about having murdered Ms Sheffield. On Friday 9 December 2005, following a five-week trial, the jury acquitted Mr Rogers of murder.

The injunction proceeding

[91] On Sunday 11 December 2005 Mr Rogers learned that TVNZ intended to broadcast a current affairs programme that evening concerning the circumstances of Ms Sheffield's death, and the subsequent court processes. The programme would

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65 *R v Rogers* (High Court, Auckland, CRI 2004-004-013121, 2 August 2005).
66 *R v Rogers* [2006] 2 NZLR 156.

include footage from the police videotape. It would specifically question whether the reconstruction and confession shown on the videotape was fantasy or a dream on the part of Mr Rogers.

[92] Later that day Winkelmann J heard, on a *Pickwick* basis, and granted an oral application by Mr Rogers for an interim injunction to restrain TVNZ from broadcasting the programme. On 15 December 2005 Venning and Winkelmann JJ, sitting as a Full Court of the High Court, heard argument from counsel for Mr Rogers and TVNZ, and from Mr Miles QC as amicus curiae, on whether a permanent injunction should issue. No statement of claim had been filed in the interim and the case proceeded to its urgent substantive hearing on that basis. The appellant had, however, filed an application for a permanent injunction and the respondent a notice of opposition, both with particularised grounds. Each was fully aware of the other's position.

[93] Senior counsel also appeared for the Commissioner of Police at the hearing on 15 December but was granted leave to withdraw. The police have accordingly, by their own choice, taken no further part in these proceedings.

[94] The High Court Judges delivered a reserved judgment on 22 December 2005.[67] They held that Mr Rogers had established the requirements for a claim in tort against TVNZ based on interference with his privacy. The Court decided that once the tape had been ruled inadmissible at his trial, Mr Rogers had a reasonable expectation of privacy in relation to its future use. This included a belief that the tape would not be released by the police to the media and that the Courts would regulate any future public use.[68] In this respect the High Court was influenced by the fact that the videotape was the product of breaches of Mr Rogers' protected rights which amounted to substantial breaches of proper standards of police conduct.[69] This finding established the first element of the tort of breach of privacy.

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67 *Rogers v Television New Zealand Ltd* (2005) 22 CRNZ 668.
68 At para [48].
69 At para [50].

[95] The High Court went on to find that any public broadcast of the tape would be offensive to an objective and reasonable person, which satisfied the other necessary element of the tort.[70] A public television broadcast would amount to harassment of Mr Rogers, given that he had been acquitted of the charge of murder. The Court also rejected a submission that the defence of legitimate public concern was available to TVNZ, saying that the criminal justice process concerning the charge against Mr Rogers had been open and transparent throughout and that the content of the videotape would not add to public debate or scrutiny of the Court of Appeal judgment.[71] For these reasons the Court made an order permanently restraining TVNZ from broadcasting the whole or any part of the recorded statement taken from Mr Rogers on 13 July 2004. TVNZ was also required to deliver up all copies that it held of the videotape. These orders finally determined the proceeding in the High Court.

[96] TVNZ appealed to the Court of Appeal, which unanimously allowed the appeal and set aside the orders made against TVNZ.[72] In their reasons for judgment O'Regan and Panckhurst JJ said they had not been persuaded to differ from the High Court's view of Mr Rogers' expectation of privacy or the offensive nature of any future broadcast of the videotape.[73] Legitimate public concern, however, as the High Court recognised, had to be balanced against Mr Rogers' privacy right, as a matter of proportionality. O'Regan and Panckhurst JJ inclined to the view that Mr Rogers' privacy interest did not prevail over the countervailing open justice considerations. What in the end was decisive for O'Regan and Panckhurst JJ in allowing the appeal was that, in the circumstances of the case, the requirements for there to be a prior restraint of TVNZ had not been met.[74] Nor did their Honours see that there was any basis for the making of a suppression order under s 138 of the Criminal Justice Act 1925.[75]

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70 At para [60].
71 At para [71].
72 *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156.
73 At paras [55] and [69].
74 At para [96].
75 At para [102].

[97] In a separate concurring judgment, William Young P doubted that what was shown on the videotape was of a sufficiently private or personal character to found a legal claim for interference with his privacy. The President, however, agreed with the majority judgment that, if the images were of a sufficiently private nature, the defence of legitimate public concern applied in the circumstances.

Was there a breach of privacy rights?

The parameters of the privacy tort

[98] In *Hosking v Runting* a majority of three Judges of the Court of Appeal held that there is a right of action at common law in New Zealand, separate from that for breach of confidence, for wrongful publication of private information.[76] The majority held that two requirements must be satisfied for this tort action to succeed. First, there must be facts in existence in respect of which the plaintiff has a reasonable expectation of privacy.[77] Facts meeting this criterion are conveniently referred to, as in *Hosking*, as "private facts". Secondly, the publicity given to those private facts must be of a kind that an objective reasonable person would consider highly offensive.[78] Even where these elements are established, if the information in question is a matter of legitimate public concern that justifies its publication, this will provide a defence to any claim. The burden of proof of this defence is on the defendant and it is not available where the matter is of no more than general interest or titillation, or gives rise to curiosity.

Are the facts private?

[99] It is unnecessary for this Court to give any detailed consideration to the Court of Appeal's decision in *Hosking v Runting* in this case. Accepting for present purposes, as the parties did, that there is a privacy tort, the limits of which are stated

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76 [2005] 1 NZLR 1.

77 Per Gault P and Blanchard J at para [117] and Tipping J at para [249].

78 Per Gault P and Blanchard J at para [117]. Tipping J at para [259] preferred to express the second element as requiring a publication that "would in the particular circumstances cause *substantial* offence" (emphasis added).

in the judgments of a majority of the Court of Appeal in that case, it is plain that the circumstances of Mr Rogers' case do not fit within them. In particular, it is necessary for Mr Rogers to establish the private nature of the factual information which he seeks to protect in his claim. For the reasons that follow, I am satisfied he is unable to do so.

[100] For there to be a reasonable expectation of privacy in relation to a fact it cannot be known to the world at large at the time of publication. It may, however, be known to some people.[79] In his written submissions in this Court Mr Corry formulated the private fact element as being the visual representation of Mr Rogers making this confession, emphasising matters of personal detail in the depiction of Mr Rogers' demeanour. These include his facial and verbal expressions, gestures, posture and comportment. This formulation of the private facts was, no doubt, tailored to overcome the difficulty that there is widespread public awareness that Mr Rogers confessed to murder to the police, and that he did so on more than one occasion. Mr Corry's argument, however, is that the additional detailed information concerning Mr Rogers' demeanour, which would be conveyed by a televised broadcast of the tape, is not at present in the public domain and that this constitutes the private facts on which the claim for breach of privacy is based.

[101] It is well recognised that, in general, photographic images may contain significantly more information than textual description.[80] This is especially so with sequential images on a videotape which will often portray graphically intimate and personal details of someone's personality and demeanour. Indeed this is so in respect of the images on the videotape in the present case.

[102] Accordingly, I accept that the detail of Mr Rogers' actions and demeanour during the police interview and reconstruction of the circumstances of Ms Sheffield's death is not disqualified from being a private fact. These aspects are not factual matters of which the public is presently aware.

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79 Per Gault P and Blanchard J at para [119].

80 *Campbell v MGN Ltd* [2004] 2 AC 457 at para [31] per Lord Nicholls and para [72] per Lord Hoffmann; *Douglas v Hello! Ltd (No 3)* [2006] 1 QB 125 at paras [105] and [106] (CA) per Lord Phillips MR.

[103] The evidence before the High Court provides a full and adequate basis upon which to determine the privacy interests of Mr Rogers. I accept that the broadcasting of the tape following his acquittal would cause Mr Rogers embarrassment and hurt. It would also affect his reputation and efforts to rebuild his life after being acquitted of murder. The overall effect on him of any broadcast which includes images from the tape is that the public are more likely to ask the question whether he would have been convicted had the tape been shown to the jury. Mr Rogers' strong desire that he be free from this sort of public intrusion on his private life is a legitimate privacy interest.

[104] It is nevertheless difficult to categorise what he does not want the public to see as private. The videotape is of events which took place during a police investigation into the possible criminal responsibility of Mr Rogers for a serious crime. His participation was always likely to lead to the showing of the recorded events, as part of the Crown's evidence against him, at a public trial attended by the media and any member of the public minded to do so. These circumstances in themselves strongly indicate that Mr Rogers had no reasonable expectation of privacy in relation to the recorded events at the time they took place.

[105] Ultimately, the tape did not become part of the Crown's evidence at the trial. That was not on account of any acknowledgement of the private character of what was depicted. It was rather because the Court of Appeal decided that the circumstances leading up to the confession were such that Mr Rogers' right to silence and his right to legal advice had been breached and that the interests of justice required that the tape be excluded from his criminal trial. The Court's judgment does not convert the public character of the events depicted into something that is private. The original purpose of making the videotape contemplated its prospective public use. The Court of Appeal's ruling on admissibility did not alter that. Accordingly Mr Rogers could have no reasonable expectation of privacy at any time in relation to events shown on the videotape and the claim for breach of privacy must fail on that ground alone.

[106] Mr Akel also argued on behalf of TVNZ that the defence of legitimate public concern applied because, in the circumstances, even if the private fact element were

satisfied, the interests of freedom of expression and open administration of justice warranted the broadcast of the tape. It is not necessary to address the point in view of my finding that Mr Rogers had no reasonable expectation of privacy in relation to the interview and re-enactment. I will consider later the relevance of freedom of expression and open justice to other issues that the case raises.

A right to broadcast the videotape?

[107] It appears that the parties and their legal advisers have assumed that, outside of a claim for breach of privacy, once TVNZ had obtained possession of videotapes of police interviews with suspects no issue could arise concerning its right to broadcast them following the conclusion of the criminal proceedings. I do not accept this perception of the limits of the High Court's powers, at least in the present case.

[108] Once a videotape of an evidential interview by the police of a person suspected of involvement in criminal offending, or of a reconstruction of a suspected crime, is submitted to the Court, the tape becomes part of that Court's record. This is so whether the tape comes in as an exhibit during trial, or earlier on an application to exclude it from the evidence. The videotape remains part of the Court's record, even after the particular court process has come to an end, as it did in the present case when Mr Rogers was acquitted.

[109] The High Court usually exercises supervisory powers in relation to its record of a criminal proceeding through the Criminal Proceedings (Search of Court Records) Rules 1974.[81] No rules have, however, been made in relation to public use of material forming part of the court's record where access to it has been independently obtained. It may be that in these circumstances the court has inherent powers to supervise and protect its records.[82] For reasons which I now explain, however, it is not necessary in the present case to consider that question.

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81 *R v Mahanga* [2001] 1 NZLR 641 at para [12] (CA).

82 This possibility was not addressed by the Court of Appeal in its discussion in *Hunt v A* (CA 114/06, 6 August 2007) at paras [51] – [55] per Hammond J for the Court.

[110] What the police did was to put evidential material in the hands of a media organisation prior to a trial. The result of this action was to put the videotape outside of the control of the High Court where the Court would normally have had such control under its search rules. It is doubtful whether the police even had power to act in this manner. There is no apparent link to that power of the police which arises from their duty to detect offenders and bring them to justice.[83] Nor do the police actions appear to lie within any other aspect of police authority that arises from statute or the common law.[84] On the material before us, authority for passing on the evidential videotape to the media can only lie within the residual freedom that government officials have to do things without legal authorisation. The existence of this "third source" of authority has been recognised by the courts.[85] It has also received persuasive, although not universal, support in academic writing.[86] Assuming that the residual freedom exists as a distinct source of authority for government action, it is clear that its scope is confined by any conflicting statutory or common law rules that apply.[87] In the present case, what the police did may have been in breach of the Police Regulations 1992. Regulation 7 imposes on the police a general duty to observe secrecy in relation to information coming into the possession of members. One exception enables police to release information to the extent necessary for the police to do their duty.[88] As police interests were not represented before us, I refrain from making any finding on whether the exception would apply

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83 There is no general statutory statement of police functions in New Zealand. Sections 5, 6 and 57A of the Police Act 1958 recognise that the powers and duties of constables at common law apply to sworn members of the police. At common law "[t]he paramount duty of the Police is to prevent crime and to detect and bring offenders to justice": *Laws of New Zealand*, Police, para [44].

84 *Laws of New Zealand*, Police, para [44].

85 *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at p 367; *R v Gardiner* (1997) 15 CRNZ 131 at p 134 (CA).

86 Harris, "The 'Third Source' of Authority for Government Action" (1992) 109 LQR 626 and "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225; Elliott, *The Constitutional Foundations of Judicial Review* (2001), pp 167 – 171. For the contrary view see Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3rd ed, 2004), pp 328 – 329 and Taggart "'The Peculiarities of the English': Resisting the Public/Private Law Distinction" in Craig and Rawlings (eds), *Law and Administration in Europe* (2003) 107, pp 115 – 116.

87 The principal controlling statute is the Bill of Rights Act.

88 Regulation 7(2)(d). This reflects the common law restriction on rights of disclosure of information by the police which are respectively discussed by Lord Bingham CJ at first instance and Lord Woolf MR on appeal in *R v Chief Constable of North Wales Police ex p AB* [1999] QB 396 at p 409 per Lord Bingham CJ and p 429 per Lord Woolf MR.

to excuse what happened in this case. It is sufficient to conclude that it is questionable whether the police had any authority to hand over the tape to TVNZ.

[111] Regardless, however, of whether the police had authority to give the videotape to the news media, for reasons I shall shortly explain I am satisfied that their actions in this case amounted to an abuse of court process. As TVNZ had actively sought the videotape, they were involved in those actions. It is well established that the High Court has inherent ancillary powers to prevent abuse of its processes.[89] Those powers can be exercised "to defeat any attempted thwarting of [the court's] process".[90] This is so even if the abuse of court process takes place after a trial, as long as the conduct would affect "the administration of justice as a continuing thing".[91] The powers are limited, in that their scope is confined to what is necessary to enable the court to act effectively in upholding the administration of justice.[92] The powers cannot be exercised in the general public interest if that interest is not concerned with the due administration of justice at the time or in the future. Within their limits, however, the powers can be exercised to control not only those associated with particular proceedings but also the world at large.[93]

[112] What the police did amounts to an abuse of process because their actions have impeded the Court's power to protect an important part of its record. The Court's ability to regulate external use of evidential videotapes of police interviews with suspects, created for the purpose of the criminal trial process, is crucial to its ability to administer justice. The Court's capacity to give due protection from misuse of such material on the Court's record to those who participate in its processes is necessary to maintain public confidence in the integrity of criminal trials.[94]

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89 *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at p 682 per Richmond J and p 689 per Woodhouse J; *Connelly v Director of Public Prosecutions* [1964] AC 1254 at p 1296 per Lord Reid and p 1301 per Lord Morris.

90 *Connelly v DPP* at p 1301 per Lord Morris.

91 *Taylor v Attorney-General* at p 677 per Wild CJ.

92 *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18 at para [17] (SC) per Elias CJ, Blanchard and McGrath JJ.

93 *Taylor v Attorney-General* at p 689 per Woodhouse J.

94 *Taylor v Attorney-General* at pp 682 – 683 per Richmond J.

[113] In a case such as the present, these inherent powers would allow the High Court to make orders in relation to the videotape that would enable it to exercise the control that the Court would have had over its record had there been no abuse of process. Such orders could include a prohibition on any broadcast of the videotape without the Court's permission. Once the Court has asserted its control, it will be in a position to determine any applications for access to the videotape, as part of the Court record, in the normal way. No separate proceeding is necessary. The determination will involve the exercise of the Court's discretion, applying the principles outlined in relation to the judicial discretion under r 2(5) of the Criminal Proceedings (Search of Records) Rules in *R v Mahanga*.[95]

[114] Mr Rogers did not proceed in this way but I consider it is now open to this Court to consider whether broadcast of the videotape should be prohibited on this basis. The relevant authorities and considerations on the merits were addressed in argument before us as if an application had been made by TVNZ to search the Court record and copy the videotape. There is an ample evidential basis for the assessment. Accordingly, this Court is in as good a position as the High Court would be if we referred the matter back to it for decision. It is also desirable that the question of whether TVNZ may broadcast the tape is finally resolved without further delay. I proceed to consider the position on that basis.

Weighing the competing interests

[115] The starting point is that there is no general right of access under New Zealand law to material on a court's record of a criminal proceeding.[96] The judicial discretion in relation to access, conferred by r 2(5), rather calls for a balancing exercise. As the Court of Appeal said in *R v Mahanga*:[97]

> We conclude that the broad judicial discretion under R 2(5) is intended to be exercised by weighing the competing interests presented by any particular application. Any legitimate privacy concern raised by an accused person is one. The purpose for which access is sought, if known, may be relevant. The principle of open justice will often be important, especially when

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95 [2001] 1 NZLR 641 (CA).
96 *Mafart v Television New Zealand Ltd* at para [23] per Elias CJ.
97 At para [32].

> applications are made for access to Court records by the media. So will be the interests of administration of justice where there is a risk that they will be harmed by disclosure.

Accordingly, it is necessary to consider the competing considerations that arise in relation to the desire of TVNZ to broadcast the videotape.

[116] TVNZ is, of course, already in possession of a copy of the videotape and will be able to broadcast it unless it is restrained. Freedom of speech is a directly relevant factor. In that respect it must be borne in mind that the conclusion of the criminal trial process in any case does not always bring finality in the eyes of the public. Both convictions and acquittals can give rise to legitimate public interest, debate and further scrutiny which freedom of expression will foster. As Gleeson CJ has pointed out in another context:[98]

> The idea that the investigation and exposure of wrongdoing is, or ought to be, the exclusive province of the police and the criminal justice system bears little relation to reality in Australia, or any other free society. There are heavily governed societies in which the police and other public authorities have the exclusive capacity to make, and pursue, allegations of misconduct; but not in ours. Indeed, in our society allegations of misconduct are sometimes made against the police and public officials.
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> Secondly, it may well be in the public interest that inaction on the part of the police and prosecuting authorities be called publicly into question. It is certainly in the public interest that it is *open* to be called into question.

[117] Often freedom of speech and open justice march together as closely related factors in applications of this kind. This case, however, demonstrates that open justice is a distinct consideration. It is primarily concerned with the sound functioning of the judicial process in the public interest whereas freedom of speech is more concerned with the free flow of information.

[118] Open justice provides critical safeguards in the operation of the criminal justice process. The ability of the public to attend, and the media to report on, what transpires during a criminal trial provides the transparency in the process that is crucial to fulfilment of the protected right to a "fair and public hearing by an independent and impartial court".[99] But it has also been

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98 *Australian Broadcasting Corporation v O'Neill* (2006) 229 ALR 457 at paras [26] – [27].

99 Under s 25(a) of the Bill of Rights Act.

recognised that the public interest served by openness in the administration of justice goes beyond protecting the fundamental rights of those charged with a criminal offence. Openness also helps meet the need to preserve public confidence in the legal system. As Woodhouse P said in *Broadcasting Corporation of New Zealand v Attorney-General*:[100]

> The Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purposes.

[119] Open justice also provides incentives for self-discipline which foster the sound and principled exercise of judicial power. As well, it makes the judiciary accountable to informed public opinion. These effects lead to greater public understanding of the judicial process and, importantly, provide reassurance to both the community, and those close to the accused and victims, that a trial has been conducted fairly and the accused treated justly.[101]

[120] There are statutory provisions permitting exceptions to openness which allow, and at times require, the courts to suppress reports of certain evidence and to prohibit identification of offenders and witnesses in certain circumstances.[102] These exceptions are, however, all administered from a starting point that emphasises the importance of open justice and freedom of expression.[103] Orders prohibiting publication of evidence, submissions or even a court's judgment will also be made where that is necessary to protect prejudicial material from affecting the fairness of a trial. Those reasons generally disappear once a trial has concluded. Thereafter a

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100 [1982] 1 NZLR 120 at pp 122 – 123 (CA). There are similar passages in the judgments of Cooke J at pp 127 – 128 and Richardson J at pp 132 – 133. See also *Television New Zealand Ltd v R* [1996] 3 NZLR 393 (CA).

101 *Mahanga* at paras [18] – [21].

102 In particular under ss 138 and 140 Criminal Justice Act 1985.

103 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at para [41] (CA).

strong onus lies on any person seeking to continue a prohibition on publication to show grounds that justify that course.[104]

[121] In general the public, including the media, have full access to court proceedings as and when they take place. In reporting on the processes of the courts, the media are restricted in what they may say only to the extent that rules permit exclusion of the public or suppression of publication of any matters for specified reasons. Such access enables full reporting by the media in traditional ways of what takes place in court. This degree of access usually fulfils the values of open justice and the right to freedom of expression on which the media are entitled to rely in reporting court proceedings.

[122] The media was, of course, able to fully report everything that happened at Mr Rogers' trial. The unusual feature of the present case, however, is that the videotape of the reconstruction of events at Mangonui, part of which TVNZ wishes to broadcast, did not form part of the evidence at the trial. This is because the Court of Appeal decided that there was a breach of Mr Rogers' protected rights and that the interests of justice required that the tape not be shown to the jury. This raises the question of whether the requirements of open justice, in relation to scrutiny of judicial processes and also police actions in this case, will not be satisfied unless the videotape is made available, in effect, for public broadcasting.

[123] In holding that the videotape would not be admitted at the trial, the Court of Appeal was not influenced by what Mr Rogers was depicted as doing or saying in the course of the alleged re-enactment. It did not consider his demeanour to be relevant. The Court based its decision that Mr Rogers' rights had been breached on its finding that the police had given assurances to counsel that Mr Rogers would not be further interviewed concerning the homicide unless his counsel was informed and given the opportunity to be present. Nothing that occurred subsequently had relieved the police of this commitment.[105] In a sense it is not strictly necessary for the videotape to be shown in order to put the reasons why it was not admitted into evidence fully before the public. Further, as Mr Corry pointed out, there is a full

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104 *R v Dally* (High Court, Wellington, T 99/89, 10 April 1990, Eichelbaum CJ) at p 3.
105 *R v Rogers* [2006] 2 NZLR 156 at paras [67] – [69].

report of what took place during the reconstruction at Mangonui in the admissibility judgments of the Court of Appeal and Cooper J in the High Court.

[124] On the other hand, members of the public have a legitimate interest in being fully informed of the nature of excluded evidence in order to make their own assessments of the Court's reasons for exclusion. For reasons already traversed,[106] images on a videotape often contain significantly more information than a textual description and that is so in this instance. Neither the reports of the events in the two judgments, nor the transcript, provide the entirety of the information available in the videotape of the re-enactment.

[125] In this instance open justice values weigh significantly in favour of allowing the media to broadcast the videotape. Two persons were charged with Ms Sheffield's murder, their trials being held ten years apart. The outcome of the process is that neither accused stands convicted. There is understandably a high degree of public interest as to why this should be so. A factor contributing to this situation is that the Court of Appeal determined it would be unjust in the circumstances to admit Crown evidence which would have been relevant to the charges against the appellant. Further media scrutiny of what happened in this case may well extend to all aspects of the operation of the judicial process as well as how the police conducted the investigation.

[126] On the other side of the scales, there are privacy interests raised by Mr Rogers. The nature of these interests was aptly described in the Canadian context in the words of Cory J in his dissenting judgment in *Vickery v Nova Scotia Supreme Court (Prothonotary)*:[107]

> The … right to privacy … inheres in the basic dignity of the individual. This right is of intrinsic importance to the fulfilment of each person, both individually and as a member of society. Without privacy it is difficult for an individual to possess and retain a sense of self-worth or to maintain an independence of spirit and thought.

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106 At para [101] above.
107 [1991] 1 SCR 671 at p 687.

[127] It is important to recognise that those interests do not have to meet the requirements specified for the privacy tort in *Hosking v Runting*. Any legitimate privacy interest of Mr Rogers is relevant to the balancing process the Court is undertaking.[108] I have already indicated in these reasons that I consider Mr Rogers has a legitimate privacy interest.[109] It is undoubtedly the case that Mr Rogers is in a vulnerable position as a person who has been acquitted of a serious crime where evidence of his guilt was not before the jury. The anxiety and stress that would result from the broadcast of the videotape would be great.

[128] A factor which, Mr Corry says, weighs heavily in favour of Mr Rogers' privacy interest is that the Court of Appeal has determined that Mr Rogers' participation in the re-enactment was secured by police conduct which breached his protected rights, as a person charged, to have the assistance of counsel and to be silent. His argument is that prohibition of any public broadcasting of the tape is necessary to uphold Mr Rogers' privacy interests. It is therefore necessary to consider the nature of remedies for breach of fundamental rights and the extent of the remedy already given to Mr Rogers in the criminal proceedings for the breach of his rights.

[129] Article 2(3) of the International Covenant on Civil and Political Rights provides:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy…

[130] The obligation to give an effective remedy is reflected in the judgment of Cooke P in *Simpson v Attorney-General [Baigent's Case]*.[110] The Court of Appeal was, in that case, addressing a pleaded situation in which the police officers who entered the plaintiff's property realised or should have realised that their warrant probably contained the wrong address. In that context Cooke P said:[111]

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108 *Mahanga* at paras [32] and [41].
109 See para [103] above.
110 [1994] 3 NZLR 667 at p 676 (CA).
111 At p 676.

> Hitherto the main remedy granted for breaches of the rights and freedoms has been the exclusion of evidence. But that has been because most of the cases have concerned evidence obtained unlawfully; exclusion has been the most effective redress and ample to do justice.

And later, after referring to s 3 of the Bill of Rights Act, he added:[112]

> The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed.

[131] In *Baigent's Case* the Court decided that the only effective remedy for the plaintiff would be compensation. In general, an effective remedy will be one that vindicates the right adequately, marking and redressing it wholly or in part. The remedy should be proportionate to the breach but determined having regard to other aspects of the public interest. In short it will be an appropriate remedy directed to the values underlying the right. [113]

[132] The present case concerned breaches of the rights of Mr Rogers, as a person who had been arrested and charged, to have access to legal assistance and to refrain from making statements to the police.[114] The purpose of the rights involved is to ensure that the person concerned will have a fair trial at a later date. The Court of Appeal's decision, that the appropriate remedy for the breach of these rights was the exclusion of the videotaped evidence from the trial, clearly met that purpose. It fully redressed the breach and thereby vindicated the right. While the Court was obviously not contemplating the present circumstances, it must be acknowledged that the fact the breach has already been redressed in a manner that meets the purposes for which the right exists is relevant in the current balancing exercise. Nevertheless, if the Court's decision facilitates the public broadcast of the videotape, the public may see that as undermining the Court of Appeal's vindication of Mr Rogers' criminal process rights.

[133] This consideration leads directly to the question of whether the administration of justice may be harmed if the Court grants permission for the

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112 At p 676.
113 *Martin v Tauranga District Court* [1995] 2 NZLR 419 at p 428 per Richardson J (CA).
114 The rights arise under ss 23(1)(b), 23(4) and 24(c) of the Bill of Rights Act.

videotape to be broadcast. In a similar context the majority of the Supreme Court of Canada in *Vickery* said of an acquitted accused:[115]

> Nugent cannot escape from proceedings in which he was involved, nor from the fair and accurate reporting of them, but the courts must be careful not to become unwitting parties to his harassment by facilitating the broadcasting of material which was found to have been obtained in violation of his fundamental rights.

[134] While concern for potential harassment of an accused following the trial will often be a relevant factor in deciding if exhibits are then to be made available to the media, I have difficulty with seeing this passage in *Vickery* as providing general guidance in cases such as the present. The relative weight to be given to privacy interests must always depend on all of the circumstances, even where they involve a vulnerable acquitted defendant.

[135] In this respect Wilson J of the Supreme Court of Canada has referred to:[116]

> the importance of not allowing one's compassion for [a] limited group of people who are of particular interest to the public (because of who they are or what they are alleged to have done) to undermine a principle which is fundamentally sound in its general application.

The appellant has, of course, been fully and, in terms of the criminal process at least, finally vindicated by his acquittal. Further public scrutiny of the circumstances can never deprive him of that status.

[136] In the end, in the circumstances of this difficult case, I have reached the conclusion, when balancing the conflicting interests, that the side of open justice carries the greatest weight. Preservation of public confidence in the legal system is directly relevant, because of the circumstances and outcome of the trials of the two accused persons.[117] There is a real risk of damage to public faith in the criminal justice system if the circumstances that led the Court of Appeal to refuse to admit the evidence are not fully transparent. It is a less than satisfactory response to reason that the end is achieved because the Courts' own descriptions of the events that are depicted in the videotape are full and complete. Open justice strongly supports

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115 At p 685.
116 *Edmonton Journal v Alberta (Attorney-General)* [1989] 2 SCR 1326 at p 1366.
117 As discussed in para [125] above.

allowing the media access to primary sources of relevant information rather than having to receive it filtered according to what courts see as relevant. On the other side of the scales, Mr Rogers' rights have been breached but also vindicated during the criminal justice process. At this stage they have much less weight.

[137] Accordingly, while the courts were entirely justified in suppressing the contents of the videotape until the trial of Mr Rogers had concluded, on balance his personal circumstances and associated rights do not provide sufficient reason for a continuing prohibition on its publication.

Conclusion

[138] For these reasons, I would dismiss the appeal by Mr Rogers, with the result that there is no longer any restraint on TVNZ preventing it from broadcasting a copy of the evidential videotape.

[139] I would make no order for costs.

ANDERSON J

[140] This proceeding began exigently and was heard and determined by the High Court with rapidity. But its speedy disposal was at the expense of structural development. It was brought as an application for injunction pursuant to r 624 of the High Court Rules, but did not comply with r 628 which stipulates commencement by statement of claim and notice of proceeding in accordance with Part 2 of the rules.

[141] In consequence a number of potential issues escaped consideration. These include how Mr Rogers came to be released from a prison where he was in custody pursuant to a Court order; why Inspector Taare thought it appropriate to release material acquired in the course of a police inquiry to a person who was not a member of the police and in circumstances seemingly unconnected with the proper objectives of the inquiry; why the police should not be a party to the suit; whether there were public interest considerations in relation to the police conduct which would justify a

limitation on the public's right to receive the information in issue; and whether the police and TVNZ would be amenable to a suit founded on breach of confidence. A range of private law remedies and public law principles warranted consideration.

[142] It is the case that the Penal Institutions Act 1954, which then applied, made provision in ss 21 and 26 for temporary release or removal on Ministerial or judicial authority;[118] and that reg 7 of the Police Regulations 1992 provides some dispensations from a prima facie requirement for the maintenance of secrecy by members of the police. It cannot be assumed that what occurred in this case must necessarily have been irregular. Nor, given the absence of the police as a party and the paucity of evidence, would it be fair to suggest it was. One is left, however, with a sense of unease. Instances of persons in custody being uplifted by the police, or material obtained in the course of police inquiries being disseminated without apparent justification, ought to be carefully scrutinised by lawyers and the courts.

[143] In the result, the case for Mr Rogers became formulated in the course of its various judicial stages on the three bases referred to in the reasons for judgment given by other members of this Court. These are breach of privacy, the application of s 138 of the Criminal Justice Act 1985, and any entitlement to relief vindicating Mr Roger's Bill of Rights Act rights, which the Court of Appeal found had been breached in the circumstances giving rise to the creation of the videotape in issue.

[144] As to the issue of breach of privacy I will assume, without wishing to be taken as endorsing, the law as elucidated by the majority of the Court of Appeal in *Hosking v Runting*.[119] I share the concern expressed by the Chief Justice that the jurisprudence of that case should not be regarded as settled. It was decided by a bare majority and both the existence of the tort and the scope of it, if it continues to be recognised, will fall to be reviewed by this Court in an appropriate case.

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118 Now, ss 62 − 65 of the Corrections Act 2004 and regs 26 − 29 of the Corrections Regulations 2005 permit the chief executive of the department responsible for administering the Act to authorise temporary release from custody or temporary removal from prison for a number of purposes, including forensic ones.

119 [2005] 1 NZLR 1.

[145] I would not go as far as Blanchard J appears to in excluding the possibility of a reasonable expectation of privacy on an occasion when a person agrees to be interviewed by and makes a statement to the police for the purposes of a criminal investigation. A good deal of police interviews must occur in circumstances which are to some extent confidential. It may be intended or supposed that what is said will not become evidence before a court, or if it is to become evidence that it will have confidential features which a court may see fit to protect. It is true that in this particular case, Mr Rogers had been charged with murder and he made his statement in circumstances where it was obviously intended that his statement was going to be put in evidence at his trial. But that does not mean that he can have no expectation of privacy in relation to a different use in other circumstances. Unfortunately, the way in which this litigation has developed means that this important issue, also, was not adequately explored.

[146] As to s 138 of the Criminal Justice Act 1985, I cannot accept that this section authorises a court to suppress publication of evidence that has been adduced before another court. Subsection (1) endorses open justice for proceedings in respect of an offence, subject to subss (2) and (3) which provide for exceptions in certain cases. It is plain, however, that the power to make orders in derogation of the open justice principle is only exercisable in respect of the matter which the court is then hearing. It is not a remedial power to restrain the publication of information in a subsequent civil proceeding.

[147] That brings me to the issue whether the Court should restrain publication of the videotape in order adequately or further to remedy the breach of rights as found by the Court of Appeal. The relevant rights were the right to consult and instruct a lawyer[120] and the right to refrain from making a statement.[121]

[148] In criminal proceedings breaches of such rights have conventionally been remedied, if at all, by holding the evidential fruits of the breaches to be inadmissible and excluding them from the evidence before the trial court. This case raises the question whether such a response must always be treated as a sufficient remedy. I

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120 Sections 23(1)(b) and 24(c) of the New Zealand Bill of Rights Act 1990.
121 Section 23(4) of the Bill of Rights Act.

think not. The remedies for breaches of the Bill of Rights Act rights and freedoms must remain flexible and responsive to the features of particular cases. An action for damages can be brought for breach of those rights.[122] Thus, I would not exclude the possibility, in an appropriate case, of damages being an available remedy in addition to the exclusion of evidence in other criminal proceedings.

[149] In this case the further remedy sought is not damages against the police but a limitation on the s 14 Bill of Rights Act rights of TVNZ to impart information, and the right of all New Zealand residents to receive it. This is not a case such as *Re J (An Infant): B and B v Director-General of Social Welfare*[123] where the Court had to resolve conflicting rights – the rights of parents under s 15 to manifest religious belief, and the rights of their child under s 8 not to be deprived of life. It is a case where a limitation of one right is sought in order to remedy a breach of another one. The public was not in any way responsible for the breaches of Mr Rogers' rights. Nor was TVNZ.[124] To limit the rights of the public and TVNZ, not in order to protect Mr Rogers' rights, but to provide additional remedy for their breach by an unrelated party, would, in my opinion, be inconsistent with s 5 of the Bill of Rights Act. It would be a disproportionate response to the breach of Mr Rogers' rights, given that he has had the significant remedy of exclusion of weighty evidence from his criminal trial, and that he has not sought any civil remedy from the police.

[150] That, however, is not the end of the story. The issue is not necessarily confined to a remedial limitation on the public's right to the information. The circumstances are such as to warrant the examination of other possible reasons why a limitation on the right to freedom of expression, through prohibiting publication of the videotape, might be justified.

[151] I agree with the Chief Justice that this case should be remitted to the High Court so that it can be properly developed and examined. There are too many

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122 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA); *Taunoa v Attorney-General* [2007] NZSC 70.

123 [1996] 2 NZLR 134 (CA).

124 TVNZ is a Crown entity company pursuant to s 7(b) and Schedule 2 of the Crown Entities Act 2004. Whether the Crown in right of the police can properly be equated with a Crown entity company was not argued before us.

important issues of public importance for this inchoate case to be summarily dispatched.

[152] On my approach it is inappropriate to attempt to resolve this appeal by the technique of analogy with the Criminal Proceedings (Search of Records) Rules. Nor do I share McGrath J's confidence that the conduct of the police in handing over a copy of the videotape, and of TVNZ in soliciting and accepting it, amount to an abuse of Court process. McGrath J's view is based on the conclusion that what happened has impeded the Court's power to protect its record. However, the tape was handed to TVNZ in late July 2004 and did not form part of a Court record until it was produced at the depositions hearing on 17 February 2005. If the Court does have an inherent power exercisable contra mundum to regulate the use of duplicates of material which ultimately become part of the Court record, why should it be confined to evidential videotapes? They are only the obsolescent medium for the particular information. There must be some underlying jurisdiction to constrain the Bill of Rights Act right to freedom of expression. Absent the applicability of s 138 of the Criminal Justice Act I can see no regulatory jurisdiction other than those founding the public and private law remedies I adverted to earlier in these reasons. I would not encourage courts to arrogate to themselves, by a broad claim of inherent power, a means of constraining Bill of Rights Act rights.

[153] I would allow the appeal, make an interim suppression order and remit the case to the High Court for appropriate case management and trial.

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