

MICHAEL FREEDMAN

MINORITIES AND HONEST OPINION

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LL.B (HONS)
(SUPERVISOR: BILL ATKIN)

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Freedom of expression, and freedom of individual reputation, are rights that have been at loggerheads since time immemorial. While a discussion regarding the correct balance of the All Black backline is always more likely to figure in a public bar conversation, where the line should be drawn between the two freedoms is a problem that has occupied political and legal thinking as much as, if not more than, any other. Agreement, however, has been extremely hard to come by - a situation that has much in common with that bar room debate. ?

A complicating factor has always been the rights of minorities. Where should their collective right to reputation, and by extension self-determination, fit into this scheme? Such a question is further complicated when the speech that attacks a minority's rights comes from a member, or group, of the society's majority. Does the majority then, by virtue of its preferential position in society, owe the minority the benefit of special protection, necessitating further inroads into the right of free speech when it conflicts with minority rights than would normally be necessary?

This essay will examine these questions in terms of the honest opinion defence in the Defamation Act 1992, which replaced the common law defence of fair comment. Specifically, it will focus on the requirement of the defence that the opinion be "genuine", and on the possible impact of New Zealand's position as a multicultural society on that requirement. To do this, it will discuss the applicability of common law to the defence, that of other sections of the Act, and requirements of the right of freedom of expression and minority rights themselves. It concludes that if contemporary New Zealand social values are not considered when publishing an opinion, that opinion cannot legitimately be termed "genuine".

I. INTRODUCTION - THE AWA CASE

On a chilly winter's morning on 7 August, 1991, New Zealand lost one of its most beloved entertainers. Billy T James, aged 42, died at Greenlane Hospital in Auckland of heart failure, not two years after having received a heart transplant. His death provoked a national outpouring of grief, appropriate to an entertainer of his stature - unfortunately, it also marked the beginning of a protracted legal dispute, which was not ended until some six years after he died. The accompanying facts are as found by the High Court. X

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In accordance with his wishes, Lynn James had intended to conduct a private funeral service, followed by one open to the public, after which she would bury her husband on Taupiri mountain. Maori custom, however, dictates that the deceased's whanau determines the burial arrangements, and in this case the subtribe from Billy T's mother's side insisted that the services could not take place until his body had lain on a marae. Subsequently William Awa, chief kaumatua of the subtribe, went with more than a dozen men to Billy T's Muriwai home to collect the body. After he was asked to leave the property, he forcibly entered the house with his group and against Mrs James' wishes took the body back to Turangawaewae marae.

In an article written about the public funeral, the *Sunday News*, reacting to public sympathy for Mrs James, referred to Awa as "body-snatching Uncle Bill". Perhaps unsurprisingly, Awa took exception to this description and sued the paper for defamation. Because the offending article was published in 1991, a year before introduction of the new Act, the proceeding took place under the auspices of the Defamation Act 1954, and the common law fair comment defence. The High Court,¹ and subsequently the Court of Appeal,² while agreeing that what the paper had written was defamatory, held that the defence had been successfully made out. The rationale was that while the court accepted that Awa was acting in accordance with custom, the question for the purposes of the defence was whether he was "morally blameworthy"³ in taking Billy T's body without his widow's permission. In the end it was decided that this opinion was not only possible, but was in fact held by a significant proportion of the general public, and the *Sunday News* was therefore entitled to print it.

A. Fair comment

The rationale behind the defence of fair comment is simple - it is to safeguard the vitally important right of freedom of expression, and ensure that inroads into that right are not any more than is necessary. As Diplock J put it,⁴

¹*Awa v Independent News Auckland Ltd* [1995] 3 NZLR 701 (HC). [*Awa* (HC)]

²*Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590 (CA). [*Awa* (CA)]

³*Awa* (CA), above n 2, 595 per Blanchard J for the majority.

⁴*Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743, 747 (QBD) per Diplock J. [*Silkin*]

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the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury.

Notwithstanding such sentiments, the fair comment defence still required the defendant to jump through several hoops in order to successfully claim it, and perhaps the most important of those hoops was the requirement that the opinion be fair. However, as Diplock J's views would indicate, this does not mean fair in the sense of being balanced or moderate. Although the law was less than clear on this point, the requirement of fairness appeared to be satisfied if the opinion was honest, and for this there were two tests.

The first test was an objective one - could a fair-minded person, however obstinate or prejudiced, be capable of holding the opinion?⁵ For the purposes of this test it was unnecessary to show that the opinion was *actually* held by the defendant - all that was required was that the defendant demonstrate that the opinion *could* be held by a fair-minded person. Thus, because honesty was being judged objectively, the fact-finding tribunal was required to examine more than merely whether the published comment accurately reflected the defendant's true opinion.

To illustrate, a subjective appraisal of honesty would require examination of the factors that go to that person's state of mind, that is, the defendant's motives for publishing the opinion. Judging a person's honesty objectively, however, necessitates scrutiny of what the defendant actually said, and this requires a particular standard to serve as a basis of comparison. And despite judicial reluctance to use as that standard the reasonable person test, it seems difficult to judge honesty objectively any other way than asking whether the opinion was reasonable enough to be held by the honest, or fair-minded person. Exactly how far the honest opinion of the fair-minded person differs from that of the reasonable person is discussed later in the essay.

The second, subjective test required the plaintiff to show malice on the defendant's part, or in other words that the defendant was predominantly motivated in publishing the opinion by spite or ill will towards the plaintiff, or otherwise took improper advantage of the occasion.⁶ If the plaintiff could show this, the defence was defeated.⁷ In this regard,

⁵*Silkin*, above n 4, 749 per Diplock J.

⁶*Horrocks v Lowe* [1975] AC 135, 149-151 (HL). [*Horrocks v Lowe*]

⁷*Telnikoff v Matusevitch* [1992] 2 AC 343 (HL). However, the common law was also confused on this

the fact that the defendant did not believe in the truth of the opinion was usually conclusive evidence that the opinion was not honestly held.⁸ Here it was important that the defendant actually held the opinion, but the question only arose if malice was pleaded.

In the case of *Awa*, malice was not pleaded, so the subjective test was not required. The objective test, whether the opinion could be honestly held by a fair-minded person, was held by Blanchard J for the Court of Appeal to be satisfied because it was apparent that many people did hold it. However, it should be noted that the comment criticised only the actions of William Awa, and not Maori custom or protocol itself. Had the comment done so, Thomas J in partial dissent believed that the decision may have been different.⁹ Blanchard J, for his part, disagreed, stating that "[o]ne race is entitled to comment adversely and even narrow-mindedly on another save as prohibited by statute".¹⁰ It was these obiter comments of Blanchard J that were the genesis of this essay.

II. HONEST OPINION

For the record, the statutory requirements of the honest opinion defence are the following:¹¹

In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is the author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion.

Like fair comment, this defence can only apply in two situations. Firstly, the matter must already have been deemed defamatory, and for this it must defame an individual. Group defamation actions are not available, except as provided by section 61 of the Human Rights Act 1993 (which will be discussed later in the essay). Secondly, the matter must be an expression of opinion - printed facts alone regarding Maori custom or culture are not covered by this defence. If the facts are true, the appropriate defence is truth, not honest

point; see *Cherneskey v Armadale Publishers Ltd et al* (1978) 90 DLR (3d) 321, 330 (SCC) per Ritchie J, where the view is espoused that it is for the defendant to prove that malice was not present.

⁸*Halsbury's Laws of England* (4 ed, reissue, Butterworths, London, 1997) vol 28, Defences, para 149, 78.

⁹*Awa* (CA), above n 2, 597 per Thomas J, dissenting.

¹⁰*Awa* (CA), above n 2, 595 per Blanchard J for the majority.

¹¹Defamation Act 1992, s 10(1).

opinion. The purpose of this essay is merely to explore whether Blanchard J's comments are correct, if applied to honest opinion - could an expressed opinion that has already been found defamatory of an individual attract the defence if made in conjunction with narrow-minded, intolerant, or insensitive racial criticism? For this purpose, it will be necessary to examine exactly what is meant by the word "genuine", and whether an opinion such as that described above could be considered a "genuine" one.

III. THE MEANING OF "GENUINE"

A. Reason for the change from "fair comment" to "honest opinion"

It is true that the rationale of the change in name of the defence, at least in the opinion of the Committee on Defamation that recommended the name change, was to clarify that the opinion need not be fair, at least in the popular sense. Apparently, the name "fair comment" was confusing laypeople, who thought that this meant that the comment had to be reasonable, or balanced, or that they had to agree with it. This was not the case, said the committee - the only requirement was that the opinion was honestly held by its maker.¹²

What must be noted, however, is that nowhere in section 10 of the Defamation Act 1992 is the word "honest" used. Instead, what is required is that the opinion be "genuine". The immediate question is what does "genuine" mean - is it synonymous with "honest"? If so, the objective and subjective tests at common law have been replaced with a purely subjective test,¹³ and the fact that racist comments are made at the same time is irrelevant, as long as the opinion is an accurate reflection of what the defendant actually believed at the time the comment was made. Under this interpretation of the defence of honest opinion, Blanchard J's comments would be correct.

However, it must be assumed that Parliament does not use words that do not accurately convey its intention. For example, if Parliament meant simply that the opinion need only be honest, then it must be concluded that the word "honest" would have been used. The

¹²Recommendations on the Law on Defamation: Report of the Committee on Defamation (December 1977) 37 [Defamation Committee].

¹³Bill Atkin "Defamation" in Hodge, Atkin, McLay and Pardy *Torts in New Zealand: cases and materials* (2 ed, Oxford University Press, Auckland, 1997) 610.

use of the word "genuine" would have been unnecessary. The obvious conclusion is that it must either add, or take away, something from the meaning of "honest". The remainder of the essay is an attempt to discover exactly what that is.

B. Common Law

One way to do this is to return to the rules laid down at common law. This is possible because it is generally accepted that the Defamation Act is not a code, and was not intended to be the be-all and end-all of defamation law, but merely to clarify what was becoming an extremely confusing legal area.¹⁴

One thing it may be argued that "genuine" adds under honest opinion is an objective test, much like the one under common law fair comment. If commentators, including Geoffrey Palmer, the Minister that introduced the Defamation Act 1992, are correct in saying that the change of name of the defence was only to clarify existing law, that the requirement is one of honesty and not fairness, then there appears to be no reason why a subjective test should be the only one. After all, honesty can be tested objectively as much as subjectively.

In this way, the question might be can an honest person¹⁵ hold an opinion that involves insensitive racial comment? In *Turner v Metro-Goldwin-Mayer Pictures, Ltd*¹⁶, Lord Porter opined that the word "fair" in relation to fair comment should be replaced with the word "honest", so that the requirement of honesty is not confused with one of reasonableness. Similarly, courts have, in the past, held that the standard used in determining whether an opinion could be held by a fair-minded person should not be the one used in the "reasonable person test".

The differences between a fair-minded person and a reasonable person are made clear in *Silkin*. A fair-minded person, according to Diplock J, can include one that is prejudiced,

¹⁴*Lange v Atkinson* [1997] 2 NZLR 22, 34 per Elias J (HC); (10 November 1997) unreported, Court of Appeal, CA 52/97 [*Lange v Atkinson*]; also see Judith Fergusson "Honest Opinion and Public Interest" [1998] NZLJ 14.

¹⁵It is submitted that providing the reader bears in mind that the test is one of honesty and not fairness, the phrase "fair-minded person" can be used interchangeably with the term "honest person" for the purposes of the objective test.

¹⁶*Turner v Metro-Goldwin-Mayer Pictures Ltd* [1950] 1 All ER 449. [*Turner*]

or obstinate - and in like fashion, in describing the types of views that the fair-minded person might hold, other courts have used the words "exaggerated",¹⁷ "violent",¹⁸ and even "wrong".¹⁹ A reasonable person, of course, would not hold these types of views - such a person would be expected to be, at least to a degree, respectful, tolerant, and considerate of others. Obviously, a fair-minded person may not be.

But this, it is submitted, does not mean that such a person would hold racist views. Rather, such views have no redeeming value, and it is unlikely that this is how the word "prejudiced" in *Silkin* is meant to be interpreted. "Prejudiced", it is argued, should be given its dictionary definition of "a preconceived opinion", or a "bias or partiality".²⁰ A racist opinion, or one motivated by racist beliefs, on the other hand, goes beyond that. A fair-minded person need not be as impartial and tolerant as the hypothetical reasonable person, but neither may such a person be a racist. A racially insensitive comment, therefore, should not be considered an "honest" one.

This is particularly so, history would indicate, in New Zealand. If "genuine" adds an objective element, then surely what must also be taken into account are the values of contemporary New Zealand society. This must be true even of the "fair-minded person", who, while not as tolerant as the "reasonable person", cannot fail to be positively affected by community values and freedoms. As Thomas J, dissenting in the Court of Appeal, said in *Awa*:²¹

New Zealand is a nation of two peoples. Each has its own culture and language. History, and the population imbalance in this country, mean that the European culture is the dominant culture and the Maori culture and language is in jeopardy of being engulfed. Problems and tensions ... inevitably exist. Yet, the two peoples ... must necessarily strive to work together in common accord.

These sentiments are not uncommon in New Zealand courts, and were echoed most notably by Cooke P during the New Zealand Maori Council cases in the late 1980s and

¹⁷*Turner*, above n 16, 461 per Lord Porter; *Cornwall v Myskow* [1987] 2 All ER 504, 512 (CA).

¹⁸*Merivale v Carson* (1887) 20 QBD 275, 283 (CA) per Bowen LJ. [*Merivale*]

¹⁹*Merivale*, above n 18, 283; *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 170 (CA) per Lord Denning MR.

²⁰The Concise Oxford Dictionary (8 ed, Clarendon Press, Oxford, 1990).

²¹*Awa* (CA) above n 2, 598, per Thomas J.

early 1990s. In one particular case he held that the Treaty of Waitangi "signified a partnership"²² between the Pakeha and Maori, in which each race had to act towards the other reasonably, fairly, and with "utmost good faith".²³ While the case was heard in the context of a statute (the State-owned Enterprises Act 1986) that specifically provided that nothing in the Act could allow the Government to act inconsistently with the Treaty, it is submitted that these principles are fundamental to New Zealand society, and are thus worthy of attention, if appropriate, when considering whether a comment can attract a defence to a defamation lawsuit.

Therefore, it is submitted, a comment that involves racial slurs cannot be "genuine", because, firstly, such a comment is not fair-minded, and secondly it is at odds with what is desirable in a modern New Zealand society. Thomas J felt that we should not be looking to the law for guidance on what is morally right to publish, but in the area of race relations, given the precarious position of Maori and other minorities in this country, it seems right that the dominant culture should provide as much legal protection as practicable.

It is this simple point which, with respect, Blanchard J simply fails to address in his majority opinion. By neglecting to give proper weight to the interpretation of "genuine" argued for in this essay, he also ignores the comments made by Cooke P in the New Zealand Maori Council cases, and thus the spirit embodied in the Treaty of Waitangi (a treaty which binds the Crown, at least at international law). Unfortunately, with the notable exception of Thomas J, the rest of the Court of Appeal were, again with respect, content to ignore it as well.

C. Human Rights Act

It may be argued that the Human Rights Act 1993 was introduced primarily to provide special protection to minorities, including in the area of freedom of expression. That Act makes it an offence for anyone to²⁴

²²*New Zealand Maori Council v A-G* [1987] 1 NZLR 641, 663 (CA). [*New Zealand Maori Council*]

²³*New Zealand Maori Council*, above n 22, 664.

²⁴Human Rights Act 1993, s 61(1)(a).

publish or distribute written matter which is threatening, abusive or insulting ... being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the basis of the colour, race, or ethnic or national origins of that group of persons.

If the racial slur that accompanies a comment defamatory of an individual satisfies this test, then it seems inconsistent to hold that the same slur can constitute a defence to a defamation action. Further, the way in which this section has been interpreted may mean that it is not adequate to cover all hurtful and intolerant comments that may be directed at minorities by members of the majority. For example, the meaning of "insulting" has been determined seemingly on what the common sense position is - the "views of the very sensitive are not an appropriate measure of whether something is insulting",²⁵ but instead, the correct test is the "reasonable person" test.²⁶ Common law also tells us that the question of whether hostility will be excited or contempt will be generated is determined "on the reaction of New Zealanders who are less perceptive or sensitive on racial issues than others".²⁷

Secondly, the section itself is narrower in focus than its predecessor, section 9A of the Race Relations Act 1971. Section 61 of the Human Rights Act 1993 only requires that the threatening, abusive or insulting matter be likely to excite hostility against or bring into contempt any group of persons on the basis of, inter alia, race. Section 9A, on the other hand, applied if such words were likely to excite ill-will against the group, or bring it into ridicule - both of which are seemingly less stringent tests than those under section 61. In other words, statements that are likely to merely excite ill-will or bring a group into ridicule are no longer sufficient to attract the Human Rights Act, unless they also go further, and are likely to excite hostility against or bring the group into contempt. This may result in greater protection for free speech, but is hardly consistent with Cooke P's desire for good faith between Pakeha and Maori.

Thus there are conceivably statements that may not contravene the Human Rights Act, yet are not conducive to the goal of harmonious race relations.²⁸ However, surely if a

²⁵*Skelton v Sunday Star-Times* [1995-1995] 1 NZCLD 361 (CRT).

²⁶*Proceedings Commissioner v Archer* [1995-96] 1 NZCLD 351 (CRT). [*Archer*]

²⁷*Archer*, above n 26.

²⁸This may particularly be the case if the comment is made in terms of satire. For example, if the comment in *Awa* included the opinion that Maori culture was a "body-snatching" one, or was "ghoulish"

country denounces racism it should denounce all racist speech, not just that offensive to the reasonable person, especially when you consider that the respective positions of the two races mean that the reasonable person will no doubt be Pakeha. For this reason, it seems that there is a good argument that the "genuine" requirement in honest opinion be interpreted expansively, to ensure that racist speech is caught by the law.

D. Malice

A further reason why it may be argued that such comments should not be included in a definition of "genuine" can be found in the common law rules regarding the subjective concept of malice. While it is true that section 10(3) of the Defamation Act 1992 specifically excludes from the honest opinion defence the application of malice it has been claimed that²⁹

matters which may be relied on to cast doubt on the genuineness of the defendant's opinion will be much the same as those that could be relied on at common law to establish malice, or to demonstrate that the opinion was not one which an honest person could hold.

One of the examples that John Burrows gives of evidence casting doubt on the genuineness of an opinion is if its dissemination is inspired by an ulterior motive, or exceptionally strong language is used in the way the opinion is phrased.³⁰ It might be argued that the use of racist language in an opinion is itself an ulterior motive for publishing it, especially as the opinion must be directed at an individual in order to be deemed defamatory. The opinion may well be seen as an opportunity for airing racist ideas, rather than allowing someone to air genuinely held views, which after all is a right fundamental to a free and democratic society.

Similarly, there is no reason why the use of racist language may not cast doubt on the genuineness of an opinion in the same way invective did at common law, as discussed in

for requiring a dead body to lie on a marae for three days, but is said in a semi-joking manner, or as sarcasm, it is conceivable it would not pass the reasonable person test of "insulting". Ditto racist jokes, and/or innuendo.

²⁹John Burrows "Defamation" in Stephen Todd (ed) *The Law of Torts in New Zealand* (2 ed, Brookers Ltd, Wellington, 1997) 902 ["Defamation"].

³⁰"Defamation", above n 29, 903.

the case of *Cornwall v Myskow*.³¹ The rationale behind making invective evidence of malice was that such language often exposed an ulterior motive in the comment - that of attacking the plaintiff personally, perhaps to settle a private resentment, or to injure the plaintiff - which in turn cast doubt on the subjective honesty of the defendant's belief. Strong language was permitted, as was "ironical, bitter or even extravagant language".³² However, if the criticism was so strong that it went beyond legitimate criticism, it became invective, and evidence that the comment did not reflect the defendant's true view, and certainly not a fair-minded person's view. Thus, because the comment failed both the objective and subjective tests for honesty under fair comment, it could not be covered by that defence.

In the same way, racist language could be evidence that the defendant did not really believe what was said. In *Pearce v Hailstone*,³³ Legoe J suggested that the position in Australia was correctly stated by the English Court of Appeal in *Gwynne v Stope*, a case that was reported only in the *Times* newspaper (4 May 1928). That case was not referred to in *Horrocks v Lowe*,³⁴ but was relied on by *Gatley on Libel and Slander* for the proposition that³⁵

malice could be found even where a person honestly believed what he said to be true if through anger or gross and unreasoning prejudice he has allowed his mind to get in such a state, to become so obsessed, as to cast reckless aspersions on other people which but for such state of mind he could not have honestly believed to be true.

The term "unreasoning prejudice" was first judicially used in the judgment of Lord Esher MR in *Royal Aquarium v Parkinson*,³⁶ and might very easily apply to a comment motivated by racism. After all, but for a racist state of mind the defendant could not be said to actually believe such a comment. In other words, the racist beliefs cloud the judgment of the defendant, and result in aspersions on other people being made recklessly, and maliciously. On an objective test, such a result of unreasoning prejudice would

³¹[1987] 2 All ER 504 (CA); also see *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR (NSW) 171 (SC) [*Gardiner*], and *Newbury v Triad Magazine Ltd* (1921) SR (NSW) 189 (SC).

³²*Gardiner*, above n 31, 174.

³³(1992) 58 SASR 240 (SC) per Legoe J.

³⁴*Horrocks v Lowe*, above n 6.

³⁵(9 ed, Sweet and Maxwell, London, 1998, para 16.16) 437.

³⁶*Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, 444.

prevent an opinion from being deemed "genuine", because, due to its inconsistency with the promotion of community values, that opinion could not possibly be held by a fair-minded person. However, even when "genuine" is interpreted subjectively, an opinion motivated by unreasoning prejudice could, given that it may be said to be expressed recklessly, lead a court to find that the defendant was subjectively dishonest - in other words, that the defendant did not believe what was said.³⁷ Thus, while malice is specifically removed from honest opinion, it is submitted that these are the types of situations that could cast doubt on the genuineness of an opinion.

E. Other sections of the Defamation Act

It is also helpful in interpreting the word "genuine" to examine other sections of the Defamation Act. For example, section 19(1) provides that the defence of qualified privilege is defeated if the plaintiff can show that³⁸

in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.

This is essentially the old common law definition of malice, but section 19(2) specifically provides that malice shall not defeat qualified privilege. Thus, subsection (1) appears to redefine malice insofar as it applies to qualified privilege, and raises the crucial question - for the purposes of defeating a claim of honest opinion, must there be something other than ill will or improper advantage? Or, alternatively, has Parliament left it up to the courts to determine what is "genuine", when faced with the kinds of situations that amounted to malice at common law? It may be asked what possible policy reasons there could be in excluding ill will and improper advantage from the factors that would render unavailable an honest opinion defence, if they are available for a qualified privilege defence. It would allow defendants to claim the defence of honest opinion even if the comment was made,

³⁷No doubt a subjective test on this basis would be more stringent and difficult to satisfy than the objective one, given that people are capable of subjectively holding racist opinions, and the comment would have to be considerably more objectionable to the fact-finding tribunal before it would rule that the defendant was subjectively dishonest. Nevertheless, it is still conceivable that a comment could fail the test of "genuine", even if only a subjective test applied.

³⁸Section 19(1) Defamation Act 1992.

for example, to deliberately hurt the plaintiff, rather than because it was what the defendant truly believed. Can it really be said that this is what Parliament intended?

It seems that Parliament has been deliberately obscure in what exactly constitutes malice for the purposes of section 10(3). The 1977 Defamation Committee's report recommended that the word "malice" not be used at all in the Act, as it felt the term was confusing and unnecessary, especially for lay people and therefore, presumably, jurors.³⁹ However, Parliament has deliberately chosen to include the word, and it seems left it to the courts to determine whether situations of a kind that were deemed malicious at common law could similarly prevent an opinion formed in these circumstances from being "genuine". Logic would appear to suggest that they should be.

Section 12 reinforces this contention. This section was intended to do away with the rule in *Campbell v Spottiswoode*,⁴⁰ which is authority for the proposition that if base or improper motives are alleged in the opinion, at common law this meant a more objective test was applied; not only did the opinion need to be honest, but the fact-finding tribunal also had to be satisfied that it was well founded. In *Awa*, this test appeared to be used even though no base or improper motives were alleged - nevertheless, a more objective fair-minded person test was used. Section 12 makes it clear that there is only one test - that the opinion be "genuine".

However, the word "genuine" is still not defined - if the above arguments are correct, an objective test may apply whether base or improper motives are alleged or not. Section 12 does not say that the only test that can be applied is subjective - it merely says that the test that is used must be the same as the one that is applied if no such motives are alleged. It seems possible, if not likely, that an opinion that includes those sorts of motives, like one that contains racist language, could not be seen as "genuine".

F. Purpose of the defence

The very purpose of honest opinion would seem to further indicate that the word "genuine" should be interpreted to exclude the possibility of racist comments being deemed permissible under the defence. In examining the defence of fair comment, but

³⁹Defamation Committee above n 12, 64.

⁴⁰*Campbell v Spottiswoode* (1863) 3 B & S 769, 776-777 per Cockburn CJ.

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with statements that could very easily be applied to honest opinion, Hammond J in the High Court judgment of *Awa* outlined the purpose as being⁴¹

[to encourage] those attempting to convey their findings about public matters to present to their readers or their hearers... a reasonable opportunity to discuss more intelligently the subject matter upon which they are writing or speaking.

The problem with insensitive racial commentary is that it simply does not allow recipients of the opinion with any sort of opportunity to discuss in an intelligent manner its subject matter. Instead, such comment plays on the emotion of the reader and does not allow any room for the application of logic or common sense. In *Awa*, it was argued by defence counsel that a comment motivated by Maori custom could not be spoken about intelligently if said custom is not fairly examined or respected. This argument was rejected out of hand by Blanchard J, who believed that each race deserved the right to publicly make narrow-minded and harsh observations of the practices of another, unless prevented by the Human Rights Act. He ignored the fact that the respective positions of the races in this country are far from equal, and contented himself in striking a blow for free speech.

However, Thomas J rejected counsel's submissions not because he believed it was vital in a democracy that different races be permitted to take pot-shots at each other, but because the comment was not itself directed at Maori custom. This suggests that if it had been, Thomas J may well have come to a different conclusion. This would seem to be the correct approach, because if a comment criticises Maori custom it should be the result of a balanced and reasonable examination of that custom. Otherwise, the comment is made without a fair appraisal of the facts, which in turn makes it impossible for the readers of the comment to discuss intelligently any matter connected with it.

It should perhaps be pointed out at this point that the writer is not arguing that fair, well thought out and justified criticism of Maori culture, or the culture of any minority for that matter, should be excluded from an honest opinion defence. Nor is it being argued that publishers should be prevented from printing facts about the culture. However, Blanchard J in *Awa* stated that publishers should be able to state narrow-minded and harsh opinions, except if prevented by statute, and as long as it is the honest opinion of the publisher this is

⁴¹*Awa* (HC), above n 1, 706 per Hammond J.

perfectly acceptable. However, it is seriously questionable whether such opinions are compatible with the values of a contemporary New Zealand society, or even the words of the Act itself, and certainly with the purpose of the defence.

This is especially true when the comment is made in the mainstream media. To achieve the goals above, it may be said that it is less important for the average person on the street that the test for genuineness be so applied. But for a mass medium that has the potential to influence millions of people it may be argued that it has a greater responsibility to be fair and reasonable in its published perceptions on another culture before such comments may be deemed "genuine". After all, as most defamation actions now involve the media against an individual then perhaps the law of defamation should be adapted to incorporate that phenomenon.⁴²

G. Conclusion on "genuine"

In sum, the word "genuine" should be given an expansive interpretation. If a comment is directed at (and is defamatory of) an individual, and includes at the same time insensitive or intolerant racial commentary, then it should not be permitted to attract the defence under section 10, even if the comment does not breach the Human Rights Act. The word should also be interpreted so that the comment may be examined in terms of the values of contemporary New Zealand society. If it runs counter to those values, it surely cannot be described as "genuine".

If it is true, however, that this approach takes liberties with the express wording of the statute, or that of the judgments that have interpreted the defence of fair comment, then the writer's response is simply to criticise the law as being too conservative, and insufficiently flexible to take account of the changed social climate that has resulted in the increased prevalence of racial hatred. Further, if such comments are acceptable under the honest opinion defence, then this appears to be seriously at odds with the basic purpose of

⁴²Interestingly, this view finds a supporter in Tipping J, who, in delivering the minority Court of Appeal judgment in *Lange v Atkinson* (above n 14), considered a requirement of reasonableness for the news media in connection with the defence of qualified privilege, no doubt being influenced by the potential of the media to misuse the occasion. Similarly, his comments that the defence of qualified privilege could embrace aspects of reasonableness support the above arguments regarding the relationship of the fair-minded person and racist comments, because there seems to be no reason why such comments should not also apply to honest opinion.

not only the defence, but indeed the fundamental right of freedom of expression that underlies it.

IV. FREEDOM OF EXPRESSION

A. *Diametrically opposed positions*

The fundamental nature of the right to freedom of expression is not, and has never been, in doubt. It is enshrined in domestic⁴³ and international law,⁴⁴ and forms the foundation of modern democratic society. According to the "libertarian" ideology,⁴⁵ limits are only thought acceptable if unrestrained speech would cause immediate peril to society. This is what is known, in civil liberty circles, as the "clear and present danger" test - often formulated in terms of whether allowing the speech is comparable to falsely shouting "fire!" in a crowded cinema.

On the other hand, the "egalitarian ideological position"⁴⁶ sees things somewhat differently. This position gives primacy to the ideals of amicable race relations, equal rights, and individual and collective dignity (including the right to self-determination). Further, it accepts the concept of (reasonable) limitations on the right of freedom of expression if it is necessary to protect these rights. This reasoning is echoed in the New Zealand Bill of Rights Act 1990 which, while affirming the right of freedom of expression in section 14, allows reasonable limitations to those rights by virtue of section 5. In sum, while the two positions appear to agree that hate propaganda, and insensitive and intolerant racial criticism made from a position of perceived racial superiority must come under this category, is of no benefit to society, it is the egalitarian position that would take steps to prohibit it.

⁴³New Zealand Bill of Rights Act 1990, s 14.

⁴⁴Article 19 of the *International Covenant of Civil and Political Rights* (to which New Zealand is a party); article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; article 13 of the *American Convention on Human Rights*.

⁴⁵Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 AULR 185, 189 ["Hate Speech"].

⁴⁶"Hate Speech", above n 45, 190.

B. Proponents of unrestricted freedom of expression

One of the arguments made by such people is that it is vital to the successful running of democratic government that freedom of expression be as unrestricted as possible. It is said that one of the fundamental characters of a democracy is that citizens are entitled to have a say in how it works. Therefore, it is crucial that people be able to express ideas and opinions regarding the government's performance, or lack thereof. They should also have access to all information so that they can make a considered decision in, for example, how to vote in a general election.

This is related to the "market-place of ideas" argument - that it is only by hearing all viewpoints that intelligent decision making is possible, and truth can be discovered. Thus, real gains are achieved for the community that would not be possible without untrammelled freedom of expression.⁴⁷ The conclusion is that if as much speech as possible is not allowed, even that of doubtful value to the process, society is on a "slippery slope";⁴⁸ the idea that once speech of doubtful legitimacy to the "market-place of ideas" is restricted, there is little or nothing to stop speech of crucial importance eventually being similarly inhibited.

Civil libertarians also claim that free speech is vital for a person's development in the areas of self-expression and self-fulfilment.⁴⁹ Sadurski describes this view as proposing that in expressing ourselves to others we reveal our very identity, and by receiving feedback on this expression we change not only the way we see ourselves, but also how others see us.⁵⁰ The libertarian view is that this is impossible if we are not permitted to communicate with others in an open and frank manner.

Thus, because of its capacity to assist in the proper running of democratic government, especially via the attainment of truth through the "marketplace of ideas" theory, and the opportunity for the development of self-expression and self-fulfilment, freedom of

⁴⁷Kathleen Mahoney "Hate Vilification Legislation and Freedom of Information: Where is the Balance?" (1994) 1 AJHR <<http://www.austlii.edu.au/ahric/ajhr/ajhr1121mahoney.html>> (last modified 15 December 1996). ["Hate Vilification"].

⁴⁸"Hate Vilification", above n 47.

⁴⁹Wojciech Sadurski "Offending with Impunity: Racial Vilification and Freedom of Speech" (1992) 14 Syd LR 163 ["Offending"].

⁵⁰"Offending", above n 49, 175.

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expression is seen by libertarians as having an "intrinsic value, not just as a means to an end, but as an end in itself".⁵¹ How, civil libertarians ask, could society even think of limiting something so precious?

A third argument for the libertarian position follows on from the above two - simply, that the fact that an intolerant vocal minority might or do take offence to the comment is not a justification for prohibiting it. Indeed, it has even been said that the fact the matter is offensive is all the more reason for protecting it.⁵² For civil libertarians, one of the great features of a democracy is the ability of its citizens to float unattractive ideas, and promote discussion and debate. They fear that if such ideas are inhibited just because certain members of society do not like them, the system breaks down and a police state is not far away.

It is also said that by restricting and punishing such speech what is really happening is that it is being forced underground where it is more likely to survive and flourish. Prosecution is likely to give these people a stage from which they can espouse their hatred, and any legal response may result in their being martyred. It is much better, civil libertarians say, to expose such speech to the cold light of day and the force of public opinion, which is more likely to stop it in its tracks than any amount of government legislation will do. It would also give citizens the opportunity to decide for themselves what is true and what is false, a right that every person on the face of the planet should have.

Finally, it is more conducive to the right to require the audience of speech to avoid it if they find it offensive. This idea was described by Sadurski as the "heckler's veto",⁵³ and is predicated on the idea that if we permitted the hearers of speech to determine when limitations should be placed on it, we would be allowing such audiences to be "the ultimate judges of constitutional rights".⁵⁴ However, liberals see the function of the law as preserving the rights of speakers against hostile listeners, not the other way around.

⁵¹"Hate Speech", above n 45, 191.

⁵²"Offending", above n 49, 186.

⁵³"Offending", above n 49, 181.

⁵⁴"Offending", above n 49, 181.

C. Critique of the libertarian rationale

While there is certainly some validity in the position of civil libertarians, it begins to crack when applied to hate propaganda. There are, of course, no unlimited rights in society, and the right to freedom of expression, while fundamental, is no exception. For example, while section 14 of the New Zealand Bill of Rights Act 1990 affirms the free speech right, and would override any common law rule purporting to restrict it, the justified limitations rule in section 5 also must be considered, which must in turn take into account any conflicting rights - including the right of minorities to quietly enjoy their culture, and thus that of self-determination.⁵⁵ By virtue of section 28, this is true even if the conflicting right is not expressly laid down in the statute. What must be remembered is that the New Zealand Bill of Rights Act affirms rights - it does not create them.

Similarly, the International Covenant on Civil and Political Rights makes it clear that the right to freedom of expression carries with it "special duties and responsibilities".⁵⁶ Thus, it may be restricted, but such restrictions must be prescribed by law and necessary, inter alia, to ensure the rights and reputations of others are respected. Therefore, one of the responsibilities that goes with the right of free speech is not to use that right to infringe the rights of others.

To take the arguments of civil libertarians one by one, the belief that freedom of expression is essential to democratic government, and its related "marketplace of ideas" theory, is seriously flawed when applied to hate speech. If such speech works by attacking the rights and reputations of minorities who are at a serious disadvantage when it comes to fighting back, then it is difficult to see exactly how this assists democratic government. If anything, it undermines it, because it strikes at the heart of other fundamental freedoms that are necessary for it.

Mahoney also points out that it relies on an "eighteenth century tone".⁵⁷ Essential to it is the idea that governments pose a continual danger to the freedom of the populace - and

⁵⁵The right to self-determination is enshrined in articles 1 and 27 *International Covenant on Civil and Political Rights*, and article 1(1) of the *International Covenant on Economic, Social and Cultural Rights* (both of which New Zealand has ratified). While this particular right is not included in the New Zealand Bill of Rights, the right of minorities to enjoy their culture is (s 20).

⁵⁶*International Covenant of Civil and Political Rights*, art 19(3).

⁵⁷"Hate Vilification", above n 47.

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that as soon as they are given the chance, they will return to the manner of dictatorial governments of years past. This, Mahoney asserts, completely misinterprets the functions governments are required to perform. Governments must act as a voice for those who have none - to ensure that their ideas and opinions are also heard. Hate speech, however, acts to deny minorities this voice, and is therefore the antithesis of a democratic society, as well as the desirable results of tolerance and racial harmony.

The market place of ideas theory also assumes, argues Mahoney, that all parties have the same chance to have their ideas heard. But this opportunity, in a contemporary Western society, is controlled by the mass media. The "market place of ideas" argument, conceived as it was in the nineteenth century, could not possibly have anticipated the mass media explosion of the twentieth. The simple fact today is that as far as a lot of people are concerned, the truth is whatever the mass media say it is. And control of the mass media is of course exerted by those in power, and those with wealth and influence. This is inevitably going to be the majority, which is yet another reason why the minority must be afforded special protection.

Secondly, the idea that freedom of expression should be untrammelled because it contributes to the self-expression and self-fulfilment of the citizen similarly encounters difficulties, especially when you consider, as Sadurski did, that self-fulfilment must also determine the restrictions on the freedom. For example, beating someone to unconsciousness may be your preferred means of expressing yourself, but this does not mean that you are entitled to do it. Similarly⁵⁸

insulting racial minorities may be necessary for your sense of unrestrained self-expression and self-fulfilment. But it must be subjected to the same limits that we accept, in a liberal society, with regard to any conduct, communicative or otherwise.

It should also be pointed out that intolerant racial expression does not intensify self fulfilment, because its nature is one of hate and ignorance. This does not make someone a better person, and it certainly does not contribute to society. What it does do is make someone bitter and twisted, and far from being able to see rational truths. For this reason alone, a government has the right, and indeed the duty, to step in especially if in doing so

⁵⁸"Offending", above n 49, 175.

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it allows other members of a society, particularly of a minority, the ability to develop and grow, an opportunity that they simply will not have if hate speech is allowed to flourish in the community.

The argument that government denunciation of such speech will merely serve to drive it underground is also flawed. Instead, what may well happen is that community denunciation of such speech, working through the legal system, will symbolise society's abhorrence of the speech. It would give minorities a method of redress when faced with such attacks, and would prevent not only their exploitation but also that of the rest of the community, who are prevented from thinking rationally by such speech.⁵⁹

However, perhaps the best argument for the special treatment of minorities is the reply to the civil libertarians' final argument - that this kind of expression merely causes offence to the recipient, and mere offence should never be a justification for censorship. Once again, this argument shows the civil libertarians' penchant for completely misunderstanding the fundamental nature of racism. By claiming that there is no real harm done by hate speech is to dismiss, and thus avoid confronting the real injury done to members of minorities facing such public ridicule. Sadurski describes the situation hypothetically:⁶⁰

... since the day I heard the speech, my life has clearly been transformed for the worse. Whenever I meet my neighbours, fellow workers, or salespersons in the shops, I search for expressions of dislike or contempt in their eyes. When they are rude, I attribute it to their hatred of Poles.⁶¹ When they are polite, I treat it as a symptom of their patronising attitude, or their protecting me from distress. They know that I am Polish. I know that they know. And they know that I know that they know.

Sadurski hypothesises that civil libertarians often underestimate the hurtfulness of hate speech on the psyche of the victim because they imagine how they would feel as a member of a dominant group if the same kind of speech was made by a minority constituent. Obviously, on any issue the majority can shout down the minority, and pass laws to prevent or control their public dissidence. But as a member of a minority, particularly one

⁵⁹"Hate Speech", above n 45, 195.

⁶⁰"Offending", above n 49, 186.

⁶¹Sadurski was describing the situation that confronts a Polish immigrant in the United States, but at least a similar situation must confront for instance a Maori on hearing such public speech, and it may be even worse because of the Maori's status as natives - New Zealand is their homeland, after all.

who lived in this country years before the European majority ever knew that it even existed, such speech must be especially hurtful, and deserving of prohibition. Arguing that the victim of such speech should carry the burden of avoiding it, as the people of the village of Skokie were advised to do by the Supreme Court of Illinois in 1978,⁶² legitimises the speech, and trivialises those feelings of hurt and despair.

The reader may argue that such speech, even if it does mentally harm its target, is just that - speech. It is, after all, not an act of violence, but just an expression of racist views. However, Gordon Allport, a social psychologist cited by Mahoney, argues that racist speech that physically hurts no-one is part of a process that eventually can lead to the type of genocide attempts seen by Adolf Hitler in the Second World War. There are, argues Allport, five stages - from the hateful expression itself, to the kind of "avoidance"⁶³ Sadurski wrote about, through racial discrimination, physical attack, and finally genocide. Each part of the chain depends on the one immediately before it. Hate speech is nothing to scoff at - left alone, it can do more damage than one man with a gun ever could.

V. CONCLUSION

As the above arguments indicate, the balance between allowing full exercise of the right to freedom of expression, and placing limitations on it, is an extremely delicate one - and the task of reaching the correct balance is made considerably more difficult when the rights of minorities are thrown into the mix. It is not an easy task the state has, nor is it an enviable one. But it is one that must be attempted, and in the end it is the interests of society as a whole, rather than one of the parties to the particular dispute, that must be given effect to.

It is well accepted, in an enlightened society, that racist speech has no inherent value. Thus, restricting it harms noone, least of all society. Allowing the majority of a society to ride roughshod over the rights of a minority, however, *is* harmful, not just because of the possibility of violent retribution, but because it changes a society somehow - it brings the society's commitment to freedom into question. This is the understanding behind the

⁶²*The Village of Skokie v The Nationalist Socialist Party of America* (1978) 373 NE (2d) 21 (S.Ct. Ill.), in which the defendant party had threatened to demonstrate on the streets wearing prominently displayed swastikas, in a town where approximately 40,500 of the town's 70,000 people were Jewish (thousands of whom were either personally captive at a concentration camp in Germany in the Second World War, or had relatives who were).

⁶³"Hate Vilification", above n 47.

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International Convention on the Elimination of All Forms of Racial Discrimination, article 7 of which requires member states to

A. Legislation and International Documents

undertake to adopt immediate and effective measures ... with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance, and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration on Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

International Covenant on Civil and Political Rights

That, if for no other reason, is why the word "genuine" in section 10 of the Defamation Act 1992 should be judicially interpreted to ensure that racist speech is condemned by society, through its legal system. Further justification, if any were needed, is found in examining not just the position of the common law prior to the introduction of the Act, but also the Human Rights Act 1993, other sections of the Defamation Act 1992, the purpose of the honest opinion defence, and the fundamental right of freedom of expression itself.

United States Constitution (1951) 348 F.2d 292

A quote comes to mind, one that has been used so often that it surely no longer requires citation. It embodies the spirit of the freedom of expression right, and carries with it the message enshrined in this paper - that in ensuring that its citizens live in a free and democratic society, the state must never lose sight of the fact that fundamental rights, especially those involving expression, can often be implemented at the expense of the very people they are designed to protect. As a very wise man once said: "the price of freedom is eternal vigilance".

United States v. Eichman (1987) 800 F.2d 1399 (11th Cir.)

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