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POLITICIANS AT THE FRONTLINE: DEFAMATION AND FREEDOM OF SPEECH IN NEW ZEALAND

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" Speech concerning public officials is more than self expression; it is the essence of self-government."

Justice William Brennan[0]

Ah, freedom of speech, the bastion of democracy. "Give me the liberty to know, to utter, and to argue according to conscience," cried Milton, "above all liberties." The right to freedom of expression is enshrined in international law;[1] it is a cornerstone of the Constitutions of many of the countries of the world; it has been included in New Zealand's Bill of Rights;[2] it pervades judicial and political discourse; it is part of the language of ordinary people. "It's a free country," is the catch-cry, "I can say what I like."

Nowhere is this right more important than in the political arena. The right to comment on the character, actions and policies of public officials[3], and to criticise and cajole them, is fundamental to democratic society.

Many would be surprised to learn, then, that the right to freedom of speech does not exist as such in the common law. Although it has recently been accorded a measure of statutory recognition in the Bill of Rights, for hundreds of years it only existed as a common law freedom "in the gaps" of the law, that is, where judges and legislators have not seen fit to restrict it in some way.

One reason for restricting freedom of speech is the protection of reputation and honour against unjustified attack. The law recognises that name-calling can hurt as much as sticks and stones. Defamatory slurs can foster hatred and ridicule and deal cruel blows to self-respect, personal and professional relationships and the esteem in which a person is held in the community.

The law of defamation protects people against untrue statements to their discredit. It protects everybody equally. Politicians and departmental heads have the same rights to sue for defamation as accountants, street-sweepers and publicans. But public officials sue much more frequently than do other New Zealanders.[4] Perhaps this is not surprising: they are frequently in the public spotlight and they are often involved in the resolution of important and contentious issues. Further, their careers depend on their reputations. They are naturally concerned to ensure that these are not unfairly tarnished.

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0 *Garrison* v *Louisiana* 379 US 64 (1967),74-75.

1 See, for example, the International Declaration of Human Rights UN Doc A/810, 71, Article 19; International Covenant on Civil and Political Rights 999 UNTS 171, Article 19; and the European Convention on Human Rights and Fundamental Freedoms 213 UNTS 221, Article 10.

2 Bill of Rights Act 1990, s 14 (see below n 46).

3 For convenience, the term "public official" will be used in this paper to refer to public officials elected and appointed - that is, politicians and government officials.

4 See below n 54.

Where does this leave our cherished freedom of speech, particularly political speech? Just how big are the gaps in the common law in which the right to speak resides?

Are they large enough to permit a newspaper to respond to as accusation made in Parliament by the shadow Minister of Justice that its campaign seeking harsher penalties for violent criminals was "more concerned with profits than with morals" by pointing out that the shadow Minister, as a noted Auckland lawyer, might himself have been concerned with personal profit because he stood to gain from policies which did not deter crime?[5]

Would these gaps allow a newspaper to publish a letter from a ratepayer attacking a Council decision to approve its President's application to convert his backyard garage into servants' quarters - when the Council had for years enforced a policy against people living in garages?[6]

Do these gaps provide enough room for a candidate in a general election to describe the leader of a national political party and candidate for Prime Minister as "... a man who despises many people...bureaucrats, civil servants, politicians, women, jews and professionals."?[7]

Could a newspaper rely on these gaps to quote an importer on the subject of import licences as saying "See Phil [the Minister for granting licences] and Phil would fix it" and calling for an inquiry into import licensing procedure?[8]

Are these gaps big enough to allow television journalists to ask, in a melodramatic and rather biased way, whether the government's close relationship with big business interests is "for the public good"?

In each of these cases, proceedings were issued for defamation. Legal costs have ensured that even in the one case that was settled, the speech was far from free. The other cases were won by the plaintiffs except for the final example, which has not yet reached trial. It concerns a "*Frontline*" programme that screened on Television New Zealand last year, and produced writs totalling almost $7 million.[9]

The implications for political speech are grim. "Publish and be damned" has changed from a defiant exhortation into a legal prognosis. Most news organisations in New Zealand (and most private individuals as well) cannot afford to be damned. Material which is in the in the public

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[5] *News Media Ownership* v *Finlay* [1970] 1 NZLR 1089.

[6] *Jones* v *Skelton* [1963] 1WLR 1362.

[7] The case was settled but not before the Court of Appeal had ruled out the defences of fair comment and qualified privilege and restricted the defendant's ability to plead justification: see *Templeton* v *Jones* [1984] 1 NZLR 448.

[8] *Truth (NZ) Ltd* v *Holloway* [1960] 1 WLR 997.

[9] The plaintiffs are David Lange ($1 million), Sir Roger Douglas ($2 million), Sir Geoffrey Palmer ($1.5 million), Sir Robert Jones ($1.3 million) and Richard Prebble ($1.15 million).

interest is left unpublished. We must ask ourselves whether these are the sorts of things we want to go unsaid.

The law of defamation has been much criticised in recent times.[10] At a fundamental level it is often said to be overly restrictive of free speech. At a procedural level it is seen as unduly complex and technical. In the 1970's it was the subject of reviews by the Australian Law Reform Commission[11] and government-appointed committees in Britain[12] and New Zealand.[13] The McKay Committee made a series of recommendations - substantive and procedural - for the improvement of the law. The most important was its suggestion that a special defence of qualified privilege be enacted for the media. Its report has borne fruit in the form of a Defamation Bill, which was introduced to Parliament in August 1988. However, that Bill does not contain the recommended defence for the media. It was referred to the Justice and Law Reform Select Committee which considered 28 submissions. The Bill has since been reported back, in a slightly amended form, to the House. Its legislative future is uncertain.

Although the literature is voluminous, little attention has been paid, except in a general way, to what might be called the distinction between public and private speech.[14] "Public speech" refers to comments and assertions about the behaviour, character and policies of those whose behaviour, character and policies are of particular public concern, most especially public officials. In this paper it will be suggested that this sort of speech is of a special character. It is more important to society than other types of speech and deserves extra protection under the law. This will be referred to as the "principle of free political speech".

In this paper I will

(i) discuss the recent *Frontline* programme "For the Public Good" which again raises the issues surrounding freedom of speech in the political context, and consider the political and administrative response;

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[10] See, for example, J Burrows "Defamation - the Need for Reform" in *Conference Papers* NZ Law Conference (Trilogy Business Systems, 1987), 129; G Palmer "Defamation - An Overview" in *Media Law* (Legal Research Foundation Seminar, 1988), 7; J McKay "Defamation - A Statutory Defence for the Media?" Unpublished Legal Writing Requirement Victoria University of Wellington 1985; T Goddard "You Mean I Can't Run That?" in *Conference Papers* NZ Law Conference (Trilogy Business Systems, 1987) 124; and N Strossen "Proposed Reforms of Defamation Law" in *Conference Papers* NZ Law Conference (Trilogy Business Systems, 1987) 121.

[11] *Unfair Publication: Defamation and Privacy* Australian Law Reform Commission Report No 11 1979.

[12] *Faulks Committee - Report of the Committee on Defamation* (1975; Cmnd 5909).

[13] *Recommendations on the Law of Defamation* Report of the Committee on Defamation (December 1977).

[14] The only New Zealand writers to have considered the distinction in any detail are Professor Palmer ("Politics and Defamation - A Case of Kiwi Humbug?" [1972] NZLJ 265) and Greg Lisk ("Defamation and its Effect on Freedom of Speech" Unpublished Dissertation, Auckland University 1974).

(ii) examine, in the context of the *Frontline* allegations, New Zealand's current defamation law, with a view to finding out what exactly it allows us to say, and what hurdles and traps exist for the unwary political commentator;

(iii) put the case for change, concluding that the present law does not offer enough protection to political comment;

(iv) outline the position in the United States where the speech of those commenting on public figures is given Constitutional protection, and look at the problems that have arisen there;

(v) analyse the statutory defence for the media recommended by the McKay Committee and suggest that its enactment would redress many of the problems raised in part (iii) without reproducing the problems inherent in the United States' solution;

(vi) evaluate the provisions of the Defamation Bill in the light of the free political speech principle and discuss the reasons given in Parliament for the rejection of the McKay defence; and

(vii) speculate on the likely impact of the Bill of Rights in this area.

PART 1. THE FRONTLINE PROGRAMME

At the end of April in 1990, Television New Zealand (TVNZ) broadcast a documentary called "For the Public Good" on its regular *Frontline* programme. To the accompaniment of evocative music and using slick graphics, spy-camera footage and sinister reconstructions, it raised questions about the links between the Labour government and big business interests.[15] Were these dealings, *Frontline* asked, really for the public good?

There was an immediate political uproar over the programme.[16] TVNZ received eight formal complaints which it passed on to its Complaints

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15 It revealed that Cabinet Ministers David Lange and Sir Roger Douglas were beneficiaries under trusts operated by businessman Sir Frank Renouf. It showed footage of Ministerial dinners with business leaders at Vogel House. It contrasted the substantial campaign contributions given by business leaders to the Labour Party - some received directly by Douglas - with the "good honest money" gathered during the NewLabour Party's fundraising. It examined the asset sales made and the knighthoods given to those same business leaders. It alleged that former State-0wned Enterprises Minister Richard Prebble deleted records concerning the government's asset-sales process after his demotion from Cabinet. It also suggested that the Labour Party's National Executive Committee discussed settling its $300 000 campaign debt to its advertising agency, Colenso Communications Ltd, by the award of government contracts.

16 Prime Minister Geoffrey Palmer described it as "all sleaze and innuendo" (*Dominion* Wellington, New Zealand, 30 April), and "grossly misleading, biased and unbalanced" *New Zealand Herald* Auckland, 30 April). Deputy Opposition leader Don McKinnon called for a Commission of Inquiry into the programme's allegations. TVNZ chief executive Julian Mounter sought a full report on the programme. Opposition MP John Banks even asked the Auditor-General to investigate.

Committee as required under section 6 of the Broadcasting Act 1989. Five of these complaints were upheld, at least in part.[17] The Committee found that the programme breached the Broadcasting Act and the Television Programme Standards in ten respects. It agreed that parts of the programme were inaccurate, unfair and lacked objectivity. Other parts were found to be "imprudent" but did not breach broadcasting standards.

On the recommendation of the Committee, TVNZ broadcast on its June 10 edition of *Frontline* a summary of the Committee's conclusions, an apology and brief statements from three of the successful complainants. The Prime Minister refused the offer of a right of reply, objecting to *Frontline*'s editorial control over the reply and questioning the fairness and independence of the complaints process.

The members of the New Zealand Business Roundtable (NZBR), some Treasury officials and several politicians were still unsatisfied. They referred their complaints to the Broadcasting Standards Authority for investigation and review under section 8(a) of the Broadcasting Act. On December 14 the Authority issued its decision on the NZBR and Treasury complaints.[18] It found that TVNZ's Complaints Committee had not gone far enough and upheld several specific complaints of inaccuracy and bias.[19]

The Authority concluded that TVNZ's apology programme was inadequate and ordered that TVNZ broadcast a correction and apology at peak viewing time summarising the Authority's decision and explaining that by way of punishment it had been ordered to refrain from broadcasting advertisements from 6 pm until closedown on Sunday February 3 1991.

As a result, TVNZ was held to account for its departures from accepted professional standards. A right of reply was offered. Two apologies were made. TVNZ suffered the indignity of explaining its lapses on prime-time television. It was punished financially.[20]

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[17] Press Release by Julian Mounter, June 1 1990.

[18] *Re New Zealand Business Roundtable Decision* 26/90 [1991] NZAR 63.

[19] The Authority held that TVNZ had descended into the realm of advocacy journalism. It had conveyed the impression that the NZBR was buying specific policies from politicians and engaging in covert action to subvert democratic government and that certain business interests were given preferential treatment in the asset sales. Thus TVNZ breached its fundamental obligation "to be truthful and accurate on points of fact" (Television Programme Standards, Standard 1). It held that TVNZ also breached its duty "to show balance, impartiality and fairness in dealing with political matters, current affairs and all questions of a controversial matter" (Standard 6) in that it "displayed a bias against sectors of New Zealand business and the NZBR in particular" and failed to provide NZBR officials with "an opportunity to comment upon the statements and messages about the NZBR's ideological stance and the process by which members purchased state assets... " (above n18, 90, 92).

[20] It is unclear precisely how much it cost TVNZ in foregone advertising revenue. However, all of the estimates I have seen exceed by a large margin the maximum fine for which TVNZ would be liable for non-compliance! In any case, it is submitted that this is an odd sort of punishment and one which seems to be directed as much at the

In short, the NZBR has had its pound of flesh. Its reputation has been salved. Several important question arise: Do these administrative remedies not provide sufficient protection for reputations and punishment for violations of them? Is it appropriate that TVNZ may be civilly liable for monetary compensation as well, particularly in the political field where (as I will argue later) there should be a greater degree of tolerance?[21] More importantly, should there be extra constraints on political journalistic speech beyond those of professional ethics and responsibility? It is submitted that there is much to be said for the system utilised by the Press Council which requires complainants to sign an undertaking not to sue before it agrees to pursue a complaint.

Perhaps if the codes of practice had been more carefully adhered to, the defamatory slurs could have been avoided. As I will demonstrate in Part 2, however, that is by no means certain. Just how much of a constraint on political speech are New Zealand's laws of defamation?

PART 2. DEFAMATION LAW AND THE FRONTLINE PROGRAMME

In this Part I will examine the legal rules of defamation and the operation of the legal system in which they are applied to find out what we can and cannot say under the law, particularly with reference to politicians and public officials.

The laws of defamation constrain speech in two ways. First, the legal rules themselves, even when considered in a theoretical vacuum, do not comprehensively protect political speech. Secondly, additional constraints on speech arise out of the processes of the law: the rules of pleading, the allocation of burdens of proof, the use of a jury as fact-finder and so forth.

Consider the *Frontline* case. TVNZ journalists uncovered information about the existence of share portfolios held in trust for leading politicians. They found out that Cabinet Ministers personally accepted huge political donations in private. They had listened to the claims of former members of the governing party's Executive Council that the Council discussed the possibility of awarding government contracts to the party's advertising agency to settle campaign debts. It was an election year and they believed that the public should be given this information. It raised important issues regarding the propriety of our politicians' behaviour, the funding of political parties, the openness of

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advertisers. Would not an ordinary fine be preferable? Part of the money could perhaps be awarded to the victim or paid into a trust fund to promote the ethical training of journalists.

[21] In the words of Geoffrey Robertson, QC, the award of massive libel damages is "hardly a rational way of rectifying media misconduct. It is a way as open to all as the Ritz Hotel, it chills publication - especially by uninsured journals - it takes several years before judgment is in, and it is starting to make the temple of law resemble a casino." ("Media Standards: The Common Law and the Communications Revolution" Unpublished speech from the Commonwealth Law Conference, 1990, 28).

democracy in New Zealand, the possibility of corporate capture of government and the accountability of our leaders.

Could they have presented this material so as to raise these issues and yet avoid liability for defamation? What sort of problems do journalists reporting on this sort of information face? How much can safely be said?

A.. Constraints Imposed by Law

1. Defamatory meaning

As a matter of law, a statement which defames a person to a third party is actionable. A defamatory statement is one that tends to lower a person in the eyes of right-thinking members of society generally or exposes that person to hatred, ridicule or contempt, or causes her or him to be shunned or avoided.[22]

The test is very wide. Publishers must tread very carefully. Questioning a person's integrity or propriety will usually injure his or her reputation. Criticism that is exaggerated may be held to be defamatory,[23] and the publication of suspicions can also found an action for defamation if it is implied that the plaintiff has created grounds for those suspicions.[24] The mere publication of a plaintiff's denials of allegations may produce 'smoke' that suggests the existence of 'fire' to ordinary readers.[25] Thus, even if rights of reply had been given in the *Frontline* programme, the very act of putting the allegations could be held to be defamatory!

With respect to the Colenso allegations, TVNZ was simply broadcasting a statement made by someone else. The editing may have been scrupulously fair and accurate. But that does not make a difference. All who publish a defamatory statement are liable for it.[26]

Moreover, the reporters must be very wary of the different meanings which can be placed on their words. Meanings are not confined to those apparent on the face of the words. The story must be scrutinised very carefully for defamatory inferences or innuendo - where the matter is defamatory if read in the light of other information known to the readers.

The bottom line is that it would have been very difficult for TVNZ's reporters to frame their story in such a way as to avoid any defamatory "stings" (harmful meanings) against the political figures they were writing about. The very essence of the story is the suggestion that the politicians' behaviour was naive and even unethical. It would have been almost impossible to avoid conveying to ordinary viewers the implication that something more insidious might have been going on

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22 *Parminter* v *Coupland* (1840) 6 M & W 105; *Simm* v *Stretch* (1936) 52 TLR 669; 80 SJ 669 (HL).

23 *McCormick* v *Bermison* (1938) 82 Sol Jo 869.

24 *Lewis* v *Daily Telegraph* [1964] AC 234.

25 *Truth (NZ) Ltd* v *Bowles* [1966] NZLR 303.

26 *R* v *Paine* (1696) Mod Rep 163.

beneath the secrecy. To criticise dealings for their lack of transparency and accountability is implicitly to point out the potential for those involved to abuse their position.

However, statements with defamatory meanings are not all tortious. There are several defences. If the statement published is true, or constitutes fair comment on a matter of public interest or is made on a privileged occasion, the publisher will escape liability.[27] Unfortunately these defences are not as comprehensive as they may seem.

2. Justification

The defence of justification protects statements whose sting is true or substantially true.[28] That does not mean that the whole item needs to be completely accurate.

Since the reporters were planning to make several allegations, they needed to be prepared to prove each one of them independently, even though they were partly interrelated. This is because a plaintiff can pick out one allegation and sue only in respect of that. In such cases the publisher cannot prove the truth of the article taken as a whole.[29] So, for example, if a businessman was to allege that the programme implied that his knighthood arose from his improper relationship with the government, then TVNZ could not prove the Ministerial business dinners, the asset sales and the secret donations to justify that inference.

3. Fair Comment

This defence is very important, especially in the political context. Lord Denning called it "one of the essential elements that go to make up our freedom of speech".[30] If this defence encapsulates our right to free speech, then any shortcomings it has should be a major source of concern. In fact, the shield of fair comment has been battered and holed in its many tussles with reputation.

Anyone seeking to rely on this defence must bear in mind five things:

(i) The statement must be recognisable as comment. It cannot be an allegation of fact, although inferences of fact are capable of being regarded as comment as long as the reasoning process is clearly set

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[27] A fourth defence, unintentional defamation, is contained in s 6 of the Defamation Act 1954. It provides a defence to a publisher who unwittingly and non-negligently defames a person if an offer is made to publish a suitable correction and apology.

[28] Under section 7 of the Defamation Act "...a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges." However, great care still needed to be taken with the accuracy of the assertions in the programme. It may be rare for detail to be truly immaterial.

[29] *Templeton* v *Jones*, above n 7.

[30] *Slim* v *Daily Telegraph* [1968] QB 157, 170.

out.[31] This means that TVNZ's journalists had to take care not to intermingle facts and opinions so that they could not be told apart.

The problem is that often the material may be presented as either a fact or a comment. For example, the unsupported assertion that certain government figures had entered into dangerously close relationships with businesspeople might well be construed as an allegation of fact. To be protected as fair comment it must clearly be an expression of opinion. The facts upon which the comment is based should ideally have been set out earlier in the story.[32]

(ii) The comment must be based on a factual substratum.[33] These facts must be set out in the publication or referred to with sufficient clarity. Under section 8 of the Defamation Act, however, the defence of fair comment "shall not fail by reason only that the truth of every allegation of fact is not proved if the expression is fair comment having regard to such of the facts alleged or referred to in the words complained of as are true." The liberalising effect of this provision may be largely illusory. There is nothing to stop the plaintiff complaining of part of the material only, so that the publisher cannot rely on statements of fact in the rest of the material because they are not contained "in the words complained of."

Even though the *Frontline* journalists were clearly working with a factual substratum, it is equally clear that they had to take great care with their phrasing and make sure they anchored comments securely to the facts.

(iii) The comment must be fair. This means that it must be a view that a person, however prejudiced, might honestly hold on the facts.[34] The test is much harsher where corrupt or dishonest motives are imputed. In such a case, the opinion must be a conclusion which ought to be drawn from the facts,[35] a requirement which approaches the stringency of the defence of justification.

The distinction between comments that impute corruption and those that merely suggest that particular behaviour (such as the personal receipt of enormous political donations) though not necessarily actually improper,

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31 *O'Brien* v *Marquis of Salisbury* (1889) 54 JP 215.

32 Their approach had to be of the form:
David Lange and Roger Douglas were beneficiaries under trusts operated by businessman Sir Frank Renouf. The trusts were funded by the politicians and contained thousands of dollars worth of shares. Politicians have great power to regulate and influence the economy and the share market. Their first duty must be to the public. These trusts create a conflict of interest. Moreover their secrecy gives rise to opportunities for abuse. Justice is not seen to be being done. Their involvement in this sort of arrangement should be forbidden; at the very least these interests ought to be disclosed to the public.

33 *Kemsly* v *Foot* [1951] 2 KB 34.

34 *Merivale* v *Carson* (1887) 20 QBD 275.

35 *Dakhyl* v *Labouchere* [1908] 2 KB 325. See also *Campbell* v *Spottiswoode* (1863) 3 B & S 769.

is undesirable because there are no checks on it, is crucial. There is a very fine line here as we have seen. As a consequence, journalists questioning the integrity of a particular political figure (as the *Frontline* reporters virtually had to do in order to raise the sorts of issues they wanted to talk about) would be well advised to ensure that they can prove the truth of the most extreme interpretation their words are capable of bearing or else refrain from publishing such allegations.

(iv) The comment must be on a matter of public interest. That does not mean a statement will be protected as long as the public find it interesting. It must relate to a matter of public concern and importance.[36] Comment on the competence and public behaviour of public representatives and officials clearly satisfies this requirement.

(v) The defence is defeated if the publication of the article is motivated by spite or ill-will. The mere existence of bad feelings between the defamer and the defamed person does not in law amount to malice. As long as the dominant reason for publication is the furtherance of the public interest, then in law they are not acting maliciously.[37]

This defence is what protects the speech of a host of people: political commentators, columnists, editorial-writers, participants in talk-back shows and politicians making speeches outside the House, and lecturers - right through to people writing letters to the editor or discussing the news over a cup of coffee. In light of the stringent requirements that the comment be separated from - and based upon - facts and that it be "fair", it is sobering to reflect on the prospects for these sorts of speech were they to come before the courts...

4. Privilege

False and defamatory statements which cannot be defended as fair comment nevertheless receive protection of they are made on a privileged occasion.[38]

Two types of privilege are relevant to the media. One is statutory qualified privilege. It permits fair and accurate reports of certain listed proceedings, documents and statements.[39]

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[36] *London Artists* v *Littler* [1969] 2 QB 375.

[37] This is not necessarily the way juries see things! See below Part 2B.

[38] See generally, J Burrows *News Media Law in New Zealand* (3ed Oxford University Press, 1980), 55-82; P Lewis *Gatley on Libel and Slander* (8ed, Sweet & Maxwell, London, 1981) paras 381-690.

[39] If the report concerns proceedings in Parliament or in court, it is protected by privilege providing it is not made maliciously (Defamation Act s19 and 1st Schedule Part 1). The other matters protected under the Defamation Act include fair and accurate reports of the proceedings of government inquiries, certain public meetings, local authority meetings, foreign legislatures and courts; and the contents of government statements and public registers (1st Schedule Part 2). These reports are given more limited protection. Not only must they be made without malice, the matter must be one of public concern and its publication for the public benefit. Furthermore, the publisher must, at the request of a complainant, publish "a reasonable letter or statement by way of explanation or contradiction" in order to make use of the defence

The second type of privilege is the common law defence of qualified privilege. This protects statements made in the performance of a legal, social or moral duty to people with a corresponding interest or duty to receive them.[40] It also covers statements made in furtherance of a lawful interest shared by the speaker and the listener.[41] At first blush these principles seem wide enough to protect the media when it is making statements and comments about very important things like Ministers' financial assets, their links with big business and the funding of political parties. The media can be said to have a social duty to publish these facts and the public has a corresponding interest in receiving them, particularly in an election year.

Indeed, it seems that stories about the behaviour and fitness for public office of candidates for upcoming elections may well attract privilege providing the publication is restricted, as far as is reasonably possible, to constituents.[42] Some Judges would go further. In *McSweeney* v *Berryman*, Barker J observed that "[t]he authorities may well recognise that the publication of defamatory material in a newspaper may be privileged where the matter published is of general interest and it is the duty of the publisher to communicate the information to the general public."[43]

One case, however, has stood as an obstacle to those wishing to develop a form of public interest privilege for the media. In *Holloway* v *Truth*, it was held in the Court of Appeal that[44]

> there is no principle of law which may be invoked in support of the contention the a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest.

Might the *Frontline* allegations be accorded privilege? The *McSweeney* and *O'Brien* dicta might suggest so. *Holloway* would indicate otherwise. In the words of Cooke J, as he then was, in *Templeton's* case, "the present law regarding qualified privilege is probably not wholly logical..."[45]. He concluded that change may be desirable, but must be left to Parliament.[46]

(s 19(2)). These defences facilitate the dissemination of important official information but the protection may be lost if the report is malicious, inaccurate or incomplete, or if the heading is not a fair summary of the report. What is more, they do not protect comment on that information.

40 *Adam* v *Ward* [1917] AC 309.

41 *Turner* v *Metro-Goldwyn-Meyer Pictures Ltd* [1950] WN 83; 1 All ER 449.

42 See *Lucas & Son (Nelson Mail)* v *O'Brien* [1978] 2 NZLR 289, 296 where Richmond P held that the crucial question was whether the "allegations... were of sufficient public importance to give rise to a social or moral duty to publish them in a newspaper." See also *Templeton* v *Jones*, above n 7, 459.

43 [1980] NZLR 168, 176.

44 [1960] NZLR 69.

45 *Templeton* v *Jones*, above n 7, 458.

46 It is worth wondering what impact section 14 of the Bill of Rights Act 1990, which states that "[e]veryone has a right to freedom of expression, including the freedom to

B. Additional Constraints Arising Through the Operation and Application of the Law

The width of the definition of defamation and the narrowness and uncertainty of the defences available against a defamation action are not the only problems faced by those who seek to comment on the fault and misconduct of political representatives and officials. Far from it. The processes of the law and the way it is applied in practice create huge hurdles even for those who are convinced that their utterances fall within the law.

It is one thing to be certain that a particular defence is available in theory. It is quite another to establish it in court. For one thing the burdens of proof in relation to the defences rest with the defendant. Plaintiffs need only prove that a defamatory statement was published, and that it referred to them. Plaintiffs who intend to argue malice need to prove that as well. They need not, however, prove that the statements were false, that the defendants were at fault or that any damage was suffered.

A defendant who contends that a statement was true must prove it. That can be devilishly difficult. She or he may be hampered by difficulties in compiling evidence (particularly if the plaintiff waits a while before bringing suit); by the rules of evidence (which may debar logically relevant material); and by ethical problems (if sources must be revealed). Moreover there is always the possibility that the fact-finder - be it a judge or a jury - will simply get it wrong.[47]

The frequent use of juries in defamation trials exacerbates these problems and creates new ones particularly with respect to the defence of fair comment. It is the jury's role to decide, amongst other things, whether the meaning of the material is defamatory, whether it consists of comment, whether that comment is "fair" and whether the statement was malicious. The Judge must rule whether the evidence is *capable* of supporting such findings. She or he makes such rulings in the presence of the jury. It is often suggested that this process must be very confusing for jury members.[48]

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seek, receive and impart information and opinions of any kind in any form", will have on the courts' reluctance to develop a public interest privilege. Note that, depending on how it is interpreted, the Bill of Rights may do much more than offer guidance to the courts in their development of the common law. The whole of the common law may have to be measured against its standards. See Part 7 below.

[47] Defendants face a further difficulty when pleading justification. They are stuck with the sting pleaded by the plaintiff, that is, they may address arguments only to the meanings alleged by the plaintiff. Of course, they can argue that the words complained of do not bear those meanings, but they cannot plead that the sting was different - for example, wider or less severe - and try to justify that sting instead (see *Templeton* v *Jones*, above n 7; *BNZ* v *Crush* [1988] 2 NZLR 234).

[48] For example, a juror who hears a judge say that the statement complained of is capable of tending to lower the plaintiff in the minds of right-thinking people could be forgiven for thinking that the question of whether the statement actually tends to lower the plaintiff in the eyes of right-thinking people has already been decided.

What is more, jury members may apply the ordinary meanings of "fair" and "malice" when considering these issues and conclude that to be "fair" a comment must be unbiased and warranted on the facts, and that a person who dislikes another and subsequently defames him or her is, with no further evidence, acting maliciously. Juries might also be biased against media defendants, and are wont to be swayed by the rhetoric or charisma of the parties.

Even where, despite these hurdles, a defence can be made out in court legal costs can be enormous. The archaic intricacies of the law of defamation and rules of pleading mean that both parties are forced to retain expert counsel. Delays are frequent. It is not unknown for cases to take five years to be resolved.[49] Costs may be awarded against the plaintiff but these may not amount to more than a token contribution toward the total legal bill. Nor can they compensate for the other costs of litigation - months or years of acrimony, frustration and diversion from other much-preferred activities.

Of course, if the defendant cannot make out a defence the costs will be much higher because they will include a bill for damages. These are determined by the jury which has little to go on, except the plaintiff's often exorbitant claim and perhaps a vague recollection of the huge awards made by overseas juries in resent defamation cases.[50]

Professor Burrows describes damages awards in defamation cases as arbitrary and disproportionately high and suggests that they often go well beyond the compensation of the plaintiff.[51] There is often an element of 'teaching the media a lesson', even where no exemplary damages are awarded.

Plaintiffs are well aware of these problems. They are able to exploit them by issuing "gagging writs" for exorbitant amounts of damages for the purpose of stifling debate. They often have no intention of proceeding to trial. Comments Professor Palmer: "[m]entioning large sums of money, in some cases an astronomical sum, scares quite rigid those who don't know the law".[52] Indeed even those who are well versed in the law might be forgiven a shiver of fright![53]

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[49] eg *Jones* v *Skelton*, above n 6. For a discussion of the intricacies of the law and the rules of pleading in defamation, see J Miles "Tactics and Pleadings in Defamation" in *Media Law* (Legal Research Foundation Seminar, 1988), 55.

[50] Professor Burrows (above n 38, 48) sets out the New Zealand dollar equivalents of several recent libel awards in Britain: Jeffrey Archer - $1.3 million; Elton John - $2.73 million; Baron Aldington - $4 million.

[51] Above n 38, 47. He believes that this is a dangerous practice because it in turn inflates the level of exemplary damages in cases where these are awarded.

[52] "Gagging Writs Under Fire"*New Zealand Times* 8 June 1986.

[53] Some writers believe that the problem of gagging writs is largely mythical. Barrister Tom Goddard points to the McKay Committee survey which revealed that an average of only one action a year was threatened against each media respondent between 1970 and 1974 and that when total damages awarded in court over that period are averaged out across threatened actions, each threat only cost the media a little over $700 (T Goddard "Defamation: The Committee Reports" [1978] NZLJ 96. And see the McKay Report, above n 13, 133-140).

The problems are worse in the political context where the public figures involved tend to be relatively wealthy, legally streetwise and much more likely than most to sue to uphold their reputations.[54]

We can at least derive a modicum of comfort from the right of a publisher, at the end of the day, to "publish and be damned" if the material is deemed important enough. Or can we? It seems that even this right is being eroded. A plaintiff who gets wind of a forthcoming publication and who suspects it may contain defamatory material may seek an interim injunction to prevent publication. Such applications are becoming increasingly frequent, and are all too often successful, despite apparently stringent legal safeguards.[55] Somehow the slogan "try to publish and be enjoined" does not have the same ring to it!

In sum, not only are there gaps in our legal "rights" to speak freely, we face an uphill battle to establish those we do have. This puts Frontline's editorial staff (who must decide whether or not to air a particular programme) in a quandry. Even if all reasonable care had been taken with the facts and phrasing (though it must be admitted that such care was not taken) the material may well still have been defamatory. Editors must make such decisions every day in relation to everything from an angry letter to the editor to a pointed political cartoon. "Strange!" said Benjamin Franklin, "that a man who has wit enough to write a satire should have folly enough to publish it."[56]

The fact remains, however, that a news organisation does not make its publishing decisions on the basis of average outcomes but rather on the basis of the writ or threat of one that sits on the desk with a lot of zeroes after the figure claimed. It is significant that only 2% of the threatened actions mentioned in the McKay survey actually went to trial. A further 6% were settled. Even as a proportion of cases commenced, the number of cases which made it to court is very small: only 10%. It is likely that a similar pattern will apply to the $25 million worth of defamation writs filed against media defendants in the Wellington High Court between 1975 and 1985 (*Christchurch Star* 27 August 1986).

The Australian Law Reform Commission also found evidence that made it certain that "many actions are commenced purely to deter further publication of material critical of the plaintiff" (above n11, para 53). The tactic works, so the Commission believed, because of confusion about the law of contempt of court and fear of providing evidence of malice.

[54] Former Prime Minister Sir Robert Muldoon has been involved in 18 defamation cases and has won 15 of them (*Evidence of the Right Honorable Sir Robert Muldoon Submission to the Select Committee* JL/89/426 2, 1). A study conducted in 1979 revealed that almost 30% of all plaintiffs in all defamation cases in New Zealand and Australia between 1969 and 1978 were politicians or government officials or candidates for those positions (G Palmer "Defamation Law Down Under" 64 Iowa LR (1979), 1215.) More recent figures show that eight politicians filed defamation writs between 1975 and 1985 in the Wellington High Court alone (Statistics compiled by the BCNZ: see *BCNZ Submission to the Select Committee on the Defamation Bill* JL/189/441 14A).

[55] See T Goddard "You Mean I Can't Run That?" in *Conference Papers* New Zealand Law Conference (Trilogy Business Systems 1987), 124.

[56] Note that the present laws and their application do not entirely meet the needs of plaintiffs either. They too are affected by the uncertainty, length and expense of the proceedings. The law provides no mechanism for the achievement of what in many

PART 3. THE CASE FOR CHANGE

In this part of the paper I will argue that as a matter of policy political speech ought to be accorded better protection under the law. That is, the importance of full and frank debate and robust criticism of policies and personalities in the political arena is such that any interference with such speech requires *greater justification* than interference with speech concerning more mundane affairs such as the performance of the All Blacks or the love life of a movie star. This I have denoted the principle of free political speech.

Why does political speech deserve special treatment under the law? The answers are many. They range from the democratic importance of speech relating to public officials[57] to New Zealand's obligations under international law.

A. The Importance of Political Speech in a Democracy

Frederick Shauer defines democracy as[58]

> a system that acknowledges that the ultimate power resides in the population at large, that the people as a body are sovereign, and that they, either directly or

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cases will be the best solution - a prompt retraction and apology - except, ironically, insofar as its complexities encourage early settlement. Success in a defamation case - which may receive little publicity - several years after the defamatory statement is made is hardly a ringing vindication of the reputation of the plaintiff!

[57] It must be admitted at once that the question of *how* to achieve such protection is a difficult one. In part, this is because of problems with the definition of the category of public officials. Clearly it is a category which covers a range of people whose actions and character are of varying degrees of importance to the public. While it might be clear that Members of Parliament, councillors, candidates for public office, diplomats, chief executives of state-owned enterprises and departmental heads ought to be included there may be less reason for denying more lowly government employees such as teachers, doctors and receptionists the same legal protection as people employed in the private sector.

The increasing practice of contracting out government services adds another level of complexity. How should we regard consultants, contractors and government agents? Similarly, how ought we to treat members of statutory boards, tribunals and authorities, and others performing statutory functions such as Justices of the Peace? A further problem is that the definition certainly excludes others - such as public figures involved in the resolution of important public issues and corporations with power to make decisions affecting the lives of thousands of employees and consumers - who ought for other reasons to be included, that is, who also ought to be able to offer better-than-usual justification for curtailing or punishing statements and commentary about their actions. This paper focuses on the people at the core of the category of public officials, the key players in our democratic system, those with respect to whom the arguments for freer speech are strongest. The narrowness of the focus does not detract from the strength of the arguments with respect to these people and the deficiencies of the legal system in this area. I recognise, however, that the awkward edges of the public official category raise issues of both principle and practical implementation. In part 5 it will be argued that the utilisation of a test of "public interest" as part of a general defence of reasonable care meets both of these concerns.

[58] F Schauer *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982), 36.

> through their elected representatives, in a significant sense actually control the operation of government.

Freedom of speech is at the heart of such a system. It is crucial to democracy in two ways. First, it embodies the right to speak. If self-government means that the people are sovereign and their representatives are servants, the people must be able to criticise public officials, evaluate their character and policies and inform them of their wishes so that they can truly "control the operation of government." The importance of such comment should not be underestimated. For example, the very next day after the airing of the *Frontline* programme, Prime Minister Geoffrey Palmer announced new rules requiring Ministers publicly to disclose their financial interests and assets.

Moreover free speech allows tensions to be released and fosters greater acceptance of the legitimacy of final decisions. A big problem with the laws of defamation in this area is that criticism of policy can all too easily be construed as a personal attack on those responsible for its formulation.

Defamation law is often depicted as a balance between the right to speak freely and the right to preserve one's reputation. But this is to ignore the second crucial aspect of freedom of speech: the right of the public to receive information. This right too lies at the core of a democratic system, the operation of which is in large part based on the notion of informed choice. "Whenever people are well-informed they can be trusted with their own government" said Jefferson. We need to be informed about the character of our leaders, their policies and their behaviour, particularly at election time. Secrecy, arrogance, incompetence and corruption strike at the very heart of democracy by destroying the link between government *by* the people and government and government *of* the people. Freedom of speech is the best control we have over the actions of our public officials. A government with the ability to silence its critics cannot be said to be democratic.

B. The Role of the Media

Clearly the news media are in a special position in this context. They are the only non-public organisations whose job it is to investigate and report on matters of interest to the public.[59]

Despite their vital role as purveyors of public information, the media have an odd half-life in New Zealand politics. Englishman Thomas Carlyle referred to the Three Estates in Parliament then added "but in the Reporters' Gallery yonder, there sat a Forth Estate, more important far than they all." Given that since 1950 New Zealand has had no Upper

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[59] The media see it as their duty "to inform the public, to expose injustice and corruption, to report on the performance of public institutions and, probably above all, to enable the communication between citizens, political leaders, institutions and public authorities, of information, comment and ideas that in turn shape opinion and bring about action" (*Joint Media Submission to the Justice and Law Reform Committee on the Defamation Bill 1988* JL/89/448 19 para 4.5 This submission was presented on behalf of the New Zealand Press Association, the New Zealand Publishers' Association, Radio New Zealand, TVNZ, The Listener, TV 3 and the Independent Broadcasters' Association.)

House, and given that political parties in New Zealand have historically been highly disciplined and successive governments have been strongly cabinet oriented and prodigious in their legislative efforts, we might expect the New Zealand press to be cherished as a public watchdog, an important institutional check on the government.

Not a bit of it. The New Zealand public accords to journalists about the same level of admiration and trust as it gives used car salespersons. At the same time, oddly enough, New Zealand's press is often said to be more responsible and restrained than its counterparts overseas. It is submitted that insufficient recognition is given in New Zealand to the centrality of the media to the operation of democratic government. In the United States, the press is protected as a Constitutional check on the operation of the state.[60] The same certainly cannot be said of New Zealand.

C. Changing Social, Political and Technological Conditions

Writing in 1968, Alison Quentin-Baxter described the United States' position as "the product of a different conceptual and philosophical approach; and a response to the different needs of a different environment." She explained[61]

> I suggest we assess the New Zealand law relating to defamation in its own setting: the smaller community, the greater facility for checking the truth of what is published before it goes to print, the comparatively few channels by which information may reach the public, the absence of constitutional provisions which can be re-meshed as required to accommodate changes in the balance of interests... looking at the picture as a whole, I reach the conclusion that there is nothing in the law of defamation which should make the press afraid to speak out in a responsible manner on matters which the public should know.

Mrs Quentin-Baxter makes two important points. The first is that any assessment of the adequacy of a law cannot be divorced from its social, political and technological context. It is still true that New Zealand is, in international terms, a small community. However, the past twenty years have seen a revolution in communications technology (including the development of FM radio, satellite television transmission and pay TV), the deregulation of the broadcasting industry and a proliferation in the number of television and radio stations and publications of various sorts. There are many more "channels by which information can reach the public." Our news organisations are swamped with information from a huge variety of sources around the world every day and face a much greater degree of competition as they package it for public consumption. They also face a much increased demand for discussion of and comment on public affairs. Thus the media cannot reasonably be expected to have the same "facility for checking the truth of what is published" as they had in the 1960's.

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60 See Part 4 below.

61 "Freedom of the Press" in K Keith (ed) *Essays on Human Rights* (Sweet & Maxwell, Wellington, 1968), 70.

Furthermore, in the 1990's, New Zealand does have a constitutional statute, the Bill of Rights Act. Although this is not supreme law, it may yet be used to accommodate changes in the balance of interests.[62]

The New Zealand of the 1990's is a very different country to that of the 1960's. The 1980's in particular was a decade of radical political and ideological change. In the early 1980's the National government embarked on a programme of massive borrowing to finance huge public projects and kept a tight grip on the economy using measures such as a price and wage freeze, a reserve assets requirement for banks and controls on interest rates. The Labour government of 1984-1990 reversed these policies, implementing a series of market-oriented reforms. Its campaign of privatisation, corporatisation and restructuring (most noticeably in the areas of defence, education and health) changed the face of New Zealand's society and government. Controversial legislation was also passed concerning such divisive issues as the decriminalisation of homosexual relations, the creation of a nuclear free zone around New Zealand, the relaxation of controls on abortion and the establishment of an employment equity regime.[63] The reforms have continued unabated since National took office in 1990, with major changes including the reorganisation of the labour market and the redesign of the welfare state.

What does all of this have to do with the laws of defamation? The answer lies in the changes that have been wrought in the attitudes of the public. New Zealanders of the 1990's of necessity it seems have a greater knowledge of and interest in political developments. There is widespread dissatisfaction with government policies and mistrust of politicians. People are more hardened and cynical. There is also discontent with the existing political system with calls for electoral reform and greater use of referenda becoming more frequent and strident. As well, there is an increasing awareness of minority rights and a proliferation of interest groups such as Age Concern, LIFE, ASH, HART and Greenpeace to protect sectoral interests and press for political change by mobilising public opinion.

These factors, together with both the National and Labour governments' commitment to openness and non-interference, have produced a much greater tolerance for robust - and even aggressive - debate in New Zealand. In light of the momentous changes that are occurring, vigorous political argument is both natural and necessary. Politicians are leading the way, even within their own parties! People, and particularly politicians, cannot afford to be thinskinned these days. And people doing the criticising should not have to afford to compensate them for their bruised egos as a result of defamation laws which are out of step with modern attitudes and needs.

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[62] See below Part 7.

[63] The Employment Equity Act 1990 has subsequently been repealed.

D. The Chill Effect

Ms Quentin-Baxter's second assertion is that New Zealand's defamation laws do not "chill" the media, that is, inhibit responsible reporting on matters of public interest.[64] It seems, however, that many journalists, editors, lawyers and media commentators do not share her opinion. Recent data on the increasing number and size of defamation claims seem to bear out these concerns.[65] Journalists find they "cannot get important stories to print because of the law."[66] The New Zealand Journalists' Union submitted that huge solicitors' bills, capricious legal outcomes and massive damage awards hamper the media's role in circulating information and enhancing public debate.

Editors tend to agree. The Joint Media Submission to the Select Committee considering the Defamation Bill states[67]

> As editors we believe the unreasonable and uncertain risks posed by the law of defamation prevent the publication of many matters which a proper fulfilment of our responsibility to the public interest would require. It is accepted, and entirely necessary, that due care and responsibility must be exercised in discharging that function. It is our experience, however, that the uncertainties and indistinct hazards of the law discourage the full and adequate reporting of many matters of legitimate public concern.

These problems were recognised by the McKay Committee which pointed out that the New Zealand press is not large and wealthy and has little ability to resist threats, defend proceedings and pay damages.[68] The Broadcasting Corporation of New Zealand (BCNZ) recently wasted $60 000 preparing for a trial which did not eventuate. According to BCNZ lawyer Leigh Hodgson the accuracy of the story was never in doubt except in the mind of the plaintiff.[69] Many news organisations cannot afford to engage in that sort of legal battle. For independent local newspapers and small community radio stations, for example, a large damages award - or even a hefty legal bill - could be crippling. They are forced to adopt the policy "when in doubt, leave it out." The McKay Committee's questionnaire revealed that almost 80% of those who are responsible for publication decisions had excluded material which they felt was in the public interest to publish.[70] There are even reports of

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64 Others, too, are skeptical about the existence of the chill effect. See, for example, C French "Defamation Law Reform - A Special Defence for the Media?" 4 Ot LR No 3 370 (1979); T Goddard "Defamation - The Committee Reports" [1978] NZLJ 96; and the Faulks Committee - *Report of the Committee on Defamation* (1975 Cmnd 5909) para 214(b).

65 See discussion on gagging writs, above n 53.

66 Secretary of the Canterbury-Westland branch of the Journalists' Union J Hampton's submission to the Select Committee lists a series of examples in which important public information was suppressed because of its defamatory potential. JL/89/456 25W, 1-2.

67 Above n 59, para 5.9.

68 Above n 13, para 233.

69 *Submission to the Justice and Law Reform Committee on the Defamation Bill* JL/89/440 14 para 8.4

70 Above n 13, 133-140.

occasions on which retractions and apologies have been issued by news organisations even when they were certain their story was accurate.[71]

E. The Argument From Truth

It seems, then, that editors are forced to think long and hard before publishing material which may be taken as defamatory - even when it concerns great and weighty issues. We have seen that such self-censorship has grave implications for the operation of a participatory democracy because it hampers our ability to give and receive information and opinions about the performance of our leaders and civil servants. There is another more philosophical reason why political speech ought to receive special protection. It is the "argument from truth".[72] This points out that we cannot assume our own infallibility and should not deny ourselves the chance to hear and evaluate all points of view because they might be right or partially right.

The *Frontline* programme provides a good example. Whatever its shortcomings, if it had been suppressed out of a fear of defamation actions, the public would have been denied a useful source of information and comment on several important issues.

It may seem odd to talk of "truth" in connection with political discussion and criticism. Perhaps it would be better to speak of "better" or "worse" policies and leaders. The point is that our system, in the words of Justice Learned Hand "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[73] The airing of even the most disruptive ideas (which are the most likely to be defamatory) is crucial to the health and stability of society. These test societal assumptions and have often been instrumental in the achievement of great leaps forward in scientific, economic and political thought. Today's heresy is tomorrow's orthodoxy.

Frederick Shauer argues that we can more readily justify the suppression of some categories of speech than others.[74] We can be very certain of ourselves when we say that the earth is round or that torturing innocent children is bad. The risk that these beliefs are wrong is tiny and the consequences of error are negligible. The same cannot be said of political speech. Majorities have no monopoly on the truth. Prevailing political "truths" are more likely than most categories of knowledge to be overturned with the passage of time. The chance of mistake when we

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[71] See, for example "Lies and Libel" *The Listener* 27 August 1983, 22. Further evidence of these attitudes is provided in Greg Lisk's Dissertation "Defamation and its Effect on Freedom Of Speech" (above n 10). Lisk interviewed several prominent editors and concluded that in their treatment of dubious business concerns, shoddy products, crime, local government problems and criticism of public figures the media often feel compelled to "play safe", err on the side of caution, water down or suppress stories and stick to the basic facts.

[72] Above n 58, ch 2-3.

[73] *US* v *Associated Press* (1943) 52 F Supp 362, 372.

[74] Above n 58, 32-34.

assume for example that a Minister is competent and honest or that small government is beneficial is much higher. Furthermore, because our leaders' decisions affect us in so many ways - taxes, social welfare, the provision of public facilities and services, the operation of SOEs and so forth - the consequences of error are much greater in the political field.

It has already been shown how difficult it is to avoid casting defamatory slurs in the heat of political debate. If freedom speech is not given "breathing space" by allowing people the right to say things which might turn out to be wrong - then inevitably there will be a cost in terms of political truth. Do we really want to sacrifice political truth at the altar of personal reputation?

F. A Bias in the Law?

It should be remembered that not all utterances are subject to the possibility of an action for defamation. Speeches in Parliament, for example, and official statements made between high officers of state, are absolutely privileged.[75]

The removal of these protections would create an uproar amongst politicians. "Parliamentary privilege is essential to the workings of democracy" they would cry. "We need to be able to speak honestly and fearlessly; the interests of democracy would not be served by gutless and brutally edited speeches by timorous MPs quailing at the prospect of attracting storms of defamation writs. We need to be able to debate governmental policies with full vigour and expose the mistakes and improprieties of New Zealand's elected and appointed officials. Besides, we have our own internal disciplinary procedures which ensure that we do not abuse our privileges."

Admittedly there is another reason for according privilege to Parliamentary proceedings: it can be argued that the doctrine of separation of powers would be violated if Parliamentary speech could be called into question in a court of law. However, the point is not that Parliamentary privilege should be taken away. Nor that all political speech should be absolutely privileged. The point is that most of the reasons for protecting speech in the House also apply with equal force to the speech of other political commentators.

Politicians and executive officials are not the only people whose job it is the expose the shortcomings of the government. They are not necessarily even the best qualified to do so. Nor have they been noticeably more responsible or accurate than most of the media. It is submitted that the fundamental difference between politicians and the media lies not in their respective indispensibility to democratic government, but in their ability (or inability) to pass laws to protect their interests!

The media does receive some special legal protection against defamation. Section 17 of the Defamation Act confers qualified privilege on media groups (for they are the only ones able to publish the

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[75] See generally *Gatley*, above n 38, paras 414-425.

requisite explanation or contradiction) when they are making fair and accurate reports of various public, judicial and governmental proceedings and statements.[76] Donald Zillman avers that[77]

> the law is biased toward the disclosure of public information through government channels. The same statement on a matter of public interest may be treated differently in a defamation action according to the person publishing the statement and the circumstances of the publication.

The facilitation of the media's ability to disseminate official information to the public is certainly a good thing. But is there not an imbalance here? It seems a little undemocratic for the pronouncements of those people already in positions of power to be specially protected. As their statements may well be more likely to be reported by than those of their critics they may be able to exercise a disproportionate influence over the views of the public. Participatory democracy relies on informed, not half-informed, choice.

G. New Zealand' s International Obligations

Finally, it is arguable that as they stand our defamation laws fall foul of our international obligations.[78] Article 19(2) of the International Covenant on Civil and Political Rights[79], which New Zealand ratified in 1979, states that:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Clause (3) recognises that the right entails "special duties and responsibilities" and permits "such restrictions as are provided by law and are necessary ...[amongst other things] for respect of the rights or reputations of others."

It is clear that New Zealand's defamation laws constitute a prima facie interference with this right to freedom of expression. It is also clear that they are *designed* to protect the reputations of others. Probably the laws are sufficiently clear to meet the requirement that they be "provided by law".[80] The question is, can they be said to be "necessary"?[81]

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[76] See above n 39.

[77] D Zillman "The American Approach to Defamation" 9 Anglo-American LJ 316 (1980),319.

[78] This question might arise in the context of a complaint to the Human Rights Committee under the Optional Protocol to the Covenant (999 UNTS 302) which New Zealand has also ratified. This process may serve as an extra layer of appeal for a defendant whose speech has been punished in the New Zealand courts.

[79] 999 UNTS 171 ("the Covenant").

[80] The equivalent provision in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("prescribed by law") has been interpreted by the European Court as requiring that the law be adequately accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct..." (*Sunday Times* case ECHR Series A, vol. 30 (1979),4, paras 48-49.) In view of the difficulties faced by the media and their lawyers who must try to gauge the limits of acceptable language - and particularly with respect to the legal mystery that is common law qualified privilege - there is room to argue that the law is not sufficiently clear to enable the citizen "to foresee, to a degree that is reasonable in the circumstances,the consequences which a given action may entail" (*Sunday Times* case, para 49.) However, in the *Sunday Times*

To my knowledge, British-style defamation common law has not yet been judicially tested against international human rights standards, so the question is an open one.[82]

However, it is strongly arguable that New Zealand's defamation laws curtail our freedom of speech to a degree that is not strictly socially necessary to protect reputations in an open and broadminded society. In particular, measured against the standards outlined in footnote 82 above, the law seems to take insufficient account of the special considerations that apply to political speech. It might be argued that the defences of fair

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Case the common law of contempt, which is arguably even more uncertain than the law of defamation, was regarded by the majority as acceptable under the Convention, so the laws of defamation would probably pass this test as well.

[81] The context of Article 19 would suggest that the real question is whether our laws are necessary *in a democratic society*. See Articles 21 and 22 of the Covenant.

[82] The European Court of Human Rights has, however, laid down the approach to take when interpreting the similarly-worded article 10:
(i) The right should be broadly construed and the allowable restrictions interpreted narrowly. (*Sunday Times* case, para 65) Perhaps this approach has less validity in the context of defamation law as Article 17 of the Covenant recognises a right to protection against attacks on reputation.
(ii) The hallmarks of a democratic society are pluralism, tolerance and broadmindedness. (*Handyside* case ECHR Series A, vol. 24 (1976), 4, paras 49, 146).
(iii) "Necessity" implies the existence of a "pressing social need" (*Sunday Times* case para 59)
(iv) State Parties are given a "margin of appreciation" with respect to the necessity of a particular interference. The margin is narrower the more justiciable is the issue (*Sunday Times* case, para 59). It is submitted that, compared with the category of "protection of morals" the question of what is necessary for the protection of reputation is a much more objective one so a smaller margin of appreciation is appropriate.
(v) The media have a duty to "impart information and ideas on political issues just as on other areas of public interest" (*Lingens* case Series A, No 103 8 EHRR 407 (1986) para 41) and the public have a corresponding right to receive such information (*Sunday Times* case para 65).
(vi) Two recent European Court decisions are of particular relevance to this paper. In the *Lingens* case, which concerned a prosecution for criminal libel, it was held that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance" (para 42)
These comments were echoed in *Oberschlick* v *Austria* Series A, EHRR vol. 204 (1991).
The Human Rights Committee, whose job it is to monitor States Parties' compliance with the Covenant, evidently agrees that political speech requires special protection. In 1988, for example, it asked the representative from Zaire about "the possibilities for lawful expression of opinion critical of the government or its members" (A/43/40 para 107). In 1989 it went as far as to suggest that Article 19 was relevant to the actions for defamation instituted by the President of Bolivia against members of the opposition (A/44/40 para 424). Further, when questioning the Tunisian representative on the report submitted by his country
it was asked "whether there was a growing tendency to offer less protection to political and other personalities against the danger of libel or whether instead there continued to be a relatively rigid system of protection for public figures" (A/45/40 para 526).

comment and qualified privilege provide adequate protection for comments on matters of public interest. It is submitted, however, that the scope of these defences is too limited and their application too uncertain[83] to meet the standards set out in the Covenant and that the overrestrictiveness of defamation laws in New Zealand may very well amount to a breach of Article 19.[84]

Conclusion

Democratic principle, the communications revolution, constitutional impoverishment, massive political reform, attitudinal metamorphosis, the "chilling" of the media, the philosophy of truth, bias in the common law, international obligations... this discussion has covered a lot of territory. The main point I have been trying the make is that there is something peculiarly important about political speech that justifies giving it more weight in its tug of war with reputation. We should be slower to interfere with political speech because it is vital to the operation of a democratic system of government, particularly New Zealand's system of government and more particularly New Zealand's system of government in the 1990's. Our need for - and increasingly, our expectation of - vigorous debate, frank criticism and bold, probing journalism is being frustrated (or at the very least is not compatible with) laws which effectively require us to stop before we say something that might reflect badly on someone and only say it if is provably true, technically comment or we are prepared to take a chance that it will be accorded privilege.

How might we improve the law so that it better accords with the principle of free political speech? It is submitted that the best approach is to insist that those commenting on the conduct, character and policies of our public officials be found at fault in some way before liability is imposed for defamation. Under present law it is not enough that the speaker has taken all reasonable care in relation to the facts.

It may be objected that it is unfair to treat public officials differently to other plaintiffs. I would reply that it is both unfair and dangerous not to recognise that such people are different to other plaintiffs in that they are in a position of public trust, are being paid by the public, are making decisions which affect us all, and can be taken to have accepted the risk of vigorous criticism when they accepted public office. It should also be borne in mind that public officials generally have greater access than private persons to media channels to explain or contradict defamatory allegations. Furthermore, such a change would at least partially bring defamation into line with other torts, which virtually all require that fault be proved before liability is imposed.

In Part 4 I will examine the US response to the question of how to implement the principle that political speech ought to be accorded special protection. In Parts 5 and 6 I will find out whether that question has even been asked in New Zealand.

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[83] See discussion in Part 2B above.

[84] These points may well be relevant to the interpretation of the Bill of Rights. See Part 7 below.

PART 4. THE US RULE

The American law relating to the defamation of public officials was initially based on the common law and gave no special protection to those commenting on their actions. But that changed in 1964. *New York Times* v *Sullivan*[85] was a watershed in US legal history. The US Supreme Court was the battleground for an elemental clash of values between the First Amendment's protection of free speech and free press and the darling of the common law, the right to reputation. The result was a knock-out win to the First Amendment, the embodiment, it was held, of the principle of "uninhibited, robust and wide open debate on public issues".[86]

The *Sullivan* case introduced a rule prohibiting[87]

> a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice - that is, with knowledge that it was false or with reckless disregard of whether it was false...

So a public official must now prove fault in order to make out a case. What is more, it is clear that the recklessness standard is objective. To succeed, the plaintiff must adduce clear and convincing evidence that the defendant entertained serious doubts as to the truth of the publication.[88]

It appears that, like fair comment, this "constitutional privilege" applies to all defendants whether or not they are part of the media.[89] However, it is clear that, unlike fair comment, this defence can protect falsely stated facts. Public interest in the matter is presumed. And the defendant's motive (central to common law malice) is irrelevant.

The application of the *Sullivan* doctrine was extended in a series of subsequent cases. It quickly came to be applied, as one commentator put it, to "all government employees, no matter how inferior their positions, and some persons and entities not employed by a government at all."[90] A distinction propounded in *Rosenblatt* v *Baer*[91] which limited the categories of public officials to those whose position tends to invite scrutiny and discussion independently of the circumstances of the particular controversy in which he or she is embroiled, was "all but ignored."[92]

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[85] 376 US 254.

[86] Above n 85, 270.

[87] Above n 85, 270.

[88] *St Amant* v *Thompson* 890 US 727 (1968).

[89] *Dun & Bradstreet* v *Greenmoss Builders Inc* 472 US 323 (1985)

[90] J Eaton "The American Law of Defamation Through Gertz v Robert Welch Inc and Beyond : An Analytical Primer" 61 Virg LR 1349, 1376.

[91] 383 US 75 (1966).

[92] Above n 90.

Further, the *Sullivan* defence was held to apply to criminal libel relating to public officials;[93] to the private conduct of public officials for statements which touch on their fitness for office;[94] to public figures[95] and even to private individuals if statements concern "matters of general or public interest".[96]

However, in *Gertz* v *Robert Welch Inc*[97] the Supreme Court backpedalled a little. It held that to extend the constitutional privilege to statements about private individuals would "abridge the legitimate state interest [in protecting reputation] to a degree that we find unacceptable."[98] Gertz rejects a test which hinges on the subject matter of the statement and focuses instead on the character of the plaintiff.[99] The *Sullivan* privilege, it was held, can only be used against two types of plaintiff: all-purpose and limited-purpose public figures.[100]

It is clear form this brief survey of US case law that a different balance has been struck from that which exists in the common law. In the US, a defamed public official faces extraordinary difficulty in making out a claim for defamation. Not only is the burden of proof on the plaintiff to establish fault, but the level of fault required (malice or recklessness) is high.

It is widely believed[101] that the US rules lead to the publication of many important public facts, most of them true, in circumstances where "they would not see the light of day [in Britain], except perhaps through the devious and unsatisfactory device of Parliamentary privilege."[102] It does not seem to have led to an epidemic of journalistic sloppiness, for as Geoffrey Robertson notes, reckless and malicious behaviour is not

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[93] *Garrison* v *Louisiana* 379 US 64 (1967).

[94] Above n 93.

[95] That is, persons who are "ultimately involved in the resolution of important public questions, or by reason of their fame, shape events in areas of concern to society at large": *Curtis* v *Butts, Associated Press* v *Walker* 388 US 130 (1967), 164.

[96] *Rosenbloom* v *Metromedia Inc* 403 US 29 (1971), 31, 44.

[97] 418 US 323 (1974).

[98] Above n 97, 346.

[99] Also see *Time* v *Firestone* 424 US 448 (1976).

[100] All-purpose public figures are those who "occupy positions of such pervasive power and influence that they are deemed public figures for all purposes" (above n 97, 345). Limited-purpose public figures are people who have voluntarily "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"(above n 97, 345). They are public figures only in connection with particular issues. The Court in *Gertz* did not stop there. It went on to reshape the law of defamation relating to private persons and the publication of private matters about public figures as well. It held that even plaintiffs who were private citizens could not sustain an action for defamation without proving some element of fault, though individual states were left some discretion over the degree of fault which had to be proved. Further, it held that presumed and punitive damages in such cases were unconstitutional.

[101] For example, Zillman, above n 77, 327; Robertson, above n 21, 26; Shauer, above n 72, 172.

[102] Robertson, above n 21, 26.

protected and newspapers are public figures themselves and when they overstep the mark their competitors are only to pleased to point it out using every inch of the latitude provided by law. Nor do "sensitive and honourable" people seem to have been deterred from seeking public office leaving "these positions open to others who have no regard for their reputation",[103] although these matters are not easy to prove.

Problems with the Public Figure Rule

There have been calls for the public figure doctrine to be adopted in New Zealand and elsewhere in the commonwealth.[104] However, most commentators, including the committees established to review defamation law in New Zealand and Britain and the Australian Law Reform Commission, seem to think that his would be a bad idea. They argue that the US law is too extreme in principle, too uncertain in practice and may not even achieve the intended freeing-up of speech. It is submitted that there is much truth in these criticisms.

The public official rule has been attacked as excessive in three ways. First, it is wrong to draw a distinction that separates out people who are prominent in public affairs and for that reason alone accords them less protection against defamatory statements. I have already argued against this proposition in Part 3.

Secondly, the US rule is too wide. It works against too many plaintiffs, including many not covered by the original rationale in *Sullivan*, that is that criticism of public officials should be robust and unimpeded. For example, Zillman suggests that Mohammed Ali and Sir Lawrence Olivier would fall into the category of general purpose public figures and therefore would be "fair game" for everyone whose allegations and comments were not malicious or reckless.[105] Under the reasoning advanced on this paper, there is no special reason to give any special protection to statements and comment about movie stars, sports heroes, beauty queens and the like. The public is naturally curious about such people but that does not justify denying them the legal protection against defamation accorded to less famous members of the public.

The third objection to the *Sullivan* doctrine is that it is too harsh on the many plaintiffs who fall within its scope. It is not enough that the defendant has negligently got the facts wrong. For the plaintiff to recover, the defendant must have known that the facts were wrong, or at least entertained real doubts as to their accuracy. Furthermore it is the plaintiff who must prove this mental element. Although I have argued that a shift in the balance struck by the law of defamation between speech and reputation is desirable, the US rule puts almost all of the weight on the side of free speech. A better balance might be provided by a simple negligence test, or at least a different allocation of the burden of proving malice.

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[103] *Gatley*, above n 38, para 488 n 65.

[104] For example, G Palmer, above n 10; 2 submissions to the McKay Committee, above n 13 para 488.

[105] Above n 77, 323.

There have also been problems with the practical application of the rule. Its scope is uncertain. Says Dean Prosser "[t]he precise boundaries of the constitutional privilege have not as yet been determined, and they may not be for many years."[106] This is one of the Australian Law Reform Commission's main difficulties with the *Sullivan* approach: there is no satisfactory way of specifying the plaintiffs to whom it applies.[107] Moreover, there is always the possibility that the Supreme Court will see fit to expand or restrict the scope of the doctrine in any given case.

In New Zealand, the McKay Committee concluded that the United States rule ought not to be adopted in New Zealand because of the potential for its abuse.[108] If the public figure rule were adopted in New Zealand, said the Committee, "too much emphasis would be placed on the principle of free speech at the expense of the equally fundamental principle that reputation deserves reasonable protection..."[109] I respectfully agree with this conclusion. The balance should be struck in a much fairer and clearer way than has been achieved in the US.[110]

The next Parts of the paper consider the McKay Committee's main recommendation and the provisions of the Defamation Bill. What do the Committee members and politicians believe is the appropriate balance for New Zealand?

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106 W Keeton et al *Prosser and Keeton on Torts* (5ed, West Publishing Co., 1984), 805.

107 Above n 11, 252. Even the categorisation of the petitioner as a private figure in *Gertz* itself is open to question - Gertz was a prominent author and public speaker and lawyer for public causes.

108 "We have doubts as to the possible effects of such a privilege, particularly at election time. The US rule could open the door to irresponsible journalism based on speculation rather than facts and it is difficult to accept that a licence to state false facts is necessary for healthy journalism." (Above n 13, para 490).

109 Above n 13, para 16.

110 It is interesting to note, however, that whatever the balance between speech and reputation in US legal theory, the reality is quite different. Professor Nadine Strossen argues that the chill effect of the law continues, because plaintiffs do not sue in defamation to win, they sue to punish the media and air their side of the story. The chill effect, then, resides in the continuing willingness of defamed people to sue, the fact that 80% of a defendant's total expenses are made up of attorneys' fees and costs, and the new focus of the law on the state of mind of journalists rather than of the truth or falsity of what they are saying: defendants are subjected to a minute examination of their beliefs, attitudes and motives including exhaustive pretrial discovery of journalistic information and outtakes (See *Herbert* v *Lando* 60 L ED 115 (1979), N Strossen "Proposed Reforms of Defamation Law" *Conference Papers* New Zealand Law Conference (Trilogy Business Systems, 1987), 121. The lesson for New Zealand is that the legal pall that hangs over political speech can only be lifted if procedural reforms go hand in hand with substantive ones.

PART 5. A STATUTORY DEFENCE FOR THE MEDIA

In 1975 the New Zealand government appointed a special Committee to make recommendations on ways of improving the existing law of defamation. The McKay Report was released in December 1987. The Committee concluded that the present law favours plaintiffs too heavily and made a wide array of recommendations, both substantive and procedural, many of which have been included in the Defamation Bill. Many of these, such as the liberalisation of the defences of fair comment and justification and the provisions aimed at curbing the issue of gagging writs would, if enacted, break down some of the barriers to political speech in New Zealand. These measures will be discussed in Part 6 below.

However, the Committee's most novel and important recommendation has not been included in the Bill. The Committee believed that the enactment of a special statutory defence for the media would tilt the balance of the law back in favour of the free flow of information which it felt was unduly inhibited because of the harsh treatment meted out to those guilty of accidental defamation.[111]

The Elements of the Defence and the Free Political Speech Principle

The defence was to be available to the media when they were stating facts or making comment on a matter of public interest, acting honestly and with reasonable care, and had agreed to offer the person defamed an opportunity to publish a statement explaining or rebutting the offending item.[112]

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111 Above n 13, para 230.

112 The draft provision was phrased as follows:

(1) Subject to the provisions of this section, matter published in a news medium shall be protected by qualified privilege if:

(a) The subject-matter of the publication was one of public interest at the time of publication; and

(b) So far as the matter consists of statements of fact, the person by whom it was published, at the time of publication acted with reasonable care in all the circumstances and believed on reasonable grounds that the statements of fact were true; and

(c) So far as the matter is an expression of opinion-

(i) The opinion was at the time of publication the genuine opinion of the person by whom it was published; and

(ii) The opinion was at the time of publication capable of being supported by statements of fact to which paragraph (b) of this subsection applies, either by themselves of in conjunction with any other facts known at the time of publication to the person to whom the publication was made; and

(d) The defendant has given the person who claims to be defamed by the publication an opportunity to have a reasonable statement of explanation or of rebuttal, or both explanation and of rebuttal, published in the same medium as the publication complained of, with adequate prominence and without undue delay.

(2) A defence of qualified privilege under this section by a defendant shall fail unless he proves:

(a) Where he has received a written complaint from the aggrieved person, that within 30 days of receiving the complaint, the defendant supplied to that person a statement in writing specifying-

As the Auckland District Law Society's Public Issues Committee says, this is hardly a defamer's charter.[113] For a start the media must exercise reasonable care in relation to their facts. The defence does not protect those who negligently or recklessly or deliberately get things wrong. The standard is to be that of the ordinary reasonable journalist and the Committee envisages a "sliding scale" of responsibility depending on the reliability of the source, the urgency of the publication, the seriousness of the allegation and so forth.[114] The codes of journalistic practice and the decisions of the Broadcasting Standards Authority could provide some of the background for an evaluation of the reasonableness of journalists' actions. This standard is flexible enough to respond to the realities of journalistic life and would mesh closely with public expectations and professional ethics.

Secondly, comment must be based at least partly on stated facts which meet this reasonableness requirement. This should give readers and viewers a chance to weigh the facts for themselves and form and informed opinion about the comment. It should also deter exaggeration.

Thirdly, there is a requirement that the person defamed be given a prompt and reasonably prominent right of reply. This requirement is common in continental countries, where it seems to be accepted as fair and workable even though it is often made compulsory and is available to everyone who is mentioned in the media.[115] Nor is it completely new to New Zealand, having featured in the statutory defences of qualified privilege and unintentional defamation since the enactment of the Defamation Bill in 1954.[116]

This element is designed to protect the interests of defamed persons. But it also serves the public's right to receive information. The public gets to hear both sides of the story fairly closely together and not simply in an article about the outcome of a defamation trial published two years after the initial allegation.

(i) The grounds on which the defendant believed that the statements of fact in the publication were true; and

(ii) the steps, if any, that the defendant had taken to verity the accuracy of those statements of fact; and

(b) That in giving the aggrieved person the opportunity to have a statement published under subsection 1 (d) of this section the defendant offered to pay-

(i) The costs of publication; and

(ii) The solicitor and client costs of the aggrieved person claiming to have been defamed; and

(iii) All other expenses reasonably incurred in the matter by the person claiming to have been defamed.

(3) In an action for defamation that is tried before a judge and jury, where a defence of qualified privilege under this section is raised, it shall be for the judge alone to determine whether the defence is established.

113 *Public Figures and the Law of Defamation* Auckland District Law Society Public Issues Committee 1983, 6.

114 Above n 11, para 246.

115 Above n 13, paras 492-495; above n 11, para 178.

116 Ss 6 and 17.

Another advantage of this remedy is that it addresses the harm caused by the defamatory statement, that is, injury to reputation, much more directly than does monetary compensation. It is also cheaper (particularly for the complainant whose costs are paid by the publisher), faster and less acrimonious than a legal battle. All of these factors help reduce the chill effect.

Finally the subject of the facts or comment must be a matter of public interest. The McKay Committee felt that the enactment of a definition of "public interest" would be undesirable.[117]

The question of its precise scope would be left to the court which could draw upon its statements about public interest in relation to fair comment and privilege. Such a test would have the flexibility to develop as public attitudes changed without creating the oppressive uncertainty that surrounds qualified privilege at common law.

Note that this requirement also provides some measure of protection for privacy.[118] Embarrassing personal information relating to private behaviour or personal relationships cannot be said to be "in the public interest" - even if it is true and concerns a public figure - unless it can be shown to relate to an area of public life.

Plainly the matters discussed in this paper fall within this concept. Prominent businessmen operating trusts of shares for leading politicians, the personal receipt by Cabinet Ministers of big political donations, allegations by former members of the governing party's National Executive Council that it discussed a debt-for-government contracts trade-off: these are clearly matters of public interest.[119] It is also clear that the McKay defence covers many other subjects besides political ones. It might include, for example, allegations about the activities of business and union leaders or comment about the quality of products or services offered to the public.

Thus the principle of free political speech does not exhaust the arguments about the McKay defence. The principle developed in this paper applies only to public officials, and with decreasing force to those

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117 However, it cited Gatley to give an indication of the breadth of the concept. Matters of public interest, says Gatley, include "the public conduct of any [person] who holds, or seeks, a public office or position of public trust, political and state matters, church matters, the administration of justice, the management of public institutions, the administration of local affairs by local authorities, books, pictures and works of art generally... and anything which may fairly be said to invite comment or challenge public attention." (R McEwan and P Lewis *Gatley on Libel and Slander* (7ed, Sweet & Maxwell, London, 1974), para 733; McKay Committee above n 13, para 239.) The Australian Law Reform Commission, on the other hand, felt that a statutory indication of the sorts of matters that were in the public interest should be provided: above n 11, p 209 (Draft Bill cl 7(3).)

118 Above n 113, 6.

119 Whether or not the other elements of the proposed defence were actually satisfied by the TVNZ staff is a different question. TVNZ would probably have difficulty establishing that it took reasonable care and offered an adequate right of reply.

with less authority and responsibility. What we can say, however, is that public officials certainly fall within the concept of public interest to the extent necessary to satisfy the free political speech principle.

What is more, this approach eschews the problems associated with the definition of the category of public officials because it focuses on the subject matter of the facts and comment. That sort of approach was quickly rejected in the US because it tipped the balance too far against the protection of reputation, but the McKay defence is much more closely circumscribed, requiring as it does the offer of a right of reply and the exercise of reasonable care and placing the burden of proof on the defendant. Thus the free political speech principle provides strong support for the adoption of the McKay defence.

Problems with the Defence

The defence has its detractors.[120] Those who oppose it argue that the balance struck in New Zealand's defamation law is already about right; that the common law defences offer sufficient protection for the media; that the chill effect does not exist; giving the press freedom to "malign with virtual impunity will unleash a torrent of defamatory material";[121] that the right of reply will do little to restore a defamed person's good name; that it does not stop the publisher from repeating the libel; that the defence will add to the complexity, length and cost of defamation actions; and that anyway it is impossible to legislate investigative journalism into existence - the media's tight budget and general community attitudes are much greater constraints than the defamation law.

The first three objections have been addressed earlier. It is submitted that the fourth does not give enough credit to constraints of professional ethics, or to the limits of the defence, particularly the requirements that the media act reasonably and give defamed persons a chance to put their sides of the story. As for the adequacy of the right of reply provision, it must be admitted that a rebuttal or explanation would not have the impact of a retraction or apology, and that it cannot magically erase the effects of the original defamatory statement, but as a second-best solution it is a lot better than a lengthy and expensive court battle. It is quick, it is cheap, it is fair, it tackles the harm done as far as possible, and there is nothing to prevent responsible publishers from themselves acknowledging and apologising for any errors that are pointed out to them. If they repeated the defamatory statement after that it would be difficult for them to argue that they had taken reasonable care with their facts on the second occasion.

While the defence may add to the complexity of cases which do come to trial, its very aim is to avoid the need for such trials in the first place by providing a mechanism for defamed persons to use instead of going

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120 See, for example, French, above n 64.

121 French, above n 64, 374.

to court.[122] It is to be hoped that this defence would lead to less overall litigation, not more.

Certainly the defence is not likely to produce a spurt of investigative journalism. But that is not its purpose. Its purpose is to encourage the media not to hesitate to publish all material of public concern which they reasonably believe to be accurate.

Others believe that the McKay defence is so hedged about with safeguards that it will be of little use in practice but do not actually oppose its enactment.[123] They say it will be almost impossible to reach agreement on the wording of the right of reply and that it will be difficult to establish that reasonable care has been taken, particularly as journalists are likely to refuse to disclose the sources of their information.

In answer to the first concern, the McKay Committee recommended that parties should be encouraged to refer any such disagreements to an independent third party and that such an offer made by the defendant would provide evidence of the reasonableness of the statement.[124] As for the second concern, it is certainly true that the courts' interpretation of the reasonableness requirement will be crucial to the efficacy of the defence. Leigh Hodgson worries that it will be easy for the plaintiff to point to avenues which ought to have been checked out before publication.

It is also true that journalists might on occasions be reluctant to disclose their sources. The McKay Committee realised as much. Yet it still felt that the defence would be of use to the media. "In most cases," it thought, "the initial source merely alerts the journalist to as matter which he then follows up elsewhere and the defence would then be available without any need to rely on the initial information."[125] It is also possible that the source may subsequently go "on the record" so that the problem dissolves. It is significant that three members of the Committee were directly involved in the media in New Zealand, and that the defence has generally been supported by other sectors of the media.[126]

Professor Burrows recognises these problems but he makes a different point. Whatever the practical difficulties with the defence, he says, its potential impact on the whole complexion of defamation law should not be underestimated. Its liberalising effect could have an influence over close decisions in other areas such as the circumstances in which qualified privilege may be granted at common law. He concludes:[127]

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[122] Indeed, it may provide the only feasible remedy for an impecunious plaintiff.

[123] For example, Hodgson, above n 69 and T Goddard *Submissions on the Defamation Bill 1988* JL/89/446 18.

[124] Above n 13, para 266.

[125] Above n 13, para 249.

[126] See especially the Joint Media Submission to the Select Committee, above n 59, para 8.

[127] *The Defamation Bill 1988* Submission to the Select Committee, JL/89/443 16, 5.

> Often the spirit of such a change is as important as the letter: it can change the climate of the law and I believe the climate of the law of defamation badly needs to be changed.

Suggested Improvements to the Defence

There are others who argue that the defence does not go far enough.[128] One criticism is that the defence should not be restricted to "matter published in a news medium." The principle of free political speech offers support to those who believe that the defence should be extended. Although I have argued that the media occupies a special position in a democratic society in that it they are responsible for meeting our right to be informed and act a a check on the operation of government, many of the arguments for freeing up political speech apply equally to the speech of private persons. The benefits of robust debate with respect to the operation of democracy and the discovery of "truth", the public's expectation of and need for wide open discussion and criticism, and our international human rights obligations all justify protecting the political speech of workmates in a public bar as well as that of political columnists in a newspaper.

The Committee gives two reasons for limiting the availability of the defence to the news media. One is that "[t]he subject matter of a private slander will seldom be of public interest." No doubt this will be of great consolation to the 'rare' non-media defendant who does speak out on matters of public interest. But are such persons really so rare? It should be remembered that all those who publish a defamatory statement are liable for it - including of course the original maker of a statement subsequently picked up by the media. The maker may have taken all reasonable care in relation to the statement. The news organisation may simply have ascertained that the maker took that care. Why should the media be able to rely on the maker's care when the maker himself or herself cannot? A similar argument applies when the media is not involved at all.

The second reason given by the Committee for the limitation of the defence to the media is that it will often be impossible for private defendants to publish a reply by the defamed person. It is submitted that this is to ignore the opportunities that often exist for private persons to correct defamatory statements. If the defamation occurs within an organisation or society, for example, a right of reply might be given in a newsletter or internal memo. Alternatively, a private person could meet the costs of the publication of a right of reply in a local newspaper. Another option is simply not to apply the right-of-reply requirement to non-media defendants at all. After all, their audience is likely to be much smaller.

The point to underscore is that we ought to think carefully before we deny to particular people who have taken care with their facts and are speaking about matters of public concern a defence that is available to

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128 See, for example, Burrows, above n 127; McKay, above n 10; B Atkin *Submission to the Justice and Law Reform Committee on the Defamation Bill 1988* JL/89/437 11.

the media in similar circumstances, simply because they might lack the ability to offer a right of reply.

A second criticism of the proposed defence is that it can be defeated by malice. Even if the term "malice" is replaced by a test of "improper motivation" as recommended by the Committee[129] so that it is less confusing to the jury, the fact remains that a person who can meet all the requirements of the defence may nevertheless lose its protection simply because of his or her personal reasons for publishing the statement. It is submitted that, from a public point of view, no statement which is on a matter of public interest and is honestly and reasonably believed by its maker can be regarded as having an improper purpose. We ought not to discourage any such statements regardless of the publisher's motivation. To do so would be to deny the public information which is by definition valuable. It is anachronistic and contrary to principle to punish a person for her or his improper motives whose actions would otherwise be lawful. The Committee recommended that malice be moulded into an honesty requirement with respect to fair comment. There is already an honesty requirement in this defence. That should be sufficient to deter malice of any flavour which is publicly significant.

Conclusion

In conclusion it is submitted that a new defence along the lines suggested by the McKay Committee would help redress the imbalance of the law and reduce its inhibitory effects on political speech. So, for example, a reporter who has discovered the making of huge secret payments by businessmen to political leaders, is sure of those facts, and wishes to point out in strong terms that such practices are improper could, if the defence was enacted, make such allegations with a great deal more confidence than at present that whopping defamation writs would not ensue. As things turned out, even if the defence was enacted it may well not be available to TVNZ in the *Frontline* case. But perhaps that is an indication of its strength. Such a defence would be tolerably certain, workable and fair to those whose reputations had been falsely impugned.

Certainly the scope of the defence is wider than the justification advanced in this paper. Nonetheless, the reasons put forward in support of the protection of political speech highlight the need for such a reform. They also suggest that the McKay defence should be modified a little. It should be expanded to cover everyone stating facts and making comments on matters of public interest and 'malice' on the part of the publisher should not defeat the defence.

The Committee records that it spent much of its time discussing and formulating this defence.[130] It was the central plank in its raft of recommended reforms. However, the politicians were always likely to be less enthusiastic about the idea. There was much interest in whether

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129 Above n 13, para 269-279; see also Defamation Bill 1988 cl 12.

130 Above n 13, para 234.

Professor Geoffrey Palmer, a member of the Committee and later Minister of Justice and then Prime Minister, would be able to persuade his colleagues in the Labour government to accept the Committee's recommendations.

PART 6. THE DEFAMATION BILL

In August 1988, more than ten years after the release of the McKay Report, the Defamation Bill was introduced to the House. Justice Minister the Hon Geoffrey Palmer said that the Bill set out to clarify and simplify the law of defamation and was in large part based on the recommendations of the McKay Committee.[131] However, it stopped short of including the special qualified privilege defence for the media. Nevertheless, Eden MP Richard Northey called it, without further explanation, "an important constitutional advance."[132]

The Bill was referred to the Justice and Law Reform Select Committee for consideration and the hearing of submissions. A number of minor changes resulted. The Bill was reported back to the House in October 1989. Although the principle of free political speech was not discussed (except in very general terms) before Parliament or the Select Committee, the Bill contains a series of reforms which would be of some benefit to those commenting on the character and conduct of public officials. The most important of these (in the context of this paper) are:
(i) the reform of the defence of justification ("truth");
(ii) the reform of the defence of fair comment ("honest opinion");
(iii) the measures dealing with gagging writs;
(iv) the creation of new remedies; and
(v) the provision for judicial conferences.

These will be dealt with in turn.

(i) The Reform of the Defence of Justification ("Truth")

Under the Bill, a defendant alleging truth would be entitled to allege and prove the truth of any of the imputations contained in the publication, and that the publication taken as a whole was substantially true.[133] This will mean that plaintiffs will not be able to snatch snippets of speech out of their context and sue on them alone.[134] The latitude that this change should provide for the wording of speeches and articles - as long as they are not materially false - is particularly important in the political context where politicians tend to be sensitive to minor errors and quick to sue and where the discouragement of the articulation of any perspectives of "truth" has its highest social cost.

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131 NZPD vol 491, 1988: 6369.

132 Above n 131, 6374.

133 Cl 8(2) and 8(3).

134 However, as Professor Burrows points out, the Bill does not clearly allow the defendant to plead and prove a meaning different to that alleged by the plaintiff: above n 38, 106.

(ii) The Reform of the Defence of Fair Comment ("Honest Opinion")

The Bill replaces the common law concept of malice with a requirement that the defendant prove that the opinion was genuine, or, where it is made by somebody else but not adopted by the defendant, that it was the genuine opinion of the author (in the case of employees and agents) or that the defendant had no reasonable cause to believe it was not the opinion of the author (in the case of such people as authors of letters to the editor and participants in talk-back shows).[135] Insofar as it replaces the confusing and irrelevant concept of malice it is submitted that the proposed reform improves the law by destroying another brick in the legal wall that surrounds free speech.

The honest opinion reforms would also eliminate two other bricks: the one which compels a defendant to prove that the comment related to facts referred to in the publication (the Bill would permit the proof of other foundation facts if they were generally known at the time of publication[136]) and the one which requires a defendant who imputes corrupt or dishonourable motives to a person to demonstrate that the allegations were warranted (this special rule would be abolished[137]).

These are significant reforms. They would iron out unjust technicalities and make the law better reflect the expectations and practices of society. The second reform, especially, receives strong support from the arguments made in this paper. It has been demonstrated how difficult it can be to avoid impugning the integrity of politicians or other public officials when criticising their performance, their policies and the ethical rigour of their conduct. In view of the supreme importance of the quality of our leaders, such speech should be given special protection not special restraint!

(iii) Measures Dealing with Gagging Writs

The Bill contains several provisions aimed at controlling the issue and efficacy of gagging writs. Under clause 33 the plaintiff's statement of claim cannot specify the amount of damages sought in proceedings for defamation against a news media defendant. If the judge feels that the damages claimed at trial are grossly excessive and the jury awards less, the court is to award costs to the defendant.[138] Clause 39 permits the

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[135] Cl 9A There seems to be an alarming gap in this provision. It appears that the defence of honest opinion will fail if the opinion was written by an employee or agent but "purports to be the opinion of the defendant" (cl 9A(2)(a)(i)). Editorials fall into exactly this category. Editorially slanted features may do as well. Editorials are the very epitome of the sort of speech that a defence of fair comment is designed to protect. Are they to receive no protection at all?! Another difficulty involves the interpretation of the "genuine opinion" requirement. Why must the opinion be "genuine" rather than "honest" as the new title of the defence would suggest? Is there a difference? Must the defendant show that the opinion was actually held, or merely that it was one that an honest person might hold?

[136] Cl 9B

[137] Cl 9C

[138] Cl 33(2).

defendant to apply for the proceedings to be struck out (so that they cannot be reinstated without leave) for want of prosecution if no date has been fixed for trial and no other action has been taken for the preceding 12 months. Further, clause 34 deems proceedings vexatious if they are commenced with no intention of proceeding to trial.

All of these measures are open to objection. Will the defendant's fright at receiving a writ be substantially less simply because damages are not specified? Why should a successful plaintiff ever have to pay the defendant's costs? Will the potential for proceedings to be struck out have any deterrent effect on the issue of gagging writs when they were never intended to be pursued? How could such an intention be proved for the purposes of clause 34?

It is submitted, however, that the Bill makes the best fist of a very difficult problem. The provisions at least have educative value and at best may deter a pernicious practice which can stifle debate on issues of great public moment.

(iv) The Creation of New Remedies

The Bill contains three new remedies.

First, the defamed person may seek a retraction or reply. If this is granted by the publisher with reasonable promptness and prominence and the publisher meets the requester's costs, including economic loss caused to the requester by the statement, the publisher's actions are taken into account in mitigation of damages.[139] Quite apart from the interpretative difficulties thrown up by this provision (what is a "reasonable reply"?; what is covered by the term "pecuniary loss"?), this clause is unlikely to be utilised often. The publisher will usually be able to negotiate a better settlement than the clause envisages - and thereby make the whole problem go away.[140]

Second, the plaintiff may seek a simple declaration that the defendant is liable for defamation. If this is the sole remedy sought and the claim is successful, the plaintiff will normally be awarded costs.[141]

Third, the plaintiff can seek a judicial correction order. The award of costs is again used as an incentive to encourage plaintiffs to seek this remedy alone. If a plaintiff chooses to seek a correction order, special damages (that is, economic loss) are still recoverable. General damages are not. The judge may give directions as to the form and content of the correction but must have regard to the defendant's interest in maintaining the style and character of the publication.

Needless to say the media are not overly enamoured with this provision. They argue that it violates their right to decide what *not* to publish and

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[139] Cls 18 and 21.

[140] Burrows, above n 38, 54.

[141] Cl 17. Damages may be sought as well, but the grant of a declaration will be taken into account when the sum is determined: cl 21.

sets a dangerous precedent for further inroads into the independence of the media. Furthermore, there are technical problems with its application.[142]

Despite these difficulties, it is submitted that the public's right to be informed justifies the availability of correction orders. They facilitate informed choice. If an independent fact-finding tribunal concludes that a news organisation has erred it would seem odd for the organisation to argue that the public interest is advanced by its refusal to publicly acknowledge that finding. They cannot be directed to print apologies or retractions as such. The limits of the remedy are circumscribed closely enough to allay concerns that this may be the 'thin end of the wedge'.

Further, the non-availability of general damages when a correction order is sought ought, if this remedy is used often enough, to reduce the financial deterrent to the publication of stories whose facts are believed true but may be difficult to prove in court.[143]

(v) Provision for Judicial Conferences

The Bill would empower judge to call a conference with or without an application by one of the parties. At the conference the judge may try to resolve particular issues between the parties, make a correction order with their consent, elicit admissions of fact, make orders relating to discovery and interrogatories and expedite the proceedings by fixing dates for the filing of documents or the taking of other such steps.

To the extent that Judicial conferences succeed in encouraging settlement, speeding up the judicial process and narrowing the issues at trial, they should lead to a welcome reduction in the costs of defamation actions and a corresponding warming of the journalistic climate.

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142 That is, because it comes at the end of a trial it is unlikely to be speedy; it is only really appropriate for statements that are demonstrably untrue; the burden of proof should not lie with the defendant; and problems may arise where the defendant is an individual whose statements are reported through the media: see Burrows, above n 38, 52-54.

143 Correction orders are central to the Australian Law Reform Commission's recommendations for the reform of defamation law. The Commission received overwhelming support for the proposal, which was "accepted as fair and workable by all the major media interests in Australia" (above n 11, para 258). It reasoned that correction orders strike a better balance between speech and reputation by creating a middle ground to replace the former 'damages or nothing' approach (paras 257, 277-278).
It also emphasised the need for speed and recommended that defamation cases be given priority in the courts. Quick judicial consideration of these issues should also deter gagging writs because "[t]here would be little point in an action in which bluff is liable to be called so quickly" (para 258). Applications for correction orders in New Zealand are given no such priority. Given the special nature of such a correction remedy whose efficacy depends on its ability to "catch up" with the original libel and given the public interest in having both sides of public issues presented relatively contemporaneously, perhaps we too should give consideration to expediting such claims.

Other Changes

There are many other measures in the Bill that will help to simplify, clarify and improve the law and its procedures. These include the abolition of criminal libel,[144] the extension of the categories of statutory qualified privilege,[145] the replacement of malice with a codification entitled "rebuttal of qualified privilege",[146] and the direction to judges to make their rulings on the question of whether the words complained of are capable of being defamatory in the absence of the jury.[147]

Omissions from the Bill

There is much that is useful in the Bill. But that does not make it a "major constitutional advance". In fact, the Bill is more notable for what it does not achieve than what it does. It does not, for example, tighten up the availability of interim injunctions and insist on a hearing for the defendant before they are issued; it does not curtail (or abolish) the role of juries or even set a ceiling on the level of damages; and it does not reenact the defence of unintentional defamation[148] which, although little used in court, may well be affecting the outcomes of out-of-court settlements.

More importantly, the Bill does not include the one reform which would have really altered the balance of New Zealand's law in favour of the right to speak and the right to receive information: the McKay Committee's defence of qualified privilege. Introducing the Bill to Parliament, the Hon Geoffrey Palmer confided that he knew "of few subjects that excite more passionate concern among members of Parliament" than the law of defamation.[149] Indeed it has often been suggested, several times by Professor Palmer himself, that politicians have a vested interest in keeping defamation laws exactly as they are.[150] So it is disappointing, but not surprising, that they have "gutted"[151] the package of reforms recommended by the McKay Committee.

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144 Defamation Bill 1988, Cl 47(2).

145 First Schedule, Part II, cls 5, 9, 10.

146 Cl 12.

147 Cl 27. One wonders why the Bill does not apply this rule to the judges' preliminary determinations on malice and fair comment as well.

148 Above n 27.

149 Above n 131.

150 G Palmer "Politics and Defamation" Address to Auckland District Law Society 'Waitangi' Seminar 14 June 1980.

151 Rotorua MP Paul East NZPD vol 502, 1989: 12898. Paul East's speech was a remarkable one. At first he seemed to chastise the government for "gutting" the "far reaching" and "major" reforms proposed by the McKay Committee. He went on to outline the terms of the defence and presented a fair case for its enactment. He concluded, however, that it was "not warranted' because it would make our law too much like that of the US. His coup de grace was that American public figures who are unfairly defamed "would wish to have a place in the laws we have in New Zealand."

The reasons given in Parliament for the scrapping of the defence were diverse and, with respect, unconvincing. Many of the arguments discussed in Part 5 were raised again in the House.[152] Particular weight was placed on the argument that "there is no justification for according the news media special privileges that are not enjoyed by ordinary citizens"[153] though the prospect of extending the defence to everybody was not discussed. It was also stressed that the defence would be unworkable as journalists would refuse to disclose their sources.[154] As has already been pointed out, the media themselves believe otherwise.[155] The MPs' argument is infuriatingly paternalistic - it is like denying a child an ice cream on the grounds that she will not eat all of it!

Having listened to these arguments the hon Richard Prebble and the hon Bill Jeffries both maintained that truth (justification) alone is a sufficient defence for the media. It seems that the same reporters who would be loathe to reveal their sources to prove that they had taken reasonable care with their facts, are perfectly willing to do so when the issue involved is one of truth! Furthermore, if truth is indeed the "100% defence" and the media do not deserve any special protection unavailable to other members of society, why should the position of MPs in the House be any different?

A further argument against the defence was that "the news media environment has changed dramatically since 1977".[156] That is certainly true. Some of the changes have already been outlined in this

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He ignored the huge differences between the proposed defence and the United States' public figure rule. Not only is the standard of care expected of plaintiffs higher under the Committee's defence, but the burden of proof rests with the defendant who is also required to offer the defamed person a right of reply.
As for his other point, it cannot be doubted that plaintiffs can recover more easily under the laws of New Zealand than under those of the US. In fact this would be so even if the McKay defence were enacted. But his argument does not actually take us anywhere. Is it supposed to be self-evident that the rule which most benefits politicians and other public figures is for that reason alone best for society as a whole?

[152] The government felt that "there was no pressing need to change the existing balance between freedom of speech and the protection of reputation." (Palmer, above n 131). The hon Richard Prebble was loathe to give the media licence "to publish lies about people in public office with impunity" (above n 151, 12899). He also asserted that the present laws do not inhibit public debate. I need not canvas the replies to these arguments again in any detail. Suffice to repeat that I believe that our defamation laws do inhibit speech, that a society which valued the free political speech principle more highly would strike a different legal balance and that the McKay defence contains sufficient safeguards against abuse.

[153] Remuera MP Doug Graham, above n 151, 12896; see also Glenfield MP Judy Keall's speech at p 12897.

[154] See, for example, Eden MP Richard Northey's speech, above n 151, 12895.

[155] Above Part 5.

[156] Above n 131. Admittedly Professor Palmer is not the best person to put these arguments as he supports much more radical reform. (See G Palmer "Defamation - An Overview" in *Media Law* (Legal Research Foundation, 1988), 7, 14.

paper.[157] There is a much greater volume of material being distributed these days and consequently an increased likelihood that defamatory statements will be made. There is also a greater demand for news and discussion of public affairs, the media are more competitive and there is less opportunity to check stories as they are being released. These factors point to the need for tight control over the media. They also point to the need for laws which recognise the constraints on the media and the importance of their role. At best the arguments are about evenly balanced. The McKay defence would seem to be a fair compromise.

In conclusion, the Defamation Bill does not go as far as it might in fostering free speech in New Zealand. The law is still weighted against defendants. However, even if the balance has not been redressed, at least the Bill tries to repair the scales.

The Bill has not yet been passed. The government that sponsored it is out of office. Given the reluctance of MPs to tamper with their "lump-sum form of superannuation"[158] it may be a long time before it again sees the legislative light of day.

PART 7. THE POTENTIAL EFFECT OF THE BILL OF RIGHTS

We are left with the imponderable: the effect of the Bill of Rights. It has already been suggested that the Bill might be used as a source of principle for the development of the common law.[159] It may have a much bigger impact than that, depending on the answer to a number of questions. Does the Bill apply to private legal relations?[160] Are the constraints on free expression imposed by New Zealand's defamation laws "demonstrably justified in a free and democratic society"?[161]

The courts are very likely to refer to the jurisprudence on other constitutional and human rights documents when interpreting the Bill of Rights. An analysis of all the possibilities is beyond the scope of this paper, but the discussion on our international obligations under the Covenant may well be of relevance, particularly as the long title of the Bill of Rights states that it was designed "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

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157 Above Part 3C.

158 Above n 150, 9.

159 In connection with the common law defence of qualified privilege, above n 46.

160 Andrew Butler has argued that it does. He contends that"common law rules which are inconsistent with the Bill of Rights can and should be set aside" ("The New Zealand Bill of Rights and Private Litigation" [1991] NZLJ 261, 262. However, he considers that most of the common law already meets the standards set out in the Bill (p262). Might this be one of the small class of cases where it does not? (But see P Rishworth "The Potential of the New Zealand Bill of Rights" [1990] NZLJ 68, and D Paciocco "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZ Recent Law Review 353, where it is argued that the Bill of Rights does not apply to private litigation.)

161 Bill of Rights Act 1990 s5.

If the courts agree that "the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual",[162] then what? The Bill might be construed to require the plaintiff to prove some element of fault in the political context, or permit a no-fault defence. It is even conceivable that the New Zealand courts will follow the United States approach and require that particular plaintiffs prove constitutional malice. It is submitted that the most likely and desirable outcome would be the development of a defence of reasonable care along the lines of that proposed in this paper.

These are open questions. It is up to the judges. The Bill is in their courts.

CONCLUSION

This paper has examined the law of defamation in New Zealand in connection with political speech. Can we really "say what we like"? It seems that freedom of speech in New Zealand consists of the right to say things that can be proved in court a couple of years later; to comment on matters of public concern - with carefully chosen words based on provable and earlier-stated facts - in circumstances where there is no ill-will for a jury to seize on and label 'malice'; to act as a conduit for various (mostly official) channels of information; and to speak to certain restricted audiences on ill-defined occasions when there can be said to be a duty to speak or an interest to protect.

Thus in the ocean of political free expression there is an island of legally allowable speech. But it is not safe to wander everywhere on the island. The unpredictable tides of the juries' application of the law mean that it is best to stay beyond the high tide mark. Even then, fears of storms of political backlash may tempt us to remain on the very upper reaches of the island. And dark threatening rainclouds may send us shinnying up trees. As a result, large parts of the island (not to mention the ocean) remain unexplored.

Bravely, or perhaps foolishly, the *Frontline* crew paddled in the ocean of unprotected speech. They raised issues of political and constitutional significance and received five massive defamation writs for their trouble. Now all of the other editors and journalists in New Zealand are watching from the high ground to see whether TVNZ drowns!

I have argued that the chill which surrounds political speech in New Zealand is unhealthy. As the European Court has recognised political speech is of a different character to other types of speech. It is the only way we can learn about, and exercise effective control over, the officials to whom we delegate sovereign power. It is particularly important in modern day New Zealand because public officials' policies are having an enormous impact on the lives of New Zealanders, while at the same time there is a growing frustration at our powerless with

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162 *Lingens* case, above n 82.

respect to public officials who often break promises and are not seen to be responding to the needs of the people.

Nor are our international obligations, the needs of 'truth' and public expectations of the right to speak served by defamation laws that are murky, beset with technicalities, plaintiff-biased and which take no account of the amount of care taken be the defendant and insufficient account of the importance of the position of political plaintiffs. In short, some extra land needs to be reclaimed for our island of allowable political speech.

This can be achieved in a number of different ways. We need not go as far as the Americans who seem to have reclaimed most of the ocean in the name of free speech! Our own McKay Committee has recommended a more limited defence which would redress the imbalance in our law without unduly prejudicing plaintiffs. Sadly, our politicians have not seen fit to implement the recommendation. Their motives must be suspect. It will be surprising if even the watered down Defamation Bill is passed in the near future.

The Bill of Rights offers a glimmer of hope for what would be radical change. As things stand, however, I have grave doubts about whether New Zealand's defamation laws are "for the public good".

As a coda, I would make one other point. If any of these changes do eventuate, it will be news organisations which benefit most. If the legal constraints on political speech are relaxed there will undoubtedly be increased opportunity for the abuse of the power of the media. Thought should be given to the development of more appropriate mechanisms for the control of journalists and the protection of the privacy and reputation of people in the public eye.
Ideally, media organisations themselves, including newspapers, should be encouraged to develop better methods for investigating complaints and controlling standards and systems of internal discipline. Perhaps there should be a statutory Standards Authority with jurisdiction over written publications to complement the Broadcasting Standards Authority. Alternatively we could establish a media ombudsman or a Press Commission with power to investigate complaints and order rights of reply. It may be that some of the solution lies in improving the training and sense of professional responsibility of our journalists and, particularly in connection with the issue of gagging writs and applications for interim injunctions, perhaps our lawyers as well!

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