MATTHEW BUNTING

CORPORATE DEFAMATION PLAINTIFFS: AN UNDESIRABLE AND UNNECESSARY ANOMALY

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ABSTRACT

This paper assesses the law relating to corporate defamation plaintiffs. Defamation law imposes a constant limit on freedom of speech, and it is in the public interest that this threat amount to the least necessary interference. This paper argues that the right of bodies corporate to sue in defamation is an illogical extension of the right of individuals to sue protect personal reputation. This extension is both unnecessary, in that corporate reputational interests are adequately protected through alternative causes of action, and undesirable, in that it is contrary to the public interest in free speech.

The uncertainty of defamation law, particularly in the corporate area, coupled with the significant resources of large corporate plaintiffs, creates a real risk that freedom of expression will be subjected to the 'chilling effect'. Media debate and popular criticism is demonstrably restricted by the threat of defamation liability.

The current law relating to corporate defamation plaintiffs is ineffective in clarifying their ability to sue, and in protecting freedom of speech. This paper argues that defamation actions by bodies corporate should be abolished, and that corporate reputation should be protected through actions in injurious falsehood, for personal defamation, and under section 9 of the Fair Trading Act 1986.

Word Length

This text of this paper (excluding contents page, footnotes, and bibliography) comprises approximately 14,500 words.

I INTRODUCTION

"It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no writer ever has a kind word".[1] The United States Supreme Court has labelled defamation "an oddity of tort law".[2] This paper advocates reforming New Zealand's defamation law to remove one of these anomalies.

In a submission to the United Nations Human Rights Committee, the anti-censorship organisation 'Let in the Light' stated that "libel actions and almost as important the threat of libel actions have been used to prevent further coverage of sensitive matters".[3] Defamation actions pose a significant threat to freedom of speech.

The traditional conception of a defamation action is of an individual suing a large media organisation for harming his or her reputation.[4] On this basis, defamation has developed into a pro-plaintiff tort. The burden placed on the defamation plaintiff is remarkably low: "The individual need not prove that any loss resulted from the libelous publication; nor need he prove that it was false; all he has to prove is that the defendant criticised him. The defendant . . . is liable not only for intentional implications but also for unforeseen and unforeseeable inferences".[5] The apparent injustice of imposing liability on this basis has been tolerated, in part because of the difficulties of proof facing the plaintiff, and in part because of the probability that the defendant enjoys a considerable resource advantage over the plaintiff.[6]

The rise of the corporate defamation plaintiff calls the pro-plaintiff structure of defamation into question. Corporate plaintiffs may have significantly greater resources with which to undertake litigation, and may be able to demonstrate very large damages.[7] One commentator has observed that "[t]his

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[1]WP Keaton, DB Dobbs, RE Keaton, and DG Owen *Prosser and Keaton on The Law of Torts* (5ed, West Publishing, St Paul, 1984) 771.

[2]*Gertz v Robert Welch Inc* (1974) 418 US 323, 349 (Powell J) [*Gertz*].

[3]J Penzi "Libel Actions in England, A Game of Truth or Dare? Considering the Recent Upjohn Cases and the Consequences of 'Speaking Out'" (1996) 10 Temp Int'l & Comp LJ 211, 227 [Penzi].

[4]See eg *Hulton v Jones* [1910] AC 20 (HL).

[5]JA Weir "Local Authority v Critical Ratepayer - A Suit in Defamation" [1972] CLJ 238, 239 [Weir].

[6]Weir, above n 5, 239-240.

[7]For example, a publically listed company might claim damages in respect of any diminuation in its market capitalisation caused by a defamatory publication.

sea change in economic positions may sharply alter the effective rights positions of plaintiffs and defendants in defamation actions, without any change in legal principles".[8] The potential for injustice in this area has been evident in a number of cases. In *Bognor Regis UDC v Campion*[9] a local authority employed a defamation action to silent a prominent critic by bankrupting him for damages of £2000 and costs of £34,445.24.[10] In *McDonald's v Steel*[11] the giant fast-food chain brought a defamation action against two pamphleteering protesters which has resulted in the longest trial in English judicial history and legal costs of over £10 million.[12] Any right of a body corporate to sue in defamation is an extension of the "earlier law which conferred such a right only on natural persons",[13] and as such must be shown to be necessary and to be justified on policy grounds.

Logic and justice demand that corporate defamation plaintiffs are recognised as distinct to individual plaintiffs. In New Zealand, this recognition is contained in section 6 of the Defamation Act 1992, which provides that:

> Proceedings for defamation brought by a body corporate shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of proceedings -
>
> (a) Has caused pecuniary loss; or
>
> (b) Is likely to cause pecuniary loss -
>
> to that body corporate.

Part II of this paper will examine the source and justification for section 6 and set out the existing law relating to corporate defamation plaintiffs. Part III will assess potential classes of corporate plaintiffs and argue that the extension of defamation rights to corporate plaintiffs is unjustified on policy grounds and an unnecessary limit on free speech. Part IV will argue that New Zealand's current corporate plaintiff rule is an inadequate reconciliation of reputation and free speech. Part V will assess two possible models of corporate

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[8]JB Attanasio "The Economic Contingency of Legal Rights?" (1995) 39 St Louis ULJ 1163, 1164 [Attanasio].

[9][1972] QB 169 (HC, per Browne J) [*Bognor Regis*].

[10]Weir, above n 5, 238; 245.

[11]unreported (31 March 1999) QBENF 97/1281/1 (CA, per Pill and May LJJ and Keene J) [*McDonald's*].

[12]MA Nicholson "McLibel: A Case Study in English Defamation Law" (2000) 18 Wis Int'l LJ 1, 2-3 [Nicholson].

[13]*Dhlomo No v Natal Newspapers* [1989] 1 SA 945, 953 (Appellate Division, per Rabie ACJ) [*Natal Newspapers*].

defamation plaintiff law to identify the characteristics of an effective model. Part VI will propose that there should be an absolute bar to defamation actions by corporate plaintiffs, accompanied by increased attention to the capacity of other tortious remedies to regulate criticism of bodies corporate.

II CORPORATE PLAINTIFFS UNDER EXISTING LAW

A The Origin of Section 6 of the Defamation Act 1992

The rule that bodies corporate may sue in defamation is a long-standing one. In *Metropolitan Saloon Omnibus Company v Hawkins*[14] Pollock CB held: "[t]hat a corporation can at common law sue in respect of a libel there is no doubt." This rule has been unquestioningly accepted in New Zealand.[15] It has been observed that "[i]t would be very odd if a corporation had no means of protecting itself against wrong; and, if its property is injured by slander, it has no means of redress except by action."[16]

In considering the scope of a body corporate's right of action, Lord Reid has observed that a "company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money."[17] This approach differentiates the position of the body corporate from that of the individual defamation plaintiff. The individual plaintiff may recover damages at large without reference to specific demonstrable loss.[18] Such awards are "a solatium rather than a monetary recompense for harm measurable in money",[19] and are commonly described as "general damages".[20] Individual plaintiffs may recover specific pecuniary loss, or "special damages"[21] in addition to general damages.

Lord Reid's dictum is the direct origin of section 6 of the Defamation Act. His approach was explicitly endorsed by the Faulks Committee in the United

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[14](1859) 4 H & N 87, 90; 157 ER 769, 770 [*Metropolitan Saloon*].
[15]See eg *Atlantic Union Oil v Bodle* [1933] GLR 441 (SC per Reed J).
[16]*South Hetton Coal Company v North-Eastern News Association* [1894] 1 QB 133, 142 (CA per Lopes LJ) [*South Hetton Coal*].
[17]*Lewis v Daily Telegraph* [1964] AC 234, 262 (HL).
[18]*Rookes v Barnard* [1964] AC 1129, 1221 (HL per Lord Devlin).
[19]*Uren v John Fairfax & Sons* (1966) 117 CLR 118, 150 (HC per Windeyer J); *Cassell v Broome* [1972] AC 1027, 1071.
[20]*Ratcliffe v Evans* [1892] 2 QB 524, 528 (CA per Bowen LJ) [*Ratcliffe*].
[21]*Ratcliffe*, above n 20, 528.

Kingdom[22] and the McKay Committee in New Zealand.[23] The report of the McKay Committee provided the basis of New Zealand's Defamation Act,[24] and was itself influenced by the conclusions of the Faulks Committee.[25] Both Committees concluded that corporate defamation plaintiffs should be restricted to claims for special damages, with general damages unavailable. Both also recommended that the corporate action should arise where special damage (or "pecuniary damage" in the words of the McKay Committee[26]) had occurred or was likely to occur. This allowance for likely special damage arose from the recognition that legitimate pecuniary damage, such as harm to goodwill, may not immediately manifest itself in actual loss.[27]

The recommendations of the McKay Committee were:[28]

> (a) It be enacted that no action for defamation should lie at the suit of any body corporate unless such body corporate can establish either -
>
> (i) That it has suffered actual pecuniary loss; or
>
> (ii) That the words were likely to cause it pecuniary loss.
>
> (b) The term "pecuniary loss" used above should be adopted rather than the term "special damage"

As is apparent from comparison with the eventual section 6 of the Defamation Act 1992,[29] the substance of the McKay Committee's recommendation was adopted.

B The Effect of Section 6 of the Defamation Act 1992

The intended effect of section 6 of the Defamation Act is set out by Doug Graham, speaking as Minister of Justice in moving that the Defamation Bill should be read a second time. He stated that clause which became section 6 "clarifies the law relating to defamation proceedings that have been brought by

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[22]*Report of the Committee on Defamation* (1975, Her Majesty's Stationary Office, Cmnd 5909) paras 329, 335, 342 [Faulks Committee].

[23]*Recommendations on the Law of Defamation: Report of the Committee on Defamation* (1977) paras 359-362 [McKay Committee].

[24](10 November 1992) 531 NZPD 12144.

[25]See McKay Committee, above n 23, para 361.

[26]McKay Committee, above n 23, para 362.

[27]McKay Committee, above n 23, para 360.

[28]McKay Committee, above n 23, para 364.

[29]See above Part I.

bodies corporate. They may sue only if they can prove that the defamatory publication has caused pecuniary loss or is likely to cause pecuniary loss. At present, there is some conflicting case law[30] on this point."[31]

As a result of section 6, it is certain that actual or likely pecuniary loss is "an essential ingredient in a corporate plaintiff's cause of action",[32] rather than a mere restriction on the damages recoverable once the cause of action is made out. As an element of the cause of action, the requirement for actual or likely pecuniary loss is a threshold question for the corporate plaintiff, who must also prove all the standard elements of a defamation action. The common law remains determinative of these standard elements, and of their application to corporate plaintiffs who have met the threshold loss requirement.

Section 6 is expressed negatively. Defamation proceedings by a corporate plaintiff "shall fail unless" actual or likely pecuniary loss is shown. This does not mean that all corporate plaintiffs have a right to bring proceedings upon establishing the requisite loss. The wording of section 6 leaves open the possibility that defamation proceedings brought by some bodies corporate will fail despite the existence of actual or likely pecuniary loss. The section does not clarify the law relating to which categories of body corporate may sue. The common law remains the source of law on this point.

The practical effect of section 6 is to clarify a single point relating to corporate defamation plaintiffs. Once the threshold damage requirement of section 6 is satisfied, defamation proceedings brought by bodies corporate are governed by the common law.

C Corporate Defamation Plaintiffs in New Zealand

Upon establishing loss satisfying the section 6 threshold, the position of the corporate defamation plaintiff remains distinct to the individual plaintiff in relation to establishing the right to sue, proving defamation, and assessing damages.

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[30]See below Part II C 4.

[31](10 November 1992) 531 NZPD 12144.

[32]M Gillooly *The Law of Defamation in Australia and New Zealand* (The Federation Press, Sydney, 1998) 27 [Gillooly].

1 *Common law defamation generally*

Broadly, the tort of defamation consists of three elements. To establish liability, there must be a defamatory statement: a statement which may "tend to lower the plaintiff in the estimation of right-thinking members of society generally".[33] The statement must identify the plaintiff: the statement must be "such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to".[34] The statement must be published: it must be communicated to some person or persons other than the plaintiff.[35]

A defendant may escape liability by proving that the defamatory statement was true,[36] that it was a statement of an honestly held opinion,[37] or that the statement was privileged.[38]

2 *Specific classes of corporate plaintiff*

The term "body corporate" suggests a uniformity among corporate defamation plaintiffs. The existence of such uniformity is doubtful. There are a number of categories of body corporate which may seek to bring a defamation action, and Commonwealth common law suggests a diversity of positions.

Companies may sue to protect their trading reputation.[39] A church may be able to bring a defamation action.[40] A trade union may bring an action[41] provided it

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[33]*Sim v Stretch* [1936] 2 All ER 1237, 1240 (HL per Lord Atkin).

[34]*David Syme & Co v Canavan* (1918) 25 CLR 234, 238 (HC per Isaacs J) [*Canavan*].

[35]*Pullman v Hill & Co* [1891] 1 QB 524, 527 (CA per Lord Esher MR).

[36]See Defamation Act 1992, s 8 [DA].

[37]See DA, s 9.

[38]See DA, s 13 in relation to absolute privilege. See also DA, s 19 and *Lange v Atkinson* unreported (21 June) CA52/97 (CA) [*Lange 2000*].

[39]*South Hetton Coal*, above n 16, 145 (per Kay LJ). *Mount Cook Group v Johnstone Motors* [1990] 2 NZLR 488, 497 (HC per Tipping J).

[40]*Anderson v Church of Scientology* [1981] WAR 279, 285 (Full Court of the Supreme Court of WA, per Smth J) [*Anderson*]. *Church of Scientology v Readers Digest Services* [1980] 1 NSWLR 344, 355-6 (Common Law Division, per Hunt J) [*Readers Digest*].

[41]*National Union of General and Municipal Workers v Gillian* [1946] 1 KB 81, 88 (CA per Uthwatt LJ) [*Gillian*]. *Australian Liquor, Hospitality and Miscellaneous Workers Union (Miscellaneous Workers Division) WA Branch v Mulligan* (1995) 15 WAR 385, 389 (SC per Anderson J).

has legal personality.[42] Other associations, such as clubs or societies, are generally able to sue in defamation provided they have legal personality.[43]

It is doubtful whether a political party would be allowed to bring a defamation action.[44] Likewise, a governmental body cannot sue,[45] although there is some doubt as the scope of this bar in relation to government trading corporations.[46]

3 Common law position of corporate plaintiffs

To succeed in a defamation action, a corporate plaintiff must show that a statement was defamatory of the body corporate itself: "[t]he words complained of, in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation as distinct from the individuals who compose it".[47] Defamation is actionable where the plaintiff's reputation is harmed. Bodies corporate have reputations which are important to their ability to function effectively. A statement which harms this corporate reputation may harm the operation of the body corporate, and is actionable.[48]

It has been suggested that a body corporate cannot be defamed by an allegation of which it cannot be guilty. "If one said of a company - 'It is a murderer' or 'it is a forger,' I have no doubt that the company could not bring an action, because a company cannot forge and a company cannot commit murder".[49] This example has been doubted[50] on the basis of expanded

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[42] *EETPU v Times Newspapers* [1980] 3 WLR 98, 106 (HC per O'Connor J).

[43] *Chinese Empire v Chinese Newspaper* (1907) 13 BCR 141, 142-143 (SC, per Morrison J) [*Chinese Empire*]. *St Michaels Extended Care Society v Frost* [1994] 6 WWR 718, 726 (QB, per Cawsey J).

[44] *Goldsmith v Bhoyrul* [1997] 4 All ER 268, 271 (HC per Buckley J) [*Goldsmith*]. *Healy v Askin* [1974] 1 NSWLR 436, 440 (Common Law Division, Lee J) [*Healy*]. See also *Argus Printing and Publishing v Inkatha Freedom Party* [1992] 3 SA 568, 600 (Appellate Division, per Hoexter JA) [*Argus*] allowing a political party to sue in defamation.

[45] *Derbyshire CC v Times Newspapers*, [1993] AC 534, 551 (HL, per Lord Keith) [*Derbyshire*] overruling *Bognor Regis*, above n 9, 175 (HC per Browne J). *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 691, 710 (CA per Gleeson CJ and Kirby P, Mahoney JA dissenting) [*Ballina*].

[46] *New Zealand Apple and Pear Marketing Board v Apple Fields* unreported (24 July 1997) High Court, Wellington Registry, CP 211/96 (per M Thomson) [*NZAPMB*]. *British Coal Corporation v National Union of Mineworkers* unreported (28 July 1996) English High Court (per French J) [*British Coal*].

[47] *South Hetton Coal*, above n 16, 141 (per Lopes LJ).

[48] *South Hetton Coal*, above n 16, 147 (per Kay LJ).

[49] *D & L Caterers v D'Ajou* [1945] 1 KB 365, 366 (CA per Lord Goddard).

[50] P Milmo & WVH Rogers *Gatley on Libel and Slander* (9ed, Sweet & Maxwell, London, 1998) 184 [*Gatley*].

corporate liability, for instance for manslaughter, but the underlying rule remains logically necessary.

Bodies corporate have successfully brought defamation actions in respect of allegations of insolvency[51] which could create difficulties in obtaining credit, allegations of poor working conditions[52] which could impede staff recruitment, and other criticisms which may make people reluctant to deal with the organisation.[53]

4 Nature of damages recoverable by corporate plaintiffs

Section 6 of the Defamation Act is expressed so as to make actual or likely pecuniary loss an element of a corporate defamation claim. The section does not expressly provide that the corporate plaintiff, having established the requisite pecuniary harm, cannot go on to claim damages in respect of non-pecuniary harm. However, it would be illogical to interpret section 6 as allowing such recovery.

In *Andrews v John Fairfax & Sons*,[54] Mahoney JA found that the corporate plaintiff had established special damage satisfying the common law threshold for corporate defamation actions. The tort having been made out, Mahoney JA awarded damages for *inter alia* "injury to the company's reputation as such", in the form of a "solatium". This equates to an award of general damages, as would be found in an individual defamation action. Mahoney JA's approach was expressly rejected by Pincus J in *ABC v Comalco*.[55] In *Mount Cook Group v Johnstone Motors*[56] Tipping J approved Pincus J's approach, holding that the special damage requirement was both an element of the tort and a restriction on damages preventing recovery of general damages. This concurrence of authority suggests that an *Andrews* interpretation of section 6 would be untenable.

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[51]*Metropolitan Saloon*, above n 14.

[52]*South Hetton Coal*, above n 16.

[53]See *Derbyshire*, above n 45, 547 (HL per Lord Keith) for a discussion of situations in which a body corporate may succeed in a defamation suit.

[54][1980] 2 NSWLR 225, 254 (CA).

[55](1986) 68 ALR 259, 348. (Full FC) [*Comalco*].

[56]Above n 39, 497.

A corporate plaintiff satisfying the section 6 threshold might claim damages in respect of loss of actual and anticipated profits,[57] expenses incurred in mitigating loss,[58] impairment to staff recruitment,[59] difficulty in obtaining credit, or reduced public donations.[60] A publicly listed company might claim massive damages in respect of any diminution in its market capitalisation caused by a defamatory publication.[61]

An award of exemplary damages to a corporate plaintiff may also be possible. Section 28 of the Defamation Act provides that "[i]n *any* proceedings for defamation, punitive damages may be awarded against a defendant only where that defendant has acted in flagrant disregard of the rights of the plaintiff" (emphasis added). The absence of reference to corporate plaintiffs, in light of their explicit recognition at section 6, suggests that corporate plaintiffs are able to recover exemplary damages.[62]

5 *Impact of the New Zealand Bill of Rights Act 1990*

To date, the New Zealand Bill of Rights Act 1990 has had a negligible impact on corporate defamation plaintiffs. Section 14 of the Act provides that "[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form".

Courts have held that the right to sue in defamation is a reasonable limit on freedom of speech prescribed by law and demonstrably justified in a free and democratic society, such as is acceptable under section 5 of the Bill of Rights.[63] Further, section 28 of the Act preserves existing rights and freedoms, which has been held to include a right to reputation.[64] The right to freedom of speech has been reconciled with this right to reputation.[65]

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[57]*Parachutes v Para-Equipment Ltd v Broadcasting Corporation of NZ* unreported (6 August 1985) High Court, Wellington Registry, A 205/83 (per Ongley J).

[58]*Comalco*, above n 55, 351 (per Pincus J).

[59]*South Hetton Coal*, above n 16.

[60]*Derbyshire*, above n 45, 547.

[61]See *Biospherics v Forbes* (1997) 989 F Supp 748 (CA). See also Attanasio, above n 8, 1164.

[62]This point is unresolved in New Zealand law. In *Ti Leaf Productions v Baikie* a company claimed punitive damages but abandonned this claim during the proceeding (HC, Timaru, CP 7/97) Amended Statement of Claim, para 14 (judgment forthcoming) [*Ti Leaf*].

[63]*Television New Zealand v Quinn* [1996] 3 NZLR 24, 56 (CA, per McGechan J) [*Quinn*].

[64]*Quinn*, above n 63, 56. (CA, per McGechan J).

[65]*Lange v Atkinson* [1998] 3 NZLR 424, 468 (CA, per Blanchard J).

In light of these considerations, the Bill of Rights has been held not to impact on the rights of corporate defamation plaintiffs.[66] This conclusion is questionable in light of *Derbyshire*[67]

III SPECIFIC CATEGORIES OF CORPORATE PLAINTIFFS

As Rabie ACJ observes in *Dhlomo No v Natal Newspapers*, some categories of body corporate "may, in certain circumstances, be denied the right to sue on the ground of considerations of legal or public policy".[68] Any right of a body corporate to sue in defamation is an extension of the "earlier law which conferred such a right only on natural persons".[69] Such extension necessarily requires consideration of policy.

The drafting process which led to section 6 of the Defamation Act considered only the effect of the provision on companies, and not how it would impact on other bodies corporate.[70] This assumption of uniformity among bodies corporate ignores the significant policy differences between organisations such as public authorities, trade unions, and churches. The position of each category of potential corporate plaintiff must be considered independently. While the ultimate conclusion of this paper is that a rule is needed which treats all corporate plaintiffs alike, this conclusion must be justified in different ways in relation to different categories of party. This part considers the specific position of each category of corporate plaintiff, and concludes that corporate defamation actions are undesirable and largely unnecessary in relation to each.

A Public Authorities

1 Nature of 'public authorities'

An analysis of the rights of a public authority must first establish the scope of its subject. Much of the case law on this point has been concerned with local

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[66]*NZAPMB*, above n 46, 14-17.
[67]See below at Parts III A 3 and IV C.
[68]*Natal Newspapers*, above n 13, 954.
[69]*Natal Newspapers*, above n 13, 953.
[70]McKay Committee, above n 23, paras 359-363.

authorities.[71] However, there appears to be no legitimate distinction between local authorities and other agencies of government having corporate personality, such as public sector ministries and departments.[72] While a distinction may be drawn between democratically elected bodies and appointed bodies,[73] this incorrectly ignores the point that corporate defamation is concerned with the reputation of the corporate entity rather than its members. Whether a body corporate's membership is elected or appointed does not alter its corporate standing.

Arguably more valid is a distinction between the public and private functions of a public authority. A local authority exercises public power over a region, but also exercises ordinary commercial functions, such as borrowing money and employing staff.[74] This divergence of powers should not legitimise a distinction between the right to suit in respect of the character of particular functions. While a public authority is acting commercially in borrowing money and hiring staff, these actions are performed in pursuance of an overall public function.[75] It is artificial to distinguish between commercial and public actions: most public actions are the aggregation of a series of commercial actions. The standing of public authorities as defamation plaintiffs should consider all publicly funded state agencies.[76]

2 *Relevant considerations*

"It is of the highest public importance that . . . any governmental body should be open to uninhibited public criticism".[77] The threat of defamation action in respect of criticism of a public authority would "place an undesirable fetter on freedom of speech".[78] Such actions would impede a crucial control against

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[71] *Derbyshire*, above n 45. *Bognor Regis*, above n 9. *Ballina*, above n 45.

[72] *Derbyshire*, above n 45, 548-549 (per Lord Keith).

[73] *NZAPMB*, above n 46, 10.

[74] *Derbyshire*, above n 45, 547.

[75] *City of Chicago v Tribune* (1923) 139 NE 86, 90 (SC Illonois, per Thompson CJ) [*Chicago*].

[76] This definition includes all public sector agencies and local authorities. SOE's and LATE's are excluded as they do not receive public funding and are instead considered as companies. Private organisations performing public functions on contract (eg Barnadoes) are excluded, as they are not state agencies.

[77] *Derbyshire*, above n 45, 547.

[78] *Dervyshire*, above n 45, 549. See also *Chicago*, above n 75, 90: "While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction on freedom of expression".

"inefficient and corrupt government".[79] The existence of this 'chilling effect' has been empirically supported in relation to defamation generally.[80] There is an allied objection to the use of "the wealth of the state, derived from the state's subjects . . . to launch actions against those subjects for defamation".[81]

Further, "the normal means by which the Crown protects itself against itself against attacks on its management of the country's affairs is political action and not litigation".[82] Public authorities have access to numerous mechanisms to defend themselves. Public authorities, or their responsible minister, may conduct investigations, issue official statements to the media, make statements protected by absolute Parliamentary privilege, or even pass legislation.[83] In light of these uniquely public abilities, it is both undesirable and unnecessary to extend to public authorities "a remedy originally designed for use by private individuals".[84]

The absence of a need for public authority defamation actions is underscored by the availability of individual actions. In *Derbyshire*, Lord Keith observes that the public reputation of elected bodies is more likely to attach to the governing political party, and that in respect of both elected and appointed public authorities a "publication attacking the activities of the authority will necessarily be an attack on the body of councilors which represents the controlling party, or on the executives who carry on the day to day management of its affairs".[85] Actions by a body corporate are, in reality, actions by its officers. Criticism of the body's actions necessarily reflects on those officers.[86]

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[79]*Chicago*, above n 75, 91.

[80]E Barendt, L Lustgarten, K Norrie and H Stephenson *Libel and the Media* (Oxford University Press, Oxford, 1997) 191 [Barendt]. Conclusions supported by written comments to author by Bill Ralston (editor of Metro) [Ralston], Phil Wallington (executive producer of Assignment) [Wallington], and an anonymous print editor [Editor].

[81]*Die Spoorbond v South African Railways* [1946] AD 999, 1013 (Appellate Division, per Schreiner JA) [*Die Spoorbond*]. See also E Grant & JG Small "Derbyshire County Council v Times Newspapers in the House of Lords: Molecular rather than Molar Motion" (1994) 14 Oxford Journal of Legal Studies 287, 289 [Grant & Small].

[82]*Die Spoorbond*, above n 81, 1013.

[83]See *Ballina,* above n 45, 707 (per Kirby P). See also *Argus*, above n 44, 598 (per Grosskopf JA)

[84]Grant & Small, above n 81, 289.

[85]*Derbyshire*, above n 45, 550.

[86]*Hill, Edgar, Christie & Johnson v Taylor* unreported (25 November 1983) 4-5 (NSWSC, per David Hunt J) [*Hill*].

Defamation claims by public authorities are not wholly insupportable on policy grounds. A public authority may have both a governing and a trading reputation. Harm to the trading reputation may make it difficult to borrow money or tender for contracts, may harm staff morale, or deter participation in the activities it conducts.[87] Despite this, defamation is not necessarily the appropriate avenue for redress, a distinction between trading and governing reputations is artificial, and the factors against a right of action strongly outweigh the potential for harm.

3 *New Zealand Bill of Rights Act 1990*

While the Bill of Rights is relevant to consideration of public authority defamation actions, the common law has not given full consideration to its effect.[88] Any defamation action limits freedom of expression, and so breaches the right to free expression in section 14. The issue is whether this limitation is permissible under section 5, which provides that freedoms may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The right of public bodies to sue in defamation is "prescribed by law", either because section 6 of the Defamation Act creates a right of action, or because a right of action exists at common law.[89]

In the European Convention for the Protection of Human Rights and Fundamental Freedoms, the phrase "necessary in a democratic society" is used in place of "demonstrably justifiable in a free and democratic society", and has been held to require the existence of a pressing social need.[90] In *Derbyshire*, Lord Keith suggests, and the Court of Appeal held, that public authority defamation actions were not a necessary limit on freedom of speech in a democratic society,[91] despite the protection the Convention affords protection of reputation.[92]

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[87]See arguments by counsel for the plaintiff in *Derbyshire*, above n 45, 537.

[88]In *NZAPMB*, above n 46, 17, M Thomson held that the effect of the Bill of Rights was outside the ambit of a strike-out application.

[89]See *Quinn*, above n 63, 56 (CA, per McGechan J): common law prescription comes within the ambit of s 5.

[90]*Lingens v Austria* (1986) 8 EHRR 407, 418 (ECHR).

[91]*Derbyshire*, above n 45, 551. [1992] 1 QB 770, 817 (CA per Balcombe LJ).

[92]Article 10(2) European Convention for the Protection of Human Rights and Fundamental Freedoms 1953.

In New Zealand, *Moonen v Film and Literature Board of Review* sets out the considerations necessary to a determination of whether a limitation on a right is demonstrably justified.[93] First, the means by which the limitation achieves its objective must be in reasonable proportion to the importance of the objective. Secondly, there must be a rational relationship between the means and the objective. Thirdly, there must be as little interference as possible with the affected freedom. Finally, the limitation must be justifiable in light of the objective. These considerations will inevitably interrelate.

The limitation on freedom of speech prescribed by the right of public authorities to sue in defamation cannot be demonstrably justified. Its objective is the protection of property interests attaching to corporate reputation,[94] and protection of officers' reputations. Defamation law properly concerns the protection of reputation, rather than attendant property rights. The objective of a public authority defamation action does not properly accord with this reputational basis of defamation law. As such, the limitation is not rationally related to its objective, and cannot be demonstrably justified.

Moreover, the subject matter of public authority defamation actions lies more properly within other areas of legal protection. The reputations of officers are better protected by personal defamation actions, and corporate property rights are better protected by the torts discussed in Part VI. Allowing public authority defamation suits would provide more protection than is necessary. As such, public authority defamation actions create greater interference with free speech than is required to achieve their objective, and so cannot be demonstrably justified.

The conclusion that public authority defamation actions impose an unjustifiable limitation on free speech is supported by comments of Article 19,[95] which states that "[d]efamation laws . . . cannot be justified on the basis that they serve to protect interests other than reputation, where those interests, even if they may justify certain restrictions on freedom of expression, are better served by laws specifically designed by that purpose".[96] As discussed,

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[93] (1999) 5 HRNZ 224, 234 (CA, per Tipping J) [*Moonen*].

[94] See *Martin Marietta v Evening Star Newspaper* (1976) 417 F Supp 947, 955 (DC, per Flannery J) [*Martin Marietta*].

[95] Article 19 is a London based 'Global Campaign for Free Expression', and is funded by UNESCO.

[96] Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London, 2000) Principle 2(c) [Article 19].

public authority defamation actions protect non-reputational interests which are more properly protected through alternative causes of action.

Thus public authorities are prevented from bringing corporate defamation actions, as this would be an act done by a branch of government which was inconsistent with the Bill of Rights. This means that no public authority has the right to bring defamation proceedings,[97] and that any attempt to bring proceedings exposes the Crown to potential liability for *Baigent's Case*[98] damages.

B Companies

1 The New Zealand context

Companies in New Zealand are incorporated under the Companies Act 1993. Section 15 of the Act provides that "a company is a legal entity in its own right separate from its shareholders". Section 16(1) provides that subject to the Companies Act, other legislation, and the general law, a company has full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and has, for those purposes, full rights, powers, and privileges. These sections give a company corporate personality upon incorporation, and give it the power to bring legal proceedings.

New Zealand companies are predominantly small. 86% of the 200,000 registered companies have only one or two members, and 95% have less than five members. There are only around 160 publicly listed companies.[99] Contrary to approaches taken in some jurisdictions, notably the US, there is no legal distinction between small and large companies.[100] For this reason, it is necessary to closely scrutinise Anglo-American perspectives to assess their relevancy to the New Zealand environment.

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[97]M Thomson's refusal to strike out defamation proceedings brought by the New Zealand Apple and Pear Marketing Board on Bill of Rights grounds can be attributed to insufficient evidence that the Board was a public authority, and determination that the application of the Bill of Rights raised issues outside the ambit of a strike out application: *NZAPMB*, above n 46, 11, 17.

[98]*Simpson v Attorney-General* [1994] 3 NZLR 667 (CA).

[99]R Dugan, P McKenzie and D Patterson *Closely Held Companies: Legal and Tax Issues* (CCH New Zealand, Auckland, 2000), 3 [Dugan].

[100]R Dugan *Companies Act 1993: Governance Issues for Closely Held Companies* (VUWLR, Wellington, 1997) 26.

Redlich sets out a series of injuries which a company could suffer as a result of a defamatory statement.[101] There may be loss of employees, impaired ability to recruit new staff, diminished sales, lost or compromised business relations or potential transactions, increased governmental scrutiny or regulation, diminished market capitalisation, and impaired access to debt markets. In *Ti Leaf*, the plaintiff company alleged loss arising from withdrawn financial backing for a film it was producing, from the abandonment of the film project, wasted expenditure on the film, and costs involved in responding to allegations.[102] However, a company "has no personality, no dignity that can be assailed, no feelings that can be touched. Since it cannot suffer physical pain, worry, or distress, it cannot lie awake nights brooding about a defamatory article".[103] A corporate right to bring defamation proceedings is a commercial right to protect corporate property rights and interests, rather than a human right.[104]

The traditional objection to companies suing in defamation is that they may be powerful entities. This power manifests itself in two ways. First, companies may exhibit a great deal of social power. Companies and government have been said to be "in a state of mutual co-operation",[105] resulting in an aggregation of social power in private companies. This power in society is reinforced by the potential for companies to directly impact on the lives of its employees, suppliers, customers, and competitors. It has been suggested that major corporations are a "system of private government",[106] in light of the impact of their actions on employment, welfare, and well-being in the communities in which they operate. To the extent that companies exercise these quasi-governmental powers, it is undesirable that they can bring defamation proceedings. For the reasons set out in relation to public authorities,[107] unfettered criticism of the exercise of such power is socially

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[101]N Redlich "The Publicly Held Company as Defamation Plaintiff" (1995) St Louis ULJ 1167, 1168-69 [Redlich].

[102]*Ti Leaf*, above n 62, Amended Statement of Claim, para 6.

[103]PN Fetzer "The Corporate Defamation Plaintiff as First Amendment 'Public Figure': Nailing the Jellyfish" (1982) 68 Iowa LR 35, 52 [Fetzer].

[104]*Martin Marietta*, above n 94, 955.

[105]Note "Libel and the Corporate Plaintiff" (1969) 69 Columbia LR 1496, 1506 [Libel and the Corporate Plaintiff].

[106]Libel and the Corporate Plaintiff, above n 105, 1507.

[107]Above Parts III A 2 and III A 3.

desirable,[108] particularly since corporate exercise of social power is not subject to effective popular restraint: corporate management is not popularly elected and dispersion of stock holding limits shareholder power.[109]

Secondly, it is argued that companies have significant resources with which to counter criticism.[110] Non-litigation responses are more readily available to the defamed company, which may employ news reports or advertising to rebut defamatory remarks. In *ABC v Comalco*, Comalco produced two films in response to claims made on ABC's Four Corners programme, at a cost of A$45,000.[111] Moreover, a company's resources enable the vigorous pursuit of litigated remedies unrestricted by the concern about legal costs which confronts individual plaintiffs and some defendants.[112] It is conceivable that a company might willingly incur legal fees in excess of their anticipated damages recovery to deter potential critics. Such deterrence appears to be driving the English *McLibel* litigation. McDonald's will have invested millions of pounds in legal fees, and any damages award will be unrecoverable by reason of the defendants' inevitable bankruptcy. McDonald's is using its economic power to influence the course of public debate, continuing an apparent policy of suppression.[113] To the extent that the behaviour evidenced by Comalco and McDonald's is representative, companies have a diminished need for defamation proceedings, and are potentially oppressive in their conduct of such proceedings.

These arguments against company defamation actions, premised on the economic power of the company, are subject to two criticisms. First, the implication that legal rights are economically contingent is an unappealing notion. An argument that a rich individual could not bring a defamation action because of their wealth would be difficult to justify.[114] However, this is a false

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[108]*Reliance Insurance v Barron's* (1977) 442 F Supp 1341, 1347-1348 (SDNY, per Brieant J).

[109]Libel and the Corporate Plaintiff, above n 105, 1507.

[110]Attanasio, above n 8, 1164.

[111]*Comalco*, above n 55, 350.

[112]Attanasio, above n 8, 1164.

[113]See Nicholson, above n 12, 2. McDonald's is reported to have "forced apologies or retractions from the BBC, *The Guardian*, and the Scottish TUC, effectively closed down the Transnational Information Centre, stopped the transmission of at least one [TV] film, and silenced a play."

[114]American restrictions on defamation actions by public figures are imposed because of the need for unfettered public discussion on matters of public interest (*New York Times v Sullivan* (1964) 376 US 254 [*Sullivan*]). The economic power of the plaintiff is irrelevant to the ability to bring defamation proceedings.

analogy. Company defamation claims protect property rights, whereas individual claims protect the human right of reputation. The question of whether a company can bring defamation proceedings is whether such proceedings are a socially justifiable restriction on freedom of expression. In light of the potential for companies to protect their property rights through injurious falsehood or Fair Trading Act actions,[115] the need for defamation actions is questionable.

Secondly, a power analysis ignores the predominance of small companies in New Zealand. An approach premised on companies such as General Motors and McDonald's cannot be assumed to be valid in relation to a corner dairy. However, where a small company is the subject of defamatory allegations, this will "often involve by necessary inference imputations against those who are responsible for its direction and control".[116] Neill and Rampton suggest an increasing pattern of defamation actions being brought by company directors in parallel to a corporate action.[117] In respect of companies where the power analysis is an invalid criticism of a corporate right to sue in defamation, the right to corporate action may be unnecessary.

Denial of defamation actions by companies is further justified on a theory of voluntary incorporation, which applies with equal weight regardless of company size. Traders are not compelled to incorporate, rather the decision is made in light of the perceived advantages of such incorporation such as preferential tax treatment and limitation of personal liability.[118] These advantages have commensurate costs. The US Supreme Court has held that a company "by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context".[119] An extension of this argument is the contention that a company is a franchise of the state in which the public have a legitimate interest.[120] On this theory, denial of company defamation actions is justifiable as being in the public

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[115]See below Part VI A.

[116]*HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, 172-173 (CA per Denning LJ) [*Bolton*]; *Tesco Supermarkets v Natrass* [1972] AC 153, 170-171 (HL, per Lord Reid) [*Tesco*]. See also B Neill and R Rampton *Duncan and Neill on Defamation* (2ed, Butterworths, London, 1983) 44 [*Duncan & Neill*]. *Hill*, above n 86, 4-5.

[117]*Duncan & Neill*, above n 116, 44-45.

[118]DE Lee "Public Interest, Public Figures, and the Corporate Defamation Plaintiff: *Jadwin v Minneapolis Star & Tribune* (1987) 81 NW U L Rev 318, 332.

[119]*GM Leasing v United States* (1977) 429 US 338, 353. (Blackmun J).

[120]NE Moll "In Search of the Corporate Private Figure: Defamation of the Corporation" (1978) 6 Hoftsra LR 334, 354.

interest, and as one of the costs incurred in obtaining the advantages of incorporation.

3 Common law developments

Following *Derbyshire*, Patfield suggested that the case "laid the foundation for the future circumscription of the right to sue for defamation in a much wider class of cases",[121] possibly including companies. In *Steel v McDonald's* the English Court of Appeal refused to extend *Derbyshire* to apply to companies, or to any particular category of companies (such as multinationals).[122] The Court accepted McDonald's argument that there was "a clear distinction between bodies which exist to serve the public interest only and a trading corporation which exists for the benefit of its shareholders and whose commercial success affects its employees, suppliers, customers, creditors and trading partners".

The decision in *McDonald's* is open to criticism. The distinction between public and private organisations is primarily based on the interests of third parties in relation to those bodies. Third party interests are a questionable consideration in defamation law, which exists to protect the interests of the plaintiff.[123] The Court of Appeal also found itself bound by obiter statements by Lord Keith in *Derbyshire* that trading corporations had a right of action in defamation. The outcome may also be coloured by the fact that the appellants appeared in person, raising doubts as to the quality of their argumentation.

McDonald's does not pose an insurmountable barrier to the extension of *Derbyshire* to companies.

C ***Political Parties***

1 Political parties in New Zealand

Evaluation of political parties' ability to bring defamation proceedings has been impeded by some uncertainty over which bodies may be so described.[124]

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[121]F Patfield "Defamation, Freedom of Speech and Corporations" [1993] Juridical Review 294 [Patfield (1993)].
[122]Above n 11, Part 3.
[123]See above Part III A 3.
[124]*Argus*, above n 44, 585-586.

This analytical barrier is avoided in New Zealand, where the concept 'political party' may be defined as a political party registered under the Electoral Act 1993. The concept incorporates Parliamentary parties such as National, Labour, and ACT, and non-Parliamentary parties such as Animals First and Mauri Pacific. The ability to sue depends on a party taking a structure giving it corporate personality. The Electoral Act 1993 does not require that parties do this.

2 Relevant Considerations

A defamatory statement may harm a political party by reducing its electoral support, by impeding the exercise of elected powers, by discouraging donors from providing financial support, and by discouraging membership. It is doubtful that diminished electoral support and difficulties in the exercise of power would be recoverable. Such harm is incapable of pecuniary expression.

The fundamental objection to defamation suits by political parties is that political debate should be free and unrestricted. It has been observed that "criticism of the ideals and policies and conduct of political parties is vital to the interests of democracy."[125] This interest is manifested in New Zealand by the recent limitations placed on defamation actions by individual political figures, based on the public interest in being informed about the qualities of political leaders.[126] This rationale is equally applicable to political parties. Defamation actions at the suit of political parties would fetter such criticism by discouraging potential critics of political parties from expressing their criticism and by indicating the party's intention to anyone making similar criticisms.

Attendant to this objection is the view that political parties should protect their reputations in a political, rather than legal forum. Political parties have greater access to channels of communication than private individuals. Requirements of balance in broadcast news [127] create a de facto right of reply in respect of criticism of political parties in this arena. Political parties operate in a political system which allows access to the media through publicly funded electoral broadcasts, contact with the Parliamentary Press Gallery, and the ability to

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[125] *Healy*, above n 44, 440.

[126] *Lange 2000*, above n 38, para 33.

[127] Broadcasting Standards Authority Free-to-Air Television Programme Code, Standard G6.

make press releases directly to media outlets. Moreover, many political parties retain in-house press officers, with some also using external public relations consultants. Individual members may also be able to sue in protection of their own reputations.

There is no New Zealand authority on the availability of defamation suits for political parties, but such actions have been viewed with disfavour elsewhere. In New South Wales, it has been clear that the "common law does not give a right of action to a political party claiming to be defamed"[128] on the grounds of the need for free political debate. In the United Kingdom, the *Derbyshire* bar on local authority defamation actions has been extended to political parties.[129]

Going against these authorities is the approach of the South African Appellate Division in *Argus Printing and Publishing v Inkatha Freedom Party*.[130] In that case the Inkatha Freedom Party was allowed to bring defamation proceedings. The unanimous decision of the Court was based on the view that defamation law contained internal controls to prevent oppressive use of defamation proceedings by political parties. It was held that free speech was sufficiently protected by the likelihood that a jury would incline against finding statements made in a political context defamatory, the availability of the defences of fair comment, justification, and qualified privilege, and the discretion of the Court in awarding damages.

This approach is of limited applicability outside South Africa. The Court held that it was impossible to draw a distinction which enabled specific consideration of the position of political parties, but rather considered the position of all bodies participating in political debate or attempting to influence government policy. Drawing on evidence from the then recent Constitutional referendum, this class was taken to include such organizations as private corporations, cultural organizations, sports clubs, and civic associations, in addition to political parties.[131] This analysis cannot be supported in New Zealand. In the relatively settled New Zealand political system, the number and breadth of bodies making public political statements is far smaller. Crucially, the Electoral Act allows precise definition of what constitutes a political party.

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[128] *Healy*, above n 44, 440.
[129] *Goldsmith*, above n 44, 270.
[130] *Argus*, above n 44, 587-591.
[131] *Argus*, above n 44, 586.

The substantive reasoning is also questionable. It is doubtful that defamation law contains sufficient safeguards to protect free speech. The Court's approach is premised on the assumption that a critic will be undeterred by potential defamation actions in which they will certainly prevail. This premise is based on the incorrect assumption that a successful defamation defendant incurs no disadvantage from the proceeding. Regardless of a costs award, a successful defendant will incur some degree of legal expense in rebutting the plaintiff's case and in making out the positive defences referred to by the Court. Further, the proceedings will impose secondary costs on the defendant, such as inconvenience, lost work time, and the disruption of discovery. A potential critic, confronted by a choice between suppressing their criticism or exposing themselves to these negative impacts, may incline towards silence.

Defamation actions by political parties are difficult to justify. They have the potential to fetter free speech at elections, when free speech is most important, and are rendered virtually unnecessary by the availability of alternative responses to potentially defamatory statements.

D Trade Unions

Trade unions in New Zealand must be registered under the Employment Relations Act 2000, which requires unions to be incorporated societies.[132] This gives unions procedural standing to sue.

A defamatory statement may harm a union by deterring members, by reducing donations, or by impeding its ability to lobby government effectively. In *Gillian's Case*[133] the plaintiff union disintegrated as a result of a defamatory statement. Courts according the right of suit to unions have been concerned to protect their effectiveness in the collective bargaining process. A union "must be able to protect itself against any form of attack calculated to arouse doubts and suspicions in the minds of members, and so destroy the cohesion and will to act of the union."[134] Without the right to bring a defamation action, an employer might cast aspersions on his employees' union to discourage membership: for the employer, individual contract negotiations will often be

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[132]Employment Relations Act 2000, s 14(1)(b) [ERA].
[133]*Gillian*, above n 41, 87 (per Scott LJ).
[134]*Gillian*, above n 41, 86 (per Scott LJ).

preferable to collective bargaining. The potential for such 'union-busting' is greater in New Zealand than it was in England at the time of *Gillian's Case*, as union membership is voluntary.

Unions have significant powers. They can call strikes[135] and potentially cripple industries. They can enter private premises to recruit members.[136] Unions also comment publicly on a wide range of issues, and through the practice of endorsing parties prior to elections, exercise considerable influence over the character of government. While judges have tended to describe unions as quasi-corporations,[137] this is an assessment of structure rather than substance. Unions are better analogised as quasi political parties. The considerations which militate against political parties suing in defamation also apply to trade unions. Unions are participants in public policy debate, and there is a public interest in that debate being unfettered. Moreover, the power of unions to unilaterally declare strikes creates a legitimate public interest in the manner in which they conduct their affairs.

The necessity of defamation actions by unions is questionable. Whereas a company may be said to have a corporate persona and perform some actions which cannot be linked to any identifiable person, unions are accumulations of individuals. Union actions, such as the conduct of internal voting, public statements on various issues, and the conduct of contract negotiations, are carried out by identifiable individuals. There is little corporate persona distinct from the membership. This has two consequences. Few statements will defame the union, as distinct from its members, such as would give rise to a defamation action brought by the corporate union. Secondly, any statement regarding a union action will inevitably reflect on individuals within the union, and so be capable of remedy through individual defamation proceedings.

On balance, the policy considerations relevant to union defamation actions militate strongly against allowing such actions.

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[135]ERA, ss 83-84.

[136]ERA, s 20.

[137]*Gillian*, above n 41, 88 (per Uthwatt J).

E Churches

Churches are free to assume any corporate structure. Commonly churches will be incorporated societies: the New Zealand Catholic church is legally the Society of Mary. Churches may also operate as companies, with Scientology being the leading example of this structure. Defamatory statements are capable of causing pecuniary harm to churches. Donations may be reduced, recruitment of clergy and congregation may be impaired, and commercial ventures conducted by the church may be impeded.

Only a narrow category of statements are capable of defaming a church. Commonly, religious criticism is aimed at 'Jews' or 'Catholics' generally. Such statements may defame individuals if, by their context, they identify a particular person. However, the church itself is not directly defamed. Similarly, statements directed against a member of the clergy will not be actionable at the suit of the church. An allegation that "Father X is a child molester" does not defame the church as a corporate entity. An allegation of corrupt administration within a church may be capable of defaming the church, as might strong criticism of the doctrines of the church. In relation to an allegation of corruption, a church's position is no different to any secular body corporate. Such statements relate to commercial administration, and this facet of a church's functions is indistinct from commercial administration within a company. The policy against allowing companies to bring defamation actions also militates against allowing churches to bring defamation actions. Doctrinal criticism will rarely be capable of a defamatory meaning. The inherent subjectivity of doctrinal debate renders it unlikely to be found objectively defamatory. A statement which misrepresents a church's doctrinal position could be defamatory: A statement that "church X advocates genocide" would be defamatory of the church as a corporate body.

Defamation of churches is, in part, a human rights issue. The reported cases do not address this point, probably because most are brought by the Church of Scientology, and there appears to be a judicial view that Scientology is not a 'real' religion.[138] The right to freedom of religion is reflected by section 13 of the Bill of Rights and section 21(1)(c) of the Human Rights Act 1993. A defamation action brought by a church seeks to protect this human right.

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[138]See *Readers Digest*, above n 40. *Anderson*, above n 40.

Limitation of the right to free expression is easier to justify when this limitation protects another human right than when it protects property rights.

Conversely there is a public interest in free debate about churches. By their nature they exercise significant power over classes of people. There is some benefit in allowing those outside the church to scrutinise its merits. This is particularly so where adherents accept church control unquestioningly. Churches also occupy a powerful position in society through their ability to guide the conduct of members. The direct political pressure of the Hikoi of Hope in respect of social policy, and the Catholic position on contraception exemplify this social power. Free speech is the means by which the population exercise control over such aggregation of social power, and should not be lightly discarded, even in the case of churches.

F Charities

Again, the starting point for analysis must be the procedural consideration of corporate personality. Preferential taxation treatment means that charities will almost certainly be structured as charitable trusts, and able to sue in the name of the trust.

Charities may be divided into religious and non-religious organisations. Groups such as the Salvation Army, World Vision, Christian Children's' Fund, and Presbyterian Social Services exist as extensions of churches. It is illogical to distinguish between these organisations and other elements of churches' ministries. Therefore the arguments canvassed in relation to churches' ability to sue in defamation are applicable to such groups.

Not all charities are affiliated to churches. Groups such as Pub Charity, Barnadoes and CCS are stand-alone organisations and are capable of suffering pecuniary loss sufficient to satisfy section 6 of the Defamation Act. A defamatory statement may "discourage subscribers or otherwise impair [the charity's] ability to carry on its charitable objects".[139] Such organisations may be perceived as acting in the public interest and deserving of the protection afforded by defamation law. However, this must be weighed against the public interest in ensuring debate and scrutiny of such organisations. Charitable status affords an organisation a uniquely favourable taxation regime. A failure

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[139] *Derbyshire*, above n 45, 547.

by a charity to comply with the terms of its trust deed amounts to tax evasion. Such failures may include trustee self-interest, illegitimate considerations in the distribution of payments, or otherwise corrupt administration. There is a public interest in ventilating these failures, particularly given the practical inability of IRD to fully monitor compliance and the public harm resulting from non-compliance. This is exacerbated by the absence of public reporting requirements for charities. Moreover, in light of the dependence of weak members of society on charities, there is also a public interest in ensuring that they conduct their activities in an appropriate manner.

While there may be an unwillingness to deprive charities of legal protection, the public interest in free debate regarding their activities does not allow a distinction to be drawn between them and other bodies corporate in relation to the ability to sue in defamation. As with other bodies corporate, charities may respond to criticism in ways other than corporate defamation actions. On balance, policy militates against allowing charities to bring corporate defamation actions.

G Clubs and Associations

Many social groupings are structured as bodies corporate. Sporting clubs, chartered clubs, and professional associations such as law societies, may all seek the advantages which arise from corporate personality, such as transactional convenience and possibly preferential taxation. Such groups may take the form of incorporated societies, trusts, or companies. Where a club or association takes a non-corporate form, such as an unincorporated society or a simple grouping of individuals, it will lack the personality to bring legal proceedings, and so fall outside the scope of this paper.

Where clubs and associations are operated on a profit basis, their position is practically analogous to that of a company, and the policy against allowing companies to sue in defamation is directly relevant. The position is different where such organisations are operated on a non-profit basis. Such organizations are capable of suffering pecuniary harm despite their non-profit status.

A non-profit organisation may take one or both of two forms. It may be a service provider, such as a sports club. Service providers are analogous to

companies, as their functions are concerned with the acquisition and disposition of property,[140] and their standing to sue in defamation is subject to similar policy considerations. Additionally, such groups may receive public funds to support their provision of services. To the extent that this occurs, the considerations relevant to public authorities are obliquely relevant.[141]

A non-profit organisation may also act as an advocate, whether for the specific interests of its members or for an alleged public benefit.[142] Both forms of advocacy organisation are analogous to political parties. While advocacy groups do not necessarily stand in elections, they participate in political debate, and may have a significant influence over the direction of policy or electoral success. The considerations relevant to political party defamation actions are relevant to advocacy groups.[143] There is a strong public interest in unfettered political debate.

Clubs and associations may take many forms, and it is futile to anticipate the character of every possible group. However, it can be seen that in the exercise of their corporate functions, clubs and associations will tend to reflect some combination of the operations of companies, public authorities, and political bodies. It has been contended that each of these corporate forms, of themselves, should not be able to sue in defamation.[144] By extension, clubs and associations as hybrids of these forms should also be denied the right to sue.

H Conclusion

Each category of potential corporate plaintiff raises unique considerations, in addition to notable areas of uniformity. Overall, these considerations lead to the uniform conclusion that defamation actions by bodies corporate are harmful to public debate and frequently unnecessary.

This conclusion is weakest in relation to churches and charities. However, actions by such plaintiffs remain undesirable. First, the right to sue can be

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[140] *Chinese Empire*, above n 43, 142-143. *Natal Newspapers*, above n 13, 955.

[141] See above Part III A 2.

[142] While groups advocating the interests of their membership will commonly claim to be acting in the public interest, there is a clear distinction between self-interested groups, such as the Business Roundtable, and publically interested groups, such as Greenpeace.

[143] See above Part III B 2.

[144] See above Parts III A 2, III B 2, and III C 2.

denied with reference to the policy canvassed as relevant to those organisations. Secondly, the right to sue can be denied by reference to its harmful secondary effects. If churches and charities were afforded the right to sue in defamation, this would lead to uncertainty over the line between those organisations and other organisations lacking standing to sue. A private company operating a charitable trust[145] or having religious affiliations[146] would have an unclear status. Such uncertainty may have a stifling effect, and would create anomalies in the law. While the arguments supporting the retention of churches' and charities' rights to sue in defamation are stronger than those applying to other bodies corporate, they are insufficient to outweigh the negative impact of such suits.

For each category of corporate plaintiff, the right to sue in defamation is not indefensible. However, in relation to each category, the benefits of the right are outweighed by its costs.

IV GENERAL INEFFECTIVENESS OF CORPORATE DEFAMATION LAW

In addition to the category-specific considerations canvassed above, the law relating to corporate defamation plaintiffs raises issues which are equally applicable to each category of potential plaintiff. This Part discusses the over-arching technical and policy shortcomings of corporate defamation law.

A Technical Shortcomings

As Hansard indicates, section 6 is intended to remove confusion over the heads of damage recoverable by a body corporate in a defamation action.[147] The section fulfills this narrow function. However, the provision has the potential to mislead. It suggests that "bodies corporate" are to be treated uniformly as a class of plaintiffs. This uniform interpretation is evident in the only case to consider the section. In *New Zealand Apple and Pear Marketing Board v Apple Fields*, M Thomson states that the "right of a corporation to sue for damages is also recognised in the Defamation Act itself section 6 (sic). I observe that the McKay Report which resulted in the passing of the

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[145]This structure is apparent in the Mcdonald's-Ronald McDonald House linkage, and The Warehouse-Tindall Trust linkage.

[146]This structure is apparent in the Sanatarium-Seventh Day Adventist linkage.

[147](10 November 1992) 531 NZPD 12144.

Defamation Act 1992 made no distinction between bodies corporate".[148] By treating all bodies corporate alike in relation to the damage threshold, section 6 indicates that they are to be treated alike in relation to corporate defamation law generally.

This uniformity of treatment is problematic in relation to both the damage threshold and the overall rule. The pecuniary damage threshold creates evidentiary difficulty for non-profit organizations, for which pecuniary loss may be indirect and delayed.[149] The damage threshold was drafted with companies in mind,[150] and is not wholly suitable to the other corporate structures to which it applies. By treating all corporate plaintiffs alike, section 6 is capable of being interpreted as meaning that policy is irrelevant to the determination of whether a particular class of corporate plaintiffs should be allowed to sue. This conclusion is contrary to precedent and logic.[151]

In drafting the Defamation Act, the legislature had the opportunity to undertake an holistic reform of the law relating to corporate defamation plaintiffs. In preferring to draft a partial rule clarifying a single point, the legislature missed this opportunity, and created the potential for confusion.

B Chilling Effect

The present hybrid of statute and common law which constitutes New Zealand's corporate defamation law creates a significant risk of the so-called 'chilling effect'. This existence of this effect has been empirically demonstrated in the United Kingdom. "[T]he chilling effect genuinely does exist and significantly restricts what the public is able to read and hear."[152] Defamation law also has a constant and restrictive effect in the New Zealand media.[153]

Neither section 6 nor the common law gives sufficient attention to the public interest in allowing criticism of bodies corporate. Section 6 is concerned solely with the technical legal question of the forms of loss which a body

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[148]Above n 46, 10.
[149]J Burrows and U Cheer *Media Law in New Zealand* (4ed, Oxford University Press, 1999) 40 n 235.
[150]McKay Committee, above n 23, paras 359-363.
[151]See *Derbyshire*, above n 45. *Natal Newspapers*, above n 13.
[152]Barendt, above n 80, 191.
[153]Ralston/Wallington/Editor, above n 80.

corporate can suffer. At common law, no New Zealand case has attached weight to the public interest. The leading Commonwealth authority for public interest denial of corporate defamation rights is *Derbyshire*, in which a county council was prevented from suing *The Times* in respect of statements about the management of the council's superannuation fund. In New Zealand this case has been viewed doubtfully, and only in the context of a strike-out application.[154] Further, *Derbyshire* only applies to public authorities. Were it part of New Zealand's common law, it would not directly affect a large group of potential corporate plaintiffs.[155]

The absence of protection of public debate in the law creates a real risk that corporate defamation plaintiffs may exercise excessive control over public debate. Provided that the damage threshold is satisfied, large corporate plaintiffs are able to force their critics into potentially ruinous litigation. This chills public debate in two ways. First, a corporate plaintiff may effectively silence a particular critic. In *Bognor UDC v Campion*,[156] the defendant was reported to be "tireless. And tiresome. Unquestionably he was a very great nuisance".[157] By bringing a defamation action the Council was able to bankrupt Mr Campion and effectively end his criticisms.[158] Secondly, a corporate plaintiff may bring a number of defamation proceedings to deter future critics.[159] The Church of Scientology has been a prolific defamation plaintiff in many jurisdictions. Because of this, potential critics of the Church will be aware of the likelihood that any criticism will attract defamation proceedings. New Zealand journalists suggest that they will be more cautious in their comments about a litigious subject.[160]

Current defamation law makes such conduct by corporate plaintiffs possible. The law contains theoretical protection for defendants, but these are ineffective. Where a plaintiff's claim amounts to an abuse of process, the proceeding may be dismissed[161] and may give rise to a tortious claim by the

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[154]*NZAPMB*, above n 46, 10-11: M Thomson observes that the Defamation Act 1992 was passed after the *Derbyshire* decision, distinguishes *Derbyshire*, and notes the 'compelling' dissent of Mahoney JA in *Ballina*.

[155]In the UK, the *Derbyshire* approach has been extended to the British Coal Corporation (*British Coal*, above n 46), and to political parties (*Goldsmith*, above n 44).

[156]Above n 9.

[157]Weir, above n 5, 243.

[158]Weir, above n 5, 238.

[159]See above Parts III B 2 and III B 3.

[160]Ralston/Wallington/Editor, above n 80.

[161]*Reid v NZ Trotting Conference* [1984] 1 NZLR 8.

defendant. The Defamation Act 1992 gives some recognition to the potential for abusive proceedings.[162] However, a defamation claim will not be an abuse where it is brought to vindicate the plaintiff's reputation.[163] Most corporate actions which seek to stifle debate can be validly described as actions in protection of the plaintiff's reputation, and are unlikely to amount to an abuse of process. The practical utility of abuse of process rules in combating the chilling effect is questionable.[164]

Defamation law also affords ostensible defendant protection through imposing the burden of proof on the plaintiff, and providing defences of truth, qualified privilege, and honest opinion.[165] These protections are also ineffective in countering the chilling effect. A successful defendant in a defamation proceedings will inevitably incur unrecoverable costs because of inadequate costs awards and secondary costs arising from the disruption of litigation.[166] The threat of a defamation action may deter criticism regardless of the likelihood of success.[167]

This chilling effect is accentuated by the uncertainty of the law. Barendt's analysis of the chilling effect concludes that "uncertainty in both the principles of defamation law and their practical application induce very great caution on the part of the media. Virtually every interviewee, in all branches of the media, emphasised the lottery aspect of this area of the law."[168] The major uncertainty in New Zealand's corporate defamation law relates to the categories of corporate plaintiffs which are able to bring proceedings. It is unclear, for instance, whether a public body could bring an action, and further, what bodies fall within any bar on public body actions. The risk created by uncertainty is that potential critics will seek to minimise their potential liability by assuming that the law takes its most unfavourable form, and acting accordingly. A potential critic of a public body might therefore assume that the law allowed that body to bring a defamation action.

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[162]DA, ss 43, 45.

[163]*R v Daily Mail (Editor): Ex parte Factor* (1928) 44 TLR 303, 306 (CA, per Lord Hewart CJ).

[164]Gillooly, above n 32, 32.

[165]See Part III C 2.

[166]See Part III C 2.

[167]Editor, above n 80, suggesting that some stories known to be defensible will be amended to avoid threatened litigation: "if the story was not overly significant but the threat was highly likely to be made good . . . one needs to keep a perspective and know which battles are actually worth fighting".

[168]Barendt, above n 80, 186.

C *Failure to Consider Freedom of Speech*

The Bill of Rights' protection of freedom of speech prevents public authorities from bringing defamation actions.[169] However, the Bill of Rights does not apply directly to private bodies. Regardless of whether section 6 of the Defamation Act, as an act done by the legislative branch, is capable of being interpreted consistently with the Bill of Rights, the ability of corporate plaintiffs to sue in defamation arises from the common law, and so cannot be directly affected by the Bill of Rights.[170] However, the principles of the Bill of Rights may be applicable by analogy.

Existing Commonwealth case law on corporate defamation is based on the perception of freedom of speech as a democratic right. This perception is paralleled by the structure of the Bill of Rights, which applies only to acts by public authorities. The cases which have denied certain bodies corporate the right to sue in defamation have sought to protect free speech as significant to the maintenance of democracy. In *Derbyshire*, *Goldsmith*, *British Coal Corporation*, *Ballina Shire Council*, and *New South Wales Aboriginal Council*, corporate plaintiffs were denied the right to sue in defamation because of the requirements of democratic government.[171]

Freedom of speech is also "a fundamental right, which in turn helps to protect other rights. If people can speak freely, they can assert their rights openly and protest any infringements."[172] Docherty identifies two grounds for this approach. Open discussion creates a marketplace of ideas "in which ideas compete in the public sphere until truth emerges."[173] Further, she argues that "people can only experience true autonomy and self-fulfillment if they are allowed to express themselves; thus free expression represents an end in itself."[174]

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[169]See above Part III A 3.

[170]Elias J's suggestion in her High Court decision in *Lange v Atkinson* [1997] 2 NZLR 22, 32 that the Bill of Rights applied to all judicial decisions as 'acts of the judicial branch' was not adopted in any of the subsequent appellate decisions.

[171]B Docherty "Defamation Law: Positive Jurisprudence" (2000) 12 Harv Hum Rts J 263, 286 [Docherty].

[172]Docherty, above n 171, 266.

[173]Docherty, above n 171, 266.

[174]Docherty, above n 171, 266.

To give full effect to freedom of speech, the common law should, through analogy, allow indirect application of Bill of Rights principles to prevent private bodies corporate from bringing defamation actions. Section 6 of the Defamation Act does not create or protect the right of private corporate bodies to bring defamation actions. Rather it regulates the exercise of their common law right of action. Thus the common law is capable of removing the rights of private corporate defamation plaintiffs, and should do so in protection of freedom of speech. This analysis is reinforced by the requirement that section 6 be interpreted consistently with the Bill of Rights wherever possible.[175]

The present state of the law is ineffective in relation to corporate defamation plaintiffs as it does not adequately protect freedom of speech. This ineffectiveness is particularly unfortunate in light of the fact that this protection could be afforded within the existing legal framework.

V POSSIBLE MODELS OF CORPORATE PLAINTIFF LAW

A United States Approach

1 The Constitutional model

In the United States, the nexus between freedom of expression and defamation is located in three Supreme Court judgments. In *New York Times v Sullivan*, Brennan J, with a plurality of the Court, held that defamatory statements concerning public officials are only actionable where the defendant has acted with actual malice, in that they either knew that the statement was false, or were acting with reckless disregard for its truth or falsity.[176] This Constitutionally driven approach stems from society's need for "uninhibited, robust and wide-open debate", and the acknowledgment that mistakes are inevitable in free debate.[177] In *Curtis Publishing v Butts* the Supreme Court extended the rule to cover public figures as well as public officials.[178] *Gertz v Robert Welch* provides for a classification of plaintiffs as private figures, general purpose public figures, which are considered to be public in relation to all of their functions, and limited purpose public figures, which are considered

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[175]New Zealand Bill of Rights Act 1990, s 6 [BoRA].
[176]*Sullivan*, above n 114, 279-80 (per Brennan J).
[177]*Sullivan*, above n 114, 279-80.
[178](1967) 388 US 130, 164 (per Warren CJ concurring).

to be public figures in relation to some of their functions.[179] In distinguishing between public and private figures, the Court suggest "looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation".[180] A plaintiff who has "thrust himself into the vortex of this public issue [or] engage[d] the public's attention in an attempt to influence its outcome"[181] is likely to be a public figure.

The classification of a corporation under *Gertz* remains uncertain.[182] The Courts of Appeal have generally "rejected a general rule of public figure status for corporations. Instead, they have interpreted *Gertz* as requiring a specific determination in each case",[183] giving rise to a "myriad of approaches and tests".[184]

2 *Advantages*

The US approach provides protection for those who participate in public debate. Where public figures bring a defamation action, they must discharge the difficult burden of proving that the defendant acted with actual malice. Critics generally make statements in good faith. The introduction of an actual malice requirement shifts the burden of proving the truth or falsity of the defamatory statement from the defendant to the plaintiff. This reduction in the defendant's evidentiary burden may reduce the chilling effect: a potential critic will not be deterred from making a statement by reason of the practical difficulties of proving its truth. *Metro* editor Bill Ralston advocates reform of New Zealand defamation law to closer reflect this US model.[185]

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[179]*Gertz*, above n 2, 351-352 (Powell J giving the judgment of the Court).
[180]*Gertz*, above n 2, 352.
[181]*Gertz*, above n 2, 352.
[182]In *Dun & Bradstreet v Greenmoss Builders* (1985) 472 US 749 [*Dun & Bradstreet*] the Supreme Court implcitly assumed that a corporate plaintiff was a public figure, but did not discuss the point.
[183]LB Oberlander "Corporate Plaintiffs: Public or Private Figures" (1998) 16 Comm Law 1 at n 8 [Oberlander].
[184]Oberlander, above n 183 at n 10, setting out tests from *National Life Insurance v Phillips Publishing* (1992) 793 F Supp 627, 634 (DC citing Fourth Circuit CA); *Snead v Redland Aggregates* (1992) 998 F 2d 1325, 1329 (Fifth Circuit CA) [*Snead*]; *Silvester v American Broadcasting Companies* (1988) 839 F 2d 1491, 1494 (Eleventh Circuit CA); *Waldbaum v Fairchild Publications* (1979) 627 F 2d 1287, 1297 (DC Circuit CA).
[185]Ralston, above n 80.

Further, by taking a case-by-case approach to determining public or private status, the US model broadly distinguishes between powerful corporations and small businesses which have chosen to incorporate.

By analysing cases on the basis of the subject matter under debate, rather than the nature of the plaintiff body, the approach gives the fullest possible effect to freedom of speech. Companies are denied the right to sue in defamation in relation to matters of public interest, despite being non-governmental bodies. Freedom of speech is not limited to the democratic context, but is effected as a wider human right.[186]

3 Disadvantages

Four elements of the US model operate to negate much of its potential benefit.

First, by taking a case by case approach, the model will require cases to proceed to a hearing to determine the status of the plaintiff. Potential critics will be deterred from criticism by a desire to avoid the difficulty and expense of arguing that a corporate plaintiff is a public figure.

Secondly, the law is uncertain. A potential critic may be unsure of how to determine the status of the object of their potential criticism. As discussed[187] uncertainty in the law increases the impact of the chilling effect it that it causes potential critics to minimise risk by assessing their position on the basis of the interpretation which is most disadvantageous to them.

Thirdly, the US Supreme Court allows corporate plaintiffs to recover "presumed damages".[188] These reflect the general damages available to individual plaintiffs in the Commonwealth as a solatium for injury to feelings. As Commonwealth authorities have established, it is illogical to award such damages to corporations, which have no non-pecuniary feelings to be hurt.[189] The approach may allow for artificial inflation of damages awards and

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[186]Docherty, above n 171, 266.

[187]See above Part IV B.

[188]*Dun & Bradstreet*, above n 182, 763 (per Powell J).

[189]See *Comalco*, above n 55, 348 (per Pincus J). The dissent in *Dun & Bradstreet* recognises this point, above n 182, 793 n16 (per Brennan J).

compensation for injuries which have never been suffered.[190] The threat of such inflated awards will chill public debate.

Fourthly, the costs regime in American courts is ineffective. The Commonwealth practice of ordering the losing party to contribute to the winning party's legal expenses is very rarely adopted. A critic who successfully defends a defamation proceeding will be left with significant legal expenses. A resource-indifferent corporate plaintiff can use this to deter critics with the threat of proceedings. Further, as a defendant, the critic is unable to take advantage of the American contingency fee regime. The financial burden of legal proceedings will have a chilling effect on free speech.

B Declaratory Relief

1 The declaratory model

A suggested reform to the law relating to corporate defamation plaintiffs is the "so-called 'diminished defamation' action".[191] Hemphill argues that "a judicial determination of wrongful conduct by the defendant . . . may seem to be a proper mechanism for the plaintiff to vindicate her reputation, with the added bonus of not chilling speech with large damage awards".[192] This model is based on the premise that corporate defamation actions serve two purposes: compensation for loss and public vindication of the body corporate. Under the declaratory model the public interest in free speech is relied on to justify requiring corporates (or their insurers) to carry the costs caused by criticism, but allowing vindication of their corporate name to limit those costs.

2 Assessment

The fundamental benefit in allowing declaratory relief to corporate defamation plaintiffs is the ability of such plaintiffs, through public vindication, to limit the harm caused by defamatory criticism. A defamatory statement about an organisation may have an enduring impact on the organisation if it continues

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[190]AW Langvardt "A Principled Approach to Compensatory Damages in Corporate Defamation Cases" (1990) 27 ABLJ 491, 492.

[191]Redlich, above n 101, 1170.

[192]JA Hemphill "Libel-Proof Plaintiffs and the Question of Injury" (1992) 71 Texas LR 401, 417.

to be regarded as true. Such a statement may also continue to taint employees of the organisation in their pursuit of future employment. Arguably, vindication of the organisation by a Court could overcome these effects.

The legitimacy of the declaratory model is questionable. The future employment prospects of employees are not the proper subject of protection by a defamation action brought by an employer. This amounts to an impermissible attempt by a plaintiff to obtain relief in respect of a third party's loss. Further, if corporate employees are unable to maintain individual actions because of insufficient identification, then the corporate employer should not be able to maintain an action on their behalf. Such an action would undermine defamation law's clear policy against providing remedies for unidentifiable parties. If employees are entitled to reputational protection under defamation law, they will be able to obtain this in an individual action. These criticisms are supported by Article 19, which suggests that defamation actions for purposes other than the protection of the plaintiff's own reputation cannot be justified.[193]

To the extent that the declaratory model protects the corporate plaintiff's own reputation, it is an inappropriate measure. It relies on the false premise that successful plaintiffs in defamation actions have demonstrated the falsity of the statement in question. Plaintiff success arises from the inability of the defendant to prove the truth of a statement. Such an outcome will often fail to 'vindicate' the plaintiff.

If bodies corporate were unable to sue in defamation, corporate relief would remain available through an action in injurious falsehood or under the Fair Trading Act.[194] As will be discussed, these actions give corporate plaintiffs the ability to sue in respect of statements made in trade such as those made by trade competitors, and those made maliciously. Declaratory relief for the corporate defamation plaintiff would only give greater protection than these actions where a statement was made by a non-trade critic acting without malice. The public interest in freedom of expression makes it doubtful that such critics should be impeded.

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[193]Article 19, above n 96, Principles 2(a)-(c).

[194]See below Part VI A.

The declaratory model would impede expression by these critics. Its capacity to alleviate the chilling effect is limited. In the defamation action brought in England by Upjohn, damages of £85,000 were awarded, while legal costs were estimated at £2.5 million.[195] While this is an extreme example, it exemplifies replacing an award of damages with a declaration would not materially alter the influences on a potential critic of a corporation. Litigation costs, being both those incurred by the defendant and those incurred by the plaintiff and awarded against the defendant, would remain a deterrent of potentially equal force. Even if legal aid was available, or the corporate plaintiff paid all costs, the deterrent effect arising from the non-financial impositions of defending a defamation action would remain. The chilling effect would be substantially unchanged.

Moreover, legal aid or plaintiff funding for the defendant would diminish the perceived legitimacy of the plaintiff's vindication. A legal aid defence, necessarily provided by a lawyer charging below market rates, may be perceived as inadequate opposition for expensive corporate counsel. Plaintiff funding may raise doubts regarding loyalty, and may cause ethical difficulties for the defence lawyer. These problems could create the impression that a declaration in favour of the plaintiff lacked credibility.

Despite the apparent advantages of the declaratory model, its legitimacy, effectiveness and necessity as a vindication tool, are not sufficient to justify the imposition it places on free expression.

C Characteristics of an Effective Model

An effective model of corporate defamation plaintiff law will afford protection to freedom of expression as a democratic right and as a broad human right. The protection afforded to criticism should be cast in light of the necessity and desirability of protecting the property interests of the relevant type of corporate plaintiff.

Elimination of the chilling effect requires that protection of critics occurs at the initiation of proceedings, rather than during proceedings. Ideally, undesirable suits by corporate plaintiffs must be prevented altogether, rather than defeated during the course of hearing.

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[195]Penzi, above n 3, 223.

The ideal model will contain few areas of uncertainty. A potential critic should be capable of analysing their legal position without having to make worst case assumptions about the scope of defamation law.

Corporate plaintiffs are not wholly undeserving. There will be cases where there is a need to compensate a corporate plaintiff for the consequences of a defamatory statement. An effective model will recognise this.

VI EFFECTIVENESS OF AN ABSOLUTE BAR ON CORPORATE PLAINTIFFS

The competing interests of freedom of speech and corporate reputation are best resolved by an absolute bar on corporate defamation actions. The apparent extremity of this approach is eliminated by consideration of the alternative legal remedies available in respect of statements which defame a body corporate. Taken holistically, a bar on corporate defamation plaintiffs coupled with the existence of alternative actions effectively protects free speech and corporate reputation.

A Alternative Actions

1 Personal defamation

It has been contended that individual members of a company are "absolutely precluded from suing in respect of a statement that tends to deprecate its business probity or prospects."[196] The purported absolutism of this rule is misplaced. It is trite that an individual cannot sue in respect of a statement which relates only to a corporate entity. However, it is difficult to think "of a statement concerning a company where the imputation which it conveyed would not also relate to directors or to those persons who were known to be responsible for the conduct of the company which was the subject of the statement made."[197] The possibility of identity between a body corporate and its officers has been recognised.[198] Patfield has suggested a distinction between mere members of an organisation, who cannot sue, and directors,

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[196]*Campbell v Wilson* [1934] SLR 249, 252 (Outer House, per Lord Mackay).

[197]*Hill*, above n 86, 4-5. *Westerway & Jones v Radio 2UE Sydney Pty Ltd* unreported (20 August 1993) 14 (NSWSC, per David Levine J).

[198]See *Bolton*, above n 116, 172-173 and *Tesco*, above n 116, 170-171.

who may be able to,[199] justified on the basis that "when something is said or done, by the [organisation] . . . it is in reality said or done by the group of persons who are responsible for its administration".[200] It seems unnecessary to draw this distinction. Many corporate actions are not actions of directors, but of employed staff. A statement criticising such an action by the body corporate is capable of being understood as criticising the employees taking the action.

The question of whether a corporate officer can maintain an individual defamation action in respect of a comment made about the body corporate should be answered, not by reference to a strict rule, but through application of ordinary principles of defamation. These require that a published statement sufficiently identify and defame the plaintiff. The plaintiff need not have been specifically identified in the statement. It is sufficient that the words are "such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to."[201]

Where a defamatory statement is directed against a body corporate, an action by an individual member of that body would require the plaintiff to rely on an innuendo or inference to establish that the statement referred to him or her. The plaintiff must prove that some recipients of the statement regarding the body corporate were aware of the extrinsic fact of the plaintiff's association with the relevant activity of the body corporate.[202]

Where an organisation is small, there is little perceived distinction between the corporate entity and its officers. People having dealings with Brown's Dairy would not recognise a distinction between Mr and Mrs Brown and Brown's Dairy Ltd. A defamatory statement about the quality of service, administration, or solvency of Brown's Dairy Ltd will, to any person dealing with Brown's Dairy, reflect on Mr and Mrs Brown.

The same cannot be said of a large organisation. A potentially defamatory statement about conduct by McDonald's does not necessarily affect the reputation of McDonald's senior international management. It is conceivable

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[199]F Patfield "Protecting the Reputation of Corporate Personnel, Organs and Associates" (1988) 18 UWALR 203, 211.

[200]*Hill*, above n 86, 4-5.

[201]*Canavan*, above n 34, 238 (HC, per Isaacs J). *Clark v Vare* [1930] NZLR 430, 433 (SC, per Myers CJ).

[202]*Consolidated Trust Co v Browne* (1948) 49 SR(NSW) 86, 93-94 (Full SC, per Jordan CJ).

that some defamatory statements against a large corporation could give rise to personal defamation actions.[203] However, it will often to be difficult for such an individual plaintiff to prove that they were identifiable from a statement about their organisation. Thus the availability of personal actions in large corporate situations will be much more circumscribed than in the small organisation context.

The personal defamation action will protect the reputation of small organizations to the same extent as a corporate action. This protection will be extensive in New Zealand, where most companies have fewer than five members.[204] Conduct of the body corporate will be the conduct of a number of these identifiable officers, meaning that comment on the conduct will be capable of referring to those officers. In such organisations, there will commonly be financial identity between the body corporate and its officers. In a personal defamation action, the officer will be able to recover compensation for harm to their own reputation, and, as special damage, for the actual or likely pecuniary loss which accrues to them through the vehicle of the body corporate.

2 *Injurious falsehood*

An action for injurious falsehood will lie where a defendant has published a false statement with actual malice which has caused harm to the plaintiff.[205] A statement is made with actual malice where the maker is aware that it is false, or is reckless as to whether it is true or false.[206] Actual malice for the purposes of injurious falsehood also requires that the defendant intended to harm the plaintiff, or was at least reckless.[207] The burden of proof for these requirements is with the plaintiff, effectively reversing the defamation onus. Section 5 of the Defamation Act provides that, in an action for injurious falsehood, "it is not necessary to bring allege or prove special damage if the publication of the matter that is the subject of the proceedings is likely to

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[203]The ability to bring such an action is a question of personal defamation law and is outside the scope of this paper. However, there is a noticable trend to raise the barriers to suit for prominent individual defamation plaintiffs. See *Lange 2000*, above n 38, para 12.

[204]Dugan, above n 99.

[205]*Ratcliffe*, above n 20, 527 (CA, per Bowen LJ); *Joyce v Sengupta* [1993] 1 WLR 337, 341 (CA, per Sir Donald Nicholls VC).

[206]*Sullivan*, above n 114, 279-80. See also *Lange 2000*, above n 38, para 42-49 relating to the misuse of the occasion of publication in the qualified privilege context, applying an analogous approach..

[207]*Customglass Boats Ltd v Salthouse Bros Ltd* [1976] 1 NZLR 36, 49 (HC, per Mahon J).

cause pecuniary loss to the plaintiff". This damage requirement parallels the existing damage threshold for corporate defamation plaintiffs: actual or likely pecuniary loss.

The tort of injurious falsehood is substantially similar to the US public figure defamation action. However, it does not carry the disadvantages of that action. There is no recovery of presumed or general damages by a corporate plaintiff. There is no uncertainty over whether the actual malice standard will apply in a given action. Costs awards can be made against an unsuccessful plaintiff. Injurious falsehood combines the logical approach to the damage threshold of Commonwealth corporate defamation with the freedom of speech protection evident in the United States.

Where a body corporate is of such a size that its officers cannot maintain personal defamation actions, the body corporate may bring an action in injurious falsehood. Large corporate plaintiffs will therefore be subject to the actual malice standard, while small corporate plaintiffs will be able to recover through their officers without proving malice. The difficult distinction between public and private figure corporations is avoided.

3 Fair Trading Act

Section 9 of the Fair Trading Act 1986 provides that "no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". This provision allows for an action resembling defamation, which allows recovery of proven pecuniary damages.[208] To maintain such an action, a plaintiff must establish:

> (a) The making of a statement by the defendant,
>
> (b) That the statement was made 'in trade',
>
> (c) That the statement was misleading,
>
> (d) That the breach caused the particular injury in respect of which the remedy is sought[209]

A statement will be made 'in trade' where it is made "in the course of commercial activity for the purpose of making a profit. It is not necessary that

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[208]Fair Trading Act 1986, ss 41, 43 [FTA]

[209]*Leucadia National Corporation v Wilson Neill Ltd* (Unreported, 12 July 1996, High Court, Auckland, CP 365/94, per Fisher J) 26 [*Leucadia*].

the act alleged form part of the day to day operating activities of the defendant".[210]

Such an action will not arise in respect of the publication of any matter in a newspaper or by a broadcaster except for advertisements and information about the supply of goods or services or the sale of land by the publisher or a connected body.[211] Fair Trading Act actions will generally not lie against newspapers, but may lie against magazines.

The main use of section 9 actions is in respect of statements made by trade rivals. The action has been used in respect of misleading comparative advertising in which the plaintiff's products have been criticised.[212] The availability of such an action protects corporate reputations against attack by competitors. In these situations it is not necessary to prove actual malice or an imputation against a corporate officer. The action also appears to extend to provide unions with a remedy against misleading statements by employers, as these statements would be 'in trade', and to protect a wide range of corporate plaintiffs against criticism by powerful corporate critics. Section 9 could give a group such as Native Forest Action a remedy against Timberlands in respect of unjustified criticism.

4 *Negligence*

The tort of negligence is not available in New Zealand in respect of reputational damage.[213] In rejecting such a tort, Cooke P held that defamation law represents "compromises gradually worked out . . . over the years . . . between competing values . . . the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it . . . would be to introduce a distorting element".[214]

Conversely, the House of Lords in *Spring v Guardian Assurance* held that a reputational injury may create negligence liability, distinguishing the New

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[210]*Leucadia*, above n 209, 26.

[211]FTA, s 15.

[212]*ER Squibb & Sons (NZ) Ltd v ICI NZ Ltd* (1988) 3 TCLR 296 (HC, per McGechan J). *Alan H Reid Engineering Ltd v Ramset Fasteners (NZ) Ltd* (1990) 4 TCLR 126 (HC, per McGechan J).

[213]*Bell-Booth Group v Attorney-General* [1989] 3 NZLR 148, 156 (CA, per Cooke P) [*Bell-Booth*]. *Balfour v Attorney-General* [1991] 1 NZLR 519, 529 (CA, per Hardie Boys J).

[214]*Bell-Booth*, above n 213, 156.

Zealand authorities.[215] This rule appears to be limited to its facts. Lord Reid accepts the proposition that reputational injury "cannot ordinarily be sustained by means of any other form of action"[216] than defamation. However, the case concerned a reference given by an employer to an employee, which was held to impute an assumption of responsibility by the employer.[217] Lord Reid's approach suggests that the ratio may be inapplicable outside the employment context. Further, the approach is out of step with the abolition of corporate defamation advocated in this paper and undermines freedom of expression. It should not be reimported to New Zealand to circumvent the proposed bar on corporate defamation plaintiffs.

B Scope of Reputational Protection

A bar on corporate defamation actions affords sufficient reputational protection to potential plaintiffs. All bodies corporate have standing to bring actions in injurious falsehood. This provides a limited right to bodies corporate to vindicate their reputations and recover compensation in respect of untrue, malicious and harmful statements. Small organizations have the further option of bringing a de facto defamation action in the name of an officer who is popularly identified with the body corporate. The rights of small bodies corporate are substantively unchanged. The rights of large bodies corporate are restricted but exist to the extent necessary to combat unfounded attacks. These rights are reinforced by the possibility of a Fair Trading Act action, carrying a diminished burden on the plaintiff in response to criticism by trade rivals.

This approach raises the barrier to action by large corporate plaintiffs against which the power analysis is valid.[218] In relation to organizations for which the power analysis is invalid, the barriers are essentially unchanged. This reflects the approach taken in the government sphere. In *Derbyshire*, Lord Keith comments that injurious falsehood and personal defamation gave "all the protection which was necessary".[219] A majority in *Ballina Shire Council* also

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[215][1995] 2 AC 296, 324 (HL, per Lord Goff) [*Spring*].
[216]*Spring*, above n 215, 323 (per Lord Goff), quoting *Foaminol Laboratories v British Artid Plastics* [1941] 2 All ER 393, 399 (HC, per Hallett J).
[217]*Spring*, above n 215, 324 (per Lord Goff).
[218]See above Part III B 2.
[219]Above n 45, 550-551.

accepted the utility of injurious falsehood actions at the suit of government bodies.[220]

C Protection of Free Speech

The proposed approach protects free speech as a democratic right and as a broader human right. The chilling effect of defamation is minimised.

1 Practical impact

The key to this protection of free speech is the almost complete elimination of the ability of powerful corporate plaintiffs to silence actual critics and deter potential critics. It will usually be difficult, if not impossible, for corporate plaintiffs to show that their critics were acting maliciously. Commonly critics of corporations make their statements in good faith. Steel and Morris in the *McLibel* litigation,[221] Professor Oswald in the Upjohn litigation,[222] and Mr Campion in the *Bognor Regis UDC* case[223] all appear to have believed that their statements were true.

The proposed approach will protect free speech from the initiation of proceedings through to any judicial determination. Corporate plaintiffs will be less likely to issue proceedings which will require them to prove actual malice. Critics will be able to make statements less deterred by the potential costs of litigation. Where proceedings are commenced, the burden of proof is shifted from the defendant to the corporate plaintiff. Rather than requiring defendants to bring evidence of the truth of their statements, actions involving powerful corporate plaintiffs will require those plaintiffs to prove that the defendant was at least reckless as to the truth of their statement, and possibly that it was made with an intention to harm. This requires the plaintiff to prove the subjective intention of the defendant. Such a burden will clearly be difficult for the plaintiff to discharge. The defendant has no positive onus. The difficulty of the defendant's case, and so the costs likely to be incurred by the defendant, are reduced. In reducing the number of suits and making those suits easier to defend, the proposed model removes the deterrents confronting those

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[220]Above n 45, 693-694 (per Gleeson CJ), 733 (per Mahoney JA). Cf 711 (per Kirby P dissenting).
[221]Nicholson, above n 12, 4 n 16.
[222]Penzi, above n 3, 219.
[223]Weir, above n 5, 242-243.

contemplating criticism of large bodies corporate. This effect is reinforced by the elimination of much of the uncertainty in the law.

The availability of the action under section 9 of the Fair Trading Act, which closely resembles the existing law of corporate defamation, effectively restricts corporate actions to situations where the defendant is a commercial entity. Such parties are likely to be better resourced than individuals, and consequently less likely to be deterred from criticism through the chilling effect. Further, the likelihood of a broad resource balance between plaintiff and defendant in such an action reduces the ability of plaintiffs to specifically silence a critic by forcing them into bankruptcy.[224]

2 *Legitimacy of limitation on free speech*

Under this approach, there are three restrictions on the freedom of speech: the injurious falsehood action available to all corporate plaintiffs, the personal defamation action available to small corporate plaintiffs, and the Fair Trading Act only available where the defendant has acted in a trade context.

These restrictions are demonstrably justifiable through an application by analogy of section 5 of the Bill of Rights and the *Moonen* principles. The objective of the restrictions is the protection of property interests attaching to reputation, and the reputations of officers. The protections afforded by the three possible actions are a minimised interference with free expression, and so can be said to be in reasonable proportion to their objective. Injurious falsehood and the Fair Trading Act action are economic actions, and are therefore rationally related to the economic protection which they afford a body corporate. The personal defamation action is also rationally related to its objective of providing reputational protection to individuals. The protections afforded are necessary and justified.

An injurious falsehood action is needed to protect bodies corporate from "false and malicious statements aimed at causing, and causing (sic), financial harm."[225] This protection is narrowly drawn and has been found to be an acceptable limit on the democratic right to freedom of expression.[226] Further,

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[224]As occured in *Bognor Regis*, (Weir, above n 5, 245) and the Mcdonald's litigation (Nicholson, above n 12, 3).

[225]*Ballina*, above n 45, 694 (per Gleeson CJ).

[226]*Derbyshire*, above n 45, 551 (per Lord Keith) (referring to Article 10 of the ECHR).

the substantially similar United States public figure defamation action is viewed as an acceptable limit on the broader human right to free speech.[227]

Similarly, the personal defamation action for smaller plaintiffs is a legitimate limit on both interpretations of freedom of expression. It is available only to officers of small bodies corporate in which there is identity between the body corporate and its officers. Defamation actions by small bodies corporate do not raise the policy issues relevant to large bodies corporate, and have been accepted as a legitimate limit on the wide interpretation of freedom of speech.[228]

The Fair Trading Act action is also a legitimate limit on free expression.[229] It affects only expressions in a trade context, which "are rarely intended to air a matter of public interest but rather to secure some advantage for the . . . trader".[230] Such statements will rarely be deserving of free speech protection. Further, its application is limited to situations of comparative resource equality between plaintiff and defendant.

VII CONCLUSION

London has been described as the "libel capital of the world"[231] because of the ease with which English law allows corporate plaintiffs to silence their critics. This is probably only because no-one has noticed New Zealand.

The law in England does give some effect to a democratic model of freedom of speech through its bar on governmental defamation actions. In New Zealand, even the existence of such a bar remains uncertain. Under the current law in New Zealand, corporate plaintiffs have the capacity to silence existing critics and to deter future criticism. Although this power is not often visibly exercised, the knowledge that it exists exerts a chilling effect over public debate.

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[227]Docherty, above n 171, 266. *Sullivan*, above n 114, 279-280.
[228]*Snead*, above n 184, 1328.
[229]*NZAPMB*, above n 46, 17. The compatibility of the Fair Trading Act action with the wide interpretation of freedom of speech has not been addressed. However, the limitation appears to be justifiable.
[230]Patfield (1993), above n 121, 304.
[231]Penzi, above n 3, 211.

This paper sets out a principled approach to the availability of defamation actions at the suit of bodies corporate and identifies the alternative remedies for reputational harm. This analysis shows that corporate defamation actions are unnecessary and place an unjustifiable fetter on freedom of expression. Both the common law and the legislature have the capacity to bar actions by corporate plaintiffs. This capacity should be exercised.

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