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"DEFAMATION IN NEW ZEALAND -
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INTRODUCTION

Almost every law, at some time or other, will become the object of controversy: one sector of its critics demanding reforms which will best serve the interest it considers paramount; another, conflicting, group who assert that their interests are not being adequately served by the present law.

Such is the case of the law of defamation in New Zealand; a law principally governed by the Defamation Act, 1954, in conjunction with British and New Zealand common law decisions.

The draftsmen of such a law walk a constitutional tightrope; they must attempt to balance the competing values of right to 'reputation' on the one hand, and freedom of opinion and expression on the other. However the problem is approached, and the remedy suggested, there will always be those dissatisfied with the resulting status quo.

Attempts to provide such a balance in New Zealand have approached the problem from the angle whereby the right to reputation is guaranteed, except in certain specific justified circumstances. If that right is breached, damages must be paid. A similar approach has been taken in England, with few major reforms being suggested as a result of a recent review of the law, none of which would markedly change this balance of interest. [1]

The United States have tackled the problem from the opposite viewpoint in recent years [2]. They regard freedom of the press, one of their most fundamental constitutional concepts, as paramount, only to be over-ruled in cases of reprehensible conduct in the extreme.

However, it will be suggested that all these schemes are totally inadequate to deal with the one real issue involved: how to maintain the right to reputation, without reducing freedom of expression to a weak, ineffective and vulnerable concept. To achieve such a reconciliation of the two, almost

1. 'Report on the Committee on Defamation', 1975, H.M.S.O. London, Cmnd 5909.
2. e.g. New York Times v. Sullivan 376 U.S. 254 (1964); Curtis Publishing Co. v. Butts 388 U.S. 130 (1967); Rosenbloom v. Metro-media Inc. 403 U.S. 29 (1971); but see Gertz v. Welch 94 S. Ct. 2997 (1974) for recent reaction to such trends.

mutually exclusive, propositions, the whole basis of the law must be re-examined, pulled apart and reconstructed along more practical lines.

This paper is an attempt to present a viable alternative to the recognised approach, by abolishing the need for such confusing and controversial areas of defamation law as privilege and fair comment, and removing also that most ineffectual remedy, damages, which seems to pervade the most inappropriate areas of our law.

THEORY OF REPUTATION

It would be easy enough to begin by saying that a right to reputation exists, should be recognised as such, and given strong consideration with respect to other areas which encroach on it. But what is reputation, and what is the value of its preservation to society?

'Reputation' itself is an abstract principle, a word used to express an evaluation of other people's estimation of an individual. It is intangible, with wide-ranging components [3], and essentially differs with the society and with the times. Basically,

> "where the disposition ... simply (depends) on the good-will (a person) bears to you ... in order to express what chance you have of deriving a benefit from his services, a kind of fictitious object of property is spoken of, as being constituted in your favour, and is called your reputation"[4].

As will be seen, such a simplistic explanation no longer is adequate to describe the present use of the word in the defamation field [5].

3. See below p. 7; also Probert, "Defamation - A Camouflage of Psychic Interests : The Beginning of a Behavioural Analysis", 15 Vanderbilt Law Review, 1173.
4. "The Collected Works of Jeremy Bentham : An Introduction to the Principles of Morals and Legislation", ed. Burns & Hart, University of London, Athlone Press, 1970, p. 193.
5. Below p. 7.

Such an estimation becomes important to the individual in relation to the treatment of him by his fellows:

> "The pleasures of a good name are the pleasures that accompany the persuasion of a man's being in the acquisition or the possession of the goodwill of the world about him; ... and as a means of it, either their love or their esteem, or both; and as a fruit of it, of his being in the way to have the benefit of their spontaneous and gratuitous services"[6].

Loss of good name and esteem in the community has social, economic and emotional consequences[7]; is it then any wonder that an individual feels that his good reputation is important to him, and wishes to maintain it as such? This has been described as 'motive', a term demonstrative of the interest of the individual's "ingratiating one's self with ... the world at large"[8].

However, the benefit of a good reputation is not confined to the individual; the desire for a good name also works to the advantage of society. A person wishing to maintain his position may be more willing to conform to society's requirements than if he has less at stake.

> "The regard of those about him more completely conditions his behaviour than any one other factor, and it likewise adds more to his stature as a person than any other one factor"[9].

Part of the sanction for contravening such norms is the loss of the esteem of one's peers, resulting in withdrawal of favourable considerations given in the past. Thus, if society reinforces the rewards for good behaviour, it has available a form of control to help it achieve a well-ordered and manageable group of citizens.

So, it is the interests of both the individual and the society to see that the best reputation possible, in its crude sense, is maintained. How, then, should statements against

6. "The Collected Works of Jeremy Bentham", op.cit p. 44.
7. He may, for example, become a social outcast, suffer financial hardship, and become psychologically disturbed.
8. Bentham, op cit. p. 106.
9. Probert, "Defamation - A Camouflage of Psychic Interests : The Beginning of a Behavioural Analysis", 15 Vanderbilt Law Review, 1173, 1178.

reputation be dealt with? If they were simply ignored, the result would be deprivation of the individual, through the withdrawal of the positive benefits he had enjoyed through his good name. Further, society could be subject to a partial breakdown in its good order: the individual whose bad deeds have been found out may feel himself free from the restraints he was under in trying to sustain his respectability, and thus commit further breaches of society's sanctions; or, if the statement was false, it may have the same result through the feelings of bitterness arising from such a statement, without the possibility of redemption of the lost reputation.

With such serious consequences, it would be irresponsible to allow all such statements to go unchallenged. The problem is one of deciding to what extent sanctions should be applied. Clearly if the statement be true, there can be no justification in censoring the publisher. It is in society's interest to know that it has been falsely applauding the actions of a person not deserving of such esteem. The inconvenience to the individual in having his wrongful behaviour publicised is his just desert. It can, in fact, help society to maintain the standards of the rest of the community, by making an example of the deviant, and withdrawing his advantages from him.

Following up this idea, Bentham wrote:

"Reputation is a fictitious entity, it cannot in strictness of speech be meddled with"[10].

However, a reflection on such reputation will either "augment or diminish that portion of good-will which the circle around him may be disposed to bestow upon him"[11]. If it diminishes it, the statement may be true or false; "if true every man has a right to convey such notions"[12], but, "if the notion being prejudicial to a man's reputation is at the same time a false one, the general rule is that no man has a right to propagate it, and to this there can scarcely be an exception"[13].

10. Bentham, "The Collected Works of Jeremy Bentham : Of Laws in General", ed. Hart, University of London, Athlone Press, 1970, p. 202.
11. ibid p. 202.
12. ibid p. 202.
13. ibid. p. 203.

There are some such exceptions, as will be seen later[14].

Reputation in its wider legal sense

'Reputation' in its present legal sense, when referring to the law of defamation, is not confined to the strict limits of what others think about an individual, although it may so appear at first glance. It has developed over the years to include more personal, or 'psychic'[14a] interests, such as hurt feelings, anxiety, economic deprivation, loss of affection, as well as withdrawal of respect leading to a possible loss of social fulfilment. The word reputation is used merely as a 'roadsign' to indicate the sorts of harms we are concerned with. It is neither an all-embracing term, nor one which excludes all other considerations. It has been easier in the past in libel cases to refer to 'reputation' as being the victim of the verbal assault, without any clear definition of the components of which it is comprised. There is some difficulty in establishing the extent to which such particular losses are considered, the Court being unwilling, at first, to recognise them as independent factors in defamation, and loath to allow expert witnesses to testify to establish the effect of the statement. The problem is also one of best compensating the individual where such loss is shown.

Thus, the individual suffers as much through the loss of his reputation in relation to his personal feelings and emotional stability, as he does from the resulting reactions of his peers in society.

Recognition of the right to reputation

The harmful effect of such statements has not gone unnoticed.

It has always been a principle of tort law that it exists "primarily to compensate the person injured by compelling the wrong-doer to pay for the damage he has done"[15], and "for the purpose of preventing man from hurting one another, whether in

14. below p. 23-25

14a. Probert, op. cit. p. 1174.

15. 'The Law of Torts', The Law Book Co, Australia, 4th Ed, 1971 p.2 (Fleming)

respect of their property, their persons, their reputations, or anything else which is theirs"[16]. Thus, the right to reputation, apart from being a right on its own account, is also a facet of the general personal injury for which the law attempts to compensate. As T.I. Emerson quotes the judgement in Curtis Publishing Co. v. Butts[17]:

> "It is the traditional law of tort - 'the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another'."[18]

The legislature has also specifically recognised the essential part that the concept of reputation plays in society. It has been acknowledged as fundamental in all defamation legislation, with the emphasis remaining throughout on the redemption of the lost reputation. In his opening speech to the second reading of the most recent libel legislation in England, the mover, in recognition of the role of reputation, said "We have tried to improve, to the limit, the safeguards for the person injured"[19]. This point of view has been borne out by the lack of fundamental changes in the balance of the law suggested by the Select Committee Report on Defamation recently published in England[20].

Such a principle has long been recognised in the Courts: Bowen L.J. stated in the old authority of Ratcliffe v. Evans[21], "The law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights (to reputation)"[22].

Possibly the most persuasive recognition of its importance is its adoption as part of the United Nations 'Universal Declaration of Human Rights', providing in Article 12:

16. "Salmond on the Law of Torts", Sweet and Maxwells, London, 1969, 15th Ed. p. 16.
17. 388 U.S. 130 (1967).
18. T.I. Emerson, "The System of Freedom of Expression", Random House Incorporated, New York, 1970, p. 534.
19. 500 H.C. DEB 5s, p. 725, per N.H. Lever.
20. "Report of the Committee on Defamation", op. cit.
21. [1892] 2 Q.B. 524.
22. supra, p. 528.

> "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference and attacks."

Some may say that its importance is not universally acknowledged, as there is no mention of any such right in that other, theoretically fundamental, statement of democratic rights, the United States Constitution. Indeed, attempts have been made to exclude any such consideration as reputation where the First Amendment is involved[23].

Such a suggestion may be countered in three ways. First, in the political climate at the time of the drafting of the Constitution, the right to freedom of speech and assembly was a contentious issue, and was therefore of prime concern to the 'Fathers' of the Constitution. As W. Probert commented,

> "Freedom of speech was memorialized in our Bill of Rights at a time when the need for such slogans - or enduring principles if you prefer - was still apparent. Patriotism is important right now, but so is a more general concern for the advance of <u>all</u> civilised values, all the values of the individual as well as those of his societies"[24].

The British common law of defamation "originated in soil entirely different from that which nurtured these constitutional values"[25].

Secondly, the American attitude has been described as one of "apathy about privacy and reputation"[26], and they are perhaps more hardened to its consequences than many of their fellows outside America.

Thirdly, provision <u>is</u> made in the Constitution for the inclusion of other rights not expressly mentioned in the document.

23. below p.38-39
24. Probert, op. cit. 1196.
25. <u>Curtis Publishing Co</u>. v. <u>Butts</u> (supra), per Justice Harlan 18 L Ed. 2d 1094, 1109.
26. Reisman, "Democracy and Defamation : Fair Game and Fair Comment", Columbia Law Review, v. 42 (1942) 1282, 1283

Under the Ninth Amendment "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". As Justice Goldberg said, in considering the application of the Amendment,

> "To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage (or, for our purposes, right to reputation) may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment, and give it no effect whatsoever"[27]. "The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments"[28].

It appears, therefore, that the right to reputation is one of magnitude; it not only affects the individual's enjoyment of life, but it has direct repercussions on society; and its important role in democracy has long been recognised as such.

However, it has a strong rival for ascendency when it comes into conflict with that much championed cause, freedom of speech.

27. Griswold v. Connecticut 381 U.S. 510, 519.
28. Griswold v. Connecticut (supra) p. 520.

THEORY OF FREEDOM OF EXPRESSION

Basic Principles

The theory of freedom of expression is the outcome of two similar, but separate, ideals, espoused by many of our forebears, both philosophers and politicians. There is the first freedom, freedom of opinion; a necessity for protection against political despotism. As Mill contended:

> "There needs protection also against the tyrrany of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own. There is a limit to the legitimate interference of collective opinion with individual independence."[29]

However, freedom of opinion on its own is not sufficient; if such opinion cannot be aired, it will be of no value, apart from the possible peace of mind of the individual who holds it. Criticism must be vented for it to be objectively examined and/or answered. As Justice Black put it:

> "Our First Amendment was a bold effort to adopt this principle - to establish a country with no legal restrictions of any kind upon the subjects people could investigate, discuss and deny. The Framers knew ... the risks they were taking. They knew that free speech might be the friend of change and revolution. But they also knew that it is always the deadliest enemy of tyrrany"[30].

Thus, the right to express one's ideas walks hand in hand with the right of such ideas to exist. Any society claiming itself to be a representative body must allow for both these avenues to be available to its members.

29. J.S. Mill, "On Liberty", Oxford University Press, London, 1912, p. 9.
30. "One Man's Stand for Freedom", ed. Dilliard, Alfred A. Knopf Publications, New York, 1963, p. 48.

Application of the theory

The means through which to disseminate such opinions, as societies have become larger, and more technically advanced, has been through an increasingly sophisticated publication, or 'press' structure. The relative authority, and role, of such a structure differs with the basic beliefs and assumptions of each society. The uses of the press have been classified into four main categories[31], showing the various adaptations consistent with differing societal demands.

Initially the press arose as a means of distributing propaganda, and reinforcing the existing power structure. This role forms the basis of the 'Authoritarian' theory[32], under which those considered wise or knowledgeable were confined to the few 'acknowledged' intellectuals, who incidentally also formed the foundation of the central authority, and in whose hands alone the machinery of the press was placed. As a result, only ideas in support of the establishment could be circulated and evaluated, eliminating what is possibly the most important press function in present day terms: the ability to criticise and check the actions of government.

With the growth of democratic and religious freedom, coupled with economic changes, it became evident that all members of society had the right, and the potential ability, to make a rational decision between truth and falsity when faced with conflicting evidence and argument. Such factors lead to what is termed the 'Libertarian' approach[33], virtually making the press the fourth power in government, after the legislature, judiciary and executive, and viewing it as a 'partner' in the search for truth.

This view has been extended to that termed 'social responsibility'[34], which concept is indicative of the danger in modern society of all the resources, both in economic terms and in relation to access to information, being concentrated more "into the hands of a powerful few"[35], and "put(ting) new and

31. F.S. Siebert, "Four Theories of the Press", University of Illinois Press, Urbana, 1956.
32. ibid p. 2-3.
33. ibid p.3.
34. ibid p.4.
35. ibid p.4.

uneasy power into the hands of media owners and managers"[36]. It is then, with the possibility of the restriction of the notion of free market of ideas, that the need for social responsibility on the part of such persons arises; if abuse is shown, it will at the same time indicate the need for some control over those with the power, in the interest of society.

The fourth theory, entitled 'Soviet Communist'[37] shows the effect of such controls being exercised to the extreme. While Russia, for example, may lay claim to a free press, it is only so in terms of the ideas of the Soviet power structure, who, while claiming to represent the opinion of all their comrades, allow no machinery to exist which may refute this view.

Present day recognition of the principle of freedom of speech

Our society falls within the third category, and as such it is considered that this fundamental right is truly deserving, and indeed in need of, protection.

General protection has been enbodied in such documents as the Declaration of the Rights of Man, 1789; the pioneer French Constitution of 1791; the Universal Declaration of Human Rights; the United States Constitution, through the First Amendment.

It may be considered that England, and the Commonwealth, have failed to recognise the stature of this fundamental principle, through omitting it from any express statement of rights. However, Dicey points out that any such recognition is unnecessary, as

> "the so-called liberty of the press is a mere application of the general principle, that no man is punishable except for a distinct breach of the law"[38],

and he quotes Lord Ellenborough:

> "The Law of England is a law of liberty, and consistently with this liberty we have not what is called an imprimatur : there is no such preliminary license necessary; but if a man publish a paper, he

36. ibid p. 4.
37. ibid p. 4.
38. A.V. Dicey, "Introduction to the Study of the Law of the Constitution", MacMillan & Co., London, 1960, p.248.

is exposed to the penal consequences, as he is in every other act, if it be illegal"[39].

Admittedly, America considered this to be a fault, which it set out to remedy, as the Congressional debates on the First Amendment show:

"Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, came in question in that body (British Parliament), invasion of them is resisted by able advocates, yet their Magna Carta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed"[40]

but it cannot be used to say that such an important consideration has been ignored.

It is argued, therefore, that, although the emphasis placed on the express recognition of the value of freedom of speech in the different jurisdictions varies, there is no basis for the conjecture that British law takes no cognisance of the right to freedom of debate, or expression of opinion. It is taken as a part of a conglomerate of rights available to each individual of the society, and as such, its worth is balanced in each situation with its effect on the other rights of the individual, and of society as a whole.

Specific recognition and protection of the right

General recognition of the right is not enough on its own. The next problem is one of devising specific protections against the abuse of the right to freedom of expression, which may arise from one of two directions.

Such a specific safeguard must prevent manipulation of the free press by any political or governmental power, which could tend to inhibit the free exchange of ideas and curb anti-establishment criticism. At the same time pressures, and possibly sanctions, must be placed on the press to prevent any excessive use of their undisputed, and virtually monopolistic,

39. ibid. p. 248, per Lord Ellenborough, The King v. Cobbett (1804) 29 St. Tr. 1.
40. As quoted by Justice Black in "One Man's Stand for Freedom", op. cit. p. 43.

power over the distribution of material which may be detrimental to the good of society.

Legislative sanctions to this effect can be seen in the obscenity and defamation laws, the Official Secrets legislation, and through the laws relating to seditious libel. Although all of these may be considered curbs on the freedom of the press to publish any matter whatsoever, and on the public's freedom to discriminate between the issues for themselves, it has generally been accepted that, for the good of the community, some restrictions in certain fields of publication are necessary. The principle has been stated thus:

> "One of the essentials of this democratic way of life is a flow of information enabling the individuals comprising society to discharge their various decisional responsibilities - to make up their minds. But the sheer mass of available information, the certain knowledge that part of what may pass for information is mis-information, false and sometimes mischievous, clogging the rational processes of public debate, and threatening unwarranted damage to individuals, call for some mechanism to secure a minimum standard of responsibility in the transmission of information"[41].

This is supported by Justice Harlan, who considered that

> "The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others"[42].

Such sanctions only apply where there is an abuse of power, or improper use of legitimate activity[43].

Thus, there is a necessity to try to balance control over the press, with freedom of the press. However, in each area of control over the press, some actual balance must be reached to be fair both to the press and to those protected. That is the point at which the major problems arise.

41. Pedrick, "Freedom of the Press, and the Law of Libel; the Modern Revised Translation", Cornell L.Q. v. 49 (1964) 581.
42. Curtis Publishing Co. v. Butts (supra) p. 1108.
43. T.I. Emerson, op. cit. p. 534, re Butts.

A PHILOSOPHICAL ANALYSIS

How then, is it possible to reconcile the view that, to support a stable democratic society, freedom of opinion and expression are considerations of paramount importance, with that right of the individual and society to enjoy the fruits of a well-earned and fully justified 'good reputation'? Such a dilemma can be seen from examining the ideology of one such philosopher who attempted to hold both views simultaneously; that is John Stuart Mill.

As discussed, there appears little disagreement with the notion that freedom of opinion and ideas, and the freedom to express them, are fundamental to the healthy running of a democratic society. The basic theory behind such a principle can be found in the initial chapters of J.S. Mill's 'Essay on Liberty'[44].

Attempts are often made to justify the granting of absolute powers to those involved in the publication of opinions, on the basis of such philosophies. To show the difficulties involved in establishing such a principle, and the virtual impossibility of it existing without seriously infringing other fundamental rights, it may help to follow through the various ideas expressed by Mill.

Mill begins with the presumption that human liberty demands "liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological.[45]" Few would disagree with this theoretical necessity; in fact, it is a force which, even if it is disagreed with, cannot be effectively countered, and may indeed grow as a result of any opposition. He continues,

> "The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.[46]"

44. J.S. Mill, 'On Liberty', Oxford University Press, London, 1912.
45. ibid p. 18.
46. ibid p. 18.

If one draws from this that the expression and publication of opinions is equally necessary to maintain social and political stability as is the holding of such opinions, I would readily concur. The time has indeed passed "when any defence would be necessary of the 'liberty of the press' as one of the securities against corrupt or tyrranical government"[47]. However, if one maintains that such sentiments hold the freedom of the press paramount above all other considerations, I cannot agree; and, indeed, it is difficult to reconcile such a view with further theories expressed by Mill later in the essay.

Mill agrees that,

> "the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists, first, in not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights ... These conditions society is justified in enforcing at all costs to those who endeavour to withhold fulfilment.[48]"

Later he states,

> "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it.[49]"

Further,

> "If any one does an act hurtful to others, there is a prima facie case for punishing him, by law, or where legal penalties are not safely applicable, by general disapprobation"[50]

and,

> "The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it[1]"

47. ibid p. 22.
48. ibid p. 92.
49. ibid p. 92-3.
50. ibid p. 16.
1. ibid p. 18.

As earlier discussed, it can hardly be questioned that the ability of a person to enjoy good reputation, if he is deserving of it, is a fundamental right to which all members of society are entitled[2]. Thus, if the actions of one, in publishing a statement leading to an infringement of the right to reputation of another, his action may be subjected to sanction. A hurtful act may be punished.

How, then, does such a theory fit in with Mill's earlier considerations of the fundamental nature of freedom of speech? Some say that he makes the two arguments compatible when he reasons that

> "It would be a great misunderstanding of this doctrine to suppose that it is one of selfish indifference, which pretends that human beings have no business with each other's conduct in life, and that they should not concern themselves about the well-doing or well-being of one another, unless their own interest is involved.[3]"

> "We have a right, also, in various ways, to act upon our unfavourable opinion of anyone, not to the oppression of his individuality, but in the exercise of ours. ... We have a right, and it may be our duty, to caution others against him, if we think his example or conversation likely to have a pernicious effect on those with whom he associates. ... In these various modes a person may suffer severe penalties at the hands of others, for faults which directly concern only himself; but he suffers these penalties only in so far as they are the natural and ... spontaneous consequences of the faults themselves.[4]"

It is readily agreed that there is a need to warn people of the dangers of association with certain persons, and of the undesirability of their actions. However, such recognition can only be desirable so far as such warnings are justified; that is, based on truth. One may agree with Mill in saying,

2. above, p. 7.-10
3. ibid p. 93.
4. ibid p. 95.

"in many cases an individual in pursuing a legitimate object necessarily, and therefore legitimately, causes pain or loss to others"[5],

and so such an undesirable person

"must expect to be lowered in the opinion of others, and to have less share of their favourable sentiments; but of this he has no right to complain.[6]"

One cannot justify, however, adapting this principle to cover situations where there is no true danger to caution people about; the effect of such a statement is not to increase the public good by warning society of the possible resultant acts of the undesirable; it merely serves to violate the individual's right to enjoy his reputation. Such a false report affecting the reputation of the individual is neither 'necessary' nor 'legitimate'; it does not benefit society, it only serves to punish an innocent person.

Those attempting to justify absolute freedom of expression may quote:

"Wrong opinions and practices gradually yield to fact and argument[7]" ... "The steady habit of correcting and completing his own opinion by collating it with those of others, so far from causing doubt and hesitation in carrying it into practice, is the only stable foundation for a just reliance on it[8]",

and that such wrongful statements provide

"a standing invitation to the whole world to prove them unfounded[9]."

"If the challenge is not accepted, or is accepted and the attempt fails, we are far enough from certainty still; but we have done the best that the existing state of human reason admits of; we have neglected nothing that could give the truth a chance of reaching us[10]".

Thus, they are saying that a false imputation as to a person's reputation will eventually be set to rights; and even if it is not, at least they have tried.

5. ibid p. 117.
6. ibid p. 96.
7. ibid p. 27.
8. ibid p. 28.
9. ibid p. 29.
10. ibid p. 29.

In rebuttal of this it is contended that the initial statement is the one which does the damage; an apology may serve to redeem the individual's reputation to a certain extent, but the accusation will still be associated with him, and his behaviour will still be suspect to a certain extent in the future. By the nature of our press structure it is rare that an individual will have available to him the same resources for publishing a clarifying statement or a denial that the original publisher enjoyed, and his reply will accordingly not carry as much weight as the initial accusation. He is then left with the stigma of having been accused, albeit falsely, of some anti-social or corrupt practice.

Further, the fact of failure to pursuade the public to ignore the earlier opinion may be acceptable in regard to mere opinions or points of view not directed at one individual; but we are dealing here with a person's reputation. It is vital that his damaged reputation be restored, or that he be compensated accordingly.

Is such punishment for the making of a false statement inconsistent with Mill's theory? I submit not. In the words of Mill

> "liberty consists in doing what one desires ... When there is not a certainty, but only a danger of mischief, no-one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk ... he ought, I conceive, only be warned of the danger, not forcibly prevented from exposing himself to it.[11]"

No-one is suggesting that all statements as to the character of an individual should not be made. While that may be desirable from the individual's point of view, it would not only prevent the provision of the necessary warnings earlier mentioned, but it would also clearly violate the rights of the press to publish what they considered relevant. All that is being suggested is that there is a risk attaching to such publication that the reputation of a person may be damaged; and that the publisher should be ready to take that risk. If the price payable as a result of such risk can be minimized, well and good.

11. ibid p.18

Therefore, it is submitted that Mill's theory could be properly interpreted as follows:

> While "the individual is not accountable to society for his actions so far as these concern the interests of no person but himself"12,
>
> "that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment if society is of opinion that the one or the other is requisite for its protection13",

substituting for the word 'individual' the phrase 'the press'. Thus, an action in publishing a statement of a defamatory nature affecting the reputation of an individual may be justifiably disciplined, and not ignored as an unfortunate by-product of absolute freedom of expression.

12. ibid p. 115.
13. ibid p. 115.

PRESENT STATE OF DEFAMATION LAW IN NEW ZEALAND

New Zealand has chosen to approach the reconciliation of the two ideals by way of a strict defamation code, which makes almost all defamatory statements subject to some form of censure.

The general definition of defamation accepted in New Zealand is the same as that which arose under the common law in England. As classified by the Faulks Committee on Defamation[14], a report published 'of and concerning' the plaintiff[15] is defamatory if it contains matter:

(a) which is to a person's discredit[16]; or
(b) which tends to lower him in the estimation of right-thinking members of society generally[17]; or
(c) which tends to expose him to hatred, contempt or ridicule[18]; or
(d) which tends to injure his reputation in his office, trade or profession[19]; or
(e) which tends to injure his financial credit[20]; or
(f) which tends to cause others to shun or avoid him[21].

However, such statements, considered prima facie to be defamatory, are subject to several qualifications.

Justification

Truth, or 'justification', is a complete defence[22], and rebuts the presumption of defamation arising from the statement[23]. Further, it is only those parts of the statement which cause real damage that must be proven to be true[24].

14. 'Report of the Committee on Defamation', H.M.S.O., London, 1975, p. 190.
15. Cassidy v. Daily Mirror Newspaper [1929] 2 K.B. 331; Clarke v. Vare 1930 NZLR so long as they may be connected by reasonable inference, the words need not refer to the plaintiff
16. Youssoupoff v. Metro-Goldwyn-Mayer (1934) 50 T.L.R. 581, 584.
17. Emerson v. Grimsby Times (1926) 42 T.L.R. 238.
18. Parmiter v. Coupland (1860) 6 M. & W. 105, 108.
19. Henderson v. Thompson [1934] N.Z.L.R. 444; Richards v. Sun Newspapers Ltd (No. 2) [1931] N.Z.L.R. 631.
20. Stubbs v. Russell [1913] A.C. 386, 392.
21. Youssoupoff v. Metro-Goldwyn Mayer (supra) 587.
22. McPherson v. Daniels (1829) 10 B. & C. 263, 272; a person has no right to a character free of that imputation if it is in fact true.
23. Belt v. Lawes (1882) 51 L.J.Q.B. 359, 361.
24. s 7 Defamation Act (N.Z.) 1954.

Absolute Privilege

The defence of absolute privilege applies in certain recognised circumstances, allowing for complete immunity on the part of the publisher[25], regardless of the motive behind the making of the statement[26]. Such occasions are strictly defined, and include statements made in the course of judicial[27], and quasi-judicial[28] proceedings, and fair and accurate reports of those proceedings[29]; statements made in the course of Parliamentary proceedings[30]; and fair and accurate reports published in respect of them[31]; statements made by one executive officer of state to another on official matters[32]; and communications between husband and wife[33].

Qualified Privilege

The further defence of 'qualified privilege' is available in respect of untrue statements made in the public interest[34] on less highly esteemed occasions, and is defeasible by proof of 'malice' on the part of the publisher[35].

Situations giving rise to such privilege are generally considered those

> "where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it"[36].

25. Royal Aquarium v. Parkinson [1892] 1 Q.B. 431, 451.
26. Royal Aquarium v. Parkinson (supra) 451.
27. O'Connor v. Waldron [1935] A.C. 76.
28. O'Connor v. Waldron (supra) 76; Thompson v. Turbott [1962] N.Z.L.R. 298, considered the Public Service Board of Appeal to be an occasion of absolute privilege.
29. s. 7 (1) Defamation Act (N.Z.) 1954 re First Schedule, Part I, allowing for absolute privilege on fair and accurate reports from the Courts or the House of Representatives.
30. News Media Ownership v. Finlay [1970] N.Z.L.R. 1089, 1102.
31. s. 7 (1) Defamation Act 1954, Schedule I.
32. Peerless Bakery Ltd v. Watts [1955] N.Z.L.R. 339; Keenan v. Auckland Harbour Board [1946] N.Z.L.R. 97, the communication between officials of a Government office was absolute privilege, therefore malice did not apply.
33. Wennhak v. Morgan (1880) 20 Q.B.D. 635.
34. Holloway v. Truth [1959] N.Z.L.R. [illegible]; the statement must be published 'in the public interest', not merely be such that the public would be interested in its content. Similarly Brookes v. Muldoon [1973] N.Z.L.R. 1.

35. Smith v. Streatfield [1913] 3 K.B. 764, 770.
36. Adams v. Ward [1917] A.C. 309, 334; adopted in Dunford Publicity v. News Media Ownership [1971] N.Z.L.R. 961; Brooks v. Muldoon (supra) 1. The Court must consider by whom, and to whom, when, why and in what circumstances it was published, and whether these considerations lead to such an interest or duty.

the most common being statements made in the pursuance of a duty, public or private[37]; statements made to another where both have a legitimate common interest[38]; statements in the pursuance of the conduct of the defendant's own affairs, where his own legitimate interest is at stake[39]; and statements in reply to questions[40] or of defence against other's statements[41].

As mentioned earlier, this defence may be defeated if the plaintiff can show improper use of the privileged occasion[42], or improper motive[43].

Fair Comment

The remaining defence available to the publisher is that of 'fair comment'. Such comment must be shown to have a reasonable basis in regard to the true facts, even if the whole statement which it relies on is not true[44]; and it must be comment on a matter of public interest[45]. The words must be clear statements of opinion, not fact[46], honestly held by the publisher[47], no matter how misguided such an opinion may be[48].

37. Toogood v. Spyring (1834) 1 C.M. & R. 187, 193.
38. Stuart v. Bell [1891] 2 Q.B. 341, 354; Eyre v. N.Z.P.A. [1968] N.Z.L.R. 736, a report on a matter of common interest loses its privilege if it is inaccurate.
39. Toogood v. Spyring (supra) 193.
40. Taylor v. Hawkins (1851) 16 Q.B. 308.
41. News Media Ownership v. Finlay (supra) 1089, a right to reply to a privileged statement exists, but such right will be lost if the reply extends beyond reasonable bounds.
42. Clark v. Molyneux (1877) 3 Q.B.D. 237, 246; Groom v. Crocker [1939] 1 K.V. 194, 206.
43. Royal Aquarium v. Parkinson (supra) 193.
44. s 8 Defamation Act, 1954 (N.Z.), Truth v. Avery [1959] N.Z.L.R. 274.
45. London Artists v. Littler [1969] 2 Q.B. 375, Denning L.J. "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in or concerned at what is going on or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment", p. 391.
46. Kemsley v. Foot [1952] A.C. 345, 358; Grech v. Odhams Press [1958] 2 Q.B. 276.
47. Slim v. Daily Telegraph [1968] 2 Q.B. 57, 170, 178, 181.
48. Horrocks v. Lowe [1974] 2 W.L.R. 1625.

[illegible] N.Z.L.R. 366. PTO

29 KELSEY, E.J. Defamation in New Zealand.

This defence, as with that of qualified privilege, may be defeated by the plaintiff's proving 'malice' on behalf of the publisher[49] even if another person with no such motive could have written the same report[50].

Innuendo

Although a statement may not appear, on the face of it, to be defamatory, it may be considered so as a result of extrinsic facts not included in the text[1]. Such facts must be shown to have been within the knowledge of some of those to whom the statement was published[2], and their existence must be specifically pleaded[3]. This claim may be coupled with that of an ordinary defamation claim based solely on the content of the statement[4].

Summary

Thus, the defamation law in New Zealand, based predominantly on that of its British counterpart, has attempted to balance the issues of freedom of speech and right to reputation by recognising the damaging nature of a defamatory statement, prima facie, but allowing that presumption to be displaced in certain circumstances; thus acknowledging the necessity of free reporting in certain situations where the individual's right is subordinate, and allowing for the reasonableness of the publisher's actions in others.

Unfortunately, there are severe practical difficulties which arise from such qualifications to the basic rule. The greatest of these is uncertainty, and is the basis for many of the present day attacks on the defamation laws. Whether or not a statement is actually defamatory is seldom in dispute[5]. However, it is often claimed that, not knowing whether a statement will be caught by one of the privileged categories, publishers tend, through fear of legal reprisal, not to publish much of the material to which it considers the public should have access.

49. Thomas v. Bradbury, Agnew Ltd [1906] 2 K.B. 627; Wilson v. Manawatu Daily Times [1957] N.Z.L.R. 735.
50. Thomas v. Bradbury, Agnew Ltd (supra) 627.
1. Grubb v. Bristol United Press [1963] 1 Q.B. 309, 322, "an innuendo is based not merely on the libel itself, but on an extended meaning created by the conjunction of the words with something outside them".
2. Cassidy v. Daily Mirror (supra) 331.
3. O'Brien v. Wilson & Horton [1971] N.Z.L.R 386. PTO

It would appear that the only way to get rid of such uncertainty would be to abolish the system of qualifications on such statements. It may be felt that this would create even more of a dilemma. It would necessarily result in either all statements being considered defamatory, with no attention being paid to the surrounding circumstances, or alternatively, all statements being permissible, as to withhold them may deprive the public of some relevant information. The latter situation has already been considered[6], and will be discussed again later[7], and is not considered to be a viable alternative to the present law.

The former, however, may be, if some means can be found to escape from the present situation of punishment of the publisher if the statement is shown to be false, to one where the emphasis is on redemption of the lost reputation. If the punitive effect of damages was no longer a deterrent to the publisher, except in cases of deliberate misconduct, and the individual cound be recompensed by some other means less inhibiting to the publisher, it is argued that the problem could be resolved to the satisfaction of both parties.

So, while the balance of interest in New Zealand is theoretically fair to both parties, its confusing nature and uncertainty of application frustrates the achievement of such a balance in the practical sense, and some reform is urgently required.

6. above p.14-21
7. below p. 38

AMERICAN TRENDS IN DEFAMATION LAW AND INTERPRETATION

The most important challenge to the established common law principles of defamation has come from recent developments in the United States.

The turning point in American libel law came with the decision in New York Times v. Sullivan[8], a case on appeal to the United States Supreme Court from Alabama. The case involved an advertisement supporting a Southern civil rights movement, and resulted in an award of $US500,000 to a city official in charge of the Police Department. He had claimed that false statements regarding police action referred to in the advertisement had adversely affected his reputation. The Supreme Court, finding itself faced with a decision which was against its conscience to uphold, as it would have meant a payment of a very substantial sum to an 'undeserving' official, could only reverse the decision on 'constitutional' grounds. Thus, after much self-justification through references to the First and Fourteenth Amendments to the Constitution, the Court arrived at a new standard for the granting of damages for the defamation of a 'public official'[9].

The new ruling allowed for recovery only where the official proved that the statement was made either with the knowledge that it was false, or with reckless disregard for its truth or falsity[10]. This principle, referred to as the 'constitutional malice' test, made recovery by such an official virtually impossible.

However, problems were subsequently encountered by the Courts in applying the test; it had failed to define the limits of application and explain the actual test adequately[11].

The test was applied in Garrison v. Louisiana[12], there being extended to cover cases of criminal libel. Later the words 'public official' received consideration in Rosenblatt's case[13], being applied resulting in the definition/to persons in governmental positions

8. 376 U.S. 254 (1964), 11 L Ed 2d 686.
9. supra p. 706.
10. supra p. 706.
11. Frakt and Moran "The Evolving Law of Defamation : New York Times v. Sullivan to Gertz v. Robert Welch Inc. and Beyond", Camden L.J. Vol. 6 Wint '75 no. 3 p.
12. 379 U.S. 125, 130 (1964).
13. 383 U.S. 283 (1965).

of

> "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it beyond the general public interest in the qualifications and performance of all governmental employees"[14].

This criterion was further widened as a result of Curtis Publishing Co. v. Butts[15] and Associated Press v. Walker[16] to cover cases involving the even more obscure 'public figure'.

By this time, however, the Supreme Court was becoming increasingly divided on what standard to apply, and how far to go in applying it. Opinions ranged from Justice Black in his desire for total abandonment of defamation cases as unconstitutional[17], to those, such as Justice Goldberg wishing to confine the application of the New York Times standard strictly to 'public officials'[18].

The Rosenbloom Test, An alternative approach

The Court next embarked along a quite different route. Rather than considering the individual involved, they looked at the subject matter.

> "The real determinent underlying earlier developments of the First Amendment restrictions was the presence of public interest, or concern about which information was needed or (about which discussion was) appropriate to enable the members of society to cope with the exigencies of their period"[19].

Thus, in Rosenbloom v. Metromedia[20] the test of 'public or general concern' in the material published was adopted. As a result,

14. supra 386
15. 388 U.S. 130 (1967)
16. 388 U.S. 130 (1967)
17. see below p.38
18. 376 U.S. 254 (1964), also Justice Brannan in Curtis v Butts (supra)
19. Frakt & Moran. op. Ct p.41
20. 403 U.S. 29 (1971)

the original reasoning of the Court in New York Times as to the advantageous position of the public official or public figure when a defamatory statement is made, and their access to the means to refute such imputations, in comparison with those of the ordinary individual, combined with the 'assumption of risk' argument[21], appears to have been abandoned. This, coupled with the virtual impossibility of meeting the 'actual malice' test, meant that most plaintiffs had to prove that their case fell outside the criteria of 'public or general concern'; most failed[22].

Gertz v. Welch, A Consolidating Step

The problem came before the Court once more in 1974, in the case of Gertz v. Welch[23].

The Court itself admitted the quandary it was in as a result of the earlier decisions:

> "This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort."[24]

The case involved a lawyer who had acted as counsel in a civil action, for the family of the victim of a murder by a police officer; he was subsequently falsely referred to as a ring-leader in attempts to frame the police, with membership of various leftist groups being attributed to him. The matter under discussion in the article was in fact nothing at all to do with him. The publisher claimed both that the plaintiff was a public figure, and that the article complained of concerned a matter of public interest. He further denied any knowledge of the falsity of the statement, and argued that there were no grounds for a finding of 'actual malice'.

21. 376. U.S. 254 (1964), 11 L Ed 686, 718
22. e.g. Firestone v Time Inc 271 So 2d 745 (Fla 1972), Mistrot v True Detective Publishing Corp 467 F. 2d 122 (5th Cir 1972)
23. 94 S. Ct 2997 (1974)
24. - U.S. -

In applying the Rosenbloom[25] public interest test, the District Court dismissed the claim for damages, irrespective of their acceptance of the fact that neither the 'public official' nor 'public figure' tests had been satisfied. The Court of Appeals for the Seventh Circuit refused to overturn the finding, supporting the application of the Rosenbloom principle. The case then came to the United States Court of Appeal.

In considering Rosenbloom, the majority decision pointed out the gross uncertainty which must surround any case where no more than three of the eight judges could agree sufficiently to write a joint opinion,[26] and where five different points of view were put forward. Such a decision cannot truly be regarded as an 'authority'.

The majority then embarked on its own examination of the various interests involved in libel law, recognising the inevitability of some element of false statement arising as a result of upholding the principle of free debate,[27] but at the same time acknowledging the compensatory needs of a defamed individual.[28] However, while concluding that some balance fair to both sides must be reached, it came down on the side of the publisher to the extent of reinforcing the New York Times principle in regard to public office.[29] The Court declined to affirm the majority ratio of Rosenbloom as it considered it inadequate to serve both the interests at stake : the private individual as well as the public official was subject to the rigorous New York Times test, and the publisher still liable even if he took reasonable precautions, if the statement was not one of 'public or general interest'.[30]

It did, however, support the New York Times viewpoint that the public official has greater access to the means to rebutt the accusations than private individuals, and assumes some degree of

25. - U.S. -
26. - U.S. -
27. - U.S. -
28. - U.S. -
29. - U.S. -
30. - U.S. -

risk by becoming so prominent.[31] Such considerations, it was felt, did not apply to the private individual, and thus he should not be subject to the strict New York Times requirement of proving wilful or negligent behaviour.[32]

The Court, further, limited compensation payable to a successful plaintiff to 'actual injury', which included what we know as general or compensatory damages.[33] Punitive damages were abolished, as they were felt to "exacerbate the danger of media self-censorship".[34]

Adaptation of Gertz v. Welch to New Zealand

It has been mooted since the New York Times case that reforms along the same lines should be incorporated into the New Zealand law in favour of the present system, in order to give greater freedom to the Press. For example, such a view was propounded in an article by Professor G.W.R. Palmer, where he proposed an amendment to the 1954 Defamation Act to the effect that

> "No action for defamation shall lie in respect to a statement on an issue of public concern unless the plaintiff can prove that the defendent made the statement with the knowledge that it was false, or with reckless disregard as to whether it was true or false".[35]

There readily appear several substantial difficulties in attempting to transpose American law to New Zealand, not to mention violent objections to the principle of such a proposal.

Differences in Judicial Roles

While it is not argued that the basic principles of the rights of man differ so dramatically from one 'democratic' country to another, it is worth noting the different sphere in which the Supreme Court operates in America, from that of its counterpart in

31. - U.S. -
32. - U.S. -
33. - U.S. -
34. - U.S. -
35. G.W.R. Palmer, 'Politics & Defamation. A Case of Kiwi Humbug?' (1972) NZLJ 265, 269

New Zealand. In New Zealand the Court is bound to follow precedent almost without exception in considering the merits of the case; the Supreme Court in the United States, however, is less restricted, acting with greater discretion to uphold the rights of those whom the stage laws deny 'fair' judgements. If the case is considered important in that its results will set a trend in lower jurisdictions, and the Court decides that the judgement subject to appeal should be reversed, it will devise a constitutional argument to allow for such a favourable decision. Hence, such judgements may tend to fall a little short of pure logic in attempting to comply to some extent with existing precedent (although our law suffers from the same problem, to a lesser extent), and, as a result, principles to be applied in the future may be based on an individual case which had merit in its peculiar circumstances, but which may not be desirable as a general rule. Had the facts in New York Times been marginally different, such a rule may never have been laid down.

With such flexibility of approach permissible in the Court it is possible to adapt the law to the circumstances in each case. However, with our slow, cumbersome and often restrictive principle of binding precedent, such versatility of approach is not possible, and, in the interests of certainty, may not be desirable. With such fundamental differences between the judicial structures of the two countries, while we can recognise any changes, or advantages as they may be considered by some, arising from United States case-law, we must be extremely cautious in adopting any such decision as our own.

Diversity of Journalistic Standards

The second major reason for rejecting the American judgement in regard to New Zealand is the great difference in journalistic standards between the two countries. America, partly because of its size, and partly because of its more diversified involvements, has a far greater variety of publications than New Zealand, dealing with a very wide-ranging number of topics. This could account for the approach taken by the Supreme Court in considering the accessibility

of a defamed person to some publication to refute the accusation levied against him. The channels available to such individuals in New Zealand are considerably more restricted.

American Press also appears to have far greater initiative. It could be suggested that the New Zealand Press does not take initiatives because of the heavier sanctions it faces. To the extent that the possibility of crippling damages inhibits the actions of the publisher in some circumstances, this is fair comment. However, it would be too simplistic to say that this is the only reason. The actual operation of the Press in New Zealand provides little in the way of scope for such investigative and critical in-depth reporting.

New Zealand's major newspapers are, on the whole, under the control of monopolies;[36] television, under the new structure, is less directly controlled by Government, but would not escape severe criticism, and possibly direct interference, should it deviate too far from the established path; radio is also quite strictly controlled, with the right to private broadcast subject to stringent licensing regulations and restrictions. As a result of these strong 'establishment' controls over most influential areas of the media, mass circulation publications tend to be conservative, and generally support the status quo. They are, as a consequence, less inclined to take a partisan approach to a contentious issue than are their American counterparts, and tend to 'play it safe'.

> "Criticism of New Zealand's daily newspapers centres on two main themes: their blandness and their timidity.
>
> The criticism falls into place when you stop to consider the basic philosophy of the role of newspapers. It reveals a fundamental difference between critics and the newspaper establishment as to what that role is.

36. e.g. Independent Newspapers Ltd owns Dominion, Evening Post, Waikato Times, Truth, Sunday Times, Sunday News, Thames Star, suburbans, country papers, racing publications, and other interests; N.Z. News; Auckland Star, Christchurch Star, Sports papers, suburbans, Woman's Weekly, other magazines.

> In America, the newspaper establishment - and the people generally - believe newspapers should be active, part of the checks and balances of democratic government, scrutinising, campaigning, shining a torch into the dark recesses, lifting the government's skirts to find its Achille's heel, ferreting out the truth.
>
> In New Zealand, the newspaper establishment sees its role as primarily passive, recording the public pronouncements of public men - pronouncements which often camouflage the real truth - with resultant columns of "he said"s and "she said"s."[36a]

One notable exception to this criticism is the News Media Ownership publication 'New Zealand Truth', which specialises in a sensational style of reporting without, apparently, a great deal of in-depth research, and, as a result, has been the subject of numerous libel suits[37] and complaints to the Press Council[38]. It would appear undesirable and indeed irresponsible, if such sanctions as now exist were removed in favour of the American approach, if it would give greater freedome to such a regular and deliberate offender.

So, while the Press does admittedly suffer some indirect, but substantial, restriction on its freedom of action through the possibility of harsh monetary penalties being awarded against it, it would be grossly unfair to lay all the blame for the tame nature of the New Zealand Press at the feet of those responsible for maintaining the defamation laws as they are. It is equally an inevitable consequence of the kind of structure and controls to which the individual components of the media are subject internally. While such a structure persists, it is contended, New Zealand Press is not ready for such freedom and its accompanying responsibilities, and indeed has no real need for it.

36a. N.Z. Listener, 'The Press in NZ' part 2, Aug 9-15, 1975, p.12.
37. e.g. Truth v. Bowles [1965] NZLR 768, Truth v. Avery [1959] NZLR 274, Truth v. Holloway [1961] NZLR 22 (P.C.)
38. see 'First Annual Report, 1972-73, New Zealand Press Council'.

The Irrepressible Fault Principle

The third basic objection to the proposal is that it heralds the reintroduction of the fault principle, a system which has only just been purged from the common law after many years of struggle.

> "The basis of the 'fault principle' was that the wrong-doer should pay".[39]

Such a principle has long been regarded by forward thinking persons as an anomalous and ill-conceived consideration when attempting to compensate an individual for a civil wrong. It is the criminal law which provides for punishment; the role of the civil law is one of compensation.

In particular, recent developments in no-fault accident compensation schemes have stressed the need to escape from such a concept. In cases of accidental personal injury,

> "It was the injury itself which was to be the focus of attention, not its cause, Fault was irrelevant."[40]

> "To distinguish between accident victims on the basis of whether or not their injuries are the result of some one else's fault seems unreasonable."[41]

> "The tort system does not compensate everyone who suffers personal injury by accident. An argument could be made that a new 20th Century morality of community concern might demand that all victims should be compensated, whereas 19th Century individualistic morality upon which the tort system is based insisted that fault was a necessary prerequisite."[42]

39. White, 'Accident Compensation Bill', 1973 NZLJ 390
40. G.W.R. Palmer, "Abolishing the Personal Injury Tort System: The New Zealand Experience" Alberta L.R. 9:169 '71, p.173
41. Palmer op.cit. p.178
42. Palmer op.cit. p.177

The Woodhouse report[43] criticised it thus:

> "If fault is not proved, then no matter how innocent the plaintiff, the common law will leave him to bear the whole burden of his losses, even though they might have been catastrophic. Those who have grown up with a legal doctrine which ignores positive arguments for one party because it can only operate upon the shortcomings of the other may think that this is just. It happens to be the law, but it is nonetheless a negative process, and it is a negative process because it has adopted the fault theory as its justification."[44]

Cannot such considerations also be ascribed to the attempt by the American Courts to entrench the fault principle in the law of defamation?

In Gertz v. Welch the Court specifically stressed the need for proof of fault:

> "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private citizen."[45]

However, even in America the need for no-fault law where injury is involved has been recognised.

> "The issue in the United States is no longer whether, but what kind of no-fault laws we shall have."[46]

It may be argued that the situations of accidental injury and defamation are not analogous, as in defamation one is not concerned with physical injury requiring financial support.

43. 'Compensation for Personal Injury in New Zealand', Report of the Royal Commission of Inquiry, Government Printer, 1967
44. ibid p.49
45. 98 S.Ct 2997
46. J. O'Connell, 'Its Time for No Fault for All Kinds of Injuries', ABA J. 60: 1070-2 S. '74, 1071

However, there may well be economic damages to the defamed person from an attack on his integrity or business activities, and he may be in need of some immediate compensation. As recognised earlier,[47] the damage resulting from such statements is not only financial, but may also be psychological, and as a result expenses may be incurred. Further just as in personal injury cases pain and suffering and mental anguish are recognised, such injury is also very real in cases of defamation.

There is also the great problem of being unable to actually prove fault, which leads to substantial uncertainty, and the prospect of bringing a case which may fail on this ground, with its accompanying expenses, may deter the individual from making a valid claim. Those in favour of the proposal would say that this is a good thing, as it would stop frivolous claims which present a threat to the Press. But there is also a principle involved that the individual should be compensated for damage done, especially where it is not a consequence of his own wrongful action. It makes no difference to the damage suffered by the plaintiff whether the action of the publisher was innocent or malicious, so why should damages be awarded along those lines? The inevitable answer is that the innocent publisher suffers if compensation is payable to all victims, so some discrimination is necessary in the interest of freedom of speech. Unfortunately, the fault principle provides such protection, at the expense of the individual.

It would appear that to compromise the two, it is necessary to devise some form of entitlement which allows recovery by all, but which does not unfairly punish a publisher who was not at fault. It is therefore unnecessary and unjustifiably discriminatory to maintain the fault requirement, and even more ill-advised to adopt it afresh at this time, if such a means can be found. Such an equitable solution is suggested below.[48]

47. above p. 7
48. below p. 61

A Matter of Principle

The strongest objection to such a proposal is one of principle. As mentioned, the foundation of New Zealand law is the British Common law. America derives its ideology from its Constitution. It has a finite statement of rights to which any question may be referred if there is doubt. Within such a document is an Amendment, the First, which states

> "Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

Attempts have been made to have this principle considered all-encompassing and exclusive of all other rights which may impinge on its scope. For example:

> "The First Amendment seems to me to be a very uncompromising statement. It admits of no exceptions. It tells us that Congress and, by implication all other agencies of the government, are denied any authority whatever, to limit the political freedom of the citizens of the United States."[49];

> "My view of the First Amendment as originally ratified, is that Congress should pass none of these kinds of laws ... I have no doubt myself that the provision as written and adopted, intended that there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned."[50];

> "I would put an end to all forms and types of censorship and give full literal meaning to the command of the First Amendment."[1];

49. A Meiklejohn, "Political Freedom, The Constitutional Powers of the People", Oxford University Press, New York, 1965, p. 107
50. "H.L. Black, One Man's Stand for Freedom", ed. Dilliard, Alfred A. Knopf, New York, 1963 p.476
1. Freedman v. Maryland 380 U.S. 61, 62 (1965), per Justice Douglas and Justice Black

> "Resolution of intellectual controversy by judicial decision or any form of government decision, is out of line with ideas of subjecting truth and near truth, falsity and near-falsity, to the process of the market-place ... In terms of basic First Amendment theory, therefore no area of communication should be abridged by libel laws."[2]

Some of the arguments against such a viewpoint have already been set out.[3]

However, its interaction with other rights can be justified as a logical extension of such a principle.

> "We should also be able to question a 'right' which does not concern itself with the kind of message which is sent out, if it be the kind which, for instance, involves predominantly false information."[4]

Such a theory works two ways;

> "if a person talked about is deprived of his freedom to communicate, to interact, what sort of social 'right' do you have?"[5]

There is a right to communicate and interact with others, in opposition to the right to say whatever one likes. The one is not really so different from the other that they can be called mutually exclusive.

The latter viewpoint has been adopted by the American Courts; a common sense approach has been taken, recognising the place of such a system of free access and distribution of information while at the same time attempting to fit it in with the realities of life. There are other considerations which do require some recognition, as pointed out by the spirit of the Ninth Amendment.[6]

2. T.I. Emerson 'The System of Freedom of Expression', Random House Inc, New York, 1971, p.530-1
3. above p.9-10
4. Probert, op.cit, p.1197
5. Probert, op.cit, p.1198
6. above p.10

Most importantly, the Press is not sufficiently responsible to warrant such awesome power. As remarked by the court in the State v. McKee

> "Immunity in the mischievous sense is as inconsistent with civil liberty as prohibition of the harmless use."[7]

Justice Powell in Gertz v. Welch commented that

> "there is no constitutional value in a false statement of fact"[8] ...
>
> "the need to avoid self-censorship by the news media is, however, not the only societal value at issue ... absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation",[9]

a sacrifice which the Court found it unconscionable to make.

As a result of this struggle of ideology, the Courts have worked backwards from the Constitution, and found that the closest they could get to the fullest compliance with the strict terms of the First Amendment was something along the lines of the recent decisions in New York Times v. Sullivan,[10] Rosenbloom,[11] and Gertz v. Welch.[12] While it is not a result which pleases those advocating the primary of the First Amendment, it is still a strong endorsement of the ideology behind it, and is not in fact too far from that extremist position in practice.

However acceptable such a position may be in America, it must be looked at in terms of New Zealand's individual circumstances. The immediate response to be expected is that New Zealand society is based on the same democratic principles, therefore the same constitutional concepts should apply. But New Zealand law is not based on such a highly specific and accessible statement of rights.

7. 73 Com 18, 28 (1900)
8. 94 S. Ct 2997
9. 94 S. Ct 2997
10. 376 U.S. 254 (1964)
11. 403 U.S. 29 (1971)
12. 94 S. Ct 2997

It does recognise those First Amendment interests, but at the same time concerns itself with other, equally important, concepts.[13] A statement of law which is based on a system where the priority of rights is so fundamentally different is not suitable for transplant to New Zealand, even in the watered down form now offered.

Summary

Although the latest ratio expounded by the American Courts may suit them admirably, and fulfill their constitutional and practical needs, it is considered that on the practical grounds of difficulty in adaptation to a different Court structure with less flexibility, and inferior press standards, as well as the theoretical objections behind such a principle, that it is not in the least practicable or responsible to seriously suggest its acceptance as a replacement for the present system.

13. above p.15

THE FAULKS COMMITTEE ON DEFAMATION

The present controversy surrounding the law of defamation has lead to widespread demands in many countries other than America, for a reinvestigation of the legal position of the publisher and the defamed individual, to determine the adequacy of the current statutory and common law provisions governing defamation suits.. Such pressure in England led to the setting up in 1971 of a Committee

> "to consider whether, in the light of the working of the Defamation Act 1952, any changes are desirable in the law, practice and procedure relating to actions for defamation"[14]

in England, Scotland and Wales.

The Committee in its report, after the hearing of a substantial amount of evidence both supporting and challenging the present law, presented a Bill in draft form encompassing the changes it considered to be both necessary and expedient. While the Committee considered the arguments both for stricter and more liberal amendments to the law, the line which they finally adopted did not differ greatly, in regard to the balance of interests, from the status quo. That is not to say that the Committee failed to give consideration to sweeping reforms; but, as they appeared satisifed overall with the balance of interests upheld by the present law, they were more concerned with the clarification of the principles involved, and easing the burden of its administration. Unfortunately, if one accepts the present format of the law, the attempts at clarification still contain several major defects, and will, it is considered, merely serve to hamper efficient administration.

14. 'Report of The Committee on Defamation, op. cit. p.1

Defining Defamation

As its initial, and probably most fundamental, reform the Committee attempted to provide a statutory definition of defamation, to set down a clear guideline to publishers, prospective plaintiffs, the Court and the jury.

It is recognised that whenever the detrimental effect of a statement is to be evaluated, some sort of guideline is necessary. Several definitions have been proffered in the past in attempts to achieve some form of clarity; for example

> "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"[15];
>
> "A defamatory statement is a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned, or avoided, or which has a tendency to injure him in his office, profession or trade."[16];
>
> "Speaking generally the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit."[17]

The definition arrived at by the Committee is contained in clause 1 (1) of the draft Bill:

> "Defamation for the purpose of civil proceedings shall consist of the publication to a third party of matter which, in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally".

The wisdom of such a definition may be seriously questioned.

15. Sim v. Stretch, per Lord Atkin, (1936) 52 T.L.R. 669, 671
16. 'Fraser on Libel', 7th Ed. p.1, approved in Myroft v. Sleight (1921) 37 T.L.R. 646, 647
17. Scott v. Sampson (1882) 8 Q.B.D. 491, 503, approved in Youssoupoff v. M.G.M. (1934) 50 T.L.R. 581, 584

While the clarification of the principles involved in a defamation suit is a laudable aim, it appears that this will not be achieved as a result of the Committee's recommendation. As the minority report indicated, it may be strongly argued that such a statutory definition is not only unnecessary, but is also unduly restrictive. There seems to have been no pressing reason for the embodiment of the definition within one statutory provision. As Lord Lyndhurst was quoted in the minority report as saying

> "I have never yet seen, nor been able myself to hit upon, anything like a definition of libel ... which possessed those requirement of a definition; and I cannot help thinking that the difficulty is not accidental but essentially inherent in the nature of the subject matter ... I have not found this to be the point in which the law of libel is deficient."[18]

There also seems to be no suggestion that the past definitions which have evolved from case law are uncertain, to the extent that either of the parties, or the Court, is unsure as to the nature of the statement. The former classifications of defamatory matter, as set out in the minority report, are mentioned above.[19] However, none of those separate classes specifically mentioned claim to be all-encompassing, or exclusive of all other factors.

It may be argued that these definitions can be construed as having a range of application far in excess of that desirable, and that what they include is unclear. This may be countered in two ways: first, that the many years of case-law concerning whether a statement if defamatory or not, have established a fairly well defined set of circumstances for allowing such a case to succeed.

Secondly, examination of the effects of the provision would tend to show it to be a dismal failure in terms of eliminating the vague and ambiguous terminology which was a feature of past

18. '1834 Select Committee of the House of Lords on the Law of Defamation and Libel'
19. above p.22

definitions, and which provided a great deal of uncertainty until clarified by case law. The Committee itself embodies in its definition some of the worst forms of generalisation, such as "in all the circumstances", "affect a person adversely" and "in the estimation of reasonable people generally". Whereas, in the past, the situations where defamatory statements were actionable were eventually reduced to within fairly clear guidelines, this new definition will be the subject of many years of litigation to re-establish the class of statements where a claim will be upheld.

There is one further, major, criticism of this section. The drawing up of a statutory definition, it may be argued, is neither expedient nor just. There is an inherent danger in any attempt to codify within one sentence several hundred years of case law, that the resulting definition will not be wide enough to cover all past circumstances, as well as future unforeseen, but justified, causes of action. By its nature, a statutory definition circumscribes all the available causes of action, and robs the Court of the flexibility it formerly had to expand a definition to include all worthwhile claims that had previously fallen outside that definition.

This reform, therefore, appears to be ill-advised, as it serves merely to introduce further facets of confusion into an area of the law which had evolved a reasonably stable format for discriminating between actionable and non-actionable statements, and restricts the future capacity of the Court to consider each case subjectively on its merits. To this end, the minority view of maintaining the status quo can be endorsed.

Partial Truth as a Complete Defence

The next reform which may come under criticism in cl.4 (2), which provides that

> "where an action for defamation has been brought in respect of the whole or any part of matter published the defendent may allege or prove the truth of any of the charges contained in such matter, taken as a

whole, does not materially injure the plaintiff's reputation having regard to any such charges which are proved to be true in whole or in part."

It is fundamental to achieving a fair balance of interests in defamation that only those deserving of good reputation should be entitled to the protection of the law, and to this extent the section serves to safeguard the publisher from undeserving technical cases. However, it has been contended that there is no practical problem involved here; the defendent, although unable to prove certain facts in mitigation of damages, may rely on such facts in a form of partial justification.[20] If he is prevented from doing so by the actual format of the proceedings, it was argued, the publisher would still not be at a disadvantage as no jury would award more than nominal damages to a successful but undeserving claimant.[21]

The objections to such reasoning seem to justify some amendment to the law as that proposed. First, it is still not right that such a plaintiff should succeed if, indeed the balance of the accusations made in the article are true, and secondly such a determination is often very important in making an order as to costs. If the technical claim is upheld, the publisher may still be liable for substantial costs as a result of a basically unjustifiable action.

Even though the theory of such an amendment is applauded, it is suggested that it would be bad policy to allow the defence of justification, or 'truth' to extend to matters which, in the light of the whole statement, have no relevance to the point in issue, even if they do not further the actual damage. The inclusion of such irrelevant facts cannot be warranted as necessary in bringing the merits of the case before the public. The Committee stated

20. Speidel v. Plato Films [1961] A.C. 1090
21. Speidel v. Plato Films (supra) p.1142-43

"It goes without saying that such imputations can only fall within the ambit of the defence if they are relevant to the facts stated or relied on"[22]

in reference to fair comment; it is equally applicable to partial justification.

It is therefore suggested that some requirement as to the relevance of all material to be included in the section, as is included in cl.5 of the Bill.

A Variation on Fair Comment and Malice

A similar attempt at restructuring is seen in cl.5, in relation to the defence of fair comment, and is reasonably successful in its aim of protecting the publisher from unjustified claims.

Unfortunately, the abolition of the principle of malice overruling the defence, and its replacement by the requirement of 'genuine opinion', appears to be a pointless exercise, as it is subject to similar considerations and therefore similar difficulties. To prove the existence of a 'genuine opinion' one must still look subjectively into the mind of the publisher, which is, by its very nature, impossible. The object as stated by the Committee, was to eliminate the possibility under the malice principle of people recovering where a commentator could be shown to have a 'malicious' attitude, even if a reasonable person would have reached the same conclusion.

In fact, the test which would seem most appropriate would be a 'reasonable man's' interpretation; that is, could a reasonable man given the bare facts reach a similar conclusion? It is suggested that this approach would be far more satisfactory, as the proving of 'genuine opinion' in its subjective form would allow occasions of abuse to be covered up by the burden of having to prove that the opinion was not genuine, even if some malice is shown to have existed.

In the case of qualified privilege the Committee seems to have recognised this difficulty in switching from a subjective test of malice, to the more objective "took improper advantage of the occasion giving rise to the privilege", a much more satisfactory

22. 'Report of the Committee on Defamation' op.cit. p.43

approach than that suggested by the Committee in regard to this section. Thus the Committee's recommendation of adopting the test of 'genuine opinion' can be condemned as failing to make any significant improvement.

An Offer of Amends

Under s.13 a person innocently publishing a defamation may offer to make amends, which, if accepted, will preclude the defamed person from claiming damages through the legal process. If such an offer is not accepted, that fact may be used in mitigation by the publisher.

Innocent publication is taken here to mean either the Hulton v. Jones[23] type situation, where it is not known that such a person as the plaintiff exists and that the publication could be defamatory to him; or where the extrinsic facts of an innuendo are not known to the publisher,[24] thus not being able to realise its defamatory nature, where reasonable care has been taken in preparing the publication.

This provision, an extension of the apology principle, has two unfortunate, and unacceptable, consequences as it stands. By limiting the recovery of damages as a result of this 'offer of amends' the Committee appears to have forgotten the underlying and fundamental aim of the damages remedy, that is true compensation for the individual and the fullest possible redemption of the damaged reputation in all cases.[25] It is not the principle of the suggestion which is opposed; it is the inequality of its application. As the minority report states

> "it ignores an important principle of defamation law - the need to provide appropriate remedies for victims, irrespective of the motives, the 'innocence' or 'guilt' of defamers",[26]

23. [1910] A.C.20
24. Cassidy v. Daily Mirror [1929] 2 K.B. 331, example of innuendo.
25. Although some redemption is only possible through some publication of rebuttal to others, damages redeem in the form of compensation and, under the present structure, are considered the best means of redemption available. see Fleming, 'The Law of Torts' op. cit. 456
26. 'Report of the Committee on Defamation' op.cit. p.200

and later

> "the punishment of non-innocent defamers is evidently regarded by those who endorse this view as a more important object of the law of defamation than concern for the interests of the victims. I do not accept this order of priorities"[27].

Thus, the Committee should be consistent in either making damages available to all victims of defamatory statements, or make provision for an offer of amends to all. If it is considered bad policy to allow deliberate defamers to escape 'punishment', thus providing the rationale for not extending the 'offer of amends' to that extent, the Committee has taken a perplexing course of action in enforcing this concept. Surely it would be more appropriate to deal with the deliberate defamer within the field of punitive damages, than in an area dealing with the redemption of the reputation of the individual.

It is contended that the latter approach of an offer of amends to all defamed persons, irrespective of the fault of the publisher, would be the most appropriate remedy in trying to right the reputation of the individual in the public's eye, in preference to merely paying a lump sum to the victim. Such a provision would still not be adequate as a total remedy. Whenever a statement is made, some damage will have been done to the individual, even if apology follows. The original imputations will still be associated with the individual no matter what attempts are made to withdraw such accusations.

In the light of this problem, it is necessary to ensure that any apology to take the place of compensatory damages goes as far as possible to attain the absolute redemption of the reputation. To achieve this, it is insufficient to publish a mere apology in a certain publication. As will be discussed later[28], the role that the Press Council could play in such a decision where the press are concerned may tend to elevate the apology to a more influential and acceptable level.

27. ibid p.201
28. below p. 63-66

There is a second reservation arising from this section: that is, the unconditional nature of the offer of amends. Where an offer of amends is accepted by a defamed individual, some provision should be made for the payment of such special damages as can be shown to have occurred,[29] as agreed by the parties. If such damages cannot be agreed on, the refusal of the plaintiff to accept the offer of amends should not be held against him, to the extent of claiming such damages in Court.

The offer of amends as suggested in the section is the germ of a very important factor of defamation law. However, its potential has not been recognised by the Committee: it approaches it tentatively and tinkers with the idea, only to restrict its application to make it all the more discriminatory, rather than to provide the equitable coverage which can result from its full utilisation and implementation.

Damages Reviewed

The remaining section which raises doubts as to its merit is cl.18, which abolishes the award of punitive damages, restricting recovery to compensation only. There is recognisable injustice in allowing a plaintiff to profit unduly from a defamation suit through the awarding of punitive damages against the publisher.

Such damages do, however, perform a useful function. Especially if provision for an offer of amends is extended to cover all defamatory statements, some form of censure on those publishers guilty of gross misconduct must be maintained to discourage deliberate or highly negligent actions. The problem of abolishing such claims altogether, and at the same time recognising the need for payment by non-innocent publishers through not extending the 'offer of amends' to cover them, would tend toward the inclusion of some consideration as to the blameworthiness of the publisher at the time of assessing general damages. Such a tendency would defeat the purpose of the proposal.

29. below p. 55-56

The logical approach in reconciling the two factors, it is suggested, would be to retain the possibility of an award of punitive damages, but channelling the proceeds away from the plaintiff, to eliminate the problem of undue profit. The machinery for achieving this will be discussed later.[30] However, on the basis of these considerations, it is contended that it would be unwise to abolish absolutely the imposition of punitive damages.

Summary

In summary, the following specific amendments to the proposed Bill are submitted, if it were to be adopted in its present form:

(i) That the suggested statutory definition of defamation be rejected in favour of retaining the common law classifications of defamatory and non-defamatory statements as established by case-law;

(ii) That a restriction as to relevance of material be inserted into cl.4 (2) relating to the defence of truth;

(iii) That the test suggested in cl.5 not be adopted, and that the test of 'whether a reasonable man could reach the same conclusion' be substituted for the test of genuine opinion;

(iv) That the provision for an 'offer of amends' under cl.13 be extended to cover both innocent and deliberate defamation;

(v) That the scope of such an offer of amends be as wide as possible so as to best achieve the redemption of the defamed individual's reputation, possibly through the authority of the Press Council;

30. below p.

(vi) That provision be made for an accompanying payment of special damages which can be proven, where an offer of amends is accepted; and where it is not, that such refusal shall not be considered to the detriment of the plaintiff in regard to a claim for such damages;

(vii) That punitive damages not be abolished as suggested in s.18 but be limited to occasions of gross misconduct with the proceeds not accruing to the plaintiff.

However, it must be stressed that such reforms do not eliminate the serious uncertainty relating to whether or not privilege will apply, nor the two associated, fundamental, problems. The publisher will still be inhibited in his actions to the extent of liability for large awards of damages in some cases. The abolition of punitive damages has little relieving effect, as such damages are at present only awarded in a small number of cases, and generally where such a sanction is deserved. The restricted scope of the offer of amends fails to provide the comprehensive relief necessary to publishers before they can truly feel free to publish what may have been borderline cases, possibly carrying heavy penalties, under the present law.

Further, the defamed person is still subject to the inequality of being compensated for damage in one situation, but in different circumstances, either because of the nature of the occasion or the publisher's action, the same damage would go unrelieved.

For these reasons, although the Bill is an improvement on the present law, it cannot be accepted as the most equitable solution possible. The provisions in this Bill may, however, be useful as guidelines to be followed in consideration of cases in the alternative proposed below.[31]

31. below p.68

THE DAMAGES REMEDY

It is a sad fact that the law of defamation is often accused of being the stumbling block of freedom of discussion and dissemination of material through the media. The reason: the unpredictable and often crippling damages that may result if a statement is considered detrimental to the reputation of the plaintiff.

However, as earlier discussed,[32] few could claim that all statements defamatory of another should be free from sanction, regardless of their consequences to society or its members. The law of torts is one of the individual's most effective safeguards; it exists to protect one's right to reputation, and enforce the payment of compensation where that right has been illegitimately interfered with. It is the just balance of interests which once more becomes the prime object. As Fleming states,

> "It poses the cruel dilemma of a choice one way or the other between the aim, on the one hand, to furnish a ready means of vindicating a man's integrity and the competing policy of shielding from the impact of a heavy verdict those who are encouraged to speak without let or hindrance."[33]

Present Trends in Awarding Damages

It may appear that in the past the Courts have not considered this a dilemma at all; awards have consistently become more disproportionate to the actual harm done, in recent years. As an English Working Committee remarked,

> "There is also considerable evidence that awards of damages in libel actions in recent years have been wholly disproportionate to what might be considered proper compensation for the aggrieved parties, and in the view of the Working Party, there is little doubt that damages have spiralled to the detriment of the balance which should properly be preserved between the rights of the

32. above p. 15, 39-40
33. Fleming, "The Law of Torts", The Law Book Co. Ltd., Australia 1971, p. 455

> Press to investigate and comment freely upon matters of public interest and the right of the individual to a remedy where his reputation is unjustly attached."[34]

The jury tend to award damages as a result of their emotional reaction to the statement in issue and its circumstances, rather than on the basis of the actual damage done.[35] Hopefully this trend is now reversing.[36]

Several reasons for such large damages can be proposed. First, there is the obvious difficulty of fixing an arbitrary monetary value on an intangible loss,[37] such as hurt feelings, loss of self-respect or public esteem, just as in assessing, for example, pain and suffering in personal injury cases. However, our legal system seems entrenched in the principle of pecuniary compensation for non-economic loss, and so long as such a system continues, we will be faced with these difficulties. Coupled with this is the desire of the Court to ensure that the injured party is truly compensated, leading to a tendency to be over-generous, rather than parsimonious.

Thirdly, one award of damages tends to be compared with another in a similar case, and is taken as a measure of the vindication the Court feels appropriate in each, possibly leading to the Court over-compensating in its efforts to be fair.

One further, and very real, problem was discussed by Lord Reid in Broome v. Cassell:[38]

> "The sums awarded as damages were more - sometimes much more - than could on any view be justified as compensatory, and courts, perhaps without fully realising what they were doing, appeared to have permitted damages to be measured not by what the plaintiff was fairly entitled to receive,

34. "The Law and the Press, the Report of a Joint Working Party of Justice and the British Commission of the International Press Institute", Stevens & Sons, London, 1965, p.24, also see Williams v. Currie 1 C.B. 841, [illegible].
35. Probert, 'Defamation - A Camouflage of Psychic Interests : The Beginning of a Behavioural Analysis', op.cit. p.1189
36. Rookes v. Barnard [1964] A.C. 1129, 1228; Broome v. Cassell, [1972] A.C. 1027
37. Ley v. Hamilton (1935) 153 L.T. 384, per Lord Atkin
38. [1972]A.C. 1027

but by what the defendent ought to be made to pay, as punishment for his outrageous conduct".[39]

The Present, and Possible, Scope of Damages

Under present law, damages may be claimed in three situations: 'special' or 'specific' damages can be claimed in cases where actual pecuniary loss can be shown to be a direct consequence of the libel, but no longer have to be proved in order to recover at all;[40] 'compensatory' or 'general' damages, payable for natural injury to the plaintiff's feeling, such as distress, mental pain and suffering, hurt pride, or loss of self-confidence and respectability;[41] and 'exemplary' or 'punitive' damages, levied against the publisher as a result of his gross irresponsibility or guilty motive in distributing the defamatory material.[42]

a) Special Damages

Initially, when the laws of slander and libel were separate, it was necessary to prove actual pecuniary loss to recover through the latter course of action, but not if the statement was libellous.[43] This anomoly was disposed of by s.4. of the Defamation Act 1954, which made such actual proof unnecessary in either case. This does not mean, however, that such damage cannot be proven and included in the total payment of compensation.

It would appear to be a fundamental principle that any person causing specific monetary loss to another by a statement should put that person back into the relative financial position he would have been in had the statement never been made. Clear cases of such damage would be drastic cutbacks in sales, not attributable to other causes; cancellation of orders; loss of credit facilities; loss of employment. Such consequences can be fairly tied to monetary values, so the problem of assessing appropriate damages does not arise.

39. [1972] A.C. 1027, 1079
40. s.4. Defamation Act. 1954
41. McCarey v. Associated Newspapers Ltd (no.2) [1964] 2 Q.B. 86, 104
42. Broome v. Cassell (supra); Uren v. John Fairfax Ltd (1966) 117, C.L.R. 118
43. Ratcliffe v. Evans [1892] 2 Q.B. 524, 531

To this extent, it is considered that damages for specific loss are justified, so long as they are shown to be readily ascertainable, and a direct consequence of the libel. Further, they should remain available to all who can fulfill this conditions, including those who at present cannot recover because of some privilege attaching to the occasion.

If one person suffers loss as a result of a defamatory statement, he has as much right to recover damages as any other person so injured, irrespective of the occasion on which it is published. The amount of extra cost that may be incurred by the publisher as a result of this reform would not, it is submitted, place him under great hardship, as cases where such damage could be proven would not be common. In the light of the further reforms suggested,[44] he should be prepared to make some concession to the injured person.

b) Punitive Damages

Punitive damages are often accused of seriously stifling the press in many areas of publication, especially where a small independent paper is void of solid financial backing, and cannot afford to pay high damages, and as a result is forced to be over-cautious in selecting and publishing information. The difficulty has been one of reaching a proper balance between what is effective as a deterrent, and what extends to a condition of self-imposed censorship.

The Courts have been wrestling with this problem for the past decade, and the position is still not clear. The House of Lords attempted to clarify the situation through the decision in Rookes v. Barnard,[45] where Lord Devlin lay down three categories under which punitive damages may be awarded:

(i) oppressive, arbitrary or unconstitutional action by government servants;

(ii) where the defendent's conduct has been calculated to make a profit exceeding probable damages payable; and

44. below p.60
45. [1964] A.C. 1129

(iii) where expressly authorised by statute.[46]

Such damages could only be considered where the compensatory damages awarded were inadequate to sufficiently 'punish' the publisher who was motivated by profit.[47]

This case was confirmed for English law in the decision of Broome v. Cassell[48] where the three categories were restated with greater clarity. Government functions were defined as those with governmental character, as opposed to acts of a private citizen;[49] and an attempt was made by Lord Wilberforce to widen the 'profit motive' provision of the second category to include "irresponsible, malicious, or oppressive use of power".[50]

A conflicting approach to punitive damages has emerged through several recent Australian decisions. The High Court in Uren v. John Fairfax Ltd[1] considered itself not strictly bound by Rookes v. Barnard[2], and therefore, not limited in their awards of damages to those falling within Lord Devlin's three categories. Argument for not adopting the House of Lords decision was based partly on the different statutory basis of the Defamation Laws in the jurisdiction,[3] and partly on the too restrictive nature of the actual words used by the English Court. The High Court, in refusing to apply the authority said

> "I am quite unable to see why the law should look with less favour on wrongs committed with a profit-making motive than upon wrongs committed with the utmost degree of malice or vindictively arrogantly or high-handedly with a contumelious disregard for the plaintiff's rights."[4]

46. (1964) A.C. 1129 p. 1226-1228
47. (1964) A.C. 1129 p. 1228
48. (1972) A.C. 1027
49. (1972) A.C. 1027, 1029
50. (1972) A.C. 1027
1. (1966) 117 C.L.R. 118
2. (1964) A.C. 1129
3. (1966) 117 C.L.R. 118 p.123
4. (1966) 117 C.L.R. 118 138

The High Court came to a similar conclusion in Uren v. Australian Consolidated Press,[5] where it again refused to restrict the situations allowing for punitive damages to those set out by Lord Devlin. When the case came before the Privy Council, the High Court's action was considered justified, as the Australian law was regarded as clear, consistent and satisfactory, and not in need of any such change as that proposed by Lord Devlin.[6] Thus, the law in Australia remains that such damages

> "can apply only where the conduct of the defendent merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights."[7]

The position most favoured in New Zealand follows closely the Australian decisions; as McGregor J. stated in Fogg v. McKnight[8]

> "It seems to me in view of the decision of the Privy Council in Australian Consolidated Press v. Uren, the New Zealand courts are not bound by Lord Devlin's decision",[9]

and considered the test of malicious, vindictive, arrogant or high-handed action most appropriate.[10]

With the application of the principle fairly well established, it appears that both New Zealand and Australian Courts have ignored one of the major factors behind the English decision in attempting to limit the scope of punitive damages. Despite argument put before the Law Lords, they refused to declare Rookes v. Barnard[11]

5. [1966] 117 C.L.R. 185
6. [1967] 117 C.L.R. 221 (P.C.) 241
7. Uren v. John Fairfax Ltd (supra) quoting 'Mayne and McGregor on Damages' 12 Ed. (1961) p.196
8. [1968] N.Z.L.R. 330; supported obiter in A. v. B. [1974] 1 N.Z.L.R. 673, in general discussion of damages re breach of promise.
9. [1968] N.Z.L.R. 330, 333
10. [1968] N.Z.L.R. 330, 333
11. [1964] A.C. 1129

inconsistent with the former law, but were generally loath to extend its authority. The greatest difficulty the Court found was to make the punitive nature of the award compatible with the tortious remedy of compensation for the indivudual's loss; hence its restrictive ratio.

As mentioned above[12] these awards draw vociferous opposition from those likely to be their 'victims', partially on the grounds that they are nearly always too high, and therefore too heavy a burden for the press to bear, and because of the great temptation of taking a case to Court in the hope of receiving a "pure and undeserved windfall".[13] The Court in Broome v. Cassell[14] drew a dividing line between those who should and should not be subject to punitive damages; the Australian Courts drew their own elsewhere. It may appear that the Australian reasoning is more valid, and that punishment should be extended to those considered by the Australian cases. However, in either situation, the unsatisfactory result is still that the plaintiff recovers more than he is actually entitled to, through mere chance. Surely, the best approach would be the continuation of the awarding of such damages in the terms accepted in Uren,[15] coupled with the channelling of the proceeds of such awards away from the plaintiff.[16] In this way a minimum standard of deterrent is maintained, with no encouragement being given to a potential plaintiff through the possibility of immense profit.

c) Compensatory Damages

The whole question of fixing compensation to non-specific loss is really the one which provides the greatest problems for the press. Punitive damages are controllable; to a large extent situations which lead to an award of compensatory damages do so through no fault of the publisher. To some extent this has been recognised, in the creation of various privileges and associated defences, as well as covered to some extent by the 'offer of amends' proposal of the Faulks Committee.[17] If it provides so many problems for

12. above p. 50-51
13. per Lord Reid, Broome v. Cassell (supra) p.1086
14. [1972] A.C. 1027
15. (1966) 117 C.L.R. 185
16. below p. 65-66
17. above p. 48

the Press, does the corresponding value to the plaintiff outweigh such a consideration? The problem then boils down to: Is monetary payment the most appropriate means of redeeming the individual's reputation? As earlier mentioned,[18] there are very real difficulties in fixing the appropriate amount of damages, amid pressures from each party, and awards have tended to be substantial, if not incredible.

Few would contend that damages have the desired effect of redeeming the individual's reputation. Money may compensate for the plaintiff's own hurt feelings, but does little to inform those in whose esteem he has fallen, that the statement had no foundation. Even if the award of damages is widely publicised, it still lacks an emphatic contradiction of the statement under review.

An attempt was made to deal with this problem in New Zealand in s.6 of the Defamation Act, 1954, allowing for an offer of amends to be made, to replace a damages suit in the area of unintentional defamation. This does have the potential to bring to the attention of the public the fact that the statement was false, and was accepted by the publisher to be false, and as such is a definite advance on the earlier damages remedy. This approach was basically the same as that adopted by the majority of the Faulks Committee.[19]

However, such an offer seldom fully redeems the damaged reputation. There may well be those who read the full defamatory statement, which will usually be of the nature to attract a large amount of public attention, but who fail to see the retraction. This may be attributable partly to the failure of the press to publish it with sufficient prominence, so that it is glossed over, rather than considered with the same authority as the earlier statement. It is perhaps understandable that the press are unwilling to publish apologies in too eye-catching a manner, as it may tend to reduce their credibility, and possibly lead to a drop in circulation.

18. above p.53-54
19. above p.47-48

However, it is a fact of life that the press must accept, as the result of the inherent risk that such errors may occur, that the consequences of their action may sometimes work to their detriment. Further, it is extremely unlikely that the loss of profit suffered through the publication of an apology would exceed damages payable under a successful libel action. Such an approach appears to work to the overall advantage of the press.

There remains the problem that such an apology may not fully redeem the defamed person's reputation, as it may fail to circulate to all those who read the original statement, and the stigma attached to such an attack on the plaintiff will remain in the minds of most, and be associated with him, no matter what apology is made. Further, such an apology may be inadequate in that it relates solely to unintentional defamation, rather than allowing for such a remedy for all victims of defamatory statements. As mentioned earlier,[20] it is the redemption of the individual's reputation which should be taken into account, rather than the relative culpability of the publisher, and, as such, any offer of amends should be extended to all defamatory statements.

If adopted, such an approach would eliminate the need for the complicated and controversial distinctions between statements made on differing occasions, and thus lead to a more simple and adequate remedy, both for the press and the individual.

The remaining problem appears to be one of making such an apology authoritative, widely publicised, and available to all defamed persons. It is in regard to the extent and authority of the apology that the role of the Press Council becomes important.

20. above p.35-37

CAPITALISING ON THE PRESS COUNCIL

The Press Council is a body seldom utilised under our present system of defamation law. While there is an opportunity for obtaining damages, there is a substantial incentive to take a case to Court, rather than accept a straight apology. However, if that encouragement was to be withdrawn, as is suggested, it would seem logical that the Press Council should take a more prominent role in the policing of the replacement law. It would merely be a logical extension of its present role.

The Workings of the Press Council

The concept of a Press Council originated in England, following a Governmental Commission of Inquiry into the Press and associated problems.[21] This resulted in a body being formed, consisting of lay persons and representatives of the press, independent of Government, to watch over the operations of the press, and see that expected standards were maintained. The Council thus established deals both with charges of unethical or negligent conduct on the part of the press, and corresponding complaints by the press about the actions of the public, or private individuals. Through the varied interests of its members, it presents a balanced outlook which takes the welfare of both the media and the individual to heart, and its decisions, though not legally enforceable, carry weight in most quarters, its directives seldom being ignored.[22]

The concept was adopted in New Zealand in September 1972, with the establishment of the New Zealand Press Council; a body consisting of an independent chairman, Sir Alfred North, a representative of the public, and two press representatives, one a journalist,

21. Royal Commission under Sir David Ross, established in 1947, originally to enquire into the running of the press, but later included provision to enquire into journalistic standards, followed by a second Commission in 1961.
22. H.P. Levy, 'The Press Council', Macmillan, London, 1967 p.32

and the other a publisher or editor. It deals with the same basic problems as its English counter-part,[23] referred to the body by members of the public and the press.

It must be stressed that the Council at present will not consider any complaint which is, or might be, subject of a Court hearing. Two reasons for this have been advanced:

> "First it is obviously undesirable that two sets of proceedings should be running at the same time; in any case Press Council proceedings must give way to court proceedings ... In the second place the Press Council will not allow process before it to be used as a means of 'discovery' to enable a complainant to obtain material for a legal action".[24]

The temptation would be great to have a trial run to establish the chances of success of an action, before outlaying vast sums of money for the Court case. The choice is at present one or the other; either the case will be contested in Court, or considered on its merits by the Council.

Potential of the Press Council

The actual effect that the Council has had in New Zealand is difficult to gauge. So far little is known generally about the body, as it is still in the experimental stage. However, it has great potential as a workable alternative to the bringing of a defamation suit for damages.

As commented on earlier,[25] the possibility of an offer of amends replacing compensatory damages is very real, if it can apply to all cases of defamatory statement, and be sufficiently authoritative to eradicate as far as possible the false suggestions made in the statement complained of. It is here suggested than an apology sponsored by a prestigious Council, if published, at a minimum to

23. see stated objectives in the Constitution of the Council, 'First Annual Report, 1972-73, New Zealand Press Council' p.14
24. H.P. Levy, op.cit. p.27
25. above p.48-51

the same public as the original statement, with the same, if not more prominance as that statement, would have the most likelihood of success in the aim of restoring the damaged reputation to the status quo.

This would, of course, only apply to statements made by members of the press.[26]

With no compensatory damages being awarded, and the apology being supervised by the Council, it would appear unnecessary to keep such cases within the bounds of the present Court structure. Proof of specific damage will be relatively mechanical, and should provide no administrative problems for the Council. Punitive damages, it is envisaged, would also be levied by the Council. Appeals from awards of punitive and special damages may lie in the Supreme Court. However, this form of remedy would be the only one available to the defamed person. If an apology is rejected, no alternative remedy will be possible. To provide otherwise would be to defeat the purpose of the reformed structure.

Changes in Structure of the Council

There are recognised difficulties which would arise from such an expansion of the Press Council's role. It would possibly be necessary to expand its membership to spread the increased workload; however, considering the relatively small number of cases coming before the Courts at present, it would not appear necessary to make it a full-time body.

The second problem is the possible restriction on the Council's autonomy, should it be given statutory recognition. This was a very real fear in England, when Parliament threatened to establish a Council if the Press did not act quickly on their own initiative.[27] However, as the Council is now established here, the fears of political influence on its membership and constitution do not apply.

26. for statements involving members of the public see below p. 67
27. H.P. Levy, op. cit. p. 9-10

Further, it has also been seen in other areas of administration and public welfare, that statutory recognition does not place restrictions on the activity of the body, but instead adds to its authority and public standing.[28]

The third major problem is the financial cost of coping with the increased workload. While it would be undesirable, and unrealistic for those bodies at present financing the Council[29] to carry the whole burden of the increased expenses, it may be reasonable to expect some increased contribution from them, as they would have been freed from the threat of large awards of damages against them as a result of the new role of the Council.

The remainder of the burden, it is suggested, could be met by the channelling of punitive damages into the funds of the Council, to contribute to its running costs and expansion. This way, the damages do not unjustly enrich the plaintiff, but benefit the community by providing for better standards of publication being enforced, and for less likelihood of such defamatory statements recurring. Such damages would have to be levied by the Council itself, as to have them decided on by the Court would necessitate virtually a separate hearing of the case in the Court. Such a provision is necessary, as, with the case no longer being subject to a Court hearing, it would otherwise be possible for a publisher, guilty of gross misconduct, to be exempt from liability, merely because the punitive machinery was no longer available.

It may be argued that it is undesirable for the Council to take such a positive role in sanctioning the press; that their role is merely that of watchdog; and, further, that they may be motivated in times of need, or plenty, to make differing and possibly inconsistent awards. To contend with this, it is suggested that any levy against an offending publisher be referred to Court for approval. The Council would thus not relinquish its independence in favour of becoming a statutory body; its role would be more advisory, or could even be considered to be that of a substitute

28. For example, the Ombudsman, as set up by 'Parliamentary Commissioner (ombudsman) Act', 1962
29. New Zealand Newspapers Publishers Association Inc; The New Zealand (except Northern) Journalists Union; and the Auckland Journalists Union.

plaintiff bringing the case to the notice of the Court. It is very unlikely that any impropriety would occur, in any case, on the part of the Council, as the press members would be unwilling to be too harsh on their fellows, especially if the body was subject to greater public scrutiny. It is equally unlikely that they would be too lenient in their action, as the protection of the good name and integrity of the press would be of paramount importance.

In this way, it is suggested, the true remedy of redemption of reputation will be achieved to the greatest possible extent, with the least possible hardship being incurred by the publisher, in defamation cases involving members of the press. It would also reduce the workload of the Courts, and make the Press Council a more practical and effectual body. Most importantly, it will eliminate the impracticality, and virtual impossibility, of placing pecuniary values on reputation; leave the press, especially small publications with little financial backing, more leeway in publishing material in good faith without the fear of crippling damages; and remove the great temptation for people with a flimsy technical case to take it to Court in the hope of making a profit.

INJURY TO REPUTATION THROUGH INDIVIDUAL ACTION

Throughout this paper the emphasis has been on statements involving the press, as they form, by far, the predominance of defamation cases presently considered by our Courts. However, there seems to be no reason for not applying similar criteria to those employed under the suggested Press Council scheme, in cases involving individuals. It would be impossible to take such cases out of the Court, as it suggested with press cases, but the basic format of deciding whether or not the case is defamatory; whether special damages can be shown; what form of apology would best achieve redemption; and whether some punitive levy was necessary, would be well within the Court's present capabilities.

The major problem is one of accessibility to means of revoking the statement. The individual does not have the same resources as the press. The most accessible means of doing so would appear to be through advertisement in publications with appropriate distributions. So long as the apology is made to the fullest extent possible, and to the satisfaction of the Court, the object of this reform should be achieved.

A REVAMPED DEFAMATION SYSTEM

It is submitted that, to achieve the most equitable result for both the publisher of a defamatory statement, and the person subject to that false statement, the following system be adopted in favour of the present defamation law:

(i) Where statements are made by the Press, they should be referred directly to the Press Council, initially by-passing the Court altogether. The Council will evaluate the statement, probably along the traditional lines referred to earlier,[30] and decide on the appropriate remedial action to be taken. It will have authority to order publication of a retraction or apology to the extent it thinks fit to best nullify the effect of the original statement.

Submissions on special damage may be made to the Council, and allowed if considered strictly justified, with the right of appeal to the Supreme Court.

The Council would also have the authority to levy punitive damages on the publisher, which will be subject to Court approval in all cases. Appeal from such a determination may also be heard by the Supreme Court.

(ii) Where statements involved two individual members of the public, the question would be referred to the Supreme Court for determination as to whether or not it was defamatory. If so, a decision as to the most appropriate form of supervised advertisement must be made, to suit the nature of the individual publication complained of. Special damages would be available on application and proof. Punitive damages may be levied in serious cases, and treated by the Court as a fine.

30. above p.22, 43

Such a system depends ultimately on the co-operation of the press. It would seem unlikely, however, that such co-operation would not be forthcoming, as they only stand to gain from such a system. The remedy suggested is far less oppressive to them than that offered under the present law. Moreover, support would make a major step in public relations, and aid them in maintaining public confidence in the integrity of the press.

> "The law of defamation never receovered from its false start. Its long history is marked by persistent dissatisfaction, clumsy judicial innovations, ... and patchwork reforms which have made the law excessively complex without rescuing it from its endemic ills".[31]

It is hoped that this grass roots reform, very basic and simplistic both in its nature and application, can provide an alternative which truly satisfies the needs of both the competing interests.

31. Fleming, 'The Law of Torts' op.cit. p.456

KELSEY, E.J. Defamation in New Zealand.