

# DRAGGED THROUGH THE MUD: CAN DISINCENTIVES TO WITNESS PARTICIPATION IN CRIMINAL TRIALS BE REMOVED?

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## ABSTRACT

*A significant disincentive to witnesses' participation in criminal trials is the ease with which reputational damage can be done in court by the making of unsubstantiated allegations. This impacts the willingness of complainants to report crimes and the openness with which witnesses give evidence at trial. The purpose of this paper is to identify the support structures currently provided to witnesses in this regard and explore possible solutions. The paper argues changes to the admissibility of evidence or separate representation for witnesses at trials are not appropriate responses to the problem. The paper examines the possibilities for redress against publishers of unsubstantiated allegations made in court, ultimately arguing that a right of reply enforceable by media regulatory bodies may be a helpful although not complete solution.*

## I. INTRODUCTION

Witnesses in criminal trials are put in the unfortunate position where untrue attacks can be made on their conduct or character with no redress available to them. Wigmore argued the courtroom should not be allowed to become the “slaughterhouse of reputations”, not only because this is indecent, but also because it limits the availability of evidence by discouraging witnesses.<sup>1</sup> Complainants must be encouraged to come forward so that crimes can be prosecuted and other witnesses to fully participate so that all information is available to allow the trial process to operate effectively.

\* Winner, 2014 Canterbury Law Review Student Essay Prize. I am very grateful to Professor Jeremy Finn for his invaluable assistance in the preparation of this work.

1 John Henry Wigmore *Evidence in Trials at Common Law: Volume 3A* (4th ed, Little, Brown, Boston, 1970) at 983.

The law fails to give adequate support to witnesses in this respect.<sup>2</sup> While witnesses can be compelled to give evidence,<sup>3</sup> they must be encouraged to inform someone of what they know so that counsel knows to compel them, or alternatively, if compelled must not be deterred from free and frank evidence due to their desire to protect themselves from unsubstantiated allegations. As Durstan notes, “gratuitously allowing distressing and humiliating cross-examination contributes to the current, and often marked, reluctance of witnesses to testify in criminal cases”.<sup>4</sup> The same is true for harmful comments in evidence-in-chief. As an indication, in the United Kingdom Witness Satisfaction Survey 2009-2010, only two-thirds of witnesses said they would agree to be a witness again if asked.<sup>5</sup>

The need to encourage witness participation is particularly stark in the case of complainants. A significant reason why complainants do not report offences is fear and distrust of the criminal justice system.<sup>6</sup> This may be particularly so in the case of sexual offences.<sup>7</sup> Complainants are not parties to criminal proceedings, but are usually the key witness, and therefore improving the process for complainants may result in increased reporting and conviction rates.<sup>8</sup> If the criminal justice system was made more responsive to complainants, the ensuing increased public confidence would encourage victims to report crimes.<sup>9</sup>

Reform is needed. This paper first explores the ease with which unsubstantiated allegations can be admitted as evidence in trial, and concludes that, while a higher threshold for admissibility could exclude gratuitous attacks, it could not exclude relevant ones. Secondly, the paper argues that neither separate legal representation nor the potential for name suppression of the witness is a complete answer to this problem. Lastly, the paper looks at possible avenues for redress against publishers of the unsubstantiated allegation, including stricter requirements on the “fair and

2 While some support for witnesses is encouraged, this is in terms of preparing for court appearances such as seeing the courtroom before the hearing, requesting special arrangements for the giving of evidence or having a support person present: Ministry of Justice “Victim Information” < [www.justice.govt.nz](http://www.justice.govt.nz) >.

3 Evidence Act 2006, s 71.

4 Gregory Durston “Bad Character Evidence and Non-Party Witnesses under the Criminal Justice Act 2003” (2004) 8 E&P 233 at 235.

5 Ministry of Justice (UK) (2012) *Satisfaction and willingness to engage with the Criminal Justice System: Findings from the Witness and Victim Experience Survey, 2009-10* (Ministry of Justice Research Series 1/12) London, United Kingdom: Ramona Franklyn at 58. It should also be noted that the United Kingdom has a Witness Service, which New Zealand lacks.

6 Elisabeth McDonald “The Views of Complainants and the Provision of Information, Support and Legal Advice: How Much Should a Prosecutor Do?” (2011) 17 Canterbury L. Rev. 66 at 71.

7 Commonwealth Office of the Status of Women (2003) *Non-reporting and Hidden Recording of Sexual Assault: An International Literature Review* (Report) Australia: Denise Lievore at 28-34.

8 Jenny McEwan “The testimony of vulnerable victims and witnesses in criminal proceedings in the European Union” (2009) 10 ERA Forum 369 at 369.

9 Ministry of Justice (2009) *A Focus on Victims of Crime: A Review of Victims’ Rights – Public Consultation Document* (Public Consultation Document) Wellington, New Zealand at 4.

accurate” requirement of qualified privilege for reports of court proceedings, and a right of reply, both statutory and through media regulatory bodies. The paper concludes that there are multiple options for reform, but due to easy accessibility and appropriate balancing of rights, a right of reply enforceable by media regulatory bodies is the most desirable course.

## II. THE ADMISSIBILITY OF UNSUBSTANTIATED ALLEGATIONS IN EVIDENCE

### *A. Relevance*

It is very easy for unsubstantiated allegations against a witness to be presented as evidence in court, either by evidence-in-chief or in cross-examination. The fundamental principle of admissibility is that relevant evidence is admissible,<sup>10</sup> and the threshold for relevance is very low.<sup>11</sup> While relevance is determined on a case-by-case basis, it appears that generally the character or credibility of a witness will be relevant to credit and therefore admissible.<sup>12</sup> These allegations, if not known by the court to be false, may be relevant to character or credibility by tending to prove the witness’s lack of veracity,<sup>13</sup> past conduct that establishes their character is unreliable,<sup>14</sup> or that their evidence itself is inaccurate.

Evidence of veracity is admissible only if it is “substantially helpful”.<sup>15</sup> This higher threshold shall be returned to below. The other types of evidence are only to be excluded either if they are not in fact relevant, or if their probative value is outweighed by their prejudicial effect.<sup>16</sup> “Prejudicial effect” does not require any consideration of the effect of the evidence being admitted on the witness, but rather simply prejudice to the fairness of the proceeding. There is an incredibly wide scope to admit evidence of allegations against witnesses.

### *B. Inadequate Protective Scheme*

Limited protections against unsubstantiated allegations being made in court exist, however they presently do not solve the problem.

10 Evidence Act 2006, s 7.

11 *Wī v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [8].

12 *R v Wood* [2006] 3 NZLR 743 (CA) at [39]; *Hobbs v Tinling* [1929] 2 KB 1.

13 Evidence Act 2006, s 37.

14 Section 40.

15 Section 37.

16 Section 8(1)(a).

## 1. The collateral issues rule

The collateral issues rule may afford witnesses some protection. The rule prevents extrinsic evidence about the credibility of a witness being offered to challenge their answer in cross-examination. This affects the ability to make an unsubstantiated allegation in evidence in chief, but not in cross-examination. The rationale is to prevent proceedings from being needlessly prolonged by trials within trials.<sup>17</sup> The rule was not expressly enacted in the Evidence Act 2006 (“EA 2006”), but has been effectively retained by its provisions.<sup>18</sup>

However, the rule has many exceptions. Established exceptions are previous convictions, previous inconsistent statements, bias, or physical or mental disorders that affect credibility.<sup>19</sup> Section 40 EA 2006 also provides that a party may offer propensity evidence about any person. Further, the rule only applies to evidence that is not directly relevant to facts in issue.<sup>20</sup>

Dangerously, the existence of the collateral issues rule also means that a wider scope is afforded to counsel in cross-examination.<sup>21</sup> A wide scope for cross-examining witnesses is seen as less potentially prejudicial to a fair trial than a wide scope for cross-examining the accused.<sup>22</sup>

## 2. Restrictions on the conduct of counsel

### (a) Improper questioning

Unsubstantiated allegations may sometimes be made by counsel in cross-examination, rather than given in evidence by another witness. On these occasions, the ability to make unsubstantiated allegations is limited by s 85(1) EA 2006, which provides that unacceptable questions cannot be asked. “Unacceptable” questions are those that are improper, unfair, misleading, needlessly repetitive, or expressed in language too complicated for the witness to understand. The non-exhaustive list of factors to guide the judge’s decision as to whether the question is unacceptable include the witness’s age or maturity, any impairments, cultural background, the nature of the proceedings, and, where the question is hypothetical, whether it has been proved by other evidence.<sup>23</sup> Importantly, this does not include the reputational interests of the witness.

While this prima facie prevents unsubstantiated allegations being made in cross-examination, it is actually a weak provision. If counsel are able to claim a legitimate purpose to their questioning, such as establishing that a witness’s

17 *Hobbs v Tirling (CT) and Co Ltd* [1929] 2 KB 1 at 19.

18 *R v Smith* [2007] NZCA 400 at [14]-[20].

19 Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at 47-48.

20 *Attorney-General v Hitchcock* (1847) 1 Exch 91, 154 ER 38 at 99.

21 Wigmore, above n 1, at s 944.

22 *R v McGlaughlin* CA456/04, 8 September 2005 at [35].

23 Evidence Act 2006, s 85(2).

testimony is not credible, then that questioning should not be considered improper. The Court of Appeal stated in one case:<sup>24</sup>

The questions did not repeat themselves or dwell on any salacious points in an emotive manner. The questions were short, to the point and were aimed at attempting to establish a lack of objectivity by reason of [the expert's] association with convicted paedophiles. Inevitably, the facts of the [expert's] background might be humiliating or embarrassing, but the questions had a legitimate purpose and cannot be said to have been calculated simply to humiliate, belittle or break the witness.

Similar to the EA 2006, the Code of Conduct and Client Care provides that:<sup>25</sup>

A lawyer must not use, or knowingly assist in using the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

In England, codes of conduct regulating the legal profession similarly discourage "oppressive" questioning of witnesses,<sup>26</sup> providing that counsel should not ask questions that are "merely scandalous or calculated only to vilify, insult or annoy the witness".<sup>27</sup> However, despite these restrictions, the scope of cross-examination is still very wide.<sup>28</sup> Indeed, in New Zealand, in *R v Thompson*, the Court of Appeal stated that "robust cross-examination is one of the many options open to counsel, who must be accorded wide discretion".<sup>29</sup>

(b) *Good faith basis*

Similarly, there is a good faith basis requirement for questioning by counsel under both the common law and the Code of Conduct and Client Care 2008. In *R v Rubick* the Court of Appeal stated:<sup>30</sup>

Before asking a question in cross-examination, a counsel must have a good faith basis for believing that the impeaching fact is in fact true. Without such a belief, counsel cannot inquire into it. A Judge is entitled to ask counsel to disclose the basis for going into a particular matter.

24 *M (CA438/10) v R* [2011] NZCA 84 at [33]-[34].

25 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Rule 2.3.

26 Royal Courts of Justice (2001) *Review of the Criminal Courts of England and Wales* London, United Kingdom: Robin Auld at 527.

27 Bar Standards Board Handbook (England and Wales) (1st ed, January 2014) including *Code of Conduct* (9th ed) at Rule C7.

28 Durston, above n 4, at 235.

29 *R v Thompson* [2006] 2 NZLR 577 (CA/SC) at [66].

30 *R v Rubick* CA545/93, 7 July 2004 at [28]; see also: *R v Griffiths* CA545/93, 5 May 1994 at 7.

However, this does not necessarily stop unsubstantiated allegations being made in cross-examination. This is because this rule does not require that counsel be able to independently prove the evidence adduced. Counsel are allowed to seek to prove through a witness's testimony "that which they believe to be true but could not otherwise independently prove".<sup>31</sup>

(c) *Reliance on these provisions*

While some protection against intentionally aggressive questioning is afforded to witnesses by these provisions, any reliance on these requirements of good faith or proper questioning is unlikely to fully prevent unsubstantiated allegations being made in cross-examination. If the lawyer has a legitimate purpose in questioning (such as discrediting the witness's evidence), then any humiliation is simply an unfortunate side effect.

Further, the risk inherent in relying on prosecution or defence counsel to make objections to improper questioning is that counsel may not prevent inappropriate or irrelevant questioning for tactical reasons.<sup>32</sup> Counsel owe no duty to protect the interests of witnesses.

Lastly, these provisions would do nothing either in the case of the unsubstantiated allegation being given in evidence by another witness, rather than in cross-examination, or where the defendant is self-represented.<sup>33</sup>

### 3. Perjury

The deterrent effect of the criminal offence of perjury is another control on the ease of making unsubstantiated allegations in court.<sup>34</sup> This offence is prima facie a strong protection from unsubstantiated allegations, however, it too is not sufficient to protect witnesses in this context. Perjury is so narrowly defined that many unsubstantiated allegations would not be captured. It is defined as:<sup>35</sup>

... an assertion as to a matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding as part of his or her evidence on oath, whether the evidence is given in open court or by affidavit or otherwise, that assertion being known to the witness to be false and being

31 Peter Marshall "The Veracity of Witnesses in Civil and Criminal Proceedings: Section 37 of the Evidence Act 2006" (2008) 14 Auckland U L Rev 1 at 7.

32 McDonald "Views of Complainants", above n 6, at 69; see also: Jonathan Doak "Victims' Rights in Criminal Trials: Prospects for Participation" (2005) 32 Brit. J. Law & Soc. 294 at 307.

33 The percentage of cases involving self-represented litigants in the criminal jurisdiction ranged between courts from 1 per cent to 7 per cent as of 2009: Ministry of Justice (July, 2009) *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* Wellington, New Zealand: Melissa Smith, Esther Banbury, Su-Wuen Ong at 86.

34 Crimes Act 1961, s 109.

35 At s 108(1).

intended by him or her to mislead the tribunal holding the proceeding.

Many allegations would escape this, for example:

- Allegations made by counsel during cross-examination (although if counsel is intentionally lying this would be captured by their specific restrictions); and
- Allegations made by a witness that the witness does not know to be false; and
- Allegations made by a witness that the witness does not intend to mislead the tribunal about a matter material to the proceeding; and
- Allegations made by a witness about an issue that the witness does not believe is material in the proceeding.<sup>36</sup> The character of a witness is generally seen to be a collateral issue.<sup>37</sup>

Even conduct that falls within that definition is likely to be difficult to prove. One witness's evidence is insufficient to prove perjury, unless corroborated in some material particular.<sup>38</sup>

For these reasons, perjury charges are not often successful. The charges laid and successful convictions in New Zealand for the past eleven years are as follows:<sup>39</sup>

|              | 2003/<br>2004 | 2004/<br>2005 | 2005/<br>2006 | 2006/<br>2007 | 2007<br>/2008 | 2008/<br>2009 | 2009/<br>2010 | 2010/<br>2011 | 2011/<br>2012 | 2012/<br>2013 | 2013/<br>2014 |
|--------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|
| Charges Laid | 24            | 24            | 6             | 11            | 8             | 13            | 10            | 24            | 36            | 16            | 15            |
| Convictions  | 12            | 8             | 3             | 2             | 1             | 1             | 3             | 3             | 4             | 4             | 7             |

These figures establish that successful perjury convictions are only achieved in a small fraction of cases. It is logical to assume that, in cases where the defendant has committed perjury but is subsequently convicted of the offence tried, a perjury charge will seldom follow. Therefore, perjury cannot be seen as a panacea to the problem. The statutory definition is not wide enough to be an effective remedy or deterrent.

It must be noted also that perjury is an action between the state and the offender, and therefore not a remedy for the affected individual.<sup>40</sup> However, the public declaration resulting from a perjury conviction may be sufficient in those cases where the charge is successful. A declaration that the allegations were false is likely to go a long way in ameliorating harm.

36 *R v Goodyear-Smith* HC Auckland T332/92, 26 July 1993.

37 Durston, above n 4, at 234.

38 Crimes Act 1961, s 112.

39 Obtained under Official Information Act 1982 Request to General Manager, District Courts.

40 The ability of an individual to bring a private prosecution has been recognised by s 6 of the Criminal Disclosure Act 2008, however, this is unlikely to be a practical solution for most witnesses, even where the definition of perjury is met.

### C. Should the Threshold for Admissibility Be Raised?

Given the inadequate protective scheme established in Part B, it can be argued that the threshold for admitting attacks on the character or credibility of a witness should be raised. Evidence as to the veracity of a witness already attracts a higher threshold than evidence about the witness's propensity, or their accuracy. Evidence of a witness's disposition to lie is admissible only if it "could substantially affect the assessment of the credibility of the witness".<sup>41</sup> The considerations for a judge in deciding whether the proposed evidence is substantially helpful do not import any higher test for reliability than under s 7, or any balancing of the likely impact of the evidence on the witness.

The justification for the higher threshold for veracity evidence is that it is an exception to the collateral issues rule.<sup>42</sup> If the evidence is of direct relevance, the veracity rules are not engaged. Therefore, it must be asked whether a higher threshold for admissibility, such that would raise the threshold for other forms of unsubstantiated allegation as to propensity and accuracy, can be justified on the basis of protection of the interests of witnesses.

#### 1. Fair trial rights

Raising the threshold for the admissibility of evidence that enables a defendant to discredit witnesses' evidence poses a risk of infringing defendants' fair trial rights.

##### (a) Overarching absolute right

Section 25(a) of the Bill of Rights Act 1990 guarantees a person charged with an offence a fair and public hearing in front of an impartial tribunal.<sup>43</sup> "Fair" means the trial is conducted in a manner where the law is applied accurately and there is no bias.<sup>44</sup> The right to a fair trial has been described to be "as near an absolute right as any which can be envisaged".<sup>45</sup> The Court in *Gisborne Herald v Solicitor-General* cited the High Court of Australia's decision in *Hinch v Attorney-General*.<sup>46</sup>

The right to a fair and unprejudiced trial is an essential safeguard of the liberty of the individual under the law. The ability of a society to provide a fair and unprejudiced trial is an indispensable basis of any acceptable justification of the

41 Australian Evidence Act 1995 (Cth), s 103(1); noted as being consistent with the higher threshold for veracity evidence by the Court of Appeal in *R v Alletson* [2009] NZCA 205 at [19].

42 *Wi v R*, above n 11, at [10].

43 Bill of Rights Act 1990, s 25(a).

44 Don Mathias "The Accused's Right to a Fair Trial: Absolute or Limitable?" (2005) N. Z. L. Rev 217 at 218, citing *Meerabux v Attorney-General of Belize* [2005] UKPC 12, [2005] 2 WLR 1307, [2005] 2 AC 513 at [40] per Lord Hope of Craighead.

45 *R v Burns (Travis)* [2002] 1 NZLR 387 (CA/SC) at 404.

46 *Gisborne Herald v Solicitor-General* [1995] 3 NZLR 563 (CA), citing *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

restraints and penalties of the criminal law. Indeed, it is a touchstone of the existence of the rule of law.

It has been stated that: “there is no room in a civilised society to conclude that, ‘on balance’, an accused should be compelled to face an unfair trial”.<sup>47</sup> While trials must be fair to both sides,<sup>48</sup> prosecution witnesses, even complainants, are not parties to the proceedings, and fairness to the prosecution is not equivalent to fairness to prosecution witnesses.<sup>49</sup>

However, while the overall right to a fair trial is absolute, a higher threshold of admissibility for this kind of evidence does not impinge upon publicity, impartiality, or the accurate application of the law. Rather, it impinges upon associated fair trial rights under s 25.

*(b) Associated rights*

The associated rights under s 25 may be limited in accordance with s 5 of that Act if to do so is demonstrably justified in a free and democratic society.<sup>50</sup> The relevant rights are the right to present a defence,<sup>51</sup> and the right to examine witnesses.<sup>52</sup> Any limitation on the ability to make allegations will be a limitation on the defendant’s ability to cross-examine witnesses or to defend themselves against that witness’s evidence.

The right to cross-examine has been described as “fundamental” due to it being the most effective way to test prosecution evidence.<sup>53</sup> However, the ability to discredit evidence *can* be limited. Where there is a serious risk of physical harm, witnesses may give evidence anonymously.<sup>54</sup> Similarly, even if essential to the defendant’s fair trial, a court cannot compel a complainant in a sexual case to undergo medical examination.<sup>55</sup> There is, of course, also the higher threshold for veracity evidence. However, these limitations are not based on reputational interests, which are viewed with a lesser degree of importance than threats to life and limb or the right to refuse an invasive medical procedure.

*(c) Can fair trial rights be balanced with reputational interests of witnesses?*

To assist the present dilemma, it must be asked whether these associated fair trial rights can be limited to balance the reputational interests of witnesses.

47 *R v Burns* (Travis), above n 45, at 405.

48 *R v Hines* [1997] 3 NZLR 529 (CA); *R v Griffin* [2001] 3 NZLR 577 (CA).

49 Mathias, above n 44, at 217.

50 Jeremy Finn “Inquisitorial Trials for Sexual Offences and ‘Fair Trial’ Rights” (2009) 15 Canterbury L. Rev 317 at 324.

51 Bill of Rights Act 1990, s 25(e).

52 At s 25(f).

53 Louise Ellison “The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison” (1999) 3 E&P 29 at 35.

54 *R v Hines*, above n 48, at 548.

55 *R v B (No 2)* [1995] 2 NZLR 172 (HC).

## (i) Sexual history of complainants

The ability to present a defence and examine witnesses is limited by restrictions on evidence concerning the past sexual experience of complainants in sexual cases.<sup>56</sup> Such evidence is not excluded absolutely; leave may be sought to adduce this type of evidence but may be admitted only where to exclude the evidence would be contrary to the interests of justice. Past sexual experience is treated as a form of propensity evidence.<sup>57</sup>

This appears to be a limitation on the associated fair trial rights imposed to balance the reputational interests of witnesses, but its purpose is more complicated than that. The provision was introduced as a check on the unfortunate practice of viewing past sexual experience as relevant to credibility where it was not,<sup>58</sup> and because of the particular trauma of complainants in sexual cases. In *B (SC12/2013) v R*, William Young J stated:<sup>59</sup>

The policies primarily underlying s 44 are that those who allege sexual offending should not be subject to humiliating cross-examination and that trials for sexual offences should not be derailed by collateral inquiries of little or no actual relevance into the complainant's sexual experiences.

Anticipation of questions about prior sexual experience may be a factor in low reporting rates for sexual offences,<sup>60</sup> with complainants even describing the cross-examination as being as distressing as their rape.<sup>61</sup> As stated by Thomas, “there can be no justice in a practice which brutalises the victim of a crime in a way which is repugnant to all civilised persons”.<sup>62</sup>

However, the test is simply a heightened relevance test. This is demonstrated by the fact that it does not restrict evidence of the complainant's sexual experience with the defendant. The Law Commission stated:<sup>63</sup>

It has been argued that there is a difference between the relevance test in s 7 of the Act and the “heightened relevance” requirement in s 44(3) that will lead to evidence that is admissible under s 7 being held inadmissible under s 44(3). While s 44(3) is on its wording a stricter test, we do

56 Evidence Act 2006, s 44.

57 This continues under the Evidence Act 2006: see the reference to s 44 in s 40 of the Evidence Act 2006.

58 Elisabeth McDonald “Her Sexuality as Indicative of His Innocence: The Operation of New Zealand's “Rape Shield” Provision” (1994) 18 Crim LJ 321 at 321.

59 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [112].

60 Home Office (UK) (2006) *Section 41: An Evaluation of New Legislation Limiting Sexual History as Evidence in Rape Trials* (Online Report 20/06) London, United Kingdom: Liz Kelly, Jennifer Temkin and Sue Griffiths at 70.

61 Department of Justice (1983) *The Victim Study* (Institute of Criminology, Rape Study Volume 2: Research Reports) Wellington, New Zealand: J Stone, R Barrington and C Bevan at 55.

62 E. W. Thomas, “Was Eve Merely Framed; or Was She Forsaken?” [1994] NZLJ 368 at 372.

63 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [7.21].

not consider that there will be a difference in outcome as regards admissibility in the vast majority of cases.

The general relevance requirement was not seen to be sufficient to prevent the introduction of irrelevant evidence of past sexual experience.<sup>64</sup>

Despite justifying a higher relevance threshold, consideration of witnesses' interests cannot be a factor in the admissibility test. McDonald and Tinsley proposed a test for the admissibility of evidence of this kind, which requires the judge to consider the "distress, humiliation and embarrassment" the questioning may cause in the complainant.<sup>65</sup> The Law Commission rejected this, stating that "at the heart of the [s 44] test is the direct relevance to the issues at trial", and that it was difficult to see how that addition would be relevant to the application of the test.<sup>66</sup> The Law Commission stated:<sup>67</sup>

We acknowledge that by its very nature this kind of evidence is inevitably going to be a source of distress, humiliation and embarrassment for a complainant. Indeed, this is the very reason that s 44 is underpinned by a presumption against admission of evidence of the complainant's sexual experience with other persons. However, as well as respecting the interests of complainants, the Act must also protect the interests and rights of defendants. Accordingly, where fair trial rights require it, such evidence will be available to the court. That is the balance struck by s 44, and more broadly, by the Act as a whole.

Even in the highly traumatic context of sexual offending, witnesses' interests cannot justify a threshold that takes into account the effect of admission of the evidence on the witness.

(ii) Bad character evidence of non-defendant witnesses in the United Kingdom

To ask whether a higher relevance threshold can be justified in less distressing cases than sexual offences, it is useful to look to the United Kingdom jurisdiction, where there is a higher relevance threshold for "bad character" evidence of non-defendant witnesses.<sup>68</sup>

64 McDonald "Views of Complainants", above n 6, at 322; citing Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 443; see also: Elisabeth McDonald "From "Real Rape" to Real Justice? Reflection on the Efficacy of More than 35 Years of Feminism, Activism and Law Reform" (2014) 45 VUWLR 487 at 491.

65 Elisabeth McDonald and Yvette Tinsley "Evidence Issues" in E McDonald and Y Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington 2011) 279 at 336; citing the proposals of the Australian Law Reform Commission, *Family Violence – A National Legal Response* (ALRC 114, 2010) at 1242.

66 Law Commission 2013 Review, above n 63, at [7.25] – [7.26].

67 At [7.27].

68 Criminal Justice Act 2003 (UK), s 100.

“Bad character evidence” is evidence of misconduct or of a disposition towards misconduct.<sup>69</sup> “Misconduct” is either the commission of an offence or other “reprehensible conduct”.<sup>70</sup> Reprehensible conduct is a very wide concept, and could include such things as racism, bullying, bad disciplinary records, or having had a child taken into care.<sup>71</sup> The Law Commission envisaged it as evidence that tends to show the witness “has behaved, or is disposed to behave, in a way of which a reasonable person might disapprove”.<sup>72</sup> This appears to encapsulate New Zealand’s propensity and veracity definitions.<sup>73</sup>

In recommending an enhanced relevance test for bad character evidence of non-defendants, the United Kingdom Law Commission hoped the test “would balance the rights and interests of the defendant with those of other witnesses”.<sup>74</sup> However, it is clear that, as with sexual experiences, while witnesses’ interests can justify a higher *relevance* threshold, to ensure that the defendant has the maximum freedom to conduct his or her case the effect of admission on the witness cannot be a consideration in whether the evidence meets the threshold.<sup>75</sup> The provision was enacted with no consideration of the effect of admission on the witness.<sup>76</sup>

Rather, the threshold is an enhanced relevance test. The evidence is admissible if it is “important explanatory evidence”,<sup>77</sup> or has “substantial probative value in relation to a matter which is a matter in issue in the proceedings and is of substantial importance in the context of the case as a whole”.<sup>78</sup> The higher threshold is justified to protect witnesses from irrelevant attack, but evidence cannot be excluded if it is of relevance to the facts in issue. Evidence of bad character is subject to a leave requirement.<sup>79</sup> Bad character evidence about *the defendant* requires a notice of intention to be served, but not bad character evidence about non-defendant witnesses.<sup>80</sup>

## 2. Effectiveness of higher relevance threshold

It appears therefore that the need to protect witnesses’ reputational interests can justify a higher threshold of admissibility for evidence as to their character or conduct. However, there is no scope in such a threshold

69 At s 99.

70 At s 112.

71 Crown Prosecution Service “Bad Character Evidence” (2004) CPS.gov.uk, Prosecution Policy and Legal Guidance < [www.cps.gov.uk](http://www.cps.gov.uk) >

72 United Kingdom Law Commission *Evidence of Bad Character in Criminal Proceedings* (UKLC R273, 2001) at [8.19].

73 See: *R v Lawson* [2006] EWCA Crim 2572, [2007] 1 WLR 1191, [2007] 1 Cr App Rep 178 at [34], and the interpretation of bad character evidence in s 103 of the Criminal Justice Act 2003 (UK).

74 United Kingdom Law Commission, above n 72, at [9.20].

75 At [8.13].

76 Criminal Justice Act 2003 (UK), s 100.

77 At s 100(1)(a).

78 At s 100(1)(b)(i) and (ii). It can also be admitted if all parties agree to it: s 100(1)(c).

79 At s 100(4).

80 At s 111(2).

to consider the impact of the admission of the evidence on the witness. Therefore, a higher threshold would be effective at removing the ability to make gratuitous attacks against a witness, but cannot remove the ability to make attacks that are substantially helpful. It can reduce the ability to make unsubstantiated allegations, but cannot remove the ability. However, this may provide some assurance to a witness that their interests are being protected. Therefore, reform in this area along the lines of the United Kingdom, which raises the threshold for evidence of propensity, may indeed be warranted, veracity evidence already attracting a higher threshold.

Were such reform made, the approach in the United Kingdom where evidence is admitted if it is important explanatory evidence or of substantial probative value to the proceedings is a useful model. This would be an extra protection for witnesses as it would allow the evidence to be objected to where it might be helpful in proving their previous misconduct, but is not actually important to a fact in issue. Often there will be no distinction.

In terms of the practical requirements of any such higher threshold, the leave requirement of the United Kingdom system provides a useful check on this evidence. However, the New Zealand Law Commission stated that, “as a matter of principle, leave requirements should be confined to matters that are the exception rather than the norm”.<sup>81</sup> As such, a leave requirement, as required with prior sexual experience evidence, cannot be supported. However, the requirement of a notice of intention to adduce evidence of this kind, as the United Kingdom has with evidence of the bad character of defendants, would be helpful in the context of name suppression, to be discussed below.

The effectiveness of any such higher threshold is limited. Often evidence that tends to prove the evidence of a witness is unreliable will be substantially helpful. Further, the threshold would not prevent allegations that do not go to propensity or veracity but to the accuracy of the testimony. As with veracity, evidence of direct relevance could not engage these rules. For these reasons, a higher relevance threshold may reduce the amount of unsubstantiated allegations heard, but cannot remove them altogether. Therefore, other options must also be considered.

#### *D. Legal Support for Witnesses*

Disincentives to participation might be lessened were there legal support for witnesses that could make applications in pre-trial stages on the admissibility of evidence, objections to inappropriate questioning under s 85 EA 2006, and applications for suppression orders for witnesses under s 202 of the Criminal Procedure Act 2011 (“CPA 2011”).

Legal support could be found in imposing a duty on trial counsel or appointing separate legal representation for witnesses. However, for the

81 Law Commission 2013 Review, above n 63, at [7.19].

reasons outlined below, the former reform would be inappropriate and the latter too ineffectual to justify the significant cost it requires.

### 1. Duty imposed on trial counsel

There are clearly shortcomings in the perceived relationship between counsel and witnesses. Complainants especially often feel lost within the criminal justice system, at a time when they are at their most vulnerable.<sup>82</sup> Research indicates that female complainants of sexual offending ultimately viewed prosecuting counsel as not helping but rather increasing the difficulties of the trial process.<sup>83</sup> In particular, they have considered prosecuting counsel responsible for not protecting them from the distressing aspects of cross-examination.<sup>84</sup> As stated above, trial counsel could object to inappropriate questioning, but may neglect to do so for tactical reasons.<sup>85</sup>

It may therefore be assuring to witnesses if a duty were imposed on the counsel who calls them to act in their interests. However, this conflicts with the professional obligations of lawyers. The Code of Conduct and Client Care states that “the professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client”.<sup>86</sup> Defence lawyers must act in the interests of their clients, defendants, at the exclusion of all other interests. The role of prosecution counsel is wider, and includes acting in the public interest. However, imposing a duty to act in the interests of witnesses is also a fundamental clash with their role.

The prosecutor’s client is the state, rather than the complainant, let alone a witness. A criminal prosecutor fulfils a “public function” and as such must not seek convictions, but rather present all credible and relevant evidence so that justice can be done through a fair trial.<sup>87</sup> This is both a duty to the state, and a duty to act in the public interest.<sup>88</sup> However, the public interest duty does not amount to a duty to act in the best interests of a witness, nor a complainant.

It is, in fact, the duty of prosecutors to act dispassionately, representing the public interest rather than an individual victim.<sup>89</sup> The Crown Law Office’s *Prosecution Guidelines* lay out that “the overarching duty of a prosecutor is to act in a manner that is fundamentally fair”, and that prosecutors “should

82 Yvonne Marie Daly “Victim Participation in Criminal Processes” [2011] NZLJ 247 at 247.

83 McDonald “Views of Complainants”, above n 6, at 69.

84 At 69.

85 Doak, above n 32, at 307.

86 Lawyers and Conveyancers Act 2008 (Code of Conduct and Client Care), Rule 5.2.

87 Allan Hutchinson “In the Public Interest: The Responsibilities and Rights of Government Lawyers” (2009) 10 *German L.J.* 981 at 988.

88 At 988.

89 McDonald “Views of Complainants”, above n 6, at 70; Ministry of Women’s Affairs (2009) *Alternative models within the criminal justice system* (Background Paper) Wellington, New Zealand at 10.

perform their obligations in a detached and objective manner”.<sup>90</sup> McDonald acknowledged that:<sup>91</sup>

... there is no doubt an inherent tension in the idea of the prosecutor as an objective “minister of justice” presenting evidence to the court dispassionately as part of the overall public interest in pursuing a conviction, while at the same time supporting or protecting the victim, through either regular objections to the questioning by defence counsel or by being obviously sympathetic to the plight of the complainant.

As Blondel explains, “because an adversary system relies on parties to assert their interests before the court, it necessarily excludes outsiders like crime victims”.<sup>92</sup> The adversary system fails to consider non-parties whose interests may be affected by the proceedings.<sup>93</sup> Prosecutors present the views of complainants to the court in the context of bail applications for specified offences.<sup>94</sup> Nevertheless, while this is appropriate in the context of post-conviction applications, representation of the complainant or another witness’s interests during trial would be likely to influence juries against the defendant and cannot be supported.

The United States’ Crime Victims’ Rights Act establishes the need for caution.<sup>95</sup> The Act guarantees eight rights to victims, including the right to be reasonably protected from the accused, the right to full and timely restitution, the right to confer with the government lawyer, and the right to be treated with fairness and respect for the victim’s dignity and privacy.<sup>96</sup> The Act does not give party status to victims, but requires the court and prosecutor to vindicate the interests of victims, which conflicts with the ethical obligations of both.<sup>97</sup> It also conflicts with the rights of a defendant, most obviously the right to be presumed innocent – in allowing for the interests of victims before conviction, the court and prosecutor must assume the defendant has caused the victim to suffer.<sup>98</sup> It would also conflict with the duty not to seek convictions.

Therefore, any duty imposed on trial counsel is inappropriate. It is also debatable how effective any such duty would be. Even under the Crime

90 Crown Law Office (2013) Solicitor-General’s Prosecution Guidelines (Guidelines) Wellington, New Zealand at [19.1].

91 McDonald “Views of Complainants”, above n 6, at 80; citing Doak, above n 32, at 306

92 Erin C Blondel, “Victims’ Rights in an Adversary System” (2008) 58 Duke LJ 237 at 239.

93 At 239.

94 Victims’ Rights Act 2009, s 29; Crown Law, above n 90, at 14.5.

95 Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act, Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261-65 (2004). The Act was named for murder victims whose families were denied the rights the Act guarantees.

96 Crimes Victims’ Rights Act 2004 (US), s 3771(a)(8); this last right is mirrored in section 7 of New Zealand’s Victims’ Rights Act 2002.

97 Blondel, above n 92, at 240.

98 At 242, citing *United States v. Turner* 367 F. Supp. 2d at 325-326.

Victims' Rights Act, the United States has not prevented unsubstantiated allegations being made against complainants. In *United States v Rubin* the judge refused to disallow the state's lawyer from making legitimate arguments "simply because the arguments may hurt a victim's feelings".<sup>99</sup>

## 2. Separate legal representation

There may be greater scope for allowing witnesses separate legal representation, although with very limited participation. However, this raises practical challenges in terms of effect and funding.

Commentators and victims' advocates have proposed introducing separate legal representation for complainants in sexual offending cases.<sup>100</sup> In some jurisdictions, state-funded legal representation is available for complainants in criminal proceedings as secondary prosecutors.<sup>101</sup> States with inquisitorial criminal justice systems in Europe all allow independent legal representation for victims of sexual offending.<sup>102</sup>

Doak observed that "this would save the prosecutor from having to juggle two roles which are ultimately incompatible": the role of representative of the victim, and representative of the Crown.<sup>103</sup> McDonald observed:<sup>104</sup>

It is certainly arguable that these roles can and should be fulfilled by victim support workers, prosecutors and trial judges. However, research has consistently demonstrated that these tasks are not routinely undertaken to the satisfaction of complainants, or even in a manner that is consistent with existing legal authority or best practice. The absence of relevant support and strong, effective advocacy about admissibility matters, or the manner of questioning, means that complainants tend to be distressed by and dissatisfied with the trial process. Distressed complainants are unlikely to give their best evidence and dissatisfied complainants will not encourage other victims to proceed with their complaints.

### (a) Scope

Temkin identified the possibility of adapting the Danish model to suit New Zealand.<sup>105</sup> The Danish Procedural Code provides that a person who is directly affected by a crime, originally victims of sexual offending only, may

99 *United States v. Rubin* 558 F. Supp. 2d 441, 416 (E.D.N.Y. 2008) at 428.

100 McDonald "Views of Complainants", above n 6, at 80.

101 At 81.

102 Fiona E Raitt *Independent Legal Representation for Complainers in Sexual Offence Trials* (Research Report for Rape Crisis Scotland, 2010) at [2.08].

103 Doak, above n 32, at 307.

104 McDonald "Views of Complainants", above n 6, at 82.

105 Jennifer Temkin *Rape and the Legal Process* (2nd ed, Oxford University Press, New York, 2002) at 293, cited in McDonald "Views of the Complainants", above n 6.

have the right to state-funded legal representation.<sup>106</sup> The court may appoint a lawyer depending on the seriousness of the crime, extending to cases of violent crime including robbery.<sup>107</sup> During the trial, the complainant's counsel may apply for leave for the complainant to give evidence in the absence of the defendant, for example, and may object to inappropriate questions put by the defence. McDonald suggested the role for such a legal representative in New Zealand could include:<sup>108</sup>

- Undertaking pre-trial argument for admission or exclusion of evidence (for example pursuant to s 18, s 37, s 43, or s 44 EA 2006);
- Being present at the trial (and objecting to inappropriate questions under s 85 EA 2006).

While separate counsel could be limited to victims of sexual offending because of their particular needs and the serious risk of them being re-traumatised by the criminal justice process,<sup>109</sup> other forms of separate legal representation do exist in other cases, for example amici curiae, technical advisors, interveners, and counsel for the child.

*(b) Analogy to an amicus curiae*

The role of an amicus curiae is a helpful model for separate legal representation for witnesses. An amicus curiae is a lawyer appointed by the court to assist by providing information about a particular area of the law, or if a party is unrepresented, advancing legal arguments on their behalf.<sup>110</sup> An amicus can represent persons who are not a party to the proceedings. A court may direct that representation be made for a specified class of person or the public interest, either on application by a party, or on its own initiative.<sup>111</sup> Among these directions, the court may appoint counsel to represent minors, unborn persons, absentees, or unrepresented persons.

As it stands, this is not apt to address the present problem. However, it demonstrates the potential for a court-appointed assistant to represent the interests of non-parties in limited ways, while crucially not granting these non-parties the ability to litigate the merits of the claim.

In New Zealand, amici curiae have been appointed for a range of purposes, including “for a class of persons that might be affected by a judgment”.<sup>112</sup>

106 Administration of Justice Act (*Retsplejeloven*) 1916 (Denmark), s 275-1.

107 At s 741a-2.

108 McDonald “Views of Complainants”, above n 6, at 82.

109 At 84.

110 *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin & Ors* [2009] NZCA 60 at [20].

111 Rule 4.27 of the High Court Rules and Rule 3.33.8 of the District Court Rules; Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012) at [15.22].

112 Law Commission *Review of the Judicature Act* at [15.20], citing *NZ Dairy Workers Union Inc v New Zealand Milk Products Ltd* [2004] 3 NZLR 652 (CA).

The Law Commission stated that in advancing legal arguments on an unrepresented party's behalf, the amicus may invoke partisan advocacy, even confronting opposing counsel.<sup>113</sup> However, an amicus does so without the ability to litigate the merits of the legal claim; the brief filed does not require the court or parties to change their behaviour.<sup>114</sup> The extent to which an amicus can be heard and present arguments is in the discretion of the court.<sup>115</sup> The representation does not amount to party status for the represented views.

Therefore, a case could be made to extend this sort of separate representation without party status to a representative of the interests of non-defendant witnesses, with limited powers to make applications to the court to be heard on suppression orders, pre-trial applications on the admissibility of evidence, and potentially the ability to make objections to inappropriate questioning under section 85 of the Evidence Act 2006. However, in the interests of fairness to the defendant, objections may have to be made in the absence of the jury.

(c) *Policy considerations*

As with duties on trial counsel, there is potential for infringement of the defendant's right to a fair trial. Participation rights are opposed by many on these grounds. Edwards stated:<sup>116</sup>

... legal representation for the defendant is crucial to ensure that he receives a fair trial, and is not subject to the unrestrained power and resources of the state. However, legal representation for a *victim* cannot be justified on these grounds, as the victim is not in a position of inequality vis-à-vis the state.

Auld agreed that putting an alleged victim whose evidence will be challenged by the defendant "in the ostensibly privileged role of an auxiliary prosecutor would be unfair" – such a scheme would not fit in an adversarial system "in which there are only two parties and the hearing is the substitute for private vengeance not an expression of it".<sup>117</sup>

It is undoubtedly true that separate legal representation would infringe a defendant's fair trial rights if that lawyer could lead evidence and cross-examine in addition to the prosecuting counsel.<sup>118</sup> Therefore, any separate legal representation must ensure that the witness is not effectively made a party to the proceedings – they should not be able to litigate the merits of

113 Law Commission *Review of the Judicature Act*, above n 111, at [15.18], citing *The Beneficial Owners of Whangaruru*, above n 110, at [20].

114 Blondel, above n 92, at 254.

115 *The Beneficial Owners of Whangaruru*, above n 110, at [26].

116 Ian Edwards "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making" (2004) 44 *Brit J Criminol* 967 at 972.

117 Royal Courts of Justice, above n 26, at 545.

118 Raitt, above n 102, at [6.08].

the case in any way.<sup>119</sup> For that reason, the involvement must be confined to a very limited scope, discussed above as being the ability to make pre-trial applications for the admissibility of evidence, be heard on suppression orders, and potentially make objections for improper questioning.

Appointing separate legal representation would mean a significant strain on resources. It would have to be funded by legal aid, which has already suffered from substantial budget cuts. McDonald argued that, while separate legal representation would cost money, it may also save money by reducing time required by victim advisors, prosecutors, or members of the police.<sup>120</sup> But to justify the expenditure, the separate legal representation must be demonstrably effective. Raitt argued that the representative could “achieve quite a lot even if confined to interventions during any cross-examination stage of the complainant, and/or objections to . . . the introduction of sexual history evidence.”<sup>121</sup> This paper respectfully disagrees about the scope for achievement.

As established above, there is no scope to consider the effects of admissibility of allegations on a witness in deciding whether to admit evidence, even were the admissibility threshold to be raised. Without the ability to put forward such a perspective, it is unclear what benefit a legal representative could be to a witness in pre-trial applications on the admissibility of the evidence.

Separate legal representation may provide useful assistance in applications for name suppression for witnesses, as will be discussed below. However, as the witness can have separate legal representation in making a suppression application already, this is unlikely to justify the expenditure. Further, a requirement of notice for the evidence would be less intrusive.

Therefore, the help that the separate legal representation could provide would be in ensuring that improper questioning is objected to. Arguably, this is the least appropriate aspect of the role of any separate legal counsel. This paper disagrees with Raitt that objections should be made *during* cross-examination. Objections should not be made in front of the jury as this would likely confuse or distract the jury and impact negatively the defendant’s right to a fair trial. Objections are unlikely to be effective if they cannot occur in such a way as to prevent the improper questioning from continuing. Therefore, it is submitted separate legal representation would not be worth the strain on resources that it would require.

119 McDonald “Views of Complainants”, above n 6, at 86.

120 At 86.

121 Raitt, above n 102, at [6.09].

### III. PREVENTING UNSUBSTANTIATED ALLEGATIONS BEING PUBLISHED BY THE MEDIA

#### *A. Suppression*

Suppression could be considered an effective remedy to this problem due to its lack of impact on fair trial rights and ability to limit the spread of unsubstantiated allegations beyond the courtroom. However, the public interest in reporting court proceedings means there are only limited grounds on which counsel can apply for an order that names or evidence be suppressed. As Thomas J stated, “the ability to scrutinise the workings of the Courts is the public’s entitlement”.<sup>122</sup>

#### **1. Orders to close court**

A witness may be reassured if the court is closed to the public, which may be ordered under the CPA 2011.<sup>123</sup> However, this clashes with the general principle that court proceedings are to be open to the public.<sup>124</sup> Therefore, such an order is available only if the judge considers the order necessary to avoid undue disruption to the conduct of the proceedings, prejudicing the security or defence of New Zealand, a real risk of prejudice to a fair trial, endangering the safety of any person, or prejudicing the maintenance of the law.<sup>125</sup> Hardship to a witness is not a valid reason to order a closed court.

#### **2. Suppression of evidence**

The unsubstantiated allegation itself could be suppressed under s 205 CPA 2011, which provides for the suppression of evidence and submissions. The considerations that a decision to suppress evidence is based on under s 205 are the same as to close court,<sup>126</sup> and do not include any consideration of the impact of publication of the evidence on a witness.

#### **3. Suppression of witnesses’ names**

Most helpful in this context is the ability to suppress a witness’s identity if the court is satisfied that publication would be likely to cause undue hardship to the witness.<sup>127</sup> This is a prima facie cure, however there are significant factors detracting from its force.

122 *Police v O’Connor* [1992] 1 NZLR 87 (HC) at 95.

123 Criminal Procedure Act 2011, s 197(1).

124 At s 196.

125 At s 197(2)(a). Note also s 199.

126 At s 205(2).

127 At s 202(2)(c).

(a) *Is damage to reputation considered “undue hardship”?*

Firstly, it is unclear whether the courts’ interpretation of s 202 as it stands encapsulates damage to reputation incurred in the course of proceedings. Under the similar provision for complainants under s 205 CPA 2011, the courts have interpreted “undue hardship” as serious hardship,<sup>128</sup> greater hardship than the circumstances warrant,<sup>129</sup> or more than ordinary hardship.<sup>130</sup>

In *Police v C*, damage to business interests due to the damage to reputation caused by the connection between the witness and accused being a “public turn off” was considered undue hardship.<sup>131</sup> However, this also involved the destruction of national and international business reputation, resulting in significant job losses for employees.<sup>132</sup>

In *Police v X*, a school that had employed a child sex offender was successful in obtaining an order for suppression under s 202(1)(c) CPA 2011.<sup>133</sup> This was partly based on the reputation of the school and the potential ramification that people might speculate the school did not make sufficient background checks on staff or monitor any concerning behaviour by the defendant and therefore not feel safe enrolling their children there.<sup>134</sup> However, there was also hardship to pupils and families attending the school due to potential speculation that other children had been offended against.<sup>135</sup>

Damage to reputation should be considered undue hardship, as the ramifications are potentially huge. No legislative change would be required to make clear that reputational damage constitutes undue hardship, but a more decisive judgment than the two above would provide great assistance.

(b) *Practical limitations*

There are several practical limitations on the ability of this provision of the CPA 2011 to stop the effects of unsubstantiated allegations. Firstly, in making the application for name suppression, the witness must either ask counsel, who have no duty to make and defend the claim, or seek separate representation specifically for the application. This would be expensive for the witness, but importantly also requires that the unsubstantiated allegation be anticipated as suppression is not likely to be granted if the name is already published.

Separate legal representation would be some help here, although unlikely to be justified on the grounds of assistance with applications for suppression alone. A more attractive option would be to raise the threshold for admissibility and, as in the United Kingdom, require a notice of intention to be given so

128 *R v Wallace* (2001) 18 CRNZ 577 (CA).

129 *Dalton v Auckland City: Porter v Auckland City* [1971] NZLR 548 (SC) at 549-550.

130 *Lyall v Solicitor-General* [1997] 2 NZLR 641, (1997) 15 CRNZ 1 (CA) at 646, 6.

131 *Police v C* [2013] DCR 315.

132 At [56].

133 *Police v X* [2013] DCR 497.

134 At 499.

135 At 502.

that the witness can prepare applications. However, as outlined above, this would not capture evidence of direct relevance, or evidence as to the accuracy of a witness's evidence.

Even with the above reform, allegations can simply be blurted out in evidence. If that is the case, there is only a requirement of a 10-second delay if there is in-court media coverage before it is broadcast.<sup>136</sup> Further, a significant detracting force is the ease with which information can be made public despite suppression orders being made, especially in the era of the Internet. While this is likely to constitute contempt of court for the publisher, it will still let the information be known to the public. Therefore, a witness cannot necessarily rely on suppression of their name to stop unsubstantiated allegations being published.

Further, even if the application is successful, the witness still suffers damage by being criticised in the proceedings without the opportunity for redress. Names of complainants in cases involving sexual offences are often suppressed, sometimes automatically,<sup>137</sup> and this has not calmed fears of humiliation and distress.

### *B. Absolute and Qualified Privilege from Defamation Claims*

Absolute and qualified privilege to defamation claims allow the media to publish unsubstantiated allegations that are made in court proceedings without any redress available for the witness. These privileges shall be discussed below.

## IV. REDRESS FOR THE WITNESS AFTER UNSUBSTANTIATED ALLEGATIONS ARE MADE

### *A. Benefit of Redress*

It is the unfortunate reality that evidence of unsubstantiated allegations may be admitted, and a suppression order may not be granted. While any form of redress would not prevent the unsubstantiated allegation being heard either in court or in the media, it may be the best balance that can be achieved between fair trial rights and removing the disincentive to witness participation. However, redress against publishers may unduly limit freedom of expression and the public interest in holding the courts accountable by reporting their proceedings. A balance must be struck.

136 Ministry of Justice (2012) In Court Media Coverage Guidelines (Media Information) Wellington, New Zealand.

137 Criminal Procedure Act 2011, s 203.

## *B. The Role of the Judge*

### 1. Judicial questioning

The judge can question a witness to clarify information under s 100 EA 2006. Ostensibly, this could be used to clarify an unsubstantiated allegation, however, this power is very limited. New Zealand's adversarial system means that a judge is a neutral arbiter, although this provision allows a judge to "descend into the arena".<sup>138</sup> But this too is limited: an appeal may be brought where a judge has descended too far.<sup>139</sup> In *Beckham v R*, the Court of Appeal held that there had been a miscarriage of justice because the Judge's questioning had gone beyond that which was necessary to clarify information that the jury might not understand.<sup>140</sup>

### 2. Judicial review

However, there is precedent that a judge can use s 100 to clarify unsubstantiated allegations made against a witness, and is reviewable if he or she fails to do so and subsequently makes unsubstantiated allegations in his or her judgment.

In *Hampton v District Court*, Whata J held that a District Court Judge's failure to question a non-party witness under s 100 on allegations made against that witness was subject to judicial review in the High Court.<sup>141</sup> The plaintiff alleged the Judge made findings of misconduct against him, namely:

- (a) that he had a motive to mislead; and
- (b) that his assertions were disingenuous; and
- (c) his enquiries were disingenuous and self-serving; and
- (d) that he was involved in the misconduct of another party; and
- (e) that he manipulated the situation; and
- (f) that he had exploited his mother.

Whata J cited *O'Regan v Lousich*, in which Tipping J stated that:<sup>142</sup>

The public are entitled to take the view, and do take the view, that if a Judge criticizes someone in a judgment the Judge has carefully weighed the evidence after giving the person criticized an opportunity to be heard.

His Honour believed that absolute privilege should not be accorded to judges, lest a wrong be committed without capacity for redress.<sup>143</sup> Tipping J held the applicant should have been given notice that he may be criticised

138 Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Thomson Reuters) at [EA100.01].

139 *R v Zarezadeh* [2011] EWCA Crim 271.

140 *Beckham v R* [2012] NZCA 290 at [72].

141 *Hampton v District Court* [2014] NZHC 1750.

142 *O'Regan v Lousich* [1995] 2 NZLR 620 (HC) at 631.

143 At 630.

and given the opportunity to comment, therefore the relevant passage of the judgment was quashed.

In *Hampton*, Whata J observed that “promoting fairness to witnesses is inextricably linked to the purpose of the Evidence Act”, and that therefore the right of an allegedly defamed witness to seek redress by way of judicial review should not be ruled out.<sup>144</sup> However, Whata J concluded that, because of the duty of a judge to be impartial, the right to review must be limited to cases where there was no evidence at all (circumstantial or otherwise) supporting a defamatory observation. Any wider basis for review would put too large a burden on the judge to infringe the role of litigants.<sup>145</sup> Further, there is no general right for a witness to be heard about prospective criticisms. This right must also be limited to avoiding abuse of process, rather than a right to challenge the outcome of a proceeding.

Aside from these limitations, there are also significant limitations on the application of this to the present problem. Firstly, while this is an important power of review for witnesses in civil jurisdictions, there is no scope to apply this power to criminal cases. As Whata J noted, in a civil case, the scope for judicial questioning is broader than in criminal proceedings.<sup>146</sup> It is particularly important in the criminal system that the roles of counsel are not intruded upon by the judge.

Further, only decisions of a District Court Judge or judge of a court or tribunal below that are reviewable. Therefore, many proceedings would not be covered. Particularly, more serious crimes where the stakes are higher and therefore there is more potential for seriously harmful allegations to be made would be heard in the High Court and therefore not subject to judicial review.

Lastly, this only applies to defamatory comments made by a judge, and not by a fellow witness or counsel. In the criminal context, the judge may make findings if the trial is judge alone. Where it is a jury trial, the judge will only make findings in pre-trial hearings, however, these are usually not made public due to the potential influence on the jury. Therefore, there will not often be scope for the judge to make defamatory findings against witnesses.<sup>147</sup>

### *C. Qualifying Qualified Privilege*

There is currently no ability for a person who has their reputation harmed by an unsubstantiated allegation in court proceedings to bring a claim against the speaker or a third-party publisher for what would otherwise be a defamatory statement due to the privilege provisions of the Defamation Act 1992 (“DA 1992”). This is a substantial barrier to effective redress.

<sup>144</sup> *Hampton*, above n 141, at [28].

<sup>145</sup> At [29].

<sup>146</sup> At [23].

<sup>147</sup> There may be some scope to make comments on the character or credibility of a witness during the judge’s summing up to the jury.

## 1. The need for privilege

Privileges protect speech deemed to be desirable in the public interest from defamation claims. Absolute privilege is guaranteed for court proceedings by s 14 DA 1992, which grants absolute privilege to anything said, written, or done in judicial proceedings by a member of the tribunal or authority, or by a party, representative, or witness.<sup>148</sup> Defamation actions should not be available in this context due to the public interest in full and frank discussions being able to be undertaken. As Campbell stated in the context of the mirroring provisions protecting parliamentary speech, were the protections afforded to free speech in Parliament removed, “parliaments probably would degenerate into polite but ineffectual debating societies”.<sup>149</sup>

The unsubstantiated allegation can then be reported in the media, causing significantly more damage. The witness is unlikely to be able to seek redress for it, because the media have a qualified privilege attaching to the publication of a fair and accurate report of court proceedings or the pleadings of parties to those proceedings.<sup>150</sup> The basis for this privilege is “the importance to society of public access to the Courts including by way of publishing”.<sup>151</sup> As Lord Diplock stated:<sup>152</sup>

If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice.

This interest is seen to override the interest in protecting individual reputations.

However, this defence is limited. Firstly, it only applies to reports that are *fair and accurate*. The defence will not apply if “the omission of some parts of the proceedings creates a false impression”.<sup>153</sup> Secondly, qualified privilege can fail if the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.<sup>154</sup> The burden of proving ill will is on the plaintiff.<sup>155</sup>

Therefore, while not as wide as absolute privilege, this defence will still be apt to cover most reports of judicial proceedings, thus removing the power of defamation law to ensure a witness’s right to protect their reputation in this context.

148 Defamation Act 1992, s 14(1).

149 Enid Campbell *Parliamentary Privilege in Australia* (Melbourne University Press, Melbourne, 1966) at 28.

150 Defamation Act 1992, First Schedule, Part 1, cl 5 and cl 6.

151 *Montgomerie v Pauanui Ltd & Anor* HC Auckland CP 71/95, 3 March 1997 at 18.

152 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 449-450.

153 *Montgomerie v Pauanui Publishing*, above n 151, at 18.

154 Defamation Act 1992, s 19.

155 At s 41.

## 2. Removing qualified privilege for certain comments

A potential option may therefore be removing the qualified privilege attaching to court reporting for certain comments. It may be argued that there is no public interest in media reports of false and defamatory statements made in court proceedings. However, while there may be no public interest in knowing the false information, there is public interest in the open administration of justice which the public have access to primarily through the media. Therefore, any qualification of qualified privilege is likely to be too detrimental to this interest.

In terms of qualifying this privilege, hypothetically, cues could be taken from *Hampton* in the context of judicial review. Comments about an issue collateral to the proceedings (which, as established, could include the character or credibility of a non-party witness), which defame that non-party witness, could be made exempt from qualified privilege. Presumably, this would also be taken to remove the corresponding common law privilege of reports of court proceedings that existed before the DA 1992.

However, a legislated ability to make a defamation claim in these circumstances is too rigid a restraint on the open reporting of court proceedings to be a justifiable limit on freedom of expression.<sup>156</sup> Having removed the right to publish based on public interest in court reports, there would be no overarching common law qualified privilege based on public interest to allow publication of the statements. The media do not have a duty to report matters in the public interest for the purposes of the common law defence.<sup>157</sup> The courts are reluctant to extend this privilege to publications made by the media to the public at large.<sup>158</sup> While a duty may exist in specialist papers where the information is of concern to the intended readers,<sup>159</sup> newspaper reports to the public rarely attract privilege as there is no strong enough interest recognised by law to give rise to the duty to communicate.<sup>160</sup> Removing this privilege would therefore be an unjustifiable limit on that right, as it would remove any other right to publish based on the information being in the public interest.

It is also not desirable to constrain the media from reporting these allegations. The treatment or making of unsubstantiated allegations in the

156 Guaranteed under s 14 of the Bill of Rights Act 1990.

157 Rosemary Tobin "Public Discussion as a Defence to a Nineteenth Century Defamation Action" (2005) 21 NZLJR 385; *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 (CA).

158 Ursula Cheer and John Burrows "Defamation" in S Todd, J Burrows, B Atkin, C Hawes, U Cheer (eds) *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, New Zealand, 2009) at 887.

159 *Chapman v Ellesmere* [1932] 2 KB 431 (publication in specialist horse racing paper about disqualification due to administering drugs to horse held to attract common law qualified privilege); *Wells v Wellington* [1952] NZLR 312 (common law qualified privilege was held to attach to the publication of a circulation newsletter specifically to members of the trade union about alleged communists in the union); and *Truth (NZ) Ltd v Holloway*, above n 157 (the Court of Appeal considered in obiter that publication of bankruptcy details in a bankruptcy specific publication might attract the privilege, but did not decide the matter).

160 *Truth (NZ) Ltd v Holloway*, above n 157, at 83 per North P.

courtroom, and importantly the reasons for decisions if they are influenced by these unsubstantiated allegations, should be subject to public scrutiny. Further, any limitation on freedom of expression may be an unpopular move: an international trend towards liberalising defamation law has become increasingly apparent in recent years.<sup>161</sup> Lastly, as shall be a common theme throughout this section, defamation claims are an undesirable remedy as they would be very costly for the affected witness to bring.

### 3. Requirement to make clear the nature of the allegation

A weaker alternative that would not impact so strongly on the interest in the open administration of justice would be to build on obiter comments in *Pauanui Publishing Ltd v Montgomerie*, and require that the publication should make clear that (a) the comment is an allegation and (b) that no supporting evidence has been put before the court. This would place a higher threshold on the requirement that a report of court proceedings must be “fair and accurate”. Were this standard met, any limit on the impact of the harm of the comment would be weak; the public may think there is “no smoke without fire”. Were the standard not met, the witness would be able to bring an expensive defamation claim. Such change would not require legislative action, but simply an authoritative decision building on the obiter in *Pauanui Publishing*.

In *Pauanui*, the Court of Appeal endorsed the finding that the qualified privilege could not apply to a report of bankruptcy proceedings because of significant omissions, inaccuracies, selectivity, and, importantly for these purposes, *failure to make clear that some of the reported matters were subjective views or allegations that were not established*.<sup>162</sup> The High Court reasoned that:<sup>163</sup>

... the page 14 article created a significantly false picture by reporting the allegations argued and put up by Mr Lunn, and by then selectively reporting from Justice Cartwright’s judgment as if those allegations were accepted by her rather than, as was the case, found by her to be countered by the evidence in support of the plaintiff’s application, essentially the subjective views of Mr Lunn himself, and ultimately inconsequential.

This does not address the issue this paper is intended to resolve. The publisher in fact misinterpreted the judge’s findings, rather than the defence failing simply because the publisher did not clarify that the comments were unsubstantiated allegations. As stated in the context of judicial review, the

161 Deirdre Kelly “Bearing False Witness Against Your Neighbour: The Evolution, Perils and Possibilities of the Development of Qualified Privilege in Defamation Law” (2007) 7 UC Dublin L Rev 106 at 106.

162 *Pauanui Publishing Ltd v Montgomerie* [2004] NZAR 702 (CA) at 710.

163 *Montgomerie v Pauanui*, above n 151, at 19.

circumstances in which the judge will make findings in the criminal trial process are limited. Findings may be made if the trial is judge alone, or made in pre-trial hearings which are unlikely to be reported. Often the judge will not comment on the character or credibility of a witness during the trial process.

Raising the threshold for fairness and accuracy is more justifiable than removing the privilege for certain comments as it does not prevent reports being made. Rather, it imposes a requirement of responsible journalism. In *Bonnick v Morris*, Lord Nicholls proposed a test for responsible journalism as being a fair balance between freedom of expression on matters of public concern and the reputations of individuals.<sup>164</sup> His Lordship regarded this as the price journalists pay in return for the privilege.<sup>165</sup>

The threat of a defamation action is likely to incentivise the media to meet the standard of “fair and accurate” reporting. However, in terms of ameliorating harm caused, this is a far less effective remedy than any sort of declaration that the allegation was untrue. It may provide some relief in the sense that it may somewhat limit the impact of publication, but that relief is very weak and unlikely to be enough to remove disincentives to participation in the trial process. Further, bringing a defamation action is not an affordable reality to most, limiting the ability to seek more effective relief if the standard is not met. Therefore, this is not an attractive option for reform.

#### *D. Right of Reply*

A right of reply would allow affected witnesses the opportunity to have a response to the allegations published. There are two potential avenues for reform: (a) by statute under the DA 1992, or (b) by forming a system that requires corrective statements to be published, similar to what exists in the context of parliamentary privilege.

#### **1. Statutory: defamation law**

Reports of court proceedings are not subject to s 18 DA 1992, which provides that qualified privilege can be defeated if the subject of the statement makes a reasonable request that a correction be published and it is denied.

Qualified privilege that is subject to s 18 attaches to a publication of a report or other matter subject to Pt 2 of Sch 1, whereas court reporting falls under Pt 1 of Sch 1. Where s 18 applies, a defence of qualified privilege will fail if:<sup>166</sup>

- (a) [...] the plaintiff requested the defendant to publish, in the manner in which the original publication was

<sup>164</sup> *Bonnick v Morris* [2004] 1 AC 300 (PC (Jamaica)).

<sup>165</sup> At 309.

<sup>166</sup> Defamation Act 1992, s 18(2).

made, a reasonable letter or statement by way of explanation or contradiction; and

- (b) [...] the defendant has refused or failed to comply with that request, or has complied with that request in a manner that, having regard to all the circumstances, is not adequate or not reasonable.

Covered by Pt 2 of the Schedule are such things as reports of courts or parliamentary proceedings outside of New Zealand, proceedings of an inquiry held under the authority of the government of New Zealand, proceedings of an international organisation, proceedings of the meeting of a local authority, and other similar proceedings.

There is scope to remove this distinction. The other provisions in Pt 1 related to parliamentary privilege, but were repealed by the Parliamentary Privilege Act 2014, which re-enacted them under that legislation also with no right of reply.<sup>167</sup> Compared with parliamentary proceedings, court proceedings are in the unique position of needing to remove disincentives to participation in their processes. Section 18 demonstrates that it is not unreasonable to require a person who has repeated defamatory comments to publish a response. It is argued that the knowledge they may have to publish a correction would deter media from publishing unsubstantiated allegations on the collateral issue of the witness's character where there is no supporting evidence, and the same may be said of the knowledge they may have to publish a response. However, importantly this would retain the media's right to publish and therefore there is no undue limitation on their freedom of expression. A response does not carry the professional embarrassment of a correction, and so is unlikely to chill valuable speech. Assessments of a number of regimes that have statutory provisions for a right of reply have concluded that they have not had a chilling effect on press freedom, calling such fears "unfounded".<sup>168</sup>

However, if the response were to be refused, once again this would degenerate into defamation proceedings, which are expensive. Therefore, this is simply not a practical avenue of redress for many affected witnesses.

## **2. Reform of regulatory bodies**

An alternative option, which would not require legislative reform, is to engage the regulatory bodies that govern certain news media outlets to give a right of reply to affected witnesses when an unsubstantiated allegation is published as part of a report of court proceedings. A model for this could be the scheme that is used in Parliament to publish responses to statements made in the House that cause damage to reputation.

167 Parliamentary Privilege Act 2014, s 18.

168 Kyu Ho Yuom, "The Right of Reply and Freedom of the Press: An International and Comparative Perspective" (2008) 76 GWLR 1017 at 1059.

Importantly, as there would be no scope to turn into defamation proceedings, but rather simply engage complaints procedures, this would not be costly for the affected witness. As stated in the Finkelstein report, a right of reply enforceable by a regulatory body:<sup>169</sup>

... is particularly important given the reach of the modern news media and the structural disadvantages experienced by individuals vis-à-vis the media. Media organisations exercise virtually unreviewable power, limited only by laws that are rarely an accessible option for ordinary people (if they ever were).

This ease of access makes this a desirable option for reform.

(a) *Parliamentary procedure*

Reports of parliamentary proceedings attract the same qualified privilege as reports of court proceedings. Where a person has had a statement made about them in parliamentary proceedings that adversely affects their reputation, they can apply to have a response entered into the parliamentary record.<sup>170</sup> The Speaker then decides, considering all the circumstances, whether the response should be incorporated into the parliamentary record. This usually includes an opportunity for the statement-maker to comment, and consideration of the extent to which the reference is capable of adversely affecting the person who made the submission.<sup>171</sup> If accepted, the response is printed as a parliamentary paper and presented to the House by the Speaker.

Importantly, in so doing, “the Speaker is not to consider or judge the truth of the reference made in the House or of the response to it”.<sup>172</sup> As the Privileges Committee set out:<sup>173</sup>

The purpose of this procedure is not to allow the correction of the record. It is intended to provide a recourse for persons who are named or identified in the House and consider that they have been adversely affected or have suffered damage to their reputation.

There is, of course, no court equivalent of the parliamentary record and as such, the Standing Orders do not translate completely to the court context. However, it is argued that the scheme could translate to third party (news media) publishers of the unsubstantiated allegations.

169 Hon R Finkelstein QC *Report of the Independent Inquiry into the Media and Media Regulation* (Report to the Minister for Broadband, Communications and the Digital Economy, Canberra, 2012) at [9.21].

170 Standing Orders of the House of Representatives 2014, SO159-162.

171 Privileges Committee (June, 2013) *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh: Report of the Privileges Committee* Wellington, New Zealand: Christopher Finlayson at 22.

172 Standing Orders of the House of Representatives 2014, SO160(3).

173 Privileges Committee, above n 171, at 22.

(b) *Media*

There is presently no right of reply applicable to this context in any of the news media regulatory schemes in New Zealand. The Law Commission, in their recent review of news media regulation, recommended that a right of reply be granted, viewing that this would not exert a chilling effect on the media.<sup>174</sup> The equivalent Australian report also recommended an enforceable right of reply should be granted to individuals.<sup>175</sup>

There is scope to engage the Press Council and Online Media Standards Authority in reforming their regulations to give a right of reply to persons whose reputation is damaged by reports of court proceedings. The process should be similar to that of s 18 DA 1992: the individual should first contact the editor of the publication with a request to publish a reasonable response. If the editor then refused, a complaint could be made to the regulatory body who would decide whether to order that the response be published. No damages would be able to be awarded. As with the parliamentary scheme, no consideration should be made of whether the allegation published is true or false, but simply the harm to reputation it has the potential to cause and the reasonableness of the response.

While this imposes obligations on news media, this is appropriate given the additional rights and responsibilities inherent in the core democratic functions they carry out, and is a suitable trade-off for the corresponding privilege they enjoy.<sup>176</sup>

(i) The Press Council

The Press Council is a self-regulatory body that has no basis in statute. It has jurisdiction over newspapers and publications of media producers that have voluntarily assumed its membership. Complaints to the Press Council are resolved using the principles that members have agreed to. The Press Council has no power to order compensation, but can order that its members publish adjudications. As it is not a statutory body, there is no right of appeal from a decision of the Press Council. This would avoid the expensive risk of becoming a quasi-defamation claim.

It would not be unreasonable to impose this further obligation on publishers who are members of the Press Council. This is because it is in line with two of the Press Council's existing principles. Principle 1 affirms that:

Publications should be bound at all times by accuracy, fairness and balance, and should not deliberately mislead or misinform readers by commission or omission. In articles of controversy or disagreement, a fair voice must be given to the opposition view.

174 Law Commission *The News Media Meets 'New Media'* (NZLC R128, 2013) at [7.70].

175 Finkelstein, above n 169, at [9.19]-[9.49].

176 Law Commission *News Media*, above n 174, at 3.

And Principle 12 provides for corrections:

A publication's willingness to correct errors enhances its credibility and, often, defuses complaint. Significant errors should be promptly corrected with fair prominence. In some circumstances it will be appropriate to offer an apology and a right of reply to an affected person or persons.

Further, members have already agreed to the Press Council's authority to require them to publish adjudications. Therefore, a right of reply would fit in easily.

*(ii) The Online Media Standards Authority*

The Online Media Standards Authority is similarly a non-statutory self-regulatory body. Its jurisdiction extends to "complaints about news and current affairs content published online by any of its members that is not subject to a complaint by any other regulator".<sup>177</sup> The Online Media Standards Authority's existing principles are similarly apt for this additional requirement. Standard 2 provides that a reasonable balance must be given to "controversial" issues, and that, in deciding whether that balance has been reasonable, the Authority will have regard to the opportunity afforded to those with significant viewpoints to contribute to the content.<sup>178</sup>

*(iii) The Broadcasting Standards Authority*

The position is more difficult when it comes to broadcasters, as the regulatory scheme concerning broadcasters is a statutory one with a right of appeal from adjudications of the Authority and the power to award monetary damages in compensation. A requirement to publish a reply could become a quasi-defamation claim if appealed from the Authority to a court. Therefore, reform to the Broadcasting Standards Authority would have essentially the same effect as reforming s 18 DA 1992, but only in terms of broadcasters. There is no reason why a higher level of vulnerability to defamation claims should apply to broadcasters, as opposed to print or online news media. Therefore, it is difficult to support legislative reform to the Broadcasting Standards Authority in this way.

The Law Commission proposed consolidating the three regulatory bodies into one non-statutory body, which would solve this distinction between broadcasting and print or online news media.<sup>179</sup> However, the government has chosen not to effect the Law Commission's recommendations, but keep them in mind as technologies further advance.<sup>180</sup>

177 Online Media Standards Authority "Our Jurisdiction" (2013) < [www.omsa.co.nz](http://www.omsa.co.nz) >

178 Online Media Standards Authority "How We Work" (2013) < [www.omsa.co.nz](http://www.omsa.co.nz) >

179 Law Commission *The News Media Meets 'New Media'* (NZLC R128, 2013).

180 Ministry for Culture and Heritage (2013) *Government Response to Law Commission Report on the News Media Meets 'New Media'* (Government Response) Wellington, New Zealand.

It is worth noting, however, that almost all if not all broadcasters in New Zealand have a corresponding website, which may be subject to the Online Media Standards Authority. Television New Zealand and MediaWorks are currently members of that Authority.<sup>181</sup> Therefore, a reply could be published online in response to their online content. It is difficult to see how a response would be reasonably published in the context of a television broadcast anyway, given the constraints on time in the programming compared to print and the Internet.

(c) *Effectiveness*

The Law Commission, in recommending an enforceable right of reply, was not concerned about the voluntary nature of membership of any regulatory bodies. The advantage to membership is the so-called “brand advantage” of being regulated, and this is thought to outweigh the disincentives to regulation. While some publishers do not subscribe to these regulators, all major publishers do. They are where the most reputational damage can be done, and therefore where the most good can be done in publishing a response.

This form of remedy would not involve any financial compensation, but there is likely to be significant satisfaction in simply having a response published. As Post observed, if reputation in the form of dignity is damaged, monetary recovery can never completely cure the plaintiff.<sup>182</sup> As stated by Bezanson and the Iowa Libel Research Project:<sup>183</sup>

The correction of falsehood and its reputational consequences are what chiefly motivate plaintiffs to sue, but ultimate judicial victory, while desired, is not a necessary precondition to their accomplishment.

Because no reform can completely prevent unsubstantiated allegations being admitted in court or published in the media, this is the most attractive avenue for reform. This is because it gives the individual the power to control the situation more than the other avenues, and would be a balm on all unsubstantiated allegations heard in court that are subsequently published by an outlet subscribed to the Press Council or Online Media Standards Authority. If the government does eventually choose to consolidate media regulatory bodies, an enforceable right of reply should be granted and should not be limited by virtue of the publication being a report of a court proceeding. For the time being, the Press Council and Online Media Standards Authority should reform their regulations to accommodate this process.

181 Online Media Standards Authority “Current Membership” (2013) < [www.omsa.co.nz](http://www.omsa.co.nz) >

182 Robert C Post “The Social Foundations of Defamation Law: Reputation and the Constitution” (1986) 74 Cal. L. Rev. 691 at 712.

183 Randall P Bezanson “Libel Law and the Realities of Litigation: Setting the Record Straight” 71 Iowa L. Rev. 226 (1985) at 228.

## V. CONCLUSION

The ease with which unsubstantiated allegations can be made against witnesses and the complete lack of redress subsequently afforded to them present a significant deterrent for full participation in the criminal trial process. The importance of this participation means this problem must be addressed. However, any potential reform meets opposition from other rights: the right to a fair trial and the right to freedom of expression. Any reform must carefully balance these interests.

The ability to make unsubstantiated allegations cannot be removed completely without infringing on these other rights to an unjustifiable extent. Therefore, disincentives cannot be removed. However, they can be reduced. This essay has identified a number of ways in which this could be done.

Firstly, the threshold for admissibility of bad character evidence could be raised, requiring a higher relevance test to be met. Such a threshold would ensure gratuitous attacks were excluded. A notice requirement for this type of evidence, where it met the threshold, would be beneficial to witnesses in enabling them to prepare applications for name suppression. A balancing test that takes into account the effect of admissibility on the witness cannot be supported, however, and therefore evidence of unsubstantiated allegations that are substantially helpful but devastating to a witness would still be admitted.

Secondly, there are avenues by which the effect of media publication of the unsubstantiated allegation could be reduced. The courts may consider building on the obiter in *Pauanui Publishing* by addressing the “fair and accurate” requirement of qualified privilege for reports of court proceedings. This could be done by requiring the report make clear that the allegation is in the nature of an allegation and is unsubstantiated. While this would not prevent publication, it would limit its impact. However, this is a weak solution.

Alternatively, a right of reply could be given to individuals in respect of media publications of the unsubstantiated allegation, either by statute, or by media regulatory bodies. This would not prevent the unsubstantiated allegation being published, but would enable the affected individual to have their response published. Regulatory reform is the most desirable option because it would address all unsubstantiated allegations made against the witness that are published by the media in a way that is inexpensive for the witness.

None of these options completely resolve the problem. Unsubstantiated allegations can still be admitted in court, and can still be published. For that reason, while a higher admissibility threshold and corresponding requirement of a notice of intention would be beneficial, a right of reply is the most attractive remedy.