DEFAMATION — AN OVERVIEW

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In 1644 John Milton published a pamphlet which said 'Give me the liberty to know, to utter, and to argue freely according to conscience above all liberties'.[1] This defence of freedom of expression and of the Press is widely accepted. It is generally regarded by the media as one of its foundation principles.

Freedom of expression is a fundamental rule out of which democracies are constructed. A principal function of journalism is to connect citizens to one another and their major social and political institutions.

Political, religious, moral, even trivial and ephemeral discussion take as points of reference some of the contents of the media. For political and governmental discussion the relationship between the media and the public is both vital and profound. This Fourth Estate theory of democracy is widely accepted.

However, all commentators agree that this apparent absolute freedom should not be without limitations. It is said, however, restraints must be imposed for only the most compelling of reasons. Such reasons can only be measured and accepted where palpable and immediate harms to the operations of state, the public order or private welfare occur.

The protection of private welfare suggests that every man and woman has the right ". . . to have the estimation in which he stands in the opinion of others unaffected by false statements to his (or her) discredit".[2]

Not many would argue the heroic position that defamation should not be an exception to the fundamental principle of freedom of speech. But many commentators today put strongly the case that the tort in its present form is in need of repair and reform.

A person bringing a defamation action need only show that the words are defamatory, (ie that they tend "to lower the plaintiff in the estimation of right-thinking members of society generally"[3]), that they are about him or her, and that they were published.

The onus is then on the defendant to escape liability by putting forward one or a number of the available defences of Justification (or truth), fair comment on a matter of public interest, consent, privilege, or any of the other limited defences available under the Defamation Act 1954.

In few other areas of the law is the onus of making out a case reversed in this way. Liability is strict. The plaintiff does not need to show fault on the part of the defendant, rather, the defendant must establish a defence to show he was not at fault. It has been said that this strange situation is forced on us by history, in that defamation developed as a tort to replace duelling, and as such, had to be much more attractive to plaintiffs than that popular sport.[4]

The plaintiff is also favoured in bringing a defamation action because he or she does not have to show any actual loss arising from the words complained of.

Once defamation is made out, loss is assumed to flow. This again turns general legal principle on its head. One is at a loss to know how juries reach decisions as to measure of damages, without even a starting point of actual economic loss. There can hardly by any consistent factors.

Of course, in reply to this it is often said that the law of defamation exists particularly to compensate for loss of reputation and damage to feelings such as humiliation, indignity, and annoyance. While these should not be held to be without value they are nebulous concepts at the best of times.

In almost all other areas of the law, the plaintiff has to work very hard to obtain recompense for any emotional damage, pain and suffering. Behind this approach is the idea that the 'gold-digging' plaintiff should be actively discouraged, and if he or she wishes to obtain damages for hurt which is not obvious (and therefore difficult to deny) then he or she must be put to strenuous proof of the matter.

And indeed, the cry in recent years, particularly from the media, has ben that the amount of damages claimed and being obtained in defamation actions are high and steadily increasing out of all proportion to the harm complained of.

A legal system which places less value on the right to life than on harm to a reputation must surely be held in contempt.

An unfortunate corollary of the damages problem is that the plaintiffs in defamation cases have often been the wrong plaintiffs.

The general principle is that the more well-known a person is, the greater his or her reputation is presumed to be. Politicians in NZ sue for defamation reasonably frequently. The evidence is that even in the United States, where public officials have to show malice to establish defamation, this has acted as no great deterrent to such persons pursuing actions for enormous damages.[5]

Yet politicians should expect criticism as well as compliments and have ready access to the media to answer back.

Large companies also sue reasonably often. For example in warning the public of a company on shaky financial ground the media is performing in the public interest. However the harshness of defamation law effectively muzzles this sort of information.

Defamation law was meant to protect the reputation of the individual, not the profits of corporate enterprise.

Further, it must be said that often damages are not the appropriate and best remedy. Substantial damages were recovered in one case when a play was described in a review as 'a flop'. It later became a box office success.

How could the reputation of those connected with it even be said to have suffered?[6] And there was clearly no monetary loss. In cases such as this, and in others where there may be simple damage to reputation to whatever degree, alternatives such as retraction and apology would be much more appropriate.

Studies have shown that most persons complaining of defamation rush first to the publisher concerned and demand an apology. Depending on what is offered, they then decide whether to take the matter further.

What effect does all this have on the media? Most commentators say it is a chilling one. The media in NZ is not large or wealthy as in the United Kingdom or Australia. Its components cannot afford to pay huge awards of damages to successful plaintiffs, or large premiums for insurances against such risks.

The catch phrase is therefore 'when in doubt, leave out'. The New Zealand press have been labelled unadventurous as a result.

The most striking problem is that of 'gagging writs'.

A gagging action is one which a plaintiff does not intend to pursue to the bitter end, but issues a writ for damages with the specific aim of silencing the offending newspaper or whatever. In the NZ media landscape already described, these writs can be highly successful. Some reform of the law to deal with such writs is clearly needed.

A second feature of the tort is that defending a defamation suit can be so complex

and technical as to ". . . cause wonderment, among ordinary citizens".[7] That wonderment, which must make the law the subject of derision, extends to practitioners and law students as well.

It has been suggested that this complexity arose partly from the fact that limitations had to be placed on the tort's use to curtail the unmanageable flood of litigation that ensued when duelling was outlawed.[8] Unfortunately, it tends only to deter the ordinary citizen.

Complexity is a problem faced by both the plaintiff and the defendant. The law of defamation in New Zealand is not codified by the 1954 Defamation Act. A definition of what constitutes a defamatory statement must be found in wide-ranging case law.

The plaintiff must plead his case carefully and he must get it right, which means paying an expert to get it right. All of this is time consuming where a prompt resolution is often the best and only remedy required.

However, a plaintiff or a defendant who wishes to use the complexity to delay proceedings may clearly do so. The plaintiff is more likely to do this, however, especially if he has issued a 'gagging writ'. The defendant is only likely to worsen his case if he delays.

If the plaintiff's task is daunting, the defendant's is more so. He faces the same initial uncertainty as to whether the words complained of are defamatory or not.

Should he resist the action, or settle out of Court? If he decides to resist, there are a number of defences available to him, but a lot of them are technical and difficult to apply in many situations. The defendant must also pay an expert to weave a path through the complexities.

A general effect of all this on the media is that although the law may be complex for the plaintiff, he or she has the 'pot of gold' to spur him or her on in any event.

Coversely, newspapers predominate among defendants, and the harshness and complexity of the law is such that they are more likely to lose and have to pay their own large legal costs to boot. So the pressure is either to settle or not to print to begin with.

Specific problems with complexity for the media mainly relate to the defences available.

The defence of justification (or truth) is in fact very difficult to prove. It may involve the newspaper disclosing its sources. If not made out, the fact that the whole thing has been aired again may unfortunately further aggravate the damage complained of.

The defence of fair comment on a matter of public interest is a very important and often used one for the media. But it is hedged by technicalities. it may be lost where there is evidence of malice on the part of the defendant, but malice itself is a slippery and nebulous concept.

Further, in almost every case where the defence is pleaded the facts on which the comment is based are required to be stated in the same article or item. Thus, if the comment is based on facts known generally to the reader, the defence is generally lost. This rule seems arbitrary and unfair.

Privilege exists as a defence at common law both in absolute and qualified terms, and there are also occasions where it is available set out in the 1954 Defamation Act, but the classes are by no means clear.

Other problems not associated with defences include the fact that many

defendants are merely innocent disseminators of defamatory statements such as booksellers and publishers, yet they are as liable to a defamation action as the originator of the statement and must rely on the complex defences already described.

The manner in which judges interpret their roles tend not to favour the defendant. It is for the judge to decide whether the words complained of are capable of being defamatory, and similarly, whether the evidence adduced by the plaintiff about the defendant is capable of establishing malice.

If the answer to both is yes, it falls to the jury to decide whether the actual evidence in the case does so establish.

But what may happen in practice is that juries have become somewhat confused about the matter, believing that in fact if the judge has said the words are capable of being defamatory, then they must be.

Juries dealing with these matter in themselves are a problem. A branch of the law which is hardly accessible to the legal profession cannot hope to be readily understood by 'twelve good men (or women) and true'.

Finally, there appears to be a real problem of prior restraint of publishers, arising from the Court's power to grant an interlocutory injunction restraining the defendant from publishing defamatory words about the plaintiff.

The jurisdiction should only be exercised with great caution and on strong prima facie evidence that the statement complained of is untrue. However, in practice these injunctions are granted ex parte, frequently on the plaintiff's mistaken impression of the publishing date and possibly because the plaintiff has delayed until the absolute last minute.

This deprives the defendant of an opportunity to swear that he can justify the words or that he will plead fair comment.

It has been suggested that the Courts are presently granting these injunctions too easily, assuming the worst.[9] The press thereby loses editorial freedom and loses its competitive edge. And the Court takes on the role of censor. A role Milton would have abhorred.

This overview establishes a clear need for reform. This year there is a new Defamation Bill on the legislative programme. It is based on the recommendations of the 1977 New Zealand Committee on Defamation. But ten years have elapsed since then and the content of the Bill is by no means set in concrete.

The bill has been on the programme for a long time but has lacked sufficient priority to get drafted ahead of other measures.

The Government has, therefore, yet to agree to the content of the Bill. And when the time comes for decisions I expect great interest. Politicians are neither uninterested or disinterested in the law of libel.

The approach being adopted is being refined but let me discuss some of its factors.

No definition of defamation is proposed. Given that defamation involves words, and meanings must change through time and in each given fact situation, this seems sensible.

No useful purpose would be served in attempting to set statutory limits on the meaning of the word 'defamatory'. The definition would have to be general in any event, leaving the Courts to interpret, which they already do.

Secondly a company will not be able to bring proceedings unless it can show

actual or likely pecuniary loss.

Thirdly, considerable revamping of available defences is planned. 'Justification' becomes 'truth', and the tests for proving facts to be true have been relaxed. 'Fair Comment' becomes 'honest opinion'.

Malice should not destroy the defence, and facts outside the offending article, as long as they are not materially different from those alleged, can support comment.

There will be an attempt to clearly and simply define the categories where privilege and absolute privilege prevail in addition to the existing common law categories.

Another proposal for inclusion in the Bill is the creation of a special qualified privilege.

Under this suggestion the defendant must show

(a) the matter was in the public interest.
(b) where facts are involved, that he took reasonable care and believed on reasonable grounds the statement was true.
(c) where opinion is involved, that it was capable of being supported by facts in the article or generally known to the person to whom published and
(d) that the plaintiff has had an opportunity of explanation and/or rebuttal in the same medium with substantially similar prominence and without delay. The defendant must reply within 7 days to the plaintiff's complaint, as to his grounds for believing the statement and what steps of verification were taken.

The defendant must also pay all costs involved and any pecuniary loss of the plaintiff. This new defence is an attempt to redress the balance in the clash between freedom of speech and defamation in favour of the defendant, but the conditions of its use ensure that the scales do not tip too far.

It is also proposed to provide for a clearly defined defence of innocent dissemination.

It is hoped that remedies will be considerably revamped and clearly defined in the Bill. The focus will be away from damages. Simple declarations that the defendant is liable should be available. The Court should be given an extremely wide discretion to make correction orders.

Punitive damages, I suggest, should only be granted by a judge alone here the defendant has acted in flagrant and contumelious disregard of the plaintiff's rights and clearly deserves to be punished. And there is a clause clearly setting out matters which can be taken into account in mitigation of damages.

Some proposed procedural reforms should have substantive effects in solving some of the problems already raised. For example, it is proposed that the judge be given power to call a conference at any time and give directions to attempt to resolve matters. In an age where the move is to mediation, this may prove very valuable.

The roles of the judge and the jury will probably be retained as they are, but it is hoped a general simplification of the law will help juries perform their task properly. Significantly, though, the draft Bill requires judges to decide whether a matter is capable of being defamatory in the absence of the jury.

There are attempts in the Bill to clearly show how plaintiffs and defendants must plead various matters.

I hope to include a provision stating that where a defendant is a news medium, the plaintiff cannot specify the amount of damages claimed. This is an attempt to

get rid of "gagging writs".

Further, where it is shown the plaintiff has no intention of proceeding to trial, this should be capable of being found to be vexatious litigation. And where damages are awarded but the judge feels those claimed were in fact gross, the defendant may get solicitor/client costs.

Other procedural changes are proposed to ensure multiple actions are brought promptly and consolidated if possible.

Finally, and significantly, there should be provision for striking out of an action on the application of the defendant where the matter has not been set down and the plaintiff has taken no other steps for a year.

What does all this leave us with? The approach outlined does not address all the problems raised in the law of defamation.

The question of delay has been only partially addressed in the present approach. Some commentators feel there should be automatic striking out where, prior to setting down for trial, the plaintiff has taken no overt steps for, say, 18 months[10], rather than on the defendant's application. This is because defendants are often reluctant to make such an application for fear they will actually encourage the plaintiff to do something.

There is also a call for a reduction of the limitation period for the commencement of a defamation proceeding, at present at six years. Just what the period may be and in what circumstances is still being mooted.

A further reform has been suggested but will not be adopted I feel sure. Firstly, it is often suggested that we import some rule akin to the United States 'public official' rule, whereby persons in this category have to show malice to succeed in a defamation action.

Finally, the part of damages problem remains. Although the present approach attempts to solve 'gagging writs', it does not address the problems of the trend towards very high damages being claimed and that no actual loss has to be shown.

Is the solution to put a ceiling on damages? If so, how much and how do we decide? Do we require actual loss to be shown, or does that defeat the very nature of the tort? One solution is to have a ceiling and strong encouragement to juries to look at matters in mitigation of damages.

There are those who say reform and relaxation of the law of defamation will alter the balance of freedom of speech too much in favour of a press which is vulgar, malicious, intrusive and sometimes downright mendacious.

It is undoubtedly true that the media is not regarded very favourably in New Zealand. It is certainly not seen as the 'fourth estate' of government as in the United States.

But it is not the law which can alter these negative characteristics. Any profession has its nasty side. Focus on these aspects unfortunately hides the fact that we have a press which is generally very responsible.

The law of defamation in New Zealand needs to be made simpler. It needs to be made more workable. I do not think the reforms which will be contained in the Bill will be radical. They will be less radical than I would wish. But politics is the art of the possible. And politicians are much more interested in this than they are in many law reform measures.

Footnotes

1. Areopagitica. A speech for the Liberty of Unlicensed Printing to the Parliament of England (1644) George Sabine Ed. John Milton, Areopagitica and of Education with Autobiographical Passages from Other Prose Work 49 (1951).

2. *Scott v Sampson* (1882) 8 Q.B.D. 491, 503 per Cave J.

3. Per Ld Atkin in *Sim v Stretch* (1936) 52 T.C.R. p 671

4. Prof J F Burrowes 'Defamation — the Need for Reform'. Paper given at 1987 NZ Law Conference in Christchurch.

5. Professor Nadine Strossen 'Proposed Reforms of Defamation Law'. Paper given at 1987 NZ Law Conference in Christchurch.

6. Ibid 4 above.

7. Ibid.

8. Ibid.

9. T G Goddard 'You mean I can't Run That?' Paper given at 1987 Law Conference in Christchurch.

10. Ibid.