DEVELOPMENTS IN MEDIA LAW

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A. *Freedom of the Press*

There is no need to re-emphasise what an essential principle freedom of the press is. It is no less than society's right to be informed. Life without the media would be life without current knowledge; life with censored media would be a life of half-truths. Not only do the media supply information, they can be a force for good by exposing evils in society. A perusal of Hansard shows that quite often questions in parliament are sparked by something a member has learned from the media; media allegations have led to the setting up of commissions of inquiry; sometimes media publicity is the only way of exposing wrong-doing in high places, especially if the responsible authorities will not take action; and sometimes media publicity is the only way of protecting the public against, say, shoddy products or shady business organisations. Yet I still find that the media are either taken for granted, and even sometimes resented, by far too many people. (Even those who support freedom of the press may exhibit a different attitude when the press publish information about them).

However there is likewise no need to re-emphasise that freedom of the press can never be absolute. It must be weighted against the rights of individuals to their reputations and their privacy, and the rights of society to a fair and effective system of justice and government. The drawing of the balance between freedom of the press on the one hand and these other rights on the other is one of the most difficult questions our legal system presents.[1] Each society has to decide where the balance lies, and the balance may shift with time. Many things influence the decision, impliedly if not expressly: the atmosphere of openness in society (in New Zealand the Official Information Act 1982 is relevant); the time pressures under which the media work and the consequent inevitability that mistakes will be made; the presence or otherwise of monopoly in the media industry; the tolerance of society at any particular time to criticisms of its members; the amount and variety of information being disseminated from the many media sources;[2] the incidence of the new technology with the opportunities it may bring for collecting information and tampering with news; the competence of the journalists who find the news; and, above all, the demonstration by the media themselves as to how responsibly they will use any freedom given them.

It seems to me that in the countries of the British Commonwealth courts and legislatures have not been entirely consistent on this question. In some respects for instance intrusion into privacy - they have in the past given the media considerable freedom; in others - for instance defamation - they have not given it nearly enough. Overall, I believe, the balance has been tilted just a little too far against the media. There are probably several reasons. For one thing, countries without a Bill of Rights have tended . at least in the past - to be very bad at arguing in terms of principle. Until quite recently it was rare to find in court judgments any express reference to "freedom of the press" or even "freedom of speech" as principles which the law should aim to protect. No doubt those principles had some effect sub silento, but no principle can have its full impact unless it is an articulated part of the reasoning process. In recent years that has begun to happen.[3] Secondly, many people are simply afraid of the media. They are suspicious of journalists; when Sir Walter Scott's nephew proclaimed his intention to become a journalist Scott wrote to him:

> "Your connection with any newspaper would be a disgrace and a degradation. I would rather sell gin to poor people and poison them that way."

When in 1972 the Younger Committee conducted a survey on the rights people regarded as important "freedom of the press" featured far down the list.[4] No doubt elements in the media sometimes do act irresponsibly. It is an insoluble paradox that while the media are essential to our free existence they must also make a profit to live, and scandal can sell papers. It is also true that, as far as newspapers are concerned, there is no control over who can enter the field. Yet I must say that in New Zealand we have far less cause for concern about our media in this respect than is the case elsewhere: overall I think the media in this country can be proud of their performance.[5]

Sometimes, also, supporters of freedom of the press do their cause a disservice by making too many claims for it. Much humbug is talked in the name of the public's "right to know."

Be that as it may, it is interesting to chart current trends in media law. We shall find, I think, that although there has been much movement in recent years the movement is not all the same way. Some of it is favourable to the press, some is not.

B. *Contempt of Court*

It remains the law that when a case is sub judice, there are strict limits on what the media can say about it. A publication is in punishable concept if there is a "real risk" that it might prejudice the trial. The 'bare facts' of what has happened can be published because it is clearly of interest to the public that a crime has been committed,[6] but prejudicial detail cannot be. The media find that a difficult distinction to draw, and their legal advisers do too. In New Zealand the advice given to different branches of the media seems to differ. Some newspapers take a more adventurous line than their competitors, or than their broadcasting counterparts. But we still have here nothing like the extremes which occasionally characterise the reports of our trans-Tasman neighbours.

No one can say that the law of contempt has operated harshly against the media in New Zealand in recent years. In 1982 Bisson J in the High Court held that no action should be taken against a newspaper which continued to publish elaborations of its original allegations despite the issuing of a defamation writ against it.[7] In 1987 Davison C J held that Mr John Banks had not committed a punishable contempt when, after referring to two murder cases which were before the courts, he cited the past record of a man whom he believed had been too leniently treated in the past despite many convictions for sex-related offences; there was not sufficient indication that the record was that of either of the two men awaiting trial.[8] As will be shown in the section on injunctions below, in two actions since 1980 to stop programmes going to air on the grounds of contempt, only one succeeded. Other instances where some might say the media went too far have received no attention from the authorities save the occasional warning from the Crown Law Office or comment by counsel or judge in the course of the trial said to be affected. As far as I can discover there has only been one occasion since 1956 in which a member of the media has been found guilty of sub judice contempt in New Zealand. That was in 1986, when a newspaper editor was fined $200 for publishing, at the behest of the plaintiff, an article based on a statement of claim in a pending court action for

conspiracy. The article lacked balance and the motive of the conspiracy action plaintiff was to publicise the matter to the detriment of the defendants.[9] The paucity of contempt litigation in New Zealand means that it has not been easy in this country to chart the legal boundaries of what is and what is not permissible. But the Banks case is valuable in that the Chief Justice assumes that the law of contempt as it has been developed in Australia is applicable in New Zealand. The law as stated in the many Australian and few New Zealand cases seems to me have relaxed a little, and to have become more rational, over the years. The developments can be summarised as follows.

1. First, a penalty can only be imposed on the defendant if, *as a matter of practical reality,* there is a *real risk* that the trial is *likely to be prejudiced* by what has been published.[10] In the great bulk of cases this resolves into the question of whether there is a real risk that the jury which tries the case will be prejudiced. In the past the law has perhaps made some unduly protective assumptions in this regard. Just how far is media comment likely to poison the minds of twelve citizens of normal experience and intelligence? There has been little research on this, but such as the Australian Law Reform Commission has been able to produce suggests that, given the huge amount of information with which we are flooded these days, detail slips from the mind very quickly. Details of a case published some months previously may therefore have lost any prejudicial effect when the matter comes to trial, although of course this will vary with the type of information and the prominence of the publication;[11] on the other hand impressions and value judaments tend to remain longer.[12]

Again, a view is gaining currency that one should not underestimate the ability of the ordinary man or woman, on being properly instructed by the judge, to put extraneous factors out of their minds - or at least to determine not to take them into account - and to concentrate solely on the evidence adduced in Court.[13] Even in England, where the contempt laws have tended to be strictly applied,this point has been made recently. In the case in 1986 involving the cricketer Ian Botham, Donaldson M R said:[14]

> "... the fact is that for one reason or another a trial, by its very nature, seems to cause all concerned to become progressively more inward looking, studying the evidence given and submissions made to the exclusion of other sources of enlightenment."

He cited Lawton J in *R v Kray:*[15] "The drama, if I may use that term, of a trial almost always has the effect of encluding from recollection that which went before."

However despite these reflections, there must remain a fear that strong publicity over the time of a trial *is* capable of swaying jurors, particularly in a finely balanced case.[16] The law must react accordingly.

The recent Australasian authorities have made no blanket risk of prejudice on the facts of the particular case. Thus such factors as the following have been relevant:

(i) How long before the trial were the stories published? If the trial was not likely to be for some months, there may be little likelihood of prejudice. "public recall . . . is likely to be forgotten in the volume of daily publicity to sensational allegations and reports of other crime given by the news media".[17]

(ii) What was the nature of the statements? It may be that the most prejudicial materials are statements that the accused has confessed or that he has a criminal record, and expressions of opinion as to his guilt or innocence.[18]

(iii) Was the subject-matter of the statements fairly common knowledge from other sources?[19]

(iv) What was the likelihood that potential jurors would have read or heard the statements?[20]

Thus, in *A G (NSW) v John Fairfax & Sons Ltd & Bacon*[21] an information was laid alleging that a certain police sergeant had committed bribery. The charge would, in the ordinary course, take about 18 months to come before a jury. In fact it was expedited and took only 7 months. Just after the laying of the information a newspaper published an account of a shooting incident in which the sergeant had previously been involved, and a statement by the policeman who had allegedly been bribed. This was held not to be contemptuous, having regard in particular to (i) the time lapse until the trial; (ii) the fact that most of the information in the article had been given detailed coverage in the media for several years; and (iii) the fact that the circulation of the paper was not such that many potential jurors would have read it. In the Banks case in New Zealand,[22] although Davison C J based his decision on the failure to show the necessary link between the criminal record to which Mr Banks referred and either of the men before the courts, his Honour also found that the broadcast would not be likely to prejudice a fair trial of the two men. Even if any listening jurors made a connection between the record and the accused, a judge's warning should ensure that they would place no reliance on it; the broadcast, being late at night, would be unlikely to have been heard by many of the potential jurors; and there was a substantial time lapse between the broadcast and the actual trial.

On the other hand, penalties were imposed in Australian cases when the premier of New South Wales, in answer to a question from a reporter, said he thought Murphy J was innocent of the charges against him and that he would be acquitted on a second trial;[23] when Derryn Hinch broadcast in considerable detail and on more than one occasion, the lurid past of a defendant (a former priest) awaiting trial on indecency charges;[24] and when the ABC broadcast, just before the trial of Murphy J, a statement that the Age tapes in which Murphy J features "exposed a network of crime and corruption"[25] In the first and third of these cases, the publications were made in close proximity to the trial. In the second the court found that the sensational nature of the allegations and the extent of publication distinguished it from the Bacon case, and outweighed the estimated delay of 10 months till trial.

2. The *second* Australian development - and Davison C.J. intimated in *Banks* that this also applies in New Zealand - is of far reaching importance. As long ago as 1937 in *Ex parte Bread Manufacturers Ltd* Jordan C.J. said that sometimes the public interest in the administration of justice must give way to the public interest in the discussion of public affairs: sometimes, in other words, the desirability of public discussion of important issues can mean that the publication of matter tending to prejudice a fair trial is not a punishable contempt. Jordan C J put the matter in this way:[26]

> "The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by

product, cause some likelihood of prejudice to a person who happens at the time to be a litigant."

Here, then, is an explicit, and for its time quite rare, acknowledgement of freedom of speech and of the press as an independent principle. The significance of several more recent Australian authorities, in particular the Hinch case in the High Court of Australia, is that they accept that Jordan C J's dictum applies even to discussion which may prejudice a criminal, as opposed to a civil, trial.[27] But the dictum is in qualified terms, and it is unlikely that the public importance of the issue would ever justify highly prejudicial material such as the publication of an accused's criminal record,[28] or statements directly suggesting an accused's guilt or innocence,[29] at a time when such publication could influence a jury. The defence thus failed in the *Hinch* and *Wran* cases (cited above) even though the purpose of *Hinch's* broadcasts was to show that the accused was still working as Director of a Youth Foundation, ostensibly a matter of public interest. Yet in *A G (NSW) v Willesee*[30] the *Bread Manufacturers* principle received dramatic application. One A was charged with larceny. During the actual course of his trial a programme featuring A was shown on television. A telecast showed A walking a Sydney street carrying a gun. The voiceover said:

> "He calls himself a minder, sorting out trouble, sometimes with his fists, sometimes with a gun. He shot one man dead but somehow, some way, the charges were dropped."

Further statements by A himself alleged he had paid some $5 million to Police and politicians over a period of time.

As a result of the programme the jury in the larceny case was discharged. Members of the NSW Court of Appeal dismissed the contempt summons. There was no deliberate intention to prejudice the trial for larceny, and the subject of discussion in the programme was not the trial, nor A's guilt or innocence, but the unrelated Subject of police corruption - a topic of obvious public concern. A's appearance was in that context, and was purely coincidental to his trial. The ventilation of the matter of public concern prevailed. Given the proximity of the publication to the trial, and its obviously prejudicial effect, the decision may occasion surprise in some quarters.[31] There may be some doubt whether it is consistent with the view taken by the High Court of Australia in the *Hinch* case, although the members of the High Court do not say the case was wrong.

There are still some unanswered questions: whether the public discussion must have been commenced before the trial so that the only question is whether the trial should truncate it [31a] what precisely is meant by Jordan C J's phrase "incidental by-product", and whether that is a necessary condition of the principal;[32] and when a matter is of *sufficient* public concern to permit the continued discussion of it despite the commencement of court proceedings. How, for instance, would the *Bread Manufacturers* principle have borne on media reporting of the international aspects of the Rainbow Warrior affair after the arrest of the French agents? There has also been some difficult and inconclusive discussion as to the exact juristic nature of the balancing process which is required with regard to the two interests: is it to be done in each individual case, or is it to be achieved by the law itself through appropriate rules? Even after the lengthy discussions by the High Court of Australia in the *Hinch* case this matter cannot be regarded as finally determined, although the first approach seems at the moment to have majority support.[33] In the

end it probably makes little difference. In the *Hinch* case *Wilson J* took this middle way:

> In an appropriate case the court is empowered to entertain a defence of discussion of a matter of public interest and in doing so to engage in a balancing exercise to determine which of the competing matters of public interest should prevail. But it is important to emphasise that in undertaking a balancing exercise the court does not start with the scales evenly balanced. The law has already tilted the scales. In the interest of the due administration of justice it will curb freedom of speech, but only to the extent that is necessary to prevent a real and substantial prejudice to the administration of justice.

Where, then, are we left as far as the law of contempt is concerned? The law seems to have relaxed a little, although it is still capable of hitting hard. The close attention to the facts of each case which characterises the recent cases makes the law more rational, and perhaps more understandable than it used to be, but I am not sure that it has made it any more certain or predictable; contempt has long been one of the most difficult areas of law to apply. But perhaps most interesting is the increasing articulation of this interest in public discussion — which is none other than freedom of the press — as a factor to be taken into consideration. As we shall see, a closely related concept has made a determined appearance in the breach of confidence cases also; and its boundaries there are no clearer. They may become so as the reported cases grow in number.

It should not be assumed that this brief outline has covered all the problems inherent in the law of contempt. There are difficulties, for instance, in defining exactly what courts and lesser tribunals that law protects; a recent House of Lords attempt at this[34] is no more helpful and no less circular than many other attempts to define the judicial function. There are also hints, especially from Kirby P of the New South Wales Court of Appeal, that the strict liability aspect of contempt of court may need re-examination.[35] In a world where so much news assails us each day is it reasonable to impose a quasi-criminal responsibility on an editor who does not know that a trial is pending which is affected by his writing? There are questions, too, as to the exact point at which a case becomes sub judice. When, in 1986, television broadcast its expose of Traffic Officer Seath before he was charged with any offence (indeed it was that expose which led to his being charged) why did Judge Blackwood think fit to refer the matter to the Solicitor-General for investigation on the matter of contempt? If, as the brief newspaper report seems to suggest, it was because the judge thought the television programme had sabotaged his power to suppress the accused's name, what implications has that for investigative journalism?[36] Again; what is the position When a person suspected of a serious crime is arrested on a lesser "holding" charge? But, overall, I do not think the current state of the law of contempt is anything much for the media to complain about.

C. *Breach of Confidence and Allied Matters*

Although the potential was there long before that, it is only in the past two decades that breach of confidence, and certain offshoots of it, have really emerged as a restriction on freedom of the press.

1. *Breach of confidence*

Although its scope extends well beyond the media, the equitable doctrine of breach

of confidence does have real implications for the media. In that the remedy most often sought is the injunction, in "breach of confidence" can have the effect which Blackstone so deplored: it can lead to prior restraint of the press - in other words censorship. Moreover the law is still in the stages of development, and in many respects is unclear: the fact that many of the cases involve only interim injunctions does not help to clarify these areas of difficulty. Nor should it be assumed that this branch of the law is of infrequent relevance to the media. It is, in fact, about "leaks" of information and the media thrive on leaks: that is often the only way they can obtain important information about the inner workings of government or private business.

Although this is something of an oversimplification, the cases on confidence have tended to concentrate on three types of situation.[36a] In each case an injunction may lie not just against the discloser but also against the media to whom he discloses. There are several cases on the books where media defendants have been injoined from publishing leaked information.[37] pirst is the area of commercial information. Employees are not allowed to disclose their employer's trade secrets or other confidential business information.[38] Nor are those who have come into possession of similar information as a result of business negotiations.[39] The expression "commercial information" is loose enpugh to encompass also artistic or literary creations which have fallen into the hands of such employees or negotiators.[40] Secondly, further cases have protected personal information: the husband-wife secrets in *Argvll v Argvll*[41], doctor-patient confidences, and personal secrets of the members of the royal family which have come into the untrustworthy possession of valets, cooks, butlers, maids and the like: the royal family have won several pieces of litigation against former employees. Thirdly, breach of confidence is also wide enough to protect state secrets. That has been sufficiently established in a number of cases, although the claim did not actually succeed in all of them: A.G v Jonathon CaDe (the Crossman diaries case)[42]; *Commonwealth of Australia v John Fairfax Ltd* (the ANZUS papers case)[43]; and the several instalments of the *Spycatcher* saga.[44] Plaintiffs in the first two categories need apparently prove only (i) that the information was confidential in that it was not public knowledge; (ii) that the information was disclosed to the confidant in circumstances which imposed on him a duty not to disclose it to others: (iii) that the confidant has broken that duty.[45] Crown plaintiffs in the third category have an additional burden: they must demonstrate that the *public interest* requires that the information in question be kept quiet.[46] The presumption in favour of open government, particularly in a country like New Zealand which has an Official Information Act, requires that a government show *reason* for stopping publication of matter. (It should be noted that the mere fact that information has been disclosed to an inquirer under the Act does not automatically remove any obligation of confidence which previously attached to it).[47]

It seems to me that there are considerable difficulties inherent in this picture of the law. First, although the theme of confidentiality' runs through all three[48] categories, the interests protected by the confidentiality in each category are really very different. The first protects commercial enterprise from unjust competition: as such it is akin to copyright and patent law, although it goes further and in some respects cuts across those areas of statute law. The second really protects privacy, and is one of several ways in which that hitherto ill.guarded interest is coming

under the law's protection. The third protects state security. There is nothing particularly novel in a single principle serving such different ends, provided it is recognised that these different goals may make it difficult to develop consistent principles in this area: as we have seen the state cases already seem to impose an additional burden of proof on the plaintiff, and there is argument as to whether, if it is too late to claim in injunction, damages lie in all three categories - they almost certainly do in the first. Moreover the defence that the information is "in the public domain" has a different dimension when the subject-matter is news as opposed to when it is, say, an invention.[49]

Perhaps most importantly, the defendants in confidence cases are diverse: employees, trade competitors, and the media. It is difficult to keep a single eye on such things as freedom of the press in a doctrine which serves so many different ends against so many different kinds of person.

The second difficulty is a matter of potential concern as far as the media are concerned. Although most of the cases fall into the three categories I have mentioned, there has never been any suggestion that these categories are exhaustive. the question, then, arises: are there any limits to the *types* of information to which an obligation of confidence can attach? Can a person or organisation, simply by entering into a contract or similar arrangement with another, oblige him not to disclose a piece of information, *whatever the nature of that information?*[50] The *Exchange Telegraph* cases,[51] decided at the turn of the century, might be taken to suggest a positive answer. It was there held that subscribers to a news agency were bound by contract not to disclose to non-subscribing media any of the news and information they received from the agency, even though received from the agency, even though some of it was such mundane material as share prices, and cricket and racing results. Non-subscribers who received such information by inducing a subscriber to breach his contract, or in some other clandestine way, could be injoined from using it. One can see the point of the cases: non-subscribers, having not paid for the service, should get their information from some other source or simply wait till it had been published. To hold otherwise would put the news agency business in peril. Yet if the thrust of these cases is to be extended too far, it could engender a most dangerous principle: that there can be a monopoly on news. That seems to be directly contrary to the beneficial rationale underlying the rule that there can be no copyright in news: information and news should be public property unless some person has a *genuine interest* in its remaining confidential. Perhaps the best solution is that of Copinger and Skone James[52]: to be able successfully to plead breach of confidence a plaintiff must show, in cases where the information is other than purely private, that he has contributed by his own effort to the creation of the information. That is a possible although somewhat implausible explanation of the Exchange Telegraph cases. Or perhaps they are best explained as not resting on breach of confidence at all.[53]

The third difficulty with these confidentiality cases is in deciding whether the second element in the plaintiff's burden of proof has been made out. Has the information been disclosed in circumstances which imposed on him a duty of non-disclosure? In other words, what is a relationship of confidence? Employer/employee clearly is; so are many professional relationships - lawyer/client, doctor/patient, banker/customer; so (at least in relation to personal information) is husband/wife. But where are the limits? What of confidential circulars to

members of a professional group such as the Law Society? What of information imparted in a meeting of a local authority which has legitimately gone into private meeting? (This is a very common source of information for the press.) What of a document marked "confidential" which has fallen off the back of a truck? What of a source who tells a reporter that the information he is supplying is "off the record",[54] or (in the case of say a Minister of the Crown) is embargoed until a named date? In some of these examples I think there is a genuine obligation of confidence (e.g. the Law Society circular); in others it smacks too much of one person trying to impose silence by a unilateral act. In others (the embargo example, for instance) the matter probably sounds in ethics rather than law.[55]

The fourth difficulty is as to remedies. As stated, that most commonly claimed is injunction. But damages probably lie as well, at least in respect of some types of breach;[55a] whether they would lie for disclosure of personal information is unclear, as is the question of how they would be assessed in such a case. In the *Spycatcher* case the New Zealand Court of Appeal would not rule out the possibility of exemplary damages in a case of "treachery against the crown"[55b] Account of profits is a remedy also, but is as yet untried against the media, at least in New Zealand.[55c] The amended statement of claim in the *Spycatcher* case in New Zealand claims inquiry into damages or account of profits.

2. *Information illegitimately obtained.*

A group of recent cases suggests that there may be a doctrine to the effect that if information is obtained by a person - in particular by a member of the media - by the use of illicit means, there is jurisdiction in the courts to grant an injunction prohibiting the publication of such information. Although sometimes indiscriminately dealt with as an aspect of breach of confidence there are signs that it is capable of developing well beyond this.

The case of *Francome v Minor Group Newspapers,*[56] although not the first in time of the cases, is a useful starting point. A national newspaper obtained from an undisclosed source a number of tapes of telephone conversations between Francome, a well-known jockey, and his wife, which revealed certain misdemeanours. The tapes had been obtained by illegal phone-tapping. The Court of Appeal upheld an interim injunction prohibiting publication of the material on the tapes.

Earlier cases had reached a similar result when information was stolen.[57] In New Zealand, of course, there may be a statutory route to the same result in cases like *Francome*. Sections 216A and 216B of the Crimes Act 1961, as amended in 1979, render it an offence to use a listening device to intercept a private communication and a further offence to publish information knowing it to have been thus obtained. It is possible that a person aggrieved by breach of those sections may have a civil action for damages and/or injunction.[58]

Francome's case occasions no surprise, and is readily justifiable. Not only was the information illegally obtained — indeed it was obtained by committing a criminal offence but the information was derived from a conversation which was clearly private and confidential.

However two other decisions suggest that the *Francome* principle is capable of extending beyond this to situations where the element of confidentiality is absent, and where the only relevant factor is the illegal mode of obtaining the information. Both of them are only at first instance but both are of considerable interest. The

first is *Savoy Hotel plc v BBC*[59] (which was in fact decided before *Francome*). The BBC, with the co-operation of the Inspectors of Weights and Measures took its television cameras into the Savoy "surreptitiously" and filmed barmen regularly serving short measures. The Savoy obtained an interlocutory injunction preventing the showing of the film. Comyn J. held that the balance of convenience justified the granting of the injunction in the light of

> "(i) all the circumstances of the case including the entry to the hotel and what went on there and the presence of the Inspectors of Weights and Measures;
> (ii) the fact that, subject to further argument at the trial, there was no general principle that the press could use information, however obtained; and
> (iii) a finding that, subject to argument at the trial, the corporation's entry with concealed cameras and television equipment could well be said to amount to a trespass." (The BBC knew from previous experience that the hotel only allowed television filming with consent and on conditions).

All of these grounds are interesting, the second particularly so, for it suggests that the media may be injoined from publishing information on the basis that it was illegally obtained, the illegality in this case being the civil wrong of trespass. More importantly, the information here seems to lack the character of confidence which was clearly present in *Francome*. The only sense in which one could describe it as "confidential" was that the hotel obviously did not wish it voiced abroad: there was nothing in the nature of the confidential relationship which has characterised earlier cases. Thus *Savoy* could be used to support an argument that jurisdiction lie to injoin the publication of information on the simple ground that it has been illegally obtained, and that this is a ground quite independent of breach of confidence.

In *Lincoln Hunt Australia Pty Ltd v Willesee*[60] a case in the Equity Division of the Supreme Court of New South Wales, Young J expressly held that such a jurisdiction exists. The plaintiffs ran an investment scheme which had attracted some criticism. A customer called at their office by prior arrangement to pick up a cheque. She was accompanied by television cameramen and a reporter. The reporter harassed persons on the premises, and the cameramen took video tape of the office lobby, and possibly also of some internal rooms. The plaintiffs claimed an injunction to stop publication of the film, saying it would damage the goodwill of their business. Unfortunately, the application being for an interim injunction, Young J was unable to traverse the issues as fully as he would have liked, but he made several findings of importance. First, he held that the entry of the TV crew for the purpose of filming was a trespass, the implied licence by the occupiers extending only to those intending to do business with the firm. Secondly, he held that the court had power to grant an injunction to prevent publication of pictures taken while trespassing. He conceded that this question went into "very deep waters". Much of the information captured on the videotape could hardly be said to be confidential: it was simply the get-up of the office lobby. So any jurisdiction to get an injunction could not be based, as it could in *Francome,* on confidentiality. However the jurisdiction of the court, he held, was not a compartmentalised one, but was a general one based on the need to restrain unconscionable conduct. He then said that when unconscionable situations exist in modern society which have no exact counterpart in history, this does not mean that the Court must just shrug its shoulders.

> "This Court still continues both in private and commercial disputes to function as a court of conscience. What is unconscionable will depend to a great degree on the court's view as to what is acceptable to the community as fair and decent at the time and in the place where the decision is made."

Views may differ on where the line of unconscionability is to be drawn, but a court must still accept the responsibility of making a decision in new situations.

> "Thus I am of the view that the Court has power to grant an injunction in the appropriate case to prevent publication of a videotape or photograph taken by a trespasser even though no confidentiality is involved. However, the court will only intervene if the circumstances are such to make publication unconscionable".

In the event, however, Young J. did not grant the requested injunction in this case, being of the opinion that it should only be granted if irreparable damage was likely to be suffered otherwise. Were trespass proved at the final hearing, exemplary damages, which could conceivably be "of immense proportions", could be awarded.

The *Savoy* and *Lincoln Hunt* cases are of great importance to the media, for they hold, at the very least, that breaking the law to obtain information may result in an injunction prohibiting the publication of that information. Many will not quibble with that, although others would doubtless argue that the question of whether information can be published should be kept separate from the question of whether one should punish any illegal acts committed while obtaining it. The view taken by Young J has a confiscatory aspect: a deprivation of the benefit of ill-gotten gains. Yet others may point out that if important information is being deliberately concealed by the possessor of it there may be no way of getting it short of some form of trespass. A form of this latter argument, however, received short shrift from Donaldson MR in the *Francome* case:

> "[The rule of law] requires all citizens to obey the law, unless and until it can be changed by due process. There are no privileged classes to whom it does not apply. If [the editor of the newspaper] can assert this right to act on the basis that the public interest, as he sees it, justifies breaches of the criminal law, so can any other citizen. This has only to be stated for it to be obvious that the result would be anarchy."

The remaining question is how *far* this principle extends. If it is confined to illegality there is little cause for concern, but Young J's statement that jurisdiction exists simply to prevent unconscionable conduct could be taken to mean that obtaining information by something less than illegal means — for instance by some type of deception or the surreptitious use of a tape recorder — Could also ground an injunction. This raises large questions of how far the media can go in obtaining information, and of how far the public interest in free dissemination of information can justify unorthodox means of obtaining it. Nevertheless, at the end of the day it is difficult to say that, as far as it has currently gone, this new development imposes unreasonable fetters on the media; and one must remember that, whatever Young J may have said in *Lincoln Hunt,* an injunction was in that case *not* granted.

3. *The public interest*

It is settled that an obligation of confidence can sometimes be overridden by the public interest that the information be published. In other words even information imparted to the media in breach of confidence can be published by them if the

information is so important that it *should* be published. The same rule may well apply to information illicitly obtained.[61] This can involve the Court in a delicate balancing exercise, weighing the, interest in confidentiality against the interest in publicity. Just *when* is the public interest in publication such that confidence is overridden? Unfortunately the fact that many of the cases have involved interim injunction applications means that the principles have not had to be worked out in detail. One is also left assuming that the "public interest" defence is a defence to a damages claim as well as to a claim for an injunction; that was certainly assumed by the New Zealand Court of Appeal in the *Spycatcher* case.

There is no ready-made set of criteria for determining what the public interest requires to be published, or for where one draws the line between what the public *should* know and what they would *like* to know. Opinions of course will differ (probably violently) on the marginal cases — and in this matter the margin is a very wide one. It depends on one's initial premises: whether one takes the fundamental rule to be that all information should be freely available unless there is a good reason for its not being so, or whether one comes at it from the other direction and asks in what circumstances individual interests in privacy, confidence and commercial profit can be overridden by the need for publicity. It may also be that everything is relative. The more recent judgments emphasise that the exercise is one of balancing; if that is so, it may be that the more sensitive the confidential information the greater will be the public interest needed to override it.[62]

In this matter the motives of the media are sometimes called in question. When the *Mirror* tried to publish the *Francome* tapes was it because the editor believed the public should know the contents, or because it was a good story which would sell some papers? The fact that in many cases both these motives are operative does not render decision-making any easier. Judges have occasionally shown their distrust of the profit motive. Thus, in *Francome,* Donaldson MR acknowledged that in exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and propagating the views of minorities the media perform an invaluable function.[63]

"However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest." Lord Edmund-Davies also said, in a case involving contempt of Court,[64] that the Court was concerned with

> "people controlling or connected with powerful organs of publishing who, for reasons of their own (one of which may be no more than the desire to boost sales) , decide to take the course of defiant dissemination of matter which ought to be kept confidential."

It must be said however, that the courts have not, overall, been unreasonable about allowing the public interest defence to media defendants. The main categories of case where the "public interest" plea has succeeded are as follows:

(a) "There is no confidence as to the disclosure of iniquity."[65] If the confidential information discloses a crime, or other misconduct, whether by the confider or others, its dissemination cannot be objected to. This beneficial doctrine is the safeguard of investigative journalism which exposes corruption, evil-doing and fraud. In *Cork v McVicar*[66], for example, information supplied in confidence by a policeman to a reporter, but secretly tape recorded by the latter, showed corruption by members of the police force. An injunction was discharged to allow publication. A less extreme example is *Initial Securities*

Ltd v Putterill[67] where it was held that there was an arguable public interest in publishing confidential disclosures by employees of a company that the company had acted in breach of the Restrictive Trade Practices Act 1956. However cases of this kind can raise the interesting question of whether, supposing disclosure of the information to be required, it should be made to the whole world through the media, or whether it should be made only to the responsible authorities - for instance the police. When does wrongdoing *need* to be exposed to all the population? That again may be a matter where opinions differ. In the *Francome* case the taped telephone conversations revealed that Francome, a jockey, had been guilty of various breaches of the racing rules. That was held not to justify publication in the media. .[68]

> "It is impossible to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or to the Jockey Club."

That case differs from the *Cork* case in three ways: in *Cork* the obtaining of the information, while surreptitious, was not illegal, whereas in *Francome* it was; the public interest in police corruption is surely greater than the public interest in breaches of Jockey Club rules; and in *Cork* there was little point in confining communication to the proper authorities, the police themselves. In the original *Spycatcher* case in July 1986[69] the English Court of Appeal, in upholding the interim injunction, used similar reasoning: because wrongdoing in the Security Service would justify communication to the police "or some such authority" it did not follow that it justified wholesale publication in a national newspaper.

(b) Publication of confidential information may be justified to avoid harm to the public. Thus in *Church of Scientology v Kaufman*[70] confidential information about the church of Scientology was allowed to be published because the evidence showed that the teachings of this religion were medically harmful. However if the risk of harm has expired — as in the case of a harmful drug which has since been withdrawn from the market[71] — the confidentiality of the information may again outweigh the public interest in disclosing it.

(c) Publication may be justified to prevent the public being misled. This is one explanation of *Initial Services v Putterill*[72]. the company had, as well as breaching the Restrictive Practices Act 1956, misled their customer as to the reason for a price increase. The important case of *Lion Laboratories Ltd v Evans*[73] perhaps also fits best into this category. Employees of the Laboratories disclosed to a newspaper that a breath-testing device, the "Intoxicometer", which had been widely used by traffic officers and had led to convictions, was seriously inaccurate. The Court of Appeal held, in an application for an interim injunction, that the defendants would be able at the trial to establish a strong defence of public interest; the injunction was thus refused. It was not necessary to show that the plaintiffs were guilty of iniquity: the public had an interest in being kept informed of matters which are of real public concern. Here the efficiency of the Intoxicometer was such a matter. Griffiths LJ said:[74]

> "[The plaintiffs] owe a grave obligation to the public to ensure that the machine is produced and maintained to the highest standards. If they do 1 not honour this obligation . . . . , people may be wrongly convicted and be powerless to do anything about it. In these circumstances, if material comes

into the hands of the press which on a fair reading suggests that the manufacturers are not honouring their obligation, or that the machine is not reliable, it seems to me that it is beyond question that it is in the public interest that this disturbing information should be made known to the public."

In other words what was at stake here was the protection of the public itself.

(d) There have also been somewhat disputable suggestions that if a person - for instance an author or music star - puts himself in the public eye for publicity purposes, he cannot complain if the media discover and publish a less savoury part of his personality. Tom Jones, the pop singer, was thus unable to prevent publication of stories about certain of his more disgraceful exploits.[75] This principle, if it is a principle, must surely be carefully confined, otherwise it could justify publication of details of the private lives of any public figure: something no one would wish to go too far.

While these four categories cover the majority of the cases, there is no suggestion that they are exhaustive. It is the great value of the *Lion Laboratories* case[76] that it holds unequivocally that the real priniciple is simply that the public interest in being kept informed of matters of real public concern can override a duty of confidentiality;[77] the principle is not based simply on iniquity. Such a test allows an assessment on the facts of each case as it arises. Inevitably in the more difficult cases different minds may reach different conclusions. It is of considerable interest to note that in the New Zealand 'Spycatcher' case[78] Davison c J said that, had it been necessary to do so, he would have exercised his discretion against the granting of an injunction because, inter alia, having regard to the extent of publication already, "it is in the public interest that the material be allowed to be published here." Little weight should be given to the possible deterrent effect of an injunction as a warning to disaffected persons in New Zealand.

4. *When are the media bound?*

There has been insufficient discussion on precisely *when* the media are bound by an obligation of confidence when they receive information "leaked" to them or another. In the *Spycatcher* case Davison C J discussed this usefully — although he was perhaps limited by the way the matter was pleaded.[79] He concluded that wellington Newspapers, to be bound by any duty of confidence, must have had actual or constructive knowledge that the party originally subject to the duty (in this case Peter Wright) had disclosed confidential information in breach of a duty not to disclose: in other words they must have been in the position of a constructive trustee. His Honour found that this had not been shown in this case. At most the editor of the *Dominion* knew that *claims* had been made that confidentiality had been breached, but no more; and indeed such claims had failed in the Australian courts. Nor was there "wilful blindness"; nor would further inquiries have made the matter any clearer. So at the time of the original decision to publish there could not be said to be any participation by Wellington newspapers in any breach of a duty of confidentiality. Nor had matters changed since then. (This last point appears to assume that the relevant date at which knowledge is to be assessed is the date of proposed publication by the media, rather than any earlier date on which the information was acquired).[80] The Court of Appeal in its interim judgment does not discuss this matter.

5. *Conclusion*

As long as the public interest justification is fairly applied, breach of confidence probably does not impose too many fetters on the media. In fact it is common practice for the media to publish "leaked" documents, particularly from government sources. As has been suggested above, the state has a heavier burden of proof to satisfy before it can succeed in an action (probably it must show that the public interest requires secrecy); that balance seems proper in an open society. Indeed the New Zealand Press Council has held that it is not a breach of ethics for a newspaper to publish a confidential government document which is obtained by honest means from someone who knew it proposed to publish the contents.[81]

It has been much debated whether breach of confidence would benefit from being enacted in statutory form. The English Law Commission has so recommended[82] Yet, while legislation would doubtless be able to clarify some of the details which are currently uncertain, one wonders in the end whether on the main issues the legislature could do much better than the common law. Is it really possible to define what is meant by confidential information or, more importantly, when it is "in the public interest" to publish?[83]

D. *Protection of Privacy*

Intrusions by the media into personal privacy have been a frequent cause of criticism,[84] although not as much in New Zealand as elsewhere. In New Zealand statute gives some protection to individual privacy: the provision of the Crimes Act 1961 relating to interception; the requirement in the Broadcasting Act 1976 that broadcasters are to have regard to "the privacy of the individual"; the security provisions of the Wanganui Computer Centre Act 1976; the conferment on the Human Rights Commission of significant functions in relation to the privacy of the individual; and the various statutes requiring certain types of court proceeding to be heard in private in the interests of the parties; and the many statutory provisions, for example the Statistics Act 1975 and the Hospitals Act 1957, which provide that disclosure may not be made of private information in the hands of employees and agencies.[86]

The common law recognises no coherent right of privacy. However certain common law doctrines can on occasion be used to protect aspects of privacy — defamation for example.[87] It is clear from what has already been written in this paper that the doctrine of breach of confidence can also be availed of in this way: the use of the doctrine to protect matrimonial, family and other personal confidences from being voiced abroad in the media is a clear example. Possibly, but more doubtfully, the *Savoy* and *Lincoln Hunt* could also be regarded as being in some way founded on a notion of privacy. But in 1986 the New Zealand courts came as close as they have ever done to adumbrating a more general doctrine of privacy protection.[88] Mr Desmond Tucker, a heart patient, was in need of a heart transplant which necessitated a trip to Australia. Mr Tucker was offered some financial assistance by the Government, but that only partly covered the necessary funds. His family sought to raise the balance by a public appeal. It was then discovered that Mr Tucker had convictions, some of them for indecent assault. Certain members of the media proposed to publish this fact. An interim injunction was granted by Jeffries J., and upheld by the Court of Appeal, on two grounds. First, it was arguable that the tort in *Wilkinson v Downton*[89] had been committed; that tort consists in the intentional or reckless infliction of emotional distress.

Secondly, it was arguable that a right to privacy may provide the plaintiff with a valid cause of action in New Zealand. Jeffries J said that this seemed a natural progression of the tort of intentional infliction of emotional distress, and was "in accordance with the renowned ability of the common law to provide a remedy for a wrong."

Eventually the injunction was discharged by McGechan J. because in the light of further developments, in particular publication of the material in Australia and by other media in New Zealand, it had become pointless to continue it. But McGechan J argued that there was a serious question to be tried in relation to privacy.

> "I go further. I support the introduction into the New Zealand common law of a tort covering invasion of personal privacy at least by public disclosure of private facts."

His Honour found the good sense and social desirability of such a protective principle compelling in a day of increased population pressures and computerised information retrieval. He also believed that legislation would be desirable on a comprehensive basis "determining the extent of the right to privacy and the relationship of that right to freedom of speech."

In other jurisdictions there has been privacy legislation, although it has been mainly directed at the specific problem of the automatic processing of personal data and covers such things as the right of access by the individual to the information held about him, limitation of access to it by others and control over its collection. In New Zealand the Information Authority has recommended the enactment of similar legislation, and a paper presented to the Minister of Justice has outlined options for protecting data privacy.[90] But so far law reform bodies have baulked at recommending comprehensive privacy protection, although those in Australia and England have both seen possibilities in the development of breach Of confidence. However in 1979 the Australian Law Reform Commission did recommend enactment of a limited provision giving a cause of action to a person in respect of the publication of "sensitive private facts", this expression being defined as matter relating to health, private behaviour, home life or personal or family relationships in circumstances in which publication is likely to cause distress, annoyance or embarrassment.[91]

Yet the difficulties are obvious. Some people are more "sensitive" about private facts than others: there may not be many types of fact which everyone would agree should not be published without consent. Moreover sometimes "private facts" may be a matter of public interest: for instance to demonstrate hypocrisy in a politician whose private life contradicts his public pronouncements, or to demonstrate the effects on family life or health of the teaching of, say, an extremist religious group or a practitioner of fringe medicine. To some extent knowledge of what other people are doing is necessary in any society whose members are interdependent.[92] Thus any law protecting privacy must contain a "public interest" exception, and the Australian proposals do. The Commission recommends that it be a defence to a privacy action that publication was "relevant to a topic of public interest."[93] Such a law would be very difficult to apply even more difficult than the breach of confidence/public interest principles. For whereas 'confidence' at least normally depends on a relationship which is objectively definable, the very concepts of privacy and public interest are to some extent mutually exclusive. Moreover, as the English Younger Committee on Privacy pointed out, privacy is not a constant

value, and it may be that at the lower end of the scale an invasion of privacy could be justified merely to satisfy public curiosity or to quell rumour and gossip. Drawing the line between what should be kept quiet and what can legitimately be apt quiet and what can legitimately be published, however one's concepts are defined, would be a matter on which it might be very difficult to achieve consistency.

The *Tucker* case raises these difficulties in an extreme form. For one thing, Mr Tucker's convictions were a matter of public record and his name had not been suppressed at the time. Were these facts about him, therefore, really "private" facts at all? It is likely they would not have fallen within the Australian Law Reform Commission's definition.[94] Was the gist of the matter not so much infringement of privacy as the inappropriateness of publishing damaging information or the danger that in the very special circumstances of the case Mr Tucker's physical health might have been affected by publication? Moreover the context of the proposed publication in the *Tucker* case was a public appeal for funds. It could be argued —and indeed was — that the subscribing public's right to know where their funds were going outweighed Mr Tucker's private right to silence. As against that, Mr Tucker had not willingly thrust himself into the public eye as Tom Jones had done: his health necessitated it.[95] There is, even now, debate as to the rights and wrongs of the matter.

At best, the question may be one of taste, ethics and regard for the feelings of others at least as much as one of law, and it may be better to leave it in that camp: as far as the newspapers are concerned, the Press Council has jurisdiction to pronounce (if it can) on when the line has been overstepped.[96] Nor do I think that in New Zealand there is any grave cause for concern. I can think of few occasions where one's sensibilities have been outraged by unwarranted intrusions of privacy by the media in this country.[97] Nevertheless there is justified concern about the possible consequences — not just in regard to the media — about modern developments in electronic data storage, and it is right that the topic should be subjected to careful scrutiny.

E. *The Interim Injunction*

The frequency of applications for interim injunctions — and the success of them — against the media in recent years is a matter of note. Injunctions are a form of prior restraint and therefore of censorship; their use against the media must therefore be monitored very carefully, particularly when it is recalled that interim injunctions sometimes effectively become permanent if the publisher cannot afford to defend further proceedings, and that, even if their effect is only to delay publication, that delay may destroy or dilute the news value of the item.

The present law derives from the *American Cyanamid*[98] determination that a plaintiff in an application for an interim injunction does not have to demonstrate a prima facie case, but merely that there is a serious question to be tried; if that is so the question is whether damages would be an inadequate remedy and whether on the balance of convenience the injunction should be granted. It does not take much to establish that there is a serious question to be tried. Moreover the *Lincoln Hunt* case raises another matter of concern: if an injunction can be granted to protect an equitable right, and if equity is not past the age of childbearing, it may well be that all manner of novel claims can be held to raise "serious questions to be tried." The *Tucker* case demonstrates that even at common law novelty is no bar to a question

being a "serious" one. That is a volatile combination. Thus in the past few years, interim injunctions have been granted as follows (many of them in New Zealand cases):

to prevent the publication of information obtained in the course of trespass;[99]

to prevent the publication of economic forecasts on the basis that they are confidential to subscribers of the firm which prepares them;[1]

to prevent (in New Zealand) publication of extracts from an English book about the English Security Service;[2]

to prevent a television programme being run on the basis that court proceedings were pending on the same matter;[3]

to prevent a story being run that a claimant for public money had previous convictions:[4]

to prevent two persons conspiring together to publish the truth about the plaintiff company with a view to causing it damage;[5]

to stop the broadcasting of a television film of Court proceedings.[6]

That is a long list: much longer than any compiled in an equivalent period before *American Cyanamid.* Moreover there is now authority for the proposition, previously thought to be incorrect, that an injunction against one member of the media can have the *effect* of binding all the media. In one of the cluster of *Spycatcher* cases[7] the English Court of Appeal has held that publication by someone who was not a party to the injunction proceedings can amount to a contempt of court if it was done with knowledge of the injunction, if there was intent to prejudice the administration of justice, and if the effect of the publication would be to destroy the subject matter of the action.[8] This last element Will almost inevitably exist in cases involving injunctions against publication; publicity from another source subverts the very purpose of the injunction. While one can see the point of this — an injunction which bound only one newspaper would be hopelessly ineffective — it is nevertheless a dangerous principle. It virtually converts the injunction from a remedy in personam into a remedy against the world — the rest of the world, be it noted, having not had the opportunity of defending the proceedings.

It may perhaps be asked whether the *Cyanamid* case is really apposite to cases involving publication. The test of "serious question to be tried" may simply not be stiff enough when important principles of freedom of the press are at stake. It has been long established, and hopefully remains so, that a different test is applied in defamation cases.[9] There the jurisdiction to grant an interim injunction will be exercised only with great caution. In particular, an injunction will be refused if the defendant says he intends to justify the words used, or to make fair comment; moreover no injunction will be granted if there is any doubt as to whether the words are defamatory. Lord Denning has justified this approach in defamation cases on the ground that it is important in the public interest that the truth should out[10] — in other words that there should be freedom of speech.

Yet after *American Cyanamid* arguments that the defamation rule should apply to all cases involving publication have not been accepted, although Lord Denning seems to have thought differently.[11] Thus the *American Cyanamid* test was applied in *Francome* (a breach of confidence case)[12]; in the *Tucker* case (McGechan J. saying that the "protective" defamation principle was not appropriate in that injury

to health was involved, and truth was no defence); and in *Gulf Oil Ltd v Page*[13] where the English Court of Appeal distinguished the defamation rule in a case involving conspiracy to tell the truth. No doubt there are special considerations in such cases, particularly confidence cases: for once publication of a confidence has happened the damage the plaintiff sought to avoid has been irrevocably done, and there is even some doubt about the availability of damages in such cases. Indeed in the *Spycatcher* case at Court of Appeal level in England Donaldson M.R. believed that the presumption in favour of an interim injunction was very strong in that class of case.[14]

> "An assessment of this relativity might lead a court properly to conclude that, in the context of the confidentiality of the work of the Security Service, the proper approach is that the conflict should be resolved in favour of restraint, unless the court is satisfied that there is a serious defence of public interest which is *very likely* to succeed at the trial."

However even if it cannot be argued that the defamation rule is appropriate to all cases of publication it can surely be suggested that the *American Cyanamid* test may not be universally appropriate either, and that the important value of freedom of the press should be a factor in determining what burden of proof a plaintiff must bear. However some may say it ought perhaps not to matter. For even if the low threshold test of *American Cyanamid* is applied, there is still much scope for the court to take freedom of the press into account in assessing where the "balance of convenience" lies. For instance, in *Cambridge Nutrition Ltd v BBC*[15] the Court of Appeal refused an interim injunction to stop the BBC publishing details of a "low calorie diet" devised by the plaintiffs, even though the plaintiffs alleged (somewhat tenuously) a contract by the BBC not to publish before a certain report was issued. Although following the *American Cyanamid* guidelines, two members of the Court, Kerr L.J. and Eastham J, had little difficulty in finding that the doubtful claims of the plaintiff were outweighed by the desirability of not restraining the BBC. "public interest" in publication was a factor.

There is a further question as to how effective injunctions are against the media. If the matter of which publication is injoined is obviously a matter of substantial interest, an injunction may actually provoke increased curiosity and media attention. That was the experience in the *Tucker* case: the media these days are not confined within national boundaries, and once overseas media organisations get hold of the story (particularly Australian publications which are readily available in New Zealand) it becomes increasingly difficult to stem the tide. McGechan J discharged the injunction in that case largely because its continuance had become pointless. "In New Zealand once the proverbial cat is out of the bag her progeny spread like lightning". He concluded that

> "Justice . . . certainly should appear blind but should not appear stupid."

Likewise the aftermath of *Spycatcher* is only too well known. In New Zealand, the Court of Appeal upheld the lifting of the interim injunction because, as Cooke P. said, its continuance would have been well-nigh absurd. The book was readily available overseas, and had been serialised in Australia; copies had entered New Zealand. There are, quite simply, limits to how far the law can contain human interest and gossip. Sometimes injunctions against the media make matters worse by provoking additional talk, some of it inaccurate and distorted. One then ends up — *as in Spycatcher* — with a Court trying to control not just one defendant, but a

whole society.

F. *Defamation*

Although defamation is by far the largest topic in media law, the one which affects editors and their publications by far the most, and the one in greatest need of reform, I do not propose to spend much time on it. This is because I expressed my views on the subject in a paper delivered to the recent New Zealand Law Conference, and also because Mr Palmer and Mr Miles are addressing you on that topic today. But, lest it be thought I am letting the matter go by default, let me summarise my thoughts.

1. *The current law*

There are at least the following problems in the current law.

(i) Defamation is very much a plaintiff's tort.[16] The plaintiff need not prove that the statements made about him are false; nor that the defendant was guilty of any fault; nor that the plaintiff has suffered any loss.[17] I cannot think of any other branch of the law where such a repressive combination of factors exists as far as the defendant is concerned. I think that of those factors the most unsatisfactory is the lack of any requirement of proving loss. I know it is very difficult to itemise all the losses which have flowed, or may in future flow, from a libellous statement[18]: but I am afraid that this attitude leads us to a point where people are recovering substantial sums of money when in reality they have suffered no real loss at all other than some temporary embarrassment or hurt feelings.[19] Certainly it is undesirable for false statements to circulate about people, but I cannot believe, given the mass of information tumbling from the media these days, that all of it is remembered for long or that all of it causes lasting harm.

(ii) I am also concerned that in New Zealand politicians are such frequent litigants; their names appear in the reports as plaintiffs far too often.[20] In some cases another politician is the defendant. public figures should, within reasonable limits, have to take more than other citizens without taking umbrage and legal advice. I am concerned, too, about the use made of this strict liability tort by corporate plaintiffs who are concerned not about reputation in the human sense but about loss of profits. Financial reporting should not have to be subject to this kind of liability: let our finance and business houses sue in negligence, or malicious falsehood, but negligence, or malicious falsehood, but not in defamation.

(iii) The law is too complex. Pleading in defamation is highly technical: there is too much opportunity to throw obstacles in one's opponents' path. In this respect it is not just defendants who suffer — plaintiffs do too. Defamation actions are long, complicated and expensive. Costs can outrun the damages. If a plaintiff loses (which is the exception rather than the rule for those who go the distance) the financial burden of costs can be crippling. Perhaps this is one reason why the huge majority of writs do not proceed to a final hearing. Moreover if the statement made about the plaintiff really was defamatory, and the matter does go to a final hearing, it may be 4 or 5 years before the case is concluded and the plaintiff's reputation is salved: at that distance of time what is the point?

There are examples in Britain of people of literary bent who, after having become involved in a defamation suit, give vent in the papers to their

impressions of the law. They are normally not complimentary.[21]

(iv) While the defences available to a media defendant *look* generous, they are not as generous in practice as one might expect. Justification can be hard to establish: it is one thing to know something to be true, but quite another to prove it to be true in a court of law to the appropriate standard of proof by legally admissible evidence. Fair comment fails tóo often, largely I suspect because of the difficulty of juries understanding the difference between fact and comment (not surprisingly) and because of their misunderstanding of the word "fair".[22] until Jones succeeded against Muldoon on this point last year I am not aware of a case in New Zealand for the past 30 years where a plea of fair comment has succeeded.

Thus the present law of defamation really satisfies no-one. It does not provide a plaintiff with a simple, quick means of setting the record right (often all he should want); and it is very hard on defendants, both in terms of what they have to establish to succeed and in terms of money (costs and damages). As far as media defendants are concerned it is undoubtedly a restraint on freedom of publication. While it is quite impossible to produce accurate figures on how often fear of defamation proceedings leads editors to leave out matters which they belief to be of public interest, there is little doubt that it happens often enough to be a matter of concern; the statistics collected by the McKay Committee in 1977 support that.[23]

Yet, while "freedom of the press" is a slogan which is permeating other branches of the law as a principle to be taken into account, it has so far had little effect in loosening the shackles of the law of defamation as far as the media are concerned. In fact on a number of occasions in recent years where the courts have been years where the courts have been confronted with a choice, they have tended to take the path least favourable to the media. Thus:

They have continued to apply the rule in *Plato Films v Spiedel*[24] that if a defendant has made a number of allegations against the plaintiff the plaintiff can sue on just one of them and deprive the defendant of the opportunity of justifying the others or pleading them in mitigation of damages[25] (a terrible rule for the investigative report which contains a single mistake):

They have shown some generosity in allowing individual members of a group to sue when the defendant's allegations were directed at the group as a whole;[26] They have construed publications as the ordinary lay reader would construe them even though this may involve some "loose thinking"; the defendant thus loses the benefit of subtlety of phrasing;[27]

The statutory privilege for imparting government statements has been narrowly construed;[28]

Although the matter has been given close consideration, the courts have so far not been prepared to admit a "public interest" privilege.

This last point deserves a little expansion. There has been much argument as to whether the media should be excused mistakes if they are providing information of public interest. The answer given by the courts has by and large been no. It was held by the Court of Appeal in *Truth (NZ) Ltd v Holloway*[29] that the media do not have a privilege to publish defamatory statements about an individual just because the general topic being developed is one of public interest.[30] There *may* be situations where privilege can avail the media over and above the current statutory qualified privilege categories, but they will be rare: a media defendant will need to show it

had a *duty* to convey the information, and that it is *in the interests of the public* to receive such information: it is not enough just that the information appears to be *of* legitimate public interest. Pleas of this kind are normally met by the response that it can never be in the interests of the public to receive nor the duty of the press to convey inaccurate information. A newspaper cannot say "we had a duty to all persons who might read our paper to inform them of all these untrue and defamatory reflections upon the plaintiff".[31] The public have no interest in receiving "information which was tortious in content."[32] Statements such as this, with respect, have the aspect of self-fulfilling prophecies.

Thus any "public interest" defence which may exist at the moment in defamation is of a much more restricted kind than the equivalent defence in contempt of court and breach of confidence, the overt reason being that in the last two branches of the law one is dealing for the most part with *true* statements, but in defamation (at least in theory) with *false* statements. Thus the media indulge in investigative reporting at their peril. But may there not be investigations of such import that a mistake or two can be *excused* provided there is some machinery for correction or right of reply?

2. *Reform*

As far as reform goes, I believe something fairly far reaching is needed. I would suggest:

(i) That there be some form of mediation or pre-trial conference at the outset of defamation cases to attempt to obtain a settlement of claims which are amenable to settlement; to ensure that unrealistic claims do not proceed further; and to ensure that in those cases which do proceed the issues between the parties are clarified.[33]

(ii) That there be provision for a judicially ordered correction, so that where a false statement has been made about a plaintiff, there is provision for the truth to be published. The proceedings in this regard should be as speedy as possible, and should be addressed simply to the question of the truth or falsity of the statement made.[34]

(iii) That, where the plaintiff desires damages in addition to any correction order, consideration be given to placing a statutory ceiling on the amount recoverable for non-pecuniary loss.[35] Punitive damages should be retained as a deterrent in appropriate cases.[36]

(iv) That consideration be given to adopting a media privilege to protect the media when they are providing information of public interest, provided that they can satisfy the court that they believed on reasonable grounds that the information was accurate. Such a privilege was recommended in 1977 by the McKay Committee. The only reservation one has about it is the difficulty which may be experienced in ving the existence of reasonable grounds for the defendant's belief.

(v) That the efficacy of gagging writs be reduced by providing that no sum by way of damages be specified in a statement of claim. This again was recommended by the McKay Committee.

G. *Conclusions*

Insofar as it is possible to draw threads together from such a diverse selection of

material one can perhaps draw the following conclusions.

1. Crudely put, some of the trends in media law favour the press, others do not. The movements in contempt of court are the most conspicuous example of those which do favour the media: there does seem to have been a relaxation there recently. One may list the following as developments which to some degree pose a threat to press freedom, although not all of them would be regarded as unreasonable by all people: the burgeoning of the law on breach of confidence (although the counter-development of the public interest defence provides a reasonable safeguard): the new developments on illegally obtained evidence; the embryo development of a tort of privacy; the snowballing of interim injunctions, a form of prior restraint.

Defamation has been set in concrete over the centuries and there has been little significant change of course recently, although the courts have perhaps not taken the few opportunities they have had to ease the media's burden. Defamation remains an instrument of restraint on the press, not only because in the hurly-burly of deadlines and information flow mistakes are inevitable, but also because the law of defamation is one (although only one) factor which inhibits investigative reporting in this country.

2. Defamation in theory prohibits the publication of false information, although the reverse burden of proof means that the plaintiff is not required to prove falsity. Some of the other branches of media law, however, prohibit the publication of *true* information: breach of confidence, privacy (insofar as there is or is going to be such a law), contempt of court. There have been slightly ominous signs recently of further movement here. The English Court of Appeal has recently held that it can constitute the tort of Conspiracy for two or more persons to combine to publish true facts about a person with the motive of causing him loss.[37] (That could have implications for the media). And in the infamous *Maxicrop* case in New Zealand the judge awarded $25,000 to Maxicrop even though he found the defendant's publication was justified, on the ground that the Ministry had failed in a duty to let *Maxicrop* assess the information before it published. Of course there need, in the interests of society and individuals, to be some situations in which the press's freedom to publish the truth should be limited, but any widening of those situations should be monitored very carefully indeed and be surrounded by adequate safeguards.

3. One Of the most interesting developments in recent years has been the increasing emphasis in the judgments on "public interest". The public interest in debate of vital issues is a factor to be taken into account in contempt of court; the public interest in publication of important matter can override an obligation of confidence (and indeed has done so in a significant number of cases with media defendants). Moreover "matter of public interest" has long been in the formula for fair comment in defamation, and even though cases of its application are like hen's teeth there appears to be a recognition of a privilege in defamation where the media are under a *duty* to provide information to the public which it is in the public interest for the public to receive. There has even been a suggestion that breach of copyright may be excused on the grounds of public interest in the information:[37] surely that is a disputable suggestion, for there is no mention of public interest among the statutory defences in the Copyright Act, and it must be doubtful whether the common law can embellish a statutory code of this kind. But these

overt references to public interest amount to an acknowledgment, long overdue in English law, of the importance of press freedom as an interest which must be weighed in the balance in cases involving publication.[38] However, it is apparent in all the fields studied that exactly *when* the public interest requires publication and outweighs other interests is a matter on which there are opinions but few guidelines. The clearest cases, of course, are very clear; "public interest" has been directly responsible in recent years for the courts permitting the media to publish investigations of evil doing — for instance police corruption (the English and Australian courts have been assiduous to protect investigations on this topic)[39] and the cult of scientology. But beyond these extremes the lines are blurred. Is it possible to draw firm lines between things the public *must* know; things it is *desirable* for them to know; things which they are *curious* to know? What is the difference between matter *of* public interest and matter publication of which is *in* the public interest? Are there in fact only degrees of public interest rather than absolutes, which must be constantly balanced against other values? There are, in the end, no legal definitions, only impressions. Different people may have different views.

Scrutton L J's dictum in *Watt v Longsdon*[40] ,although it appeared in a rather different context, may be apposite. He said that the question of whether there is a social or moral duty to impart information is

> "a question which the judge is to determine, without any evidence, by the light of his own knowledge of the world, and his own views on social morality, a subject matter on which views vary in different ages, in different countries, and even as between man and man."

4. It may well be that, with the exception of the inflexible rules in defamation, the courts have not been too hard on the media in New Zealand (as compared, say, with Great Britain). The most recent contempt cases have been generous, especially *Banks.* Interim injunctions were eventually lifted in the Spycatcher and Tucker cases 'y lifted in the *Spycatcher* and *Tucker* cases so that the only ground of complaint there was that publication was delayed, with, at least in the case of *Spycatcher,* somewhat embarrassing results. Our courts have been astute not to get themselves into the corner currently occupied by the English courts.

5. Where is reform necessary? Defamation, in my view, cries out for it for the reasons I have outlined. Reform proposals were made in 1977. I hope the Government will act. There have been various proposals in other countries statutorily to reform some of the other topics discussed in this paper: privacy (in a very limited way) in Australia; breach of confidence in England; contempt of court in Australia and England (and, in respect of civil cases only, in New Zealand) . But on looking at those proposals I am not persuaded that they greatly improve the present situation. The main vice of all these areas is their uncertainty; the proposals really succeed very little in improving that, simply because the concepts and interests involved are of their nature not susceptible of precision. I do wonder, however, whether it may be possible to look at the impact of the interim injunction on the media and consider whether the *American Cyanamid* test is always the right one where publication and the media are concerned.

6. It should not be thought for a moment that this paper covers all the recent developments in media law. If it did it would have been even longer. So I

have not had time to discuss such things as the possible impact on the media of Section 20A of the Summary Offences Act 1981 dealing with improper use of official information; the new statutory provisions about openness of information and meetings of local authorities; the new provisions about publicity of court proceedings in the Criminal Justice Act 1985 including a reformulation of the suppression of name rules: decisions (and a statute) on how far journalists and others must disclose their sources; the limited censorship provision in the International Terrorism (Emergency Powers) Act 1987: the Official Information Act 1982 itself; and the media defence in the Fair Trading Act 1986.[41]

Footnotes

1. "I still find the utmost difficulty in deciding precisely what middle course is most suitable in a civilised society to procure that no scandal can legitimately be concealed, no matter of public concern removed from public vigilance, while yet no inoffensive and law-abiding person can find himself pilloried and lampooned for the cruel delectation of a public either born or assiduously schooled to love sensation. A. Goodman (1960) 13 CLP 135 at 137.

2. This factor is beginning to be taken into account in contempt cases. See below.

3. See Burrows *The House of Lords and Freedom of the Press* (1982) 3 *Journal of Media Law and Practice* 278.

4. *Report of the Committee on Privacy* Cmnd 5012 (1972). "Protecting freedom of the press" ranked 6.8 on the ranking scale, well below "protecting privacy" (30.1) and "improving race relations" (20.4). However it was well above "improving prison conditions" (- 35.9).

5. No doubt the Press Council and the Broadcasting Tribunal are partly responsible, but quite apart from these bodies there is a general air of responsibility.

6. *Packer v Peacock* (1912) 13 CLR 577 at 588.

7. *Wilson v Waikato and King Country Press Ltd* High Court Hamilton M248/79 9 February 1982. The case is a most valuable authority in respect of gagging writs.

8. High Court Wellington CP607/86, 608/86, 21 July 1987. In the same judgment Davison C J reached the same conclusion in respect of a statement, shortly after an arrest for murder, that "well known monsters" should not be let loose on the streets.

9. *Parker v Parker and Barrington* High Court Auckland, CP 674/86, 30 July 1986. In 1956 a finding of contempt was made, but no penalty imposed, in respect of the publication of a photograph: *A-G v Noonan* [1956] NZLR 1021.

10. The formulation of Davison C J in the *Banks* case, relying on the Australian authority. His honour separates two questions: (i) has a contempt been committed? and (ii) should an order be made against the contemnor? It is in respect of the latter question that the quoted test applies. However the tendency in Australia has been to treat it as unnecessary to maintain the distinction between punishable and non punishable contempts; the same test applies to both questions: see *A-G (NSW) v John Fairfax G Sons Ltd S Bacon* [1985] 6 NSWLR 695 esp at 708 per McHugh J A. This matter is not resolved in *Hinch v A-G* (Vic) (1987) 61 ALJR 556.

11. ALRC Report no. 35: *Contempt* Ch 6 at 162.

12. Ibid.

13. Again the Australian Law Reform Commission wonders how effective judges' instructions to this end really are: ibid at 163.

14. *Attorney-General v News Group Newspapers Ltd* [1986] 3 WLR 365 at 376.

15. (1969) 53 Cr App R 412 at 415.

16. ALRC Report no. 35 at 164. See also *Thompson v Commission of Inquiry* [1983] NZLR 98 at 111. (The principles of contempt are discussed in this case.)

17. The *Banks* case (supra n 8) at 27. See also *A-G NSW) v John Fairfax & Sons Ltd & Bacon* (supra n 10); *Waterhouse v ABC* (1986) 61 ALJR 24. The same factor was regarded as important in the *Botham* case (supra n 14). In the colourful words of Donaldson M R: "This trial will not take place for at least 10 months, by which time many wickets will have fallen, not to mention much water having flowed under many bridges. . ." (at 375).

18. See ALRC Report no. 35 at 165-166.

19. See in particular *A-G (NSW) v John Fairfax & Sons Ltd & Bacon* (supra n 10). It is different, however, if the other statements are themselves in contempt: *DPP v Wran* (1987) 7 NSWLR 616 at 629.

20. The *Banks* case (supra n 8); *DPP v Wran* (supra n 19).

21. Supra n 10.

22. Supra n 8.

23. *DPP v Wran* (supra n 19).

24. *Hinch v A-G for Victoria* (1987) 61 ALJR 556.

25. *DPP v ABC* [1987] 7 NSWLR 588.

26. (1937) 37 SR NSW 242 at 249.

27. *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650; *DPP v Wran* (supra n 19); *Hinch v A-G for Victoria* (supra n 24).

28. The *Hinch* case (supra n 24).

29. The *Wran* case (supra n 29).

30. Supra n 27.

31. The Australian Law Reform Commission was disposed to recommend a public interest defence "distinctly narrower than the common law principle": ALRC Report no. 35 at 195. They regarded it as important whether it would be detrimental to the public debate to delay it till after the trial. See the summary by Chesterman (1987) 61 ALJ 695 at 705.

31a There is no suggestion in the *Hinch* case (supra n 24) that this is a necessary requirement, although dicta in *Attorney-General v Times Newspapers Ltd* [1974] AC 273 could be interpreted in this way.

32. The members of the High Court of Australia in *Hinch* (supra n 24) appear to differ on this: cf Wilson J at 567 with Deane J at 572 and Toohey J at 578.

33. See the judgments in *Registrar of the Court of Appeal v Willesee* (supa n 27), *Waterhouse v ABC* (supra n 17) and *Victoria v Builders Labourers' Federation* (1982) 152 CLR 25 and, in particular, compare the judges in *Hinch v Attorney General for Victoria* (1987) 61 ALJR 556: Mason C J at 558.559, Wilson J at 567, Deane J at 573, Toohey J at 578, Gaudron J at 585-586.

34. *A-G v BBC* [1981] AC 303: contempt applies only to a court "exercising the judicial power of the state".

35. In *Registrar of Court of Appeal v Willesee* (supra n 27). However this was not taken up in the *Hinch* case (supra n 24).

36. See *R v Savundranayagan & Walker* [1968] 1 WLR 1761 which suggests that proceedings become sub judice not just when proceedings are pending but when they are "imminent".

36a "Confidence" may arise from contract; from equitable duty; or from fiduciary duty.

37. E.g. *Argyll v Argyll* [1967] Ch 302; *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892; *Distillers Co Ltd v Times Newspapers Ltd* [1975] QB 613; *Schering Chemicals Ltd v Falkman* [1982] QB 1.

38. E.g. *Merryweather v Moore* [1892] 2 Ch 518.

39. E.g. *Seager v Copydex Ltd* (1967) RPC 349.

40. E.g. *Fraser v Thames Television Ltd* [1984] QB 44 (the "Rock Follies" case) and *Talbot v General Television Corp. Pty Ltd* [1980] V.R. 224.

41. Supra n 37.

42. [1976] 1 QB 752.

43. (1981) 55 ALJR 45.

44. The English cases where the injunction was granted are in some ways the most interesting. See (1986) 136 New LJ 799 (CA) and [1987] 3 All ER at 343 (HL).

45. The clearest brief outline is by Gurry in Finn (ed) *Essays in Equity,* 110. See also Data Privacy, An Options Paper, (1987) by T.J. Bride, at 54-59.

46. *A.G v Jonathan Cape Ltd* [1976] 1 QB 752 at 770; *Commonwealth of Australia v John Fairfax Ltd* (1981) 55 ALJR 45 at 49 per Mason J; *A-G for U K v Wellington Newspapers Ltd* HC Wellington CP421/87, 15 December 1987, per Davison C J.

47. Official Information Act 1982 s.48(2).

48. Even the three categories should not be regarded as exhaustive: in *Distillers Co Ltd v Times Newspapers Ltd* [1975] QB 613 the confidentiality was based on a court order for discovery.

49. As to damages, see below, page 13. As far as the "public domain" is concerned, real questions can arise as to how far the media will be restrained from publication if the information has already been published by another sector of the media. By and large some degree of publication will not prevent an injunction: *G v Day* [1982] 1 NSWLR 24. But as *Spycatcher* shows, there may come a point when further restraint is pointless.

50. No doubt the "public interest" defence will often avail a confidant in such circumstances but that imposes a burden of proof (not entirely easy to satisfy) on the defendant. I am here talking of whether the plaintiff should not have to satisfy the court at the outset that the information is of such a kind that it can sustain an obligation of confidence at all. It has occasionally been said that the information "must have the necessary quality of confidence about it", (E.g. *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47), but this appears to mean only that the information must not be in the public domain.

51. *Exchange Telegraph Co Ltd v Central News Ltd* [1897] 2 Ch 48; *Idem v Gregory* [1896] 1 QB 147; *Idem v Howard* (1906) 22 TLR 375.

52. *Copyright,* 11th ed, para 92.

53. They may rest rather on inducing breach of contract, or may be forerunners of the modern cases (dealt with below) on obtaining information by illegitimate means.

54. Cf *Cork v McVicar* dealt with below. In *G v Day* [1982] 1 NSWLR 24 a newspaper was restrained from printing an informant's name when he had

supplied information on the clear understanding that his identity was to be confidential because he feared for his safety.

55. The Press Council certainly treats failure to comply with an embargo as a breach of ethics: see its Annual Report for 1985 at p.7.

55a See *Seagar v Copydex Ltd* (supra n 39), *Fraser v Thames Television Ltd* [1984] QB 44, *Talbot v General Television Corporation Pty Ltd* [1960] VR 224 and *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354 at 361. Cf the doubts of Prichard J in *Aquaculture Corpn v N Z Green Mussel Co Ltd* High Court, Auckland A 1369/79, 4 Nov 1986.

55b *A-G for UK v Wellington Newspapers Ltd* CA 203/87, 21 Dec. 1987.

55c Cf *Snepp v US,* 444 US 507 (1980) (account of profits of a book).

56. [1984] 1 WLR 892. *Cf Malone v Metropolitan Police Commissioner* [1979] 2 All ER 620 where the telephone tapping was by the police and not illegal.

57. *Franklin v Giddins* [1978] 1Qd R 72. See also *Ashburton v Pape* [1913] 2 Ch 469 and *Philip v Pennell* [1907] 2 Ch 577.

58. See *Shiel v Transmedia Productions Pty Ltd* [1987] 1 Qd 199 or 211. The current position of the law on civil remedies to enforce criminal statutes is somewhat confused: see *Lonrho Ltd v Shell Petroleum Ltd* [1982] AC 173.

59. (1983) 133 New L J 105.

60. (1986) 4 NSWLR 457. See also *Shiel v Transmedia Productions Pty Ltd* [1987] 1 Qd R 199 where a conversation was intercepted contrary to privacy legislation by a concealed tape recorder. Although this conduct was described as "thoroughly reprehensible" the refusal to grant an injunction was upheld.

61. Although it has not yet been necessary to determine that question.

62. See the approach adopted in the *Lion Laboratories* case (infra n 73) and *X v Y* (The Times, 11 Nov 1987).

63. [1984] 1 WLR 892 at 898.

64. *A-G v Leveller Magazine* [1979] AC 440 at 466.

65. The phrase of Wood VC in *Gartside v Outram* (1857) 26 LI Ch (NS) 113 at 114.

66. *The Times,* 31 October 1984. The *Cork* case is also of interest in that (i) the information was only confidential because the source requested the reporter that it be treated as such and (ii) it was surreptitiously obtained by a recorder concealed on the reporter's person.

67. [1968] 1 QB 396.

68. [1984] 1 WLR 892 at 898.

69. (1986) 136 New LJ 799.

70. [1973] RPC 627; see also *Hubbard v Vosper* [1972] 2 QB 84 and, most recently, *Church of Scientology v Miller, The Times* 23 Oct 1987.

71. *Schering Chemicals Ltd v Falkman* [1982] QB 1.

72. Supra n 67. In *Church of Scientology v Kaufman* (supra n 70) Goff J described the tenets of scientology as "absolutely nonsensical mumbo-jumbo".

73. (1985] QB 526.

74. Ibid at 551.

75. *Woodward v Hutchins* [1977] 1 WLR 760.

76. Supra n 73.

77. A similarly generous view was taken by Megarry V.C. in *Malone v Metropolitan Police Commissioner* [1979] 2 All ER 620 at 635: "There may be cases where there is no misconduct or misdeed but yet there is a just cause or excuse for breaking the confidence." He instances the hypothetical case of an "impending chemical or other disaster" of which the public ought to be informed. Cf the view taken by Ungoed-Thomas J. in *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 260. In *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 the Law Lords appeared to accept that there was no sufficient public interest to excuse disclosure in a case where leaked documents revealed mismanagement and governmental intervention in the steel industry; and in *X v Y (The Times* 11 Nov 1987) Rose J. held that the public interest in knowing that two practising doctors were being treated for AIDS at an identified hospital was outweighed by the need for confidentiality within the health service.

78. *A-G for UK v Wellington Newspapers Ltd* HC Wellington CP 421/87, 15 Dec 1987. This point was not considered by the Court of Appeal: CA 203/87, 21 Dec 1987.

79. It was alleged that the company published the material "Knowing of and wilfully disregarding Wright's said breaches of fiduciary duty and has itself thereby participated in . . . such breaches." Davison C J said that this wording in effect pleaded that the company was liable as a constructive trustee.

80. Lord Denning took the view that even if a newspaper comes by information innocently it can be restrained from publishing if it later learns that it was

originally given in confidence: *Fraser V Evans* [1969] 1 QB 349 at 361. See Stuckey (1981) 4 UNSWLJ 73.

81. Press Council Annual Report for 1974, pp. 10-11.

82. Report, *Breach of Confidence,* 1981, reprinted 1983.

83. There has been quite a lot of writing on the general topic of breach of confidence. Gurry, *Breach of Confidence* (1984) is the fullest treatment. See also the English Law Commission's report, supra n 82. Two articles which emphasise the effects of the doctrine on the media are Thompson, (1985) 6 *Journal of Media Law and Practice* 5 and Cripps (1984) 4 OJLS 361.

84. The English Royal Commission on the Press (1977) Cmnd 6810 regarded intrusion into privacy as the worst aspect of the press's performance.

85. Although when Sir Thaddeus McCarthy retired as Chairman of the New Zealand Press Council he noted intrusion into privacy as an area which caused him some concern.

86. See the review of privacy in New Zealand prepared for and in consultation with the Human Rights Commission by T. J. McBride (1985); and Data Privacy, An Options Paper (1987) by T.J. McBride.

87. Particularly in regard to the appropriation of photographs for advertising purposes: eg *Tolley v Fry (J.S.) & Sons* [1931] AC 333.

88. *Tucker v News Media Ownership Ltd* High Court Wellington CP 477/86 22 October 1986 (Jeffries J.) 23 October 1986 (CA) 7 November 1986 McGechan J.

89. [1897] 2 QB 57.

90. As to overseas legislation see, for example, the Data Protection Act 1984 (UK), the Privacy Act 1982 (Canada), and the Privacy Act 1974 (USA). Data Privacy, An Options Paper (1987) by T.J. McBride, contains a comprehensive survey. As to reports, see the Younger Committee Report (1972) (supra n 4) and the Report on Breach of Confidence (supra n 82) in England; ALRC Report no. 22 *Privacy* (1983), ALRC Report no. 11 *Unfair Publication: Defamation and Privacy* (1979). In New Zealand see *Personal Information and the Official Information Act: Recommendations for Reform* (1986) by the Information Authority, and the McBrides report, supra.

91. ALRC Report No. 11 *Unfair Publication: Defamation and Privacy* (1979). See clauses 19-23 of the draft bill at pp 214-215. See also pp 117-122.

92. A point made by the Younger Committee.

93. Cl 21 (n) of the draft bill.

94. The Commissioner excluded from the proposed privacy provision any facts which were "matters of public record".

95. A point made strongly by McGechan J. He described Mr Tucker as a "reluctant debutante" in the public eye.

96. Although in the 1985 Esso Lecture Sir Zelman Cowan said that if the Press Council is able to determine whether privacy has been improperly infringed so ought the Courts.

97. Note also the conclusion of the Australian Law Reform Commission: "In Australia the number of privacy-invading publications appears to be small." ALRC Report no 11 at 121.

98. *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

99. The *Savoy Hotel* case (supra n 59).

1. *Informetrics Business Services Ltd v BCNZ* High Court Wellington CP 363/87, 7 September 1987.

2. *A-G for the United Kingdom v Wellington Newspapers Ltd* High Court Wellington CP 421/87 5 August 1987. There were, of course, similar injunctions in the UK, the widest being against the BBC to prevent their publishing any revelations from any source about the Security Service: see *The Times,* 4 Dec 1987.

3. *Mount Albert City v BCNZ* High Court Auckland A421/81 5 May 1981 the Court finding the programme might prejudice the issues in the trial. However other applications relating to contempt have been unsuccessful, eg *Knapp Roberson & Associates v Roberson & Edward* High Court, Auckland CP 792/87 10 June 1987 (although conditions were placed on the broadcast.)

4. *Tucker v Hews Media Ownership Ltd* (supra 88).

5. *Gulf Oil Ltd v Page* [1987] 3 WLR 166.

6. *BCNZ v Mafart and Prieur* CA 58/86, 24 April 1986.

7. *A-G v Newspaper Publishing Plc* [1987] 3 All ER 276.

8. Although the case refers to the English Contempt of Court Act 1981 there can be little doubt that its rationale applies in New Zealand. Although the Court of Appeal found that an intent to impede the administration of justice was required, it said that this could be inferred from the circumstances, including the foreseeability of the consequences: Donaldson MR at 304, Lloyd LJ at 310.

9. The rule in *Bonnard v Perryman* [1891] 2 Ch 269, applied in New Zealand since *Cyanamid* in *McSweeney v Berryman* [1980] 2 NZLR 168 and in England in *Herbage v Pressdram Ltd* [1984] 1 WLR 1160.

10. *Fraser v Evans* [1969] 1 QB 349 at 360.

11. See his judgment (dissenting) in *Hubbard v Pitt* [1976] QB 142. In *Hubbard v Vosper* [1972] 2 QB 84, 96 he said "We never restrain a defendant in a libel action who says he is going to justify. So in a copyright action, we ought not to restrain a defendant who has a reasonable defence of fair dealing. Nor in an action for breach of confidence, if the defendant has a reasonable defence of public interest. The reason is because the defendant, if he is right, is entitled to publish it: and the law will not intervene to suppress freedom of speech except where it is abused."

12. See especially Fox LJ at 900. But was it in *Lion Laboratories?* The case was not referred to by name, and the eventual holding was that an injunction should not be granted because the defendants had satisfied the court that they had "a serious defence of public interest which may succeed at the trial." Yet Stephenson LJ distinguishes the defamation rule; the defendants had to do more than raise a plea of public interest, they must show "a legitimate ground for supposing it is in the public interest for it to be disclosed."

13. Supra n 5. This case might be regarded as a dangerous precedent, not just because of the interim injuction point, but because of its use of the conspiracy concept in the context of publication.

14. (1986) 136 New LJ 799 at 799. (Emphasis added.)

15. *The Times,* 5 Dec 1987.

16. Although, as I will suggest later, even plaintiffs may find its constraints unsatisfactory.

17. By section 4 of the Defamation Act 1954 the plaintiff need not prove special damage in either written or spoken defamation: and general damage is presumed.

18. Sometimes of course, financial and other observable loss does occur, as for instance if the plaintiff's business declines or he loses a job as a result of the defamation.

19. See for example *Fielding v Variety Inc* [1967] 2 QB 841. Cf *Herald & Weekly Times v Hawke* [1984] VR 587 where it was held that an interrogatory asking the plaintiff what actual injury had been suffered to his reputation was improper and oppressive.

20. And sometimes as defendants too — defaming, as well as being defamed, is a

risk of public life.

21. To take three examples: In 1986 Sir Peter Hall, head of the National Theatre, considered bringing a defamation action in respect of things said about him in a newspaper. He was advised that because the case involved a difficult point of pleading it could be long and very costly. He decided not to proceed. "In other words I cannot sue for a statement I consider to be untrue and defamatory because I dare not risk losing half a million pounds." (*The Independent* 30 Sept 1987). In 1981 Jonathan Aitken was sued over an article, meant to be humorous, which he wrote in the *East Kent Critic:* the action was in respect of twelve "light-hearted words". The case "took up four years of preparation and five days of intense argument in Court" before eventually judgment was entered for Mr Aitken. His costs were £30,000. "The mountains surely do not need to go into such labour to produce a ridiculous mouse." *(U.K. Press Gazette,* Feb 11 1985.) The *Economist* was recently sued over allegations that a certain newspaper had been set up with a Soviet subsidy. The trial began, but the jury was discharged; costs by this time amounted to £600,000. The *Economist* commented that the dice were loaded against defendants in defamation cases: "This plain imbalance has, for some time, accounted for a growing pressure to overhaul the law." (18 April 1987).

22. Mr T. Goddard discussed the defence in his paper to the 1987 Law Conference.

23. Report on Defamation (1977). The Committee sent a questionnaire to members of the media on this and other questions.

24. [1961] AC 1090.

25. *Templeton v Jones* [1984] 1 NZLR 448. English Courts have recently relaxed this rule: see the article by Fowler [1987] NZLJ 217.

26. E.g. *Christchurch Press Co v McGaveston* CA 191/84 13 Dec 1985.

27. *Christchurch Press Co v McGaristan* supra n 26.

28. *Blackshaw v Lord* [1984] QB 1 (although no one could quibble with the decision in this case).

29. [1960] NZLR 69 (CA); [1961] NZLR 22 (PC).

30. The fullest recent discussions of the authorities are in *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, *Templeton v Jones* [1984] 1 NZLR 448, and *Potroz v Taranaki Co-op Dairy Co Ltd* High Court, New Plymouth, CP 21/86.

31. *Smiths Newspapers Ltd v Becker* (1932) 47 CLR 279 at 304 per Evatt J.

32. *Brooks v Muldoon* [1977] 1 NZLR 1 at 8-9 per Haslam J.

33. The Iowa Libel Research Project has begun a Libel dispute resolution programme: see *Dispute Resolution* Summer 1987.

34. The Australian Law Reform Commission recommended such a provision: Report no 11.

35. Proved or likely pecuniary loss should of course be recoverable. It is interesting to note that the Supreme Courts of Canada has itself placed a limit on non-pecuniary damages in personal injury cases. There is some evidence that the lower Court are being influenced by this in defamation cases: see e.g. *Snyder v Montreal Gazette Ltd* (1983) 5 DLR (4th) 206 Quebec CA. There are precedents for statutory limitation on damages: e.g. Human Rights Commission Act 1977 s.40.

36. *Gulf Oil Ltd v Page* [1987] 3 WLR 166.

37. E.g. *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 259; *Commonwealth of Australia v John Fairfax & Sons Ltd* (1981) 55 ALJR 45 at 51.

38. "Press freedom" is also mentioned by name in some of the judgments. See, for instance, the judgment of McGechan J. in the *Tucker* case (supra n 88), and *Alex Harvey v BCNZ* [1980] 1 NZLR 163.

39. See *Cork v McVicar* in the section on breach of confidence, and the *Willesee* and *Bacon* cases in the section on contempt of Court.

40. [1930] 1 QB 130 at 139.

41. Although it has, interestingly, been said in Australia that the media may still be liable as a party under other sections of the Act: *Advanced Hair Studio Pty Ltd v TVW Enterprises Ltd* (1987) ATPR 40-816.