TACTICS AND PLEADINGS IN DEFAMATION

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This is not an easy paper to write. I do not believe there is any area in the law in which the courts have managed to retain so successfully the intricacies of 19th century pleading. The difficulties are compounded by a constant requirement to exercise often difficult value judgments from the time the complaint arises until the time it is either settled or determined in court. When it is further appreciated that the whole topic is fraught with such emotive issues as a individual's reputation, the right to free speech, and the duty of the press to expose corruption wherever it might be found - then it is not surprising that this area remains as complex and as controversial today as it has been throughout this century.

For the purposes of this paper I propose not to distinguish between slander and libel. For all practical purposes they can be treated as the same.

Much of what I will say will be known to most of you. This paper is directed at the working journalist as well as the practising lawyer. I have tried to refer to some of the pitfalls which I, and others who practice in this field, have fallen into over the years with the pious hope that others might avoid them. Obviously in the final analysis it is impossible to comment in any particularly helpful way on issues involving judgment and tactics. These alter in subtly different ways in every case that you will be involved in. However, I believe there may be some basic comments on pleadings and tactics which are common to enough defamation cases to make it worthwhile to mention them. Like so many legal problems the approach is often a matter of commonsense coupled with sufficient confidence to make the decisions in the first place. Having said that I believe that this is an area in which beginners should be wary. It is normally rash for laymen, no matter has experienced in the field, to attempt to settle defamation actions, or worse still to make decisions to run them or defend them without obtaining competent legal advice. The *Eyre v Wilson & Horton* litigation in 1967 and 1968 is a salutary lesson on the perils that can arise in such circumstances. AS for lawyers it is probably preferable to have someone running the litigation who has had some experience in this field. Hopefully it will be clear by now that that person should be brought in from the outset rather than halfway through the litigation. By that stage it will almost certainly be too late to alter the course that the litigation has already taken.

The Start

Generally speaking these days the defamatory statement will have been published in a newspaper, magazine, television or radio. consequently the plaintiff will be concerned initially with stopping the damage as soon as possible. He will almost certainly be upset, angry and determined to right what he sees as a serious wrong which will be read and remembered by thousands of people. Almost certainly his instructions will be to write immediately to the defendant demanding an immediate retraction and threatening large sums of damages.

There is certain advice which I believe should always be given to a potential plaintiff at the first meeting. It should include the following:—

(a) The Oscar Wilde warning. There is no area of litigation in which you should warn your client more strongly of the perils of launching such proceedings. Once started they become increasingly difficult to stop other than by a potentially humiliating and damaging withdrawal.
(b) Few plaintiffs in New Zealand have made money out of a defamation action.
(c) Even fewer plaintiffs have not regretted at some stage in the proceedings that

they were ever launched.

The letter should make it clear what statements are being complained about and, depending on your instructions, should normally request an immediate retraction. It should be made clear that the positioning and terms of the retraction are subject to your approval. Normally you would reserve your right to issue proceedings whether or not a retraction was published.

The defendant's position at this stage is unenviable. Certain actions taken by a defendant at this stage necessarily dictate the course of the litigation. Once an apology and retraction is published then generally speaking the only remaining issue is the amount of damages that will have to be paid. On the other hand there is no better time to settle a defamation action than within the first few weeks of the incident taking place. Normally the plaintiff is still treating a retraction as being his primary aim. Attitudes have yet to harden.

An offer of a suitable retraction and something towards the complainant's costs settles many potential actions.

Unless a clear defence is available then generally speaking a settlement should be negotiated. From my experience it would be rare for a defendant to pay out more in an early settlement than he would two years later particularly if account is taken of legal costs and executive time.

On the other hand if the defendant believes the statement to be true of if the reporters or management consider that some principle is at stake then a complete denial is appropriate.

Statement of Claim

Generally speaking the law has developed the concept of two categories of meanings in a defamation action —

(1) The natural and ordinary meaning; and
(2) The innuendo

In defining what is the natural and ordinary meaning of the words complained about the following principles taken from Duncan and Neill on Defamation, second edition, at page 7, are set out as clearly and accurately as anywhere:-

(a) The Court decides the natural and ordinary meaning as a question of fact by attributing to the words the meaning which the Court considers that they would convey to ordinary reasonable persons. It is not limited to the literal meaning of words but includes any inference or implication which would reasonably be drawn. *Rubber Improvement Ltd v Daily Telegraph Ltd* 1964 AC 234 at 258.
(b) The sense in which the words were intended is treated as irrelevant. *Slim v Daily Telegraph Ltd* 1968 2 QB 157.
(c) The sense in which the words were *in fact* understood is treated as irrelevant though, it seems, regard will be had to the sort of people to whom the words were or were likely to have been published.
(d) The words are construed in their context.
(e) Where a case is tried with a jury the decision as to the natural and ordinary meaning of the words is for the jury, but the Judge may first have to rule whether the words are capable in law of bearing one or more of the meanings for which the parties contend.

Since the meaning in which the words were in fact understood is irrelevant it follows that a plaintiff may be defamed even though the reader did not believe the imputation against the plaintiff. As Lord Morris in *Morgan v Odhams Press Ltd* (1971) 2 All ER 1156 at 1168 stated:—

> "It was submitted that if defamatory words concerning A are published to B who refuses to believe that the words are true, then A would have no cause of action. I consider that such a contention is completely fallacious. Apart from any question affecting the measure of damages A's rights would be unaffected by the circumstances that B in fact disbelieved the words."

"It is important that this principle be borne in mind. Typically a plaintiff will have little idea how the defamatory statement has affected him. If the statement has been published in the media it is inevitable that friends or business acquaintances will contact him. They will normally express scepticism or straight disbelief at the allegations. This does not affect the cause of action although it might be a factor in assessing damages. What of course should be borne in mind is that it is the friends or business associates who do not contact the plaintiff and who for varying reasons believe or are influenced by the statements are the ones which cause problems.

This principle is important as a potential plaintiff is often discouraged when he is unable to find witnesses who will say they were influenced by the libel.

These principles lead to an important practical point. If a plaintiff is relying on the natural and ordinary meaning only then he is not entitled to call evidence at the trial as to what the words mean or were understood to mean by other witnesses. Evidence is given only that the words were said and it is up to the Judge and jury to rule on whether the words are capable of and were in fact defamatory.

The precise words or statements which are alleged to be defamatory should always be pleaded. If, as is sometimes the case in slander, the plaintiff is not sure what the precise words were, then it is probably permissible to set Out the words the plaintiff believed were said. Normally this problem would only arise if the statements had been made on radio or on television. In those circumstances the plaintiff's advisors should write to the station immediately advising the station that a writ is contemplated and asking for the tape to be kept and a copy sent to the advisors immediately. It is common practice for television and radio stations to keep tapes of everything that is said for a certain time. Should the station destroy the tapes after they have received such a letter then the plaintiff is obviously in a significantly stronger position than if the letter had not been written.

A reminder of the importance of pleading the precise statements rather than articles in full was given by *Williamson J in Scott v Fourth Estate Newspapers Ltd* (1986) 1 NZLR 336.

The True and False Innuendo

Much confusion has arisen from this rather arcane distinction. The false or popular innuendo is nothing more than a recognition that a statement may often have more meanings than the literal one. provided the further inferences alleged by the plaintiff are inferences which a reasonable reader of the statements would accept then these inferences are properly pleaded as part of the natural and ordinary meaning of the words.

On the other hand the true innuendo arises where a statement which appears to be harmless is in fact defamatory as a result of some extraneous fact or reference

which only a particular person or group of persons know. A classic example of this would be a statement suggesting that some well-known person has recently been seen visiting a house at a particular address. In fact it is well known to certain people that the address is a notorious brothel. On the face of it the statement is quite innocuous but, if untrue, the statement would be regarded as highly damaging to those who were aware of the extraneous fact not reported in the publication.

These distinctions are not academic. They have to be specifically pleaded and there are very different evidentary rules governing the two causes of action.

Strictly speaking it would be logical to suggest that the false innuendo pleading is unnecessary. The words complained of should speak for themselves and no further pleadings setting out any extended meaning should be necessary. That remains the case where the statement complained of has a clearly defined and an obvious defamatory meaning. However in all other circumstances where the statement is ambiguous or has more than one reasonable meaning it is better practise to set out the various meanings which the plaintiff claims flow from the defamatory statement.

In England it was stated by Lord Denning MR that:—

> "All this satisfies me that in most cases it is not only desirable, but also necessary, for the plaintiff to set out in his pleading the meaning which he says the words bear."
>
> *Allsop v Church of England Newspaper Ltd* (1972) 2QB 161,167

This approach was settled in New Zealand by Somers J when he said:—

> "And in the end I think the courts have come to the view where the natural and ordinary meaning of the words carry more than one meaning or there is room for more than one inference or where they are uncertain a plaintiff is required to state the meaning he proposes to rely on."
>
> *James v New Zealand Tablet CO* (1976) 2 N.Z.L.R. 545

When pleading a true innuendo the Rules oblige you to plead specifically the particulars of the facts and matters relied on - Rule 188 of the High court Rules.

A useful example of how this rule is construed in New Zealand, together with examples of matters wrongly pleaded as facts supporting the alleged innuendo is *O'Brien v Wilson & Horton* (1971) N.Z.L.R. 386.

Included in this judgment is the adoption by Beattie J of the form of pleading taken from *Lewis v Daily Telegraph Ltd* (1964) AC234 where it was suggested that there should be three paragraphs in the statement of claim —

1. A paragraph setting out the defamatory statements
2. If they do not speak for themselves a paragraph setting out those innuendos and indirect meanings going beyond their literal meaning which the plaintiff claims to be inherent in them and
3. If there is the necessary material a paragraph pleading a secondary meaning or legal innuendo supported by particulars under Rule 188.

A further practical effect of the distinction between the two forms of innuendo is that at the trial you will need to call evidence proving the existence of the extraneous matters which are alleged to give rise to the extended meaning of the statement. As I have pointed out earlier it is not permissible to lead evidence on what the plaintiff says is the natural and ordinary meaning of the words complained about. That is something which counsel may address on but it is

invariably left to the judge and finally the jury to determine.

The Defendant — Initial Response

It is important that the initial letter from the plaintiff or his solicitor should be responded to immediately. Concern should generally be expressed at the allegations and further time sought to gather together the information needed to make a sensible assessment as to whether or not there is a defence open to the defendant. consequently this should normally be pointed out in the letter acknowledging the plaintiff's claim. Failing to reply or replying in a cavalier way always sounds discourteous at best and arrogant at worst at the hearing perhaps two years later.

If there are no defences available then it is cheaper to concede immediately and publish a retraction and apology and, if necessary, pay costs and damages. I am quite convinced that in normal circumstances it is far cheaper from a defendant's point of view to settle in this way than to haggle over drafting considerations of the apology or to defend a writ on quantum alone unless the amount claimed is ludicrously high. Having said that I acknowledge that there are differing viewpoints on this issue and there can be advantages to a defendant in delay. Death of the plaintiff, of course, as the law presently stands automatically halts a defamation action. I suppose the age of the plaintiff should be taken into account when making a decision as to whether it should be defended or not. I know of several perfectly valid defamation actions which did not settle because the plaintiff was claiming too much and which were ultimately withdrawn when the plaintiff died.

There is also no doubt that for many people litigation exhaustion can occur more speedily with defamation than with most other forms of litigation. That is normally because the expected or claimed effect on the plaintiff's reputation did not in fact occur. consequently two years later when the outrage has died away and the cost continuing to mount there are quite understandable grounds for settling claims. To some extent it is a question of instinct and gut feeling as to which course would ultimately cost your client less. However I consider that a deliberate decision to defend a defamation action, knowing there is little or no chance of succeeding merely to try to force the plaintiff into settling, is a risky decision and is likely to rebound in an alarming manner.

Corporations

Companies can and often do sue for defamation. However there is an important distinction between the damages claimable by a company and that claimed by a person. A company can only sue if it is defamed in the way it conducts its business i.e. its trading character. Consequently it can sue for allegations that it is insolvent or run in a dishonest, improper or inefficient manner.

Parachutes & Para Equipment v Broadcasting Corporation of NZ Limited (1895) BCL 1439 is an example of a company claiming quite substantial damages for an attack on its trading character.

Actions for defamation by companies should be contrasted with actions for slander of title which technically are than satisfactory. It is probably possible to run the two actions together. It might be arguable that a company which deliberately markets shoddy goods has also been injured in its trading character.

It will be readily appreciated that damages arising out of some investigation into

corporate trading could be huge if the allegations could not later be substantiated. As the Bell Booth case in Wellington has recently shown the guarantee that a plaintiff will succeed in such an action and, in the case of failure, the costs can also be huge. That case is also an example of the care which a plaintiff must take before launching such an action. Obviously the initial damage done to the company can be continued and compounded by constant references to the litigation in the press and the inevitable inferences that must flow should the plaintiff ultimately fail.

DEFENCES

Justification

This must be both the classic and the most dangerous defence to rely on. classical in the sense that truth is a complete and, to most laymen, the only defence that should be available; dangerous because of the fetters that have been placed on defendants over the years by the courts and because of the punitive element which hangs over the head of a defendant relying on this defence.

Firstly the onus of proving justification lies firmly on the defendant. The reason for this is that the law presumes that defamatory statements are false and thus the defendant is required to prove that they are true.

Second while a defendant may not have to prove the truth of every detail of the words complained of it is still necessary to prove the sting or gist of the libel. However this does not allow any great relaxation of the part of a defendant as was pointed out by Lord Shaw in *Sutherland v Stopes* (1925) AC47 at 79:—

> "If I write that the defendant on March 6 took a saddle from my stable and sold it the next day and pocketed the money all without notice to me, and that in my opinion he stole the saddle, and if the facts are truly found to be that the defendant did not take the saddle from the stable but from the harness room, and that he did not sell it the next day but a week afterwards, but nevertheless he did, without my knowledge or consent, sell my saddle so taken and pocketed the proceeds, then the whole sting of the libel may be justifiably affirmed by a jury notwithstanding these errors in detail."

"In an unreported decision, *Wilson v Jones* (1979) BLC 554 McMullin J accepted that not every word had to be proved and the main gist of the allegation was sufficient. But it was reaffirmed that it had to strictly proved.

Defendants would not be reassured by the success Mr Mihaka had when he successfully sued the Wellington Publishing Co Ltd and obtained an award from a jury in 1975 for $5,000.00 for the incorrect claim in a book review that he had spent most of the last 15 years in jail. This was quite incorrect. He had only spent a year in jail although during a period of 11 years he had a list of 31 convictions of varying degrees of significance.

Mihaka v Wellington Publishing Co Ltd (1975) 1 N.Z.L.R. 10.

A decision to plead justification should not be taken without careful thought on whether the sting of the libel can be justified in its entirety and what the consequences might be for an unsuccessful defendant.

Lord Denning in *Associated Leisure v Associated Newspapers* (1970) 2QB 450 said:—

> "A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure

to establish this defence at the trial may properly be taken in aggravation of damages".

Bearing in mind the onus of proof and the requirement of a defendant to prove precisely the allegations complained about by the plaintiff it is not surprising that successful defences are comparatively rare. The cost of failing to establish the defence can be considerable.

It has been held on many occasions that the conduct of the defendant both prior to the hearing and during the hearing can be taken into account when assessing damages. A defence of justification necessarily requires the statements to be repeated and justified during the hearing. If the case is given wide media coverage, as is often the case, there may be a legitimate basis for saying that damages should be increased should the defence fail. Nevertheless this principle has a chilling effect on any defendant planning to run such a plea. There are at least as compelling arguments suggesting that it is in the public interest that defendants should be free to run such a defence without such draconian consequences hanging on such imponderables as a jury decision.

It should not be thought that judges today are less likely than in former years to be moved by such applications by the plaintiff. In a recent decision by Gallen J. in *Potroz v Taranaki Co-Operative Dairy Co Ltd* (1987) BCL 1283 the judge increased the damages claimed from $50,000.00 in respect of each of two statements to $70,000.00 and $65,000.00 as a result of the conduct of the defendant. This was granted during the hearing.

The conduct of the defendant amounted to making enquiries before the case started as to the settlements the plaintiff had already received from other defendants for the same statements. under the Defamation Act 1954 a defendant is entitled to lead evidence as to any settlements the plaintiff has already received for the same defamatory statements. Despite that statutory right the judge, in a decision which I consider wrong and would hope would not be treated as a precedent, increased the amount claimed quite substantially. This is simply the last of a long line of cases which reflect the problems that any defendant has with this plea. Bearing in mind the public interest in ensuring that the newspapers and other media continue to investigate and make public scandals and questionable conduct of persons and companies in the public eye some form of reform in this field is long overdue.

Difficult tactical decisions sometimes arise when a plaintiff is aware that part of the statement complained of can be justified and part not. A plaintiff is entitled to choose that part of the statement which he considers to be defamatory. He is also entitled to specify a particular meaning which he considers the statement has. A good example of this selective pleading was in the recent New Zealand case of *Templeton v Jones* (1984) 1 N.Z.L.R. 448. Mr Templeton had described Mr Jones as "a man who despised bureaucrats, politicians, women, jews and professionals... . Mr Jones is a man who seems to hate. Mr Jones is a man who despises many people"

When Jones sued he ignored all allegations other than the allegation that he despised jews. He was quite entitled for tactical reasons to isolate one claim. This in turn created real tactical problems for the defendants.

The basic principle is that a defendant is not entitled to justify a libel which has not been pleaded. However if the defendant could prove that Jones despised

bureaucrats, civil servants, politicians and women as well as jews should he not be allowed to plead these particulars. The answer the court of Appeal gave was that he could not.

Cooke J. said at page 452:—

> "The allegation that the Plaintiff despises Jews is not reasonably capable of being treated as other than a distinctive charge. It is obviously different, for instance, from the allegation that he despises women. It is true that many of the allegations in the passage quoted are variations on or illustration of a theme; namely that the plaintiff indulges in the politics of hatred. They are specific and separable allegations nonetheless."

As a result the defendant was not entitled to plead these further particulars. It would follow that the defendant would not be entitled to call the evidence referred to in the particulars at the trial. Tactically it was obvious that the defendant was seeking to show that in general terms Mr Jones was an outrageous bigot who held extreme views on many other subjects other than jews. The effect of this evidence on the jury would be significant. It is yet another example of the Court's sensitivities to the rights of a plaintiff in defamation actions.

A later case in the UK court of Appeal shows how fine a line is required in this area of pleading. In a somewhat analogous situation the plaintiff sued The Observer as a result of a long article it ran on the affairs of Polly Peck (Holdings) Plc. The plaintiff chose to sue on only one allegation in the article. The defendant sought to justify the matters complained of by referring to the article as a whole. The court of Appeal allowed the defendant to look at the whole publication, and to plead accordingly, in order to argue that the words complained about had a meaning different to that alleged by the plaintiff. If that could only be done by referring to statements in some other part of the article then that was fortuitous and allowable. *Templeton v Jones* was discussed. O'Connor LJ thought that the defendant in that case might have been entitled to introduce the particulars which were rejected on the basis that the plaintiff was an intolerant bigot preaching politics of hatred in the hope of political advantage, and that, if that was the sting of the passage as the whole, then those particulars should be admitted.

At the least the advisors to a plaintiff who seeks to isolate one part of an article as being defamatory should warn their client that unless the statement is clearly severable from the rest of the article then a defendant may be entitled to plead and introduce evidence on all the other allegations in the publication. Even if the plaintiff is ultimately successful the cost to the plaintiff in terms of further publicity and damage to his reputation may be considerable.

Finally particulars of justification should be drawn with care. Not only are you restricted at the trial to evidence dealing only with those particulars but discovery is also limited on the same basis.

A holding defence including a series of denials is dangerous. It is customary for plaintiffs to plead that the words complained of were published falsely and maliciously. A bare denial is tantamount to a plea of justification and has been held to be such. *Stredwick v Wiseman* (1966) N.Z.L.R. 263.

It is possible to plead a partial justification provided it is recognised that this is essentially a mitigation plea rather than a complete defence. In the Mihaka case it would have been possible for the defendant to have pleaded as partial justification that he had been in jail for one year and perhaps had been convicted of 31 offences.

This must be pleaded with some care.
Plato Films Ltd v Speidel (1961) A.C. 1090.

Fair Comment

This defence is applicable for expressions of opinion on any matter of public interest. The following requirements are necessary:—

(i) the comment must be based on provable facts
(ii) the comment must be on a matter of public interest
(iii) the comment must be recognisable as comment rather than as a statement of fact
(iv) the comment must be fair in the sense that it could be uttered by a fair minded if bigoted man
(v) the defence can be defeated if the defendant was actuated by express malice

The defence of fair comment is an important defence and does provide some real scope for a defendant. However as we have come to expect there are also significant limitations for a defendant.

A necessary ingredient is that any comments must be based on facts which must be correct. The rationale is obvious. It should not be a defence if the factual basis which triggered the potentially damaging comment was incorrect.

It is a pleading requirement for a defendant to specify which of the words or matters complained of are statements of fact. He must further particularise the facts and matters on which he relies in support of the allegations that the words or matters are true. Rule 189 of the High Court Rules.

Section 8 of the Defamation Act 1954 now provides some assistance to a defendant who is unable to prove the truth of all the matters which he relied on when expressing the opinion. However he must be able to prove sufficient of those facts which would allow his comment to still be treated as fair.

The second requirement is that the comments must be on a matter of public interest. Again the onus is on the defendant. Generally speaking reviews of books or plays, reports on public meetings or the conduct of people well known to the public are all matters of public interest. Similarly comments on the administration of justice or management of public institutions and probably public companies.

In practice the most difficult area tends to be in deciding whether or not the comment was fair. Like so many of the terms regularly used in defamation the phrase "fair comment" is misleading. This is because generally speaking the defendant has to show no more than that the comment is one which someone prejudiced although honest could hold.

It is extremely difficult to know where the boundaries lie. Criticism must not be used as a cloak for mere invective. In *News Media Ownership v Finlay* (1970) NZLR 1089 the court of Appeal agreed with a jury decision rejecting a defence of fair comment on the basis that the statements went beyond the bounds of fair comment.

The litigation arose out of a speech by Dr Finlay in the House criticising Truth on the basis that "it had been carrying on an unremitting, unrelenting and unprincipled campaign against the penal policy followed by the Department of Justice". In fact Truth was advocating a campaign for birching criminals. As a result Truth published a later issue extremely critical of Dr Finlay stating that "as a noted Auckland lawyer he obviously has a very real material interest in the

continuance of Dr Robson's ineffective measures that offer no deterrent to street bashers . . . . perhaps Dr Finlay is more concerned with profits".

It was argued that amongst other defences the defence of fair comment was appropriate. North P. rejected the argument that the honesty of the publisher was the only requirement. AS well, there has to be an element of fairness inherent in the criticism although the courts are entitled to be tolerant in this assessment. However the imputation of disgraceful motives to the plaintiff went clearly beyond the bounds of legitimate criticism.

So to the famous criticism of Liberace by Cassandra of the Daily Mirror. He described Liberace as this "deadly winking, sniggering, chromium plated, scent impregnated, luminous, quivering, giggling, fruit flavoured, mincing, ice covered heap of mother love. . . . .without doubt he is the biggest sentimental vomit of all times. Slobbering over his mother, winking at his brother and counting the cash at every second, this superb piece of calculating candy floss has an answer for every situation".

Liberace claimed that Cassandra was alleging he was homosexual while Cassandra claimed that it was legitimate criticism without any such allegation. Indeed Cassandra suggested that such a suggestion was fantastic. Not surprisingly the jury awarded £8,000.00 damages.

Absolute Privilege

Any statement made in the House of Representatives is absolutely privileged. This gives complete protection to the maker of the statement regardless of whether the statement was false or made maliciously.

There is a less well known example of absolute privilege bestowed by the common law which gives complete protection to any statement made by a high Officer of state in the course of his official duties. See *Peerless Bakery Ltd v Watts* 1955 N.Z.L.R. 339.

Qualified Privilege

It is this area of the law which holds more interest for reporters and lawyers. Qualified privilege in the absence of malice provides a complete defence in the following situations:—

(a) Statements made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them.
(b) Statements made for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive them.
(c) Statements made in the protection of a common interest to the person sharing the same interest.
(d) Fair and accurate reports of judicial proceedings.
(e) Fair and accurate reports of parliamentary proceedings.
(f) Extracts from parliamentary papers and public registers.
(g) certain reports published in newspapers or by broadcasting protected by the Defamation Act 1954 Section 17.

I do not propose to deal in detail with many of these categories. I believe some have more significance than others. But the first ground is one of particular interest to the media. It arises whenever a statement is made in pursuance of a duty to publish provided the persons to whom the defamatory statement is published have

a corresponding duty or interest to receive it. The rationale is that there are certain situations where it is in the public interest that people should be allowed to speak freely on occasions when it is their duty to speak and that the media should be allowed to report them. In such circumstances they have the right to be wrong provided their views are honestly held. Once again, as in the defence of justification, this is a defence which has been often pleaded and is rarely successful. Over the last ten years it has been run by newspapers and television on a number of occasions and has failed on most occasions.

One of the difficulties is showing that all the readers or viewers of the defamatory statement had a sufficient duty or interest to receive the statement. The wider the readership the harder it is to convince a judge that all viewers have this duty. In *Blackshaw v Lord* 1983 2 All ER 311 it was held that the readers of the Daily Telegraph did not have a legitimate interest in reading mere speculation or rumour. If the charges are still under investigation or if the allegations or charges have been authoritatively refuted then this defence would also be difficult to run.

Similarly in *Morosi v Mirror Newspapers Ltd* 1977 2 NSWLR it was held in the case of a publication through the mass media the views of journalists or unidentified persons, or reports of rumours or speculation about controversial matters cannot come within the protection of qualified privilege however interested or curious the public might be about them.

These cases and the subsequent case of *Comalco Ltd v Australian Broadcasting Corporation* (1986) ACTR 1 have driven home that there is no special defence of qualified privilege open to journalists making allegations on matters of public interest to the general public. Firstly, they doubt whether there is any duty to publish such statements when they amount to allegations only. Second they doubt whether there is any legal interest in the readers or viewers seeing it. The latter case involved an action by Comalco against the ABC arising from a report on "Four corners" and was very critical of the treatment by that company of the aborigines. The allegations were incorrect and damages were awarded of $295,000.00. Aggravated damages were considered appropriate as a result of the conduct of the defendant both before and during the trial.

It is further authority for the proposition that there is no general rule that defamation by television is inherently less likely to injure the reputation of a plaintiff than defamation by some less transient mean. In fact many of the defamatory statements were rendered more forceful and indeed memorable by the skilfully presented visual images which accompanied them and this was relevant to the assessment of damages.

To complete this melancholy story of failure by the media I should say that this defence was also argued strongly in the Potroz case. It involved a strike by the dairy workers in the Taranaki region which resulted in milk not being collected for two days and dumped. It caused heated reactions throughout the province and the events leading up to the strike and during it were given considerable prominence by the local newspapers. The defamatory statements were made by Federated Farmers and one of the principal employers. If ever this defence should have been successful it is submitted that this case was the one. Gallen J. disagreed.

Indeed on one of the few occasions that sir Robert Muldoon failed in his extensive defamation experience was in *Brookes v Muldoon* (1973) NZLR 1. This defence was pleaded and rejected. Haslam J. held that the public had no interest,

apart from perhaps curiosity, in learning why Mr Brookes had not been appointed as a Chief Mediator in industrial disputes.

Like so many other defences available in theory they are of little assistance in practice.

Qualified privilege, however, has had greater success when the issue is whether or not the report is a fair and accurate report of proceedings in parliament or in the courts. While qualitative judgments are inevitable on whether the reports are fair and accurate there is at least a fighting chance for defendants to succeed in those circumstances. The difficulty, of course, comes when the newspaper or television report condenses a longer story. They are quite entitled to do this and the courts have accepted that even if some element of distortion results it remains a valid defence provided the report is fair.

The primary requirement is that such reports have to be fair and accurate. In *Cooke v Alexander* (1974) Q.B. 279 the issue was whether a parliamentary sketch giving an account of the impression made on the viewer of certain speakers could have protection under this section. The Court held that it could provided the sketch was fair. Another case suggests that the test is whether the report is *substantially* a fair account.

An interesting case involving the misreporting of what took place in a court was *Grech v Odhams Press Ltd* (1958) 2QB 275. The error was in reporting a supposition by a witness as a fact. It is an excellent example of how accurate court reporting has to be.

One of the dangers of Court reporting arises when only one side is reported. If the effect of that is to give a misleading impression to the public then the paper is at risk.

Generally speaking privilege does not cover any statements that were not made in open court or in pleadings which have been filed but not referred to in open court. Consequently the reporting of the contents of a statement of claim when it is filed is a distinctly risky business. Almost certainly the defendant disagrees with the allegations and since a statement of defence has not been filed it would be difficult to argue that the report was fair and accurate even if such a defence was open to a defendant.

See: *Lucas G Son (Nelson Mail) v O'Brian* (1978) 2 NZLR 289

Part 2 of the First Schedule of the Defamation Act 1954 sets out some eleven cases where qualified privilege is available. The additional requirement here is that there is an obligation to publish an explanation or retraction on behalf of a potential plaintiff who believes he has been defamed. It includes reports of meetings of local authorities, public meetings or inquiries and general meetings of any incorporated company.

Unintentional Defamation

There is one other statutory defence open to the media when the statement was unintentional and an offer of amends was promptly made. Again this defence promises more than it ever delivers. It has been authoritively stated that it has only been relied on once in the United Kingdom and it failed. To my knowledge it has been relied on only once in New Zealand and it also failed.

Malice

This is another term which is misleading. It has nothing to do with the fact that the defendant disliked the plaintiff or had been mean or petty. Its essential feature is dishonesty or being motivated by some indirect or improper motive. It becomes important in defamation as it successfully negates the defence of fair comment or privilege. A trap which counsel have fallen into on many occasions, judging from the reported cases, is that under the rules notice giving particulars of the plea and the matters from which the malice is to be inferred must be filed and served within 7 days of the filing of the statement of defence see: Rule 190 of the High Court Rules.

This Rule has been strictly applied and cases have been lost as a result of defendants overlooking this procedural requirement. It seems anachronistic to me that the 7 day requirement should still have been insisted on under the new rule. I have no doubt that leave would be granted to extend time for filing the notice provided no prejudice to the plaintiff has been suffered. However it would be most unlikely that such latitude would be granted at the trial itself.

Injunctions

There is a long settled rule that a plaintiff cannot get an injunction against a defendant stopping a potential defamation or a repetition of an earlier defamatory statement if the defendant has or is proposing to plead justification. The reason for this is that the public interest requires such allegations to be debated in public.

See: *McSweeney v Berryman* (1982) NZLR 168

In an interesting development last year in *Gulf Oil (Great Britain) v Page* (1987) Ch 327 the courts distinguished this line of authority on the basis that where conspiracy is alleged a court would consider granting an injunction. This may foreshadow a move away from this long standing principle.

Judge or Jury

There is a continuous debate over whether juries or a judge alone are preferable from the point of view of a plaintiff. I do not think there is any firm rule. It is certainly a mistake to answer that judges would necessarily be less generous to plaintiffs than juries.

Either party can insist on a jury. However if one party sets the case down before a judge alone you have only four days to give notice insisting on a jury — see Rule 427.

This issue was recently discussed by Henry J. when he allowed the time to be extended. However this is only likely to be allowed in circumstances where a refusal would be unfair to the defendant. The decision also reflected a bias towards the desirability of jury trials in defamation actions. See *Willis v Katavich* 1988 BCL 9.

Damages

This is possibly the most arbitrary and difficult area in what is already one of the more arbitrary and difficult areas of the law. Generally speaking damages are awarded to give the plaintiff compensation for injury to his reputation and to his feelings, sense of affront and indignation caused by the defamation. Obviously the amount should depend on such further factors as the seriousness of the charge, the

position of the plaintiff in the community and the extent to which the statement was circulated.

It is now established law that in certain situations where the defendant's conduct has been high handed or oppressive punitive damages can be awarded.

See: *Cassell & Co Limited v Broome* (1972) AC 1027 *Taylor v Beere* (1982) 1 NZLR 81

There are no helpful guidelines. counsel are not entitled to address the jury on the basis of previous awards. In fact juries no doubt make awards on the basis of half remembered awards made perhaps years before in circumstances probably quite different to the one in which they concerned with. This merely adds a further element of chance to the lottery which most defamation actions amount to.

Apart from one or two extraordinary high awards the amount of damages awarded in reported cases are not as high as people generally believe. Such awards include £11,000.00, $22,000.00, $15,000.00 (2), $11,500.00, $180,000.00, $35,000.00, $66,000.00 and $44,000.00.

I have attempted to reassess these claims in present day values. They are approximate only but they do give some rough indication as to what those claims will be worth today. Starting with the first claim it would now be worth approximately $246,000.00. The others are $78,000.00, $130,000.00, $116,000.00, $24,000.00, $297,000.00, $58,000.00, and the $66,000.00 award in 1985 is currently worth approximately $90,000.00.

The awards were made in the following cases:

Truth (NZ) Ltd v Holloway (1960) NZLR 69

Medcalf v Broadcasting Council of New Zealand (unreported) A.148/77 Wellington

Eyre v NZPA (1968) NZLR 737

Finlay v News Media Ownership (1970) NZLR 1089

MacDonald v Radio I (unreported)

Birch v Broadcasting Corporation of New Zealand (unreported) 1983

McGaveston & Ors v Christchurch Press Co Ltd 1983 BCL 371

Parachutes & Para Equipment v Broadcasting Corporation of New Zealand (1985) BCL 1439

Potroz v Taranaki Co-operative Dairy Co Limited (1987) BCL 1283

In contrast to these awards there is still the possibility that a jury will award a derisory or contemptuous amount on the basis that defamation has been technically proved but that the plaintiff for whatever reason should not be awarded any damages. In *Pamplin v Express Newspapers Ltd* (1988) 1 WLR 116 the sum of 1/2p was awarded. It is probable that no lower award is likely to be made.

One of the most difficult areas for a defendant in this field is to attack a plaintiff's reputation. AS one would expect the plaintiff is presumed to have an immaculate reputation. However a defendant is entitled to plead and prove, if possible, that the plaintiff has in a general way a bad reputation. The practical difficulty is that the courts have consistently refused to allow defendants to rely on specific facts or circumstances which might infer such a bad reputation. such evidence of that character must also be linked to the sting of the defamatory statement. For example an allegation concerning a plaintiff's professional ability could not be met by evidence of a bad driving record. Evidence of specific incidents reflecting badly

on the plaintiff is normally not admissable. On the other hand a lengthy criminal record is almost certainly admissible as evidence of a general reputation.

See: *Goody v Odhams Press Ltd* (1967) 1 QB 333

In practice, however, it is difficult to prove a bad reputation without referring to specific incidents. It is also difficult to find evidence that can prove bad character. Again a failure to satisfy a judge or jury that the evidence in either admissable or effective leaves a defendant open to an application to increase the damages.

Evidence can also be lead in mitigation that an apology had been published or that the plaintiff had already received damages for the same defamatory statement. My own experience suggests that judges or juries do not seem to be influenced to any obvious degree by an apology. In the Potroz case where the plaintiff had already received some $40,000.00 in respect of the same or similar statements Gallen J. seemed similarly unimpressed by what most lawyers involved in this field would have seen as already generous balm for the wounds the plaintiff had suffered.

The law of defamation is crying out for review. A blueprint for a substantial revision which would remove a number of the anomalies I have referred to is contained in the report of the McKay committee in 1977. Despite protestations by politicians from both parties since then little has been done. While I absolve the present Minister of Justice from this suspicion one cannot help but suspect that one of the reasons why reform has been so slow in this field is the very extensive use of the courts that the politicians themselves have made in this field. The reported cases are littered with actions by politicians bringing cases against the media for slights on their character. politicians themselves, of course, are rarely sued as they tend to keep their comments to statements in the House. They are completely protected. With the law as it stands at present there is little doubt that serious criticism of the conduct of politicians should not be carried out by the faint hearted or the poor.