MEDIA AND ADVERTISING LAW

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PREFACE

In February 1988 the Legal Research Foundation conducted a very successful multi-disciplinary seminar on Media Law - involving participants from various branches from the media as well as lawyers and politicians. One of the addresses, written by Rt Hon Geoffrey Palmer, then the Minister of Justice, dealt with Defamation Reform. His address proceeded from the premise that reform of defamation was needed and promised much. Other papers at the 1988 seminar dealt with developments in Media Law and more technical aspects of defamation.

In this seminar, four years on, the Legal Research Foundation is revisiting the topic of Media Law. It has also expanded the scope of interest to include aspects of Advertising Law.

In the four years that have passed, the promised Defamation Bill has not materialised and many media hopes in this regard have been dashed. In his paper, the Rt Hon David Lange, former prime minister of New Zealand, examines proposals for defamation reform and offers a perspective on the fate of the proposed Defamation Bill.

In his paper Professor J F Burrows, the highly-regarded academic and media commentator, examines some recent developments in Media Law, drawing together such issues as privacy, contempt of court and developments in defamation. Andrew Brown's paper examines two aspects of Advertising Law, the commercialisation in advertising of likenesses, voices, images and persona together with recent phenomenon of environmental or "green" advertising.

DEFAMATION REFORM
RT HON DAVID LANGE CH MP

The first point to deal with is the whereabouts of the defamation bill. Having had its first reading it is before the justice and law reform committee. When it will reappear is unknown to me. The minister of justice was reported recently as saying that no date had been set for its second reading. This is not surprising. The committee is struggling with the reform of companies law and securities law, both of which certainly deserve higher priority than the defamation law.

There is no clamour for the bill to be passed, or at least no clamour loud enough for the government to notice.

It would be wrong to suggest that this state of affairs denotes satisfaction with the law as it stands. The statute is nearly forty years old. It was the subject of a law reform committee report in 1977. The defamation bill was introduced to parliament in 1988, when the minister of justice of the day said that it was incontestable that the law needed to be clarified and simplified.

The fact is that reform of the law is difficult. It raises a conflict of principle which will never easily be resolved, as the bill itself shows. Prospective plaintiffs may rest easy that the bill does not entrust the news media with a new defence of qualified privilege while representatives of the news media complain that the new correction orders may actually oblige them to publish the truth about plaintiffs.

You will gather from that last remark that there is a peculiar difficulty in the reform of the defamation law. The statute law is the responsibility of people who are collectively the most likely group of potential plaintiffs. I don't think it's any accident that the American position, which has raised free expression in matters of public concern to the level of a constitutional guarantee, is the product of the supreme court and not the legislature. There may be members of parliament who are capable of objectivity about the law. I don't claim to be one of them. But equally I'm no more inclined to attribute objectivity to the representatives of the news media. It is awareness of these difficulties as much as anything else which persuades members of parliament that the law may best be left to the courts.

Having acknowledged these handicaps, I propose to discuss the balance between the public interest in the defence of individuals from unjustified attack and the public interest in freedom of information and expression. I shall argue that the balance is not in need of shifting by statutory intervention but that there are aspects of the law which seem to me to defeat both interests and should be remedied.

I should begin by asking if there is indeed a public interest in the protection of reputation. It is probably better expressed as the public interest in the prevention or remedy of harm to individuals.

I don't doubt that words can hurt. Untrue words can lead in some cases to economic loss. But the damage can be far more than economic. Think for a moment of the extraordinary demands made recently for the publication of the names of the supposed customers of a dealer in child pornography. Imagine what it might mean to those who were wrongly identified by any such publication. The law must surely allow those who are harmed in such a way to seek some remedy from those who inflicted the harm.

Is the law as it stands an adequate means of soothing the hurt feelings of individuals? It may be, but only if you have the money. The fact is that an action in defamation is beyond the means of all but a tiny number of the population. People who come to public notice and do not have the means to seek legal remedy for what they regard as a false and hurtful publication may complain to the press council or the broadcasting standards authority if that is relevant, but the remedies available fall short of those available in an action in defamation.

It may I suppose be argued that a cause of action which is not in practice available to all should not be available to a few, but I don't like to argue that two wrongs make a right.

Even for plaintiffs who can afford it, the costs of the action, and the risks it involves, are often out of proportion to the result. It certainly isn't the kind of action a plaintiff can conduct on his or her own behalf. It's a form of action outside the experience of most legal practitioners, and the finer points of the pleadings demand a professional expertise which belongs to what seems to me to be a diminishing pool of practitioners. A full-blown action can't in any way be described as a swift form of justice. The most energetic plaintiff may wait two years after publication before the case comes to trial.

When it does come to trial, the result can be a lottery in which the popularity or otherwise of the plaintiff and the mannerisms of counsel can influence the result as much as any measure of consolation for the damage done to the plaintiff's hurt feelings. We haven't seen here the large awards made in British courts by juries which appear to be passing judgement on the journalistic standards of tabloid newspapers, but that's not to say it can't happen.

There isn't any obvious answer to the problem of uncertainty in awards. It is inherent in an action where the hurt at issue can rarely be easily quantified. I do not believe that damages should inevitably be a matter for a judge alone. Simply because there is little which is scientific about the measurement of damages, they should be left to juries to determine as the best if imperfect indicator of public standards.

These hurdles to plaintiffs aside, does the law go too far in salving the hurt feelings of those plaintiffs who can afford an action? To put it the other way round, does the law represent too great a restraint on freedom of information and expression? Or in another way again, are there cover-ups which remain uncovered because the law is an undue restraint on investigative journalism?

It is hard at this point to resist talking about the current sensation, the calls for an inquiry into the management of the Bank of New Zealand. A lot of information about the bank's affairs has come dribbling into the public view under the protection of parliamentary privilege, which might lead some people to imagine that only in parliament can these matters be safely raised.

In fact, I can't think of much that's been said inside the house that hasn't been reported without privilege in various newspapers, and reported a great deal more coherently and pointedly than anything that's been said in parliament. It seems to me that the case for some kind of inquiry into the bank's recent history was long ago overwhelmingly established, by journalists and analysts and others, without attracting a single writ in defamation. The simple fact that this publicly-owned entity came to the point of collapse is grounds for inquiry in itself. The inquiry is being resisted because the political will to clean out the stable is almost non-existent.

The means of resistance isn't the gagging writ or the threat of legal action. The government seems to me to be relying for its defence on the complexity of the issues. Last week for example the member for Tauranga described a device used by the BNZ to disguise some of its losses. I'm quite sure he didn't understand what he was reading. The difficulty is that you could probably count on the fingers of one hand the number of journalists who understand it.

I don't mean that as a reflection on journalists. The fact is that good investigative reporting of any kind, whether in the print media or the electronic media, is expensive. Reporters must be reasonably knowledgeable about their subject matter. They must spend time on the investigation, perhaps for no result.

If you recall a good piece of investigative writing like the article which prompted the inquiry into medical practice at the national women's hospital, you could easily appreciate that months of work must have gone into it. Reporting of this kind is the exception. There is little serious investigative reporting in the newspapers, none on the radio, and occasional pieces on the television.

This hasn't happened because the news media are cowed by the possibilty of legal action. It's happened because, for reasons which they could explain better than I, the owners of the news media don't put the money into investigative journalism.

The fact of course is that the truth of what is published is a complete defence to any action in defamation. Journalists who do their homework properly do not end up on the losing end of a defamation action.

I don't mean to suggest that the prospect of a defamation writ can't have a deflating effect on journalistic enthusiasm. Journalists do work under pressure, they do make mistakes and mistakes can be costly. But journalists are actually in the same position as the employee who smashes up the company car. Explaining to your employer that you've cost the firm a lot of money isn't a happy experience for anybody.

But another matter entirely is the gagging writ, the writ which is served to intimidate or silence.

The possibility of a gagging writ is hardly a deterrent to most reporting about politicians. The idea that a politician can slap a writ on Television New Zealand or Wilson and Horton and cow them into silence by the likely expense of the action or the mountainous sum of damages claimed is just laughable.

It may perhaps be possible for a wealthy individual or a corporate plaintiff to intimidate a publisher less well-endowed than TVNZ or the owners of the *New Zealand Herald*. It is certainly possible for an individual journalist to be assaulted in this way, and the unfairness of this is incontestable. For that reason alone there seems to me to be a case for legislative intervention to limit the potential abuse of process.

I come now to the vehicle for any reform of the law, the defamation bill.

The bill as I said is now four years old. It was introduced as the result of an undertaking given by the Labour party when it was in opposition to bring in a bill broadly based on the recommendations of the 1977 law reform committee. It was no secret when the bill finally appeared that it had been the cause of disagreement in the government caucus. When he introduced it the minister of justice made the point that the government was not committed to any particular provision of the bill, and was inviting submissions. The opposition speaker on justice, who is now the minister, was equally non-committal.

The main aim of the bill was to simplify the law, to make it more accessible and to reduce the possibility of abuse like the gagging writ. It did not propose any shift in the balance in the existing law between the need to protect individuals from hurt and freedom of information and expression.

In this the bill differed from the authors of the 1977 law reform report, who did propose a shift in the balance. If my recollection is right, it was this proposal which caused most of the argument in the caucus. The committee recommended that there be available to publishers of matters of

public interest, which would certainly cover news reporting and investigative reporting as those terms are commonly understood, a defence of qualified privilege. No matter what the truth of the matter published, a plaintiff could not succeed in an action in defamation if the publisher had acted with reasonable care and had given the defamed person an opportunity to publish a statement explaining or contradicting the offending statement.

This defence is a cautious step towards the American approach, which gives greater weight than our law to freedom of speech and less to the protection of individual feelings. It is the same approach, I might add, as the Americans take to gun control.

In one respect, I can see some attraction in a proposal which would effectively limit the ability of plaintiffs to sue. There is a sense in which the defamation law is a real burden on anyone in public life. If something damaging is published about you, you're expected to sue. If you don't sue, people assume that whatever was published about you by whoever was bold enough to publish it must be true. If you can't afford to sue, you're left with protestions of innocence which are almost certain to fall on stony ground.

If politicians and other potential plaintiffs were greatly restricted in their ability to sue in defamation, there would eventually be a change in the climate of opinion. If you're open to attack and you can't defend youself, people will no longer be entitled to assume that whatever is published about you must be true. Judges and the royal family are the beneficiaries of this kind of approach. People might come in time to discriminate between the obviously sensational and sources which have gained a reputation for honesty and accuracy in their reporting.

I do occasionally rely on the assumption that people discriminate. I was recently the subject of a defamation in the *Dominion* newspaper, which published an extraordinary report of our military response to the Fiji coup based largely on the self-serving recollection of a retired military person. The paper was predictably niggardly in the prominence it gave to rebuttal. I haven't issued proceedings, for two reasons. In the first place, I thought it quite likely that I could publicise my side of the story in some other medium, which proved to be the case. In the second place, the paper's editorial line these days is so distorted by bias that I believed that no reasonable person would give the articles credibility.

But usually I do take action. The problem with giving greater licence to the news media is that we are a small and unsophisticated society, and there isn't a lot of depth in the news media. Having been hurt enough in the past by untrue publications, I'm not sure I could cope with outbursts of the "now it can be told" variety which would certainly follow any relaxation of the law.

My particular concern would be the electronic media. It may be the nature of the medium but there is in television journalism in particular an intermingling of reporting and advocacy which is generally avoided in newspaper journalism.

Television, whose power to influence can hardly be overstated, is itself an active participant in the political process. You may recall the day that Mr Peters announced in parliament the name of the businessman who supposedly had attempted to bribe him. The opinion of almost everyone who was in the house and heard him that day was that he'd made a complete fool of himself, and if you read what he'd said and compared it with what he'd promised, you couldn't draw any other conclusion. Some newspaper reports suggested as much. But on TVNZ's six o'clock news that night, it was a case of he came, he saw, he conquered. No other account of the event could possibly have the impact of that single television item, yet it was an utter failure of objective reporting.

Until I'm convinced that this most powerful medium has a lesser interest in the merely sensational, I shall not be voting in parliament for any greater licence for the news media to avoid actions in defamation.

Having discussed what isn't in the defamation bill, I come back to what is.

The changes the bill proposed in the defences seem to me to be unexceptional. They are essentially a tidying up and clarification. They aim to simpify the language of the defences, changing for example "fair comment" to "honest opinion" and "justification" to "truth", both of which will make it easier for juries to understand exactly what it is they are looking for.

The bill proposes new remedies.

One of the aims of the bill is the encouragement of early settlement of grievances so that people who are more interested in quickly clearing their name than in recovering damages can do so.

The bill allows a plaintiff to seek a declaration that the defendant is liable to the plaintiff in defamation. Unless the court awards otherwise, the successful plaintiff will be awarded solicitor and client costs against the defendant, provided that the plaintiff seeks only a declaration and costs.

Another new provision allows courts to make correction orders. The bill as introduced would allow the court to give directions about the content of the correction, and the time, form, extent and manner of its publication. The order would not usually be made unless the court had given final judgement for the plaintiff. A plaintiff is not precluded from seeking damages as well as a correction order, but there is an incentive to restrain oneself in that the successful plaintiff who seeks only an order will be awarded solicitor and client costs against the defendant. A correction order cannot be made if the plaintiff who also seeks damages is awarded anything other than special damages.

This provision was objected to in submissions to the select committee by representatives of the news media, who took exception on the grounds of freedom of speech to their being obliged to publish a correction. This objection seems to me to be wholly spurious. There is no freedom worth having unless we are responsible in its exercise. If the news media do harm to individuals in the exercise of their freedom of speech then they must take the responsibility of putting right the damage they have done. The publication of a correction or rebuttal may be a more appropriate remedy in some cases than a monetary award. I was sorry to see it reported recently that the minister of justice was thinking of restricting the courts to a power of recommendation that a correction be made, a failure to heed the recommendation possibly going to punitive damages. The order I think should be available.

Professor Burrows has made some more telling criticisms of it, pointing out that the clause as drafted is unclear as to where the burden of proof might be. It may rest on the plaintiff, as the court could not issue a correction order unless it had found as a fact what the truth of the matter was. Professor Burrows also points out that a correction order may have a somewhat narrow application, in that a simple error of fact is easily enough corrected but a more complex defamation may not be. I would not argue for a shift in the burden of prooof, and I would like to see the order renamed a remedial order on the understanding that the court might order correction, retraction or rebuttal in whatever form it deemed an appropriate response to the damage done to the plaintiff.

The bill as introduced makes provision to defeat gagging writs. There may be some deterrent effect in its prohibition of any mention in a statement of claim of the amount of damages claimed in proceedings against a news medium. There may also be some deterrent to intimidatory claims in the provision that an unsucessful defendant will be awarded solicitor and client costs against the plaintiff if the amount of damages claimed by the plaintiff is in the opinion of the judge grossly excessive. I have some reservations about any provision for the striking out of proceedings for which no trial date has been fixed and in which no other steps have been taken for the previous twelve months which does not allow for the possibility that some proceedings are temporarily discontinued not for want of prosecution but for want of money.

Before I finish I should like to deal briefly with one aspect of defamation reform which was hardly material when the defamation bill was introduced. That is the defence of individuals against damaging words spoken under the protection of parliamentary privilege.

I have to say that I do believe there is a place for this complete form of privilege. I think it's important for democratic government that elected representatives be able to speak freely, provided always they speak responsibly.

I was reminded recently of Robert Maxwell, the master of the gagging writ, whose illicit activities remained largely uncovered until he died, when a damburst of revelation swamped the news media. Maxwell of course intimidated by more than the issuing of writs. He was immensely powerful in the very industry the public looked to to disclose his activities. I'd like to think that in similar circumstances here some member of parliament might speak out, safe from the crippling costs of litigation. In other, less dramatic cases, members of parliament may be the only voice which can be raised on behalf of ordinary people against the powerful and privileged.

But the point as I said is that it must be done in good faith. The attack of Mr Peters on Mr Cushing was self-serving and cowardly. The minister of justice, I assume with this case in mind, has proposed that offended parties may make application for the publication in the parliamentary record of some remedial statement and that the privileges committee should determine the issue. I don't have any particular objection to this, but it's hardly a serious solution. People who complain about what's said about them in parliament would have their case determined by members of parliament. There is no judicial detachment there to speak of.

The most effective sanction on irresponsible behaviour among any group of people is the dissapproval of your peers. Most members of parliament refrain from abusing parliamentary privilege, not only as a matter of taste, but because they know that abusing it would earn them the contempt of their fellow members. Mr Peters has our contempt. His standing with the public soars. Which only goes to show that defamation is not the easiest branch of the law.

J B Burrows News Media Law in New Zealand (3rd edition 1990) p 53

MEDIA LAW: RECENT DEVELOPMENTS

J.F. Burrows

INTRODUCTION

After one Seminar of this kind, a disgruntled member of my audience approached me and said that the media always mess things up so badly he believed they should be abolished altogether. We could do without newspapers, radio or television he said. He cannot have meant that of course, because life without the media would be unliveable. As Walter Lippman once said "We would live in an invisible environment". We would know virtually nothing.

Not only do the media supply the information which enables us to govern our lives; they also provide an important vehicle for comment. In a democracy it is vital that there be informed comment on the way we are governed and on the many decisions of both the public and the private sector which affect us. That is free speech in its classical sense. Sometimes that freedom may be used to expose wrong doing, roguery and fraud in the commercial or governmental sectors. Although some may criticise some of the methods used by television programmes like *Fair Go* and the *Holmes* show, there is not the slightest doubt that those programmes have sometimes succeeded in exposing wrong-doing and supporting people who otherwise would have no way of confronting systems which have let them down.

Freedom of speech is thus one of our most fundamental liberties and must be safe-guarded at all costs. That is explicitly recognised in s. 14 of the *New Zealand Bill of Rights Act* 1990. That section has already made an appearance in some media cases[1] and it has clearly influenced the judges' reasoning in those cases. Its long-term effects in media law could be substantial.

However, freedom of speech and of the press can never be absolute, and must be subject to reasonable restrictions. The *Bill of Rights Act* recognises that too.[2] But for the reasons I have given, any restrictions on that freedom must be very carefully scrutinised. Herein lies the paradox. The more freedom one gives, the more that freedom will have its price. On the one hand, errors will be made. Time limits in the media are short (day old news is not news at all); resources and staffing in our media offices are often slender; not all reporters are equally experienced in difficult areas like financial reporting. So, although every care should be taken to ensure that mistakes are not made, it is inevitable that some will be. One hopes that any system of media law will be understanding about that. On the other hand, to survive in an increasingly competitive environment the media must attract an audience. And what attracts audiences is not just information and comment, it is entertainment as well. The public likes to be amused, titillated and shocked. The sensational English tabloid newspapers outsell *The Times* and *The Guardian* by a huge margin. Thus, even when the media wish to convey a serious message they sometimes use sensational means to do so. At other times I am afraid they use sensationalism without much in the way of serious message at all. In doing this they are simply like any other business or trade which wants to attract custom: they are giving the public what they have learned by experience it wants. This tells us the public as much about itself as it does about the media.

However, inaccurate information and excessive sensationalism can be harmful. The law must control them. To allow the media all proper freedom so that they may do good and yet to impose effective controls when they are bad is one of the most difficult challenges faced by our legal system. The balance is extraordinarily difficult to draw. Lord Goodman put it as well as anyone ever has:[3]

> "I still find the utmost difficulty in deciding precisely what middle course is most suitable in a civilised society to procure that no scandal that can legitimately be concealed, no matter of public concern removed from public

1 *R. v. Chignell & Walker* (1990) 6 C.R.N.Z. 476 at 479; *Police v. O'Connor* [1992] 1 N.Z.L.R. 87 at 97.

2 Section 5.

3 (1960) 13 Current Legal Problems 135 at 137.

vigilance, while yet no inoffensive and law-abiding person can find himself pilloried and lampooned for the cruel delectation of public either born or assiduously schooled to love sensation".

Having said in an equivalent seminar four years ago[4] that I did not think the balance achieved by New Zealand law was quite right, I today repeat that assertion. However, there have been signs of some movement in the last four years and I think that today the balance has changed a little. There is doubtless room for vigorous debate whether that change is an improvement.

Media law consists of a series of discrete topics, and in the past there has not been much linking principle.[5] That reflects much of New Zealand and English law. Unlike the Continentals with their codes, we have far too often failed to see the law as a connected whole. I believe that today we are getting better at thinking in terms of principle and policy, and I think that the *New Zealand Bill of Rights Act* 1990 will accelerate that trend in New Zealand. But a legacy of the old compartmentalized approach is that there has been inconsistency in the various branches of media law. While the law of defamation has been extremely hard on the media, other branches of the law, e.g. the law protecting privacy, have been much looser in their control. Some would say that the laws about privacy have been almost non-existent. There may be a direct relationship here, in that courts, frustrated by the inability of the law to deal effectively with some areas of the media's performance, have hit excessively hard in areas where they can; in defamation the media have certainly been hit very hard indeed.

I now wish to take three important areas (privacy, contempt of court and defamation) and attempt to show that in each one of them there has been recent movement. These movements have caused a change in the balance. The bulges in the legal wallpaper have moved a little.

1. PRIVACY

As I have said, in the past the law gave little protection to individual privacy. Provided what was published about an individual's private life was true, there was little that individual could do about it legally. It is not entirely clear why this was so, but perhaps there were three reasons. First is the difficulty in defining what is meant by privacy in any but the most general terms. It is often said that privacy encompasses at least two things (a) the right to keep personal facts to ourselves and (b) the right not to be subjected to intrusive means of information-gathering (by hidden cameras and the like). But even here there is room for difference of opinion. What exactly are personal facts? Different people have different sensitivities as to what is private in that sense. Secondly, unlike fraud, assault or breach of contract it is difficult to verbalise what exactly it is that is damaged when our privacy is infringed, and what form of compensation is appropriate. Even reputation, which defamation is supposed to protect, is less ephemeral than that part of us which is injured when our privacy is infringed. Thirdly, if the law is to act against infringements of privacy there must be clear exceptions in cases where the public interest overrides the individual interest. That too is a very difficult line to draw. Not everyone would agree with the way it has been drawn in America where candidates for high public office are subjected to the most searching scrutiny of their backgrounds and private lives.

However, questions of definition aside, the tactics of the British tabloids have produced a rising crescendo of protest in recent years, and the inability of the law to handle it in a way which is deemed satisfactory has led to demands for change. Reporters have used tactics which no-one could support. The stories include those of a reporter who entered a mental hospital under false pretences and spoke to a relative of the Queen who had long been confined there. And of the team of journalists who obtained entry to the Hospital room where actor Gorden Kaye (of 'Allo 'Allo fame) was recovering from a very serious operation and attempted to film and interview him while he was still in a semi-conscious state. The law here certainly did not behave very effectively: when the Gorden Kaye case went to the Court of Appeal the Court held itself to be powerless to grant remedies for

4 Legal Research Foundation Inc. Seminar, *Media Law*, 25 February 1988.

5 See the discussion by Jolowicz in "The Judicial Protection of Fundamental Rights under English Law" in *The Cambridge-Tilburg Law Lectures* 1979, esp at 5-8 and at 43-47.

breach of privacy.[6] Even if such matters were to be seen as ethical rather than legal, the Press Council did little better than the courts. It was dubbed "a tiger with rubber dentures". In 1990 a Committee headed by Sir David Calcutt made a stern recommendation that the media be given one year to put their house in order by means of a new Complaints Commission, otherwise legal reform would have to be considered. In 1992, Sir David has been asked to re-visit the problem.[7] Almost simultaneously with that announcement came the media revelations involving the Duchess of York and the Princess of Wales. (It is perhaps an interesting comment on the public's taste and sense of relevance that these infringements of the Royals' privacy created far less of an outcry than many previous media excursions into people's private lives.)

Perhaps oddly, the New Zealand legal system (and it may be the Australian one too) has responded rather more boldly. I say oddly, not because the New Zealand judges or legislature are timorous or conservative these days, but because the problem is nowhere nearly as serious in this country. Although we have a complaints procedure for both the print media (the Press Council) and the broadcasting media (the Broadcasting Standards Authority and its predecessor the Broadcasting Tribunal) the number of complaints alleging breach of privacy are a very small proportion of the whole.[8] The tactics, particularly of the broadcasting media, do occasionally cause upset, but nothing they do compares with the excesses of the English tabloids.

In New Zealand the pattern of both common law and statute is similar. Starting with a piecemeal, patchy protection (which could lead to strangely inconsistent results), the law has begun to move towards a more general coverage.

The common law: The law of *breach of confidence* has been moving apace, although it has not yet often resulted in much more than the interim injunction as a remedy. In this area the English courts are as far ahead as we are. If information is divulged in confidence by one party to a relationship to another, the law will prevent the confidant from divulging it further. This branch of the law can protect a diverse range of interests - trade secrets,[9] government secrets,[10] and (importantly) personal secrets.[11] In a number of cases confidence actions have effectively protected a form of privacy. In the early days there was considerable emphasis on the relationship aspect: employer/employee, husband/wife, business negotiations. But since *Stephens v Avery*[12] in 1988 it would be fair to say that the nature of the information imparted has come to assume at least equal importance.[13] The more obviously it is of a private and personal nature the more likely it is to call this branch of the law into play. In that case highly personal information about sexual conduct confided to a friend was held to be protected.

Trespass is an area which has been particularly developed by the antipodien courts. It has been held that the "walk-in", that technique whereby television crews enter private premises with cameras rolling, is a trespass from the start.[14] This is so even if the crew has entered only the waiting room of business premises, for the implied licence to be there extends only to persons there to do business with the occupier. The New Zealand case of *Marris v TV3*[15] is interesting in this respect. A reporter knocked on the door of the home of a doctor who had been receiving some unfavourable publicity, there being cameras outside filming the proceedings. It was held that since it appeared that the reporter had entered the premises, not to speak to the doctor, but rather to demonstrate that the doctor did not wish to speak with him, trespass was an arguable cause of action. Sometimes no doubt the purpose or motive of such a media crew (to speak or not to speak) will be very hard to prove with accuracy, but the case is significant, especially as Neazor J said that if trespass were to be established at the trial "the plaintiffs will as I understand it be able to seek exemplary damages." The second important respect in which these cases have developed

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6 *Kaye v. Robertson, The Times* 21 March 1990.

7 *The Times* 4 August 1992.

8 In a life of three years the Broadcasting Standards Authoirty has decided only five complaints in which privacy was the dominant cncern (*McAllister* 5/90, *Walker* 6/90, *Cooke* 1/91, *Gisborne BHS* 7/92 and *Clemens* 19/92).

9 E.g. *Seager v. Copydex Ltd* [1967] 1 W.L.R. 923.

10 E.g. *Attorney-General for U.K. v. Wellington Newspapers Ltd* [1988] 1 N.Z.L.R. 129.

11 E.g. *Argyll v. Argyll* [1967] Ch. 302.

12 [1988] 2 All E.R. 477.

13 See Lord Goff in *Attorney-General v. Guardian Newspapers Ltd (No 2)* [1990] 1 A.C. 109 at 281.

14 See in particular *Lincoln Hunt Australia Ltd v. Willesee* (1986) 4 N.S.W.L.R. 457, *Emcorp Pty Ltd v. ABC* [1988] 2 Qd R 169 and *Church of Scientology Inc. v. Transmedia Productions Pty Ltd* [1987] Aust. Torts Rep. 80-101.

15 H.C. Wellington CP 754/91 14 October 1991.

the law is in the express recognition that there is jurisdiction to grant an injunction to stop the publication of films and probably other information acquired in the course of such a trespass. The jurisdiction is discretionary of course, and in only one case in Australia or New Zealand has an injunction actually been granted.[16] There is a possible analogy with the court's discretion in the law of evidence to reject illegally-obtained evidence.

However of most significance in the privacy field has been the potential development of a new tort of invasion of personal privacy by "the public disclosure of private facts".[17] I say potential, for so far, although there have been a reasonable number of cases, they have all involved applications for interim injunction where it was enough to demonstrate that an arguable case existed. But there has been unanimity in the cases that such a cause of action is indeed arguable. Interim injunctions have been granted in cases:

> . where the media were preparing to disclose past convictions for indecency of a sick man on whose behalf public subscriptions were being solicited to send him to Australia for a heart operation (the *Tucker* case);[18]
>
> . where a TV documentary was to be broadcast giving the personal history of a little girl involved in a terrible custody battle (the *Morgan* case);[19] and
>
> . where the media proposed to publish the name of a man under suspicion by the Serious Fraud Office (the *C* Case).[20]

However such a claim was held not to be sustainable on the particular facts of the *Marris* case[21] where Marris had suffered no more than upset and anger as a result of this intrusion on his property. Trespass was a possible cause of action, but this general tort of invasion of privacy was not. Nor was it in the case of *Bradley v. Wingnut Films*[22] where the filming of a tombstone in a cemetery was said to involve nothing in the nature of disclosure; moreover there could be nothing less private than a tombstone in a public cemetery.

So this embryo tort is on the verge of being set loose in the legal system. No-one seems to have doubted that it is seriously arguable that such a tort exists. Yet the detailed problems of definition and application are very great indeed. We shall return to them again later. There is also the question of whether McGechan J's description of the tort as the public disclosure of private facts is the whole story, or whether that is simply "the minimal area of the tort" as Neazor J has put it.[23]

Statute: We note a similar broadening out when we turn to statute law. For some time there has been a number of statutes (and they have increased steadily in number) which have protected specific aspects of privacy in a piecemeal and somewhat illogical way. For instance it is a criminal offence to use listening devices to listen to someone else's conversation:[24] but not to secretly record a conversation to which you yourself are a party. It is a criminal offence after nightfall to peep or peer into a dwelling-house window;[25] but not to use a zoom lens to film someone (say the Duchess of York) by a private swimming pool. (And why the difference between a listening device and a filming device?) It is a criminal offence to open someone else's mail,[26] but not to photocopy a letter which has already been opened. Piecemeal legislation thus leads to illogical distinctions. Moreover statute law, unlike common law, depends entirely on the words the legislators have used. The protection offered by narrowly worded statutes is sometimes more limited than might ideally be required or even than the framers originally intended. So for instance when the Guardianship Act forbids publication of a report of custody "proceedings" it may not

16 The *Emcorp* case, supra n. 14.

17 *Tucker v. News Media Ownership Ltd* [1986] 2 N.Z.L.R. 716 at 733 per McGechan.

18 Ibid.

19 *Morgan v. Television N.Z. Ltd* H.C. Chirchurch CP 67/90 1 March 1990.

20 *C v Wilson & Horton Ltd* H.C. Auckland, CP 765/92, 27 May 1992. (Possible infringement of privacy was one of two grounds, the other being possible contempt of court by prejudicing the court's power to make an order for suppression of name. There was no discussion of the privacy issue.) See also Ellis J. in *T. v. Attorney-General* (1988) 5 N.Z.F.L.R. 357 at 378.

21 Supra n. 15.

22 H.C. Wellington, CP 248/92, 27 April 1992.

23 The *Marris* case (supra n. 15) at p. 7 of the judgment.

24 Crimes Act 1961 s. 216 A-E.

25 Summary Offences Act 1981 s.30.

26 Postal Services Act 1987 s.14.

succeed in forbidding publication of the fact that proceedings are in train, or that an order has been made.[27]

However the legislature is now moving beyond these specific instances and there are recent acts which cast the net more widely. The Privacy Commissioner Act 1991 gives the Privacy Commissioner no coercive powers, nor even power to investigate individual complaints, but his powers are significant none the less. He can receive representations from the public and can enquire generally into any practices which may unduly infringe privacy. He can make public statements and report to the Prime Minister on matters which should be drawn to the latter's attention and on the need to take legislative or other action to give better protection to individual privacy. His statutory office will ensure that his recommendations will be taken very seriously. It is significant, and desirable, that the Act does not attempt to define "privacy".

Even more significant from the media's point of view however is the Broadcasting Act 1989, which confers significant powers on the Broadcasting Standards Authority. The Act provides that every broadcaster is responsible for maintaining in its programmes and their presentation standards which are consistent with the privacy of the individual.[28] The Authority can determine complaints about breach and can award up to $5000 compensation. Although the number of complaints squarely based on infringement of privacy have been gratifyingly few so far,[29] the Broadcasting Standards Authority has in a number of decisions established a useful set of principles.[30]

The Authority has found in favour of the complainant

> . where a radio station gave the telephone number of a public figure and invited listeners to ring him (the *Walker* case);[31]
>
> . and where a hoax breakfast-session phone call from a radio station disclosed that the complainant had had a disagreement with another driver in his car the previous evening, that the other driver had chased him home, and that he had gone into a neighbour's property to seek refuge, the address of that neighbour's property being given; also broadcast were the description and registration number of the complainant's car and also, most significantly, his name (the *Clements* case).[32]

In both the above cases damages were awarded, $500 in the first and $1000 in the second. However the Authority found against the complainant in a significant case (the first before the Authority) where the funeral of a person involved in a well publicised murder-suicide was filmed from a distance; the public interest in the matter and the fact that the cemetery was a public place were important.[33]

Conclusions: There are close parallels between the common law and statutory positions. Having begun in a piecemeal fashion both types of law are now moving towards more general pronouncements, thus recognising that underlying those piecemeal protections there perhaps is a more general although poorly articulated policy. In both types of law too there is still considerable doubt as to how general this new protection is to be. Neazor J as we have already seen has questioned whether the formulation in the *Tucker* case regarding the public dissemination of private facts is merely a minimum protection. There is also doubt as to the extent of the jurisdiction of the Broadcasting Standards Authority, for the Broadcasting Act is expressly concerned with privacy "in programmes and their presentation." The question has legitimately been asked as to whether this could extend to the means used in obtaining information in the first place.[34]

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27 Cf *Television N.Z. Ltd v. Dept of Social Welfare* H.C. Christchurch AP 39/90, 40/90, 20 April 1990 and *Director-General of Social Welfare v. Television N.Z. Ltd* (1989) 5 F.R.N.Z. 594 at 596.

28 Section 4.

29 See above n. 8.

30 They are conveniently set out in *Clements* 19/92.

31 *Walker* 6/90.

32 *Clements* 19/92.

33 *McAllister* 5/90.

34 See the discussion in *McAllister* (supra).

But even if one takes the narrowest view of these new general principles there are still grave problems of definition which are reflected in both the common law cases and the Broadcasting Standards Authority decisions. It will have been noted that the facts of the various cases have been very different indeed. There is little resemblance between the personal background of the little girl in the *Morgan* case and the harassment caused by the phonecalls in the *Walker* case before the Authority. Among the questions raised are the following. For one thing, what exactly is meant by private facts? For example is the depiction of private grief of which we see so much these days in television interviews a matter of privacy? For another, what if some or all of the facts occurred in public? Can their public dissemination in the media ever be regarded as an infringement of privacy? The answer may well in certain circumstances be yes. In the *Tucker* case itself Mr Tucker's convictions had been a matter of public record in the past and one may well ask at what point they receded into his private past and ceased to be public property. One of the Broadcasting Standards Authority's five principles of privacy recognises this very point. It reads:

> "The protection of privacy also protects against the public disclosure of some kinds of public facts. The public facts contemplated concern events such as criminal behaviour which have in effect become private again for example through the passage of time. Nevertheless the public disclosure of public facts will have to be highly offensive to the reasonable person."

It may even be that certain occurrences in public places could be so distressing to the individual that publication of them could be regarded as an infringement of privacy. In an Australian case[35] for example Young J suggested that a photograph of a person badly injured and in great distress after an accident might be a breach of privacy as might be a photograph of a woman caught in a gust of wind in a public place with her skirts blown up. Yet the public nature of the cemetery in both the *McAllister* and *Bradley* cases was a significant factor in the tribunals not entertaining privacy claims and in the *Clements* case the Authority found itself in considerable difficulty in that most of the activities reported in the radio broadcast had taken place on the public road and so were difficult to classify as private matters. (However in that last case it was the publication of Mr Clements's name which was seen as the crucial factor in the holding that this was indeed a breach of privacy.) These distinctions are not particularly satisfactory.

Then again, it is clearly acknowledged in the Broadcasting Standards Authority's principles, and must surely be acknowledged in common law as well, that there will be circumstances where the public interest in publication outweighs the individual's interest in his or her privacy. That line will be a difficult one to draw also. For example could it have been argued in *Tucker* that since public money was being solicited it was in the public interest to know all about the man? However the line is one that the courts have had to draw elsewhere, in particular in breach of confidence and in the defence of fair comment in defamation.

The whole area of privacy raises another question of degree. How serious must the interference be before it is redressable by law? In the *Marris* case Neazor J thought it was significant that in the *Tucker* case there was a threat to health involved, whereas in the case before him it was a case simply of embarrassment or anger. The Authority in its five principles has said that privacy protection is confined to situations where the facts disclosed are "highly offensive and objectionable to a reasonable person of ordinary sensibilities". The trouble is of course that this question of degree may be answered differently by different people on the same set of facts. But the law has had to cope with questions of degree on numerous occasions in its past and it will be a matter for the courts over a period of time to chart the boundaries of what is acceptable and what is not in a series of decisions.

It may turn out in the end that this whole area of privacy will be one of those where each case requires a balancing exercise in which a number of factors will be relevant: the nature of the information, where it happened, the hurt it did, and the public interest involved. Breach of confidence has got itself into this balancing situation and privacy may well be of the same ilk. One is tempted to wonder whether sometimes privacy may even be something of a red herring. It could well be that in some cases what we are really talking about is not so much privacy as the infliction of extreme embarrassment or distress without

35 *Bathurst City Council v. Saban* (1985) 2 N.S.W.L.R. 704 at 708.

any countervailing public interest in publication. It is significant that in a number of the cases *Wilkinson v Downton* was an alternative cause of action.

There is much more working out to be done. However I think it would be unwise at this stage for statute to attempt a more precise definition. This is probably an area where if the law is to work at all it is best for it to develop slowly with the experience of actual situations. That creates uncertainty no doubt, but that is preferable to inflexible rules which are too restrictive. Moreover before statute intervenes any more than it has already it must be carefully considered whether any such protections are necessary as far as the media are concerned. As I have said before I am not yet convinced that infringement of privacy by the media is a serious problem in this country. It would be a shame if our law-makers reacted in this country to an overseas problem. It may be at the end of the day that some of the concerns people have could be effectively addressed by a proper code of ethics.[36]

What I do believe is that the attempts made in the Privacy of Information Bill 1991 are quite inappropriate in connection with the media. I say nothing of the value or otherwise of that Bill applied to other institutions in both the public and private sectors or of the need to control electronic data storage. But if applied to the media in its present form it could do great damage. It was framed I am sure without the media specifically in mind, but its all-encompassing principles are framed in terms wide enough to extend to them. The principles it lays down could have the effect of seriously stifling and hindering the media. In particular:

i. Since "personal information" is defined so as to encompass any information about an individual virtually all information held by a media organisation is subject to the Bill.

ii. The requirement that information be collected primarily from the person concerned is unworkable.

iii. The rights of an individual to see the information held about him or her and to require its correction could provide intolerable opportunities for delay and obstruction.

iv. The requirement that the holder of personal information must not publish it (with certain vague exceptions) is ridiculous when applied to the media.

Press freedom cannot be subjected to that kind of uncertainty. If there is ever to be regulation of privacy as far as the media is concerned it must be done with the media's interests specifically in mind. The media cannot be thrown into a melting pot together with financial institutions, credit agencies and street-corner dairies.

Let us leave the issue of privacy with the comment that developments in the past few years have been significant. The movement although tentative has at least been uniform.

2. CONTEMPT OF COURT

As far as the *sub judice* rule is concerned the law of New Zealand remains in theory much as it always was. It is not significantly different from the law in Australia or England despite the intervention of legislation in the latter country. The law is simply this: once a matter is *sub judice* - once a trial is pending - one must not publish material which creates a real risk of prejudice to the trial. Fanciful possibilities are discounted: there must be a *real risk* of prejudice as a matter of *practical reality*.[37] The following types of publication are therefore at risk (taking into account factors such as time and place of publication):

i. details of an accused's past record;

36 A proposal for such a code was discussed at a conference on privacy held at the University of Canterbury's School of Journalism in March 1992. (See *The Press*, 30 March 1992).

37 The recent law is discussed by Davison CJ in *Solicitor-General v. Broadcasting Corporation of N.Z.* [1987] 2 N.Z.L.R. 100.

ii. the fact that the accused has confessed;

iii. the fact that the accused is facing other charges;

iv. prejudgements (i.e. statements that the accused is guilty or innocent);

v. serious misreporting of the trial;

vi. photographs of the accused, at least in cases where identity could be an issue;

vii. accounts from eye-witnesses, particularly accounts supplying detail which could be in contention at the trial;

viii. comment on the demeanour or veracity of witnesses.

In recent years there are examples in England and Australia of penalties being imposed for publications of most of the above kinds. In 1992 for example the *Journal of Media Law and Practice*[38] has noted cases of the B.B.C. being fined £5000 for a court report which was "strewn with errors", of the B.B.C. (again) being held in contempt for publishing film of an accused man, and of a Scottish newspaper being held in contempt for speculating about the outcome of a trial. There have in fact not been many contempt cases in New Zealand's legal history. Perhaps that is because the media have overall been well behaved (Les Cleveland once described them as not a watch-dog but a well-behaved draughthorse).[39] Nevertheless there are in years past reported cases of the media being held in contempt for publishing photographs of an accused;[40] commenting on a witness's demeanour;[41] advocating stiff punishment for a convicted sex offender;[42] and for revealing the bad character and past record of a convicted man pending his appeal.[43] There have been a number of recent cases as well but in almost all of them the matter has been resolved in favour of the media. In *Wilson v Waikato and King Country Press*[44] it was held that it was not contempt for a paper to continue publishing allegations about a suspect firm of photographers even after they had issued a writ for defamation. In the *Moses Shortland*[45] case the Court of Appeal discharged an interim injunction preventing comment, most of it favourable, about a person being pursued by the police in relation to crime of violence. In *R v Chignell & Walker*[46] Robertson J refused to make a blanket order prohibiting publication of comment about statements made by a certain witness, and the crown's decision whether or not to call that witness. And in the well known case brought in connection with the broadcasting by John Banks of details of a past criminal record the contempt charge failed principally on the ground that it was not clear precisely whose record Mr Banks was speaking of.[47] Those decisions affirm in clear terms that contempt is still a weapon in this country against those who exceed the limits,[48] but that contempt is not a weapon which will be readily called into play. It is of interest to note that in the *Chignell & Walker* case section 14 of the Bill of Rights Act played a significant role.

The media have certainly begun to take more liberties than they used to in reporting crime. Most of these liberties have gone unchecked by the law. One detects that there is a certain element of risk-taking by some elements of the media, driven no doubt by the competitive edge. If you do not publish the story there is the risk that your competitor might get in first. The decision whether to "run it" is often motivated by such considerations.

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38 See the 1992 issues at 163 and 202.

39 *The Structure and Functions of the Press in New Zealand* (unpublished thesis, Victoria University of Wellington, 1970).

40 *Attorney-General v. Noonan* [1956] N.Z.L.R. 1021.

41 *Attorney-General v. Davidson* [1925] N.Z.L.R. 849.

42 *Attorney-General v. Tonks* [1939] N.Z.L.R. 533.

43 *Attorney-General v. Crisp* [1952] N.Z.L.R. 84.

44 H.C. Hamilton, M248/79, 9 February 1982.

45 *Television N.Z. Ltd v. Solicitor-General* [1989] 1 N.Z.L.R. 1.

46 (1990) 6 C.R.N.Z. 476.

47 *Solicitor-General v. Broadcasting Corporation of N.Z.* supra n. 37.

48 This is clearly stated in the *Television N.Z.* case (supra n. 45) and *Chignell & Walker* (supra n. 46). Note also that the Court of Appeal in the *Television N.Z.* case also suggested that a matter may become *sub judice* when an arrest is "highly likely": cf. now *Attorney-General v. Sport Newspapers Ltd* [1991] 1 W.L.R. 1194 where the English Court of Appeal were unclear on the matter.

There have been strong complaints from the legal profession and others some of whom believe that things have already got out of hand.[49] From time to time the Solicitor-General and even the courts have issued warnings. There is a certain degree of confusion too, because different editors take different stances, and different media legal advisers give different advice to their clients. It is by no means uncommon for a newspaper having decided on legal advice not to run a story to express disbelief and some annoyance when it finds that the broadcasting media have run it with apparent impunity.

Yet it is important to note the types of story that are being run with impunity. The provision of detail about the facts of the offence, often from eye-witnesses, is the area where incremental creep is most obvious. The old "safe" story reporting simply that "a garage was burgled last night and that a man will appear in court charged with the offence this morning" tend now to be embellished with stories of the getaway car, the weapons used in the holdup, and the ordeal of the unfortunate garage attendant. This is an area where decision-making is certainly difficult, for the question of whether such detail prejudices the trial will be answered differently by different people. Photographs and TV film of accused are now common-place. This is another aspect where there has been substantial change over the years. Indeed persons facing trial are now often walked in front of a line of cameras as they enter court. Backgrounders about the victims of the crime and the distress of relations are not uncommon either. There is a certain amount of emotive language and plenty of effort to catch the attention of listeners and readers.

Yet it is not true to say that the law of contempt is being flouted wholesale. It is very seldom that one sees the past record of an accused, although sometimes the media must be sorely tempted when they know the accused on a sex killing charge has 50 previous convictions, some involving sexual violence. The media are well aware that information of this kind is not even admissible during the trial itself. Nor does one too often see reports that the accused has confessed, or deliberate trials-by-media of the gross kind exemplified by the *Mahon* case in England in the 1920s.[50] So while there are certainly things being published now which would not have been 10 years ago I do not think it is quite fair to say that the law of contempt has ceased to be a restraining force. However the movement is clear, and the New Zealand media are today publishing things that would get them into trouble in other countries. Visitors from those countries comment on it.

It is interesting to speculate on the reasons. While I do not think the formulation of the law has changed much, part of the problem has been a genuine doubt as to exactly how far a jury of twelve good men and women are prejudiced by certain types of publication provided they are clearly told by the judge to put them out of their minds.[51] The New Zealand Court of Appeal has said, admittedly not in an contempt case, that properly directed juries are capable of doing their job objectively despite media publicity. Richardson J said:[52]

> "Our system of justice operates in an open society where public issues are freely exposed and debated. Experience shows that juries are quite capable of understanding and carrying out their role in this environment notwithstanding that an accused may have been the subject of widespread debate and criticism. A ready example - far removed from this case factually - is the way charges of serious violence against gang members are dealt with. Undoubtedly there is widespread prejudice against them yet juries still acquit or fail to agree on occasions indicating that when confronted with an actual case they can be expected to carry out their task responsibly in the light of the evidence."

And in an English case Lawton J once said:[53]

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49 See *The Mass Media and the Criminal Process* by the Publis Issues Committee of the Auckland District Law Society, 9 May 1989; and the statement by the President of the N.Z. Law Society in *Law Talk* 9 November 1989. I have found most helpful a paper by Dr R. E. Harrison, *The Mass Media and the Criminal Process: A Public Service or a Public Circus?* June 1992.

50 *R. v. Evening Standard* (1924) 40 T.L.R. 833.

51 See Burrows, *News Media Law in N.Z.* (3rd ed.), 259-260.

52 *R. v. Harawira* [1989] 2 N.Z.L.R. 714 at 729.

53 *R. v. Kray* (1969) 53 Cr App. R. 412 at 415.

> "The drama if I may use that term of the trial almost always has the effect of excluding from recollection that which went before".

However we are here in the realms of speculation and it is difficult to believe that certain sorts of information have no effect on the minds of jurors, particularly in marginal cases. And as long as we even suspect that prejudice could result in such cases it is better to play safe. There is after all little countervailing public good that can justify many such publications. They are matters in which the public has a *curiosity* rather than a justifiable *interest*. There is perhaps just an element in all this of the inching forward by the media being so gradual that it has been difficult for the enforcers to know precisely where the line should be drawn themselves.

I do note however an interesting new development. The Solicitor-General has recently, rather than taking contempt proceedings in court, taken a radio station to the Broadcasting Standards Authority[54] about items broadcast which he said were attempts to influence judicial decisions. The complaint was apparently brought (inter alia) under section 4(1)(b) of the Broadcasting Act which requires broadcasters to maintain standards consistent with the maintenance of law and order. The Solicitor-General in his letter of complaint used language directly reminiscent of the law of contempt:

> "My complaint is that both of these broadcasts amount to an attempt to influence a judicial decision. Statements such as this are a matter of concern to the judiciary and to all those who are involved in administering the legal system. The purpose of them is to undermine the independence of the courts with consequent detriment generally to the administration of justice. In other words it is a cornerstone of a democratic system that the courts are independent and are seen to be such. The media should not act in a way that tends to undermine them."

This route of enforcement is an interesting one.

Before leaving the law of contempt I should like to touch on one other aspect of it: media interviews of jurors after the conclusion of a case. There has always been confusion as to when this is and is not contempt. The most authoritative case, an English one in 1980 involving the Jeremy Thorpe trial, propounded the test that a contempt is committed if the interview would tend -

i. to imperil the finality of jury verdicts, or

ii. to affect adversely the attitudes of future jurors and the quality of their deliberations.[55]

That is an extremely difficult test to apply in any particular case. On one view interviews with jurors always infringe the second limb, for knowledge that one of their fellows may go public can always affect the frankness of debate in the jury room. However in the Thorpe case the court seemed to take the view that each case must be judged on its own merits. More clarity is clearly desirable.

In New Zealand recently there have been a number of juror interviews by the media. The best known were those relating to the Tamihere and Appelgren trials. The Tamihere case received the most publicity. There, having been approached by one juror, the media themselves approached others. The Solicitor-General investigated the matter with a view to determining whether a contempt had been committed, but at this stage no action has followed. In other jurisdictions there has been legislation to clarify and regulate this practice and in New Zealand the Law Society's Criminal Law Committee has suggested an amendment to our Juries Act rendering it an offence to solicit information from jurors.[56] This is a question on which there could be extended debate. One can argue with some degree of persuasion that properly to understand the workings of our criminal justice system it is helpful to know how juries work. That is particularly so if it becomes apparent that certain abuses are occurring in the jury room. As against that however one must

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54 *Solicitor-General and Capital FM Ltd.* ID 1/91.

55 *Attorney-General v. New Statesman and Nation Publishing Co.* [1981] Q.B. 1.

56 See the *Contempt of Court Act* 1981 (UK) s. 8 and the *Juries (Amendment) Act* 1985 (Vic). The N.Z. Law Society Committee's proposals are set out in *Law Talk*, July 20, 1992.

weigh the important considerations mentioned in the Thorpe case. It would be most undesirable for jury decisions to be reopened at will, and it would certainly not increase the confidence of future jurors to know that anything they said in the secrecy of the jury room could later end up on the front pages of the newspapers. Weighing up these considerations the Law Society's Committee has apparently seen the major evil as being the media approaching jurors and soliciting information from them. They apparently do not regard the same objections as attaching to information which is volunteered to the media by jurors. There may be some who argue that the publication of any jury information however it is obtained is equally harmful.[57] This area is yet another fraught with the difficulty of trying to balance the interests of a proper justice system against the legitimate interests of freedom of speech. I wish I believed there was a simple answer.

3. DEFAMATION

There has been talk for years of reform of the law of defamation.[58] It still remains the most inhibiting and restrictive of the laws controlling the media. If the law has been generous to the media in matters of privacy, and if its enforcement is becoming more so in contempt of court it is still far from generous in the law of defamation. (However even there I believe there is evidence of a developing generosity towards the media.)

Defamation is a tort of absolute liability. The plaintiff does not have to prove fault; the plaintiff does not even have to prove that the statements made about him or her were false. Damages have always been high - not as high in New Zealand as in Britain but still sometimes more than the injury was worth. I have always wondered whether the severity in this area simply reflects that the sins of the media in other areas are being visited on them here. It has in the past been difficult to "get" the media for infringement of privacy. It has been correspondingly easy and profitable to "get" them for defamation.

This is a pity, for defamation can inhibit the media where their services are needed most: in bringing to light evil doings in public life or in the business community. If people are abusing their positions and if the most effective way to stop them doing it is to bring the matter to public attention, it is to the detriment of all of us if the media are inhibited from doing so. It is now well known how effectively Robert Maxwell used the law of defamation.[59] It is said that at the time of his death he had 60 defamation writs outstanding. Journalists who knew things about the details of his financial operations often did not dare to venture into print. It is not just the most sensational elements in the media which are curbed by the law of defamation. Some of New Zealand's most careful and correct newspapers have been amongst the heaviest losers.[60] In this sense the media as a whole pay for the sins of the few. The "media" is too often seen as a job lot.

It is interesting however to examine such movements as there have been in the law of defamation and I believe there are signs that a loosening up may be incipient. There continue to be tough decisions on the facts. Mr Crush received a large award when a wrong emphasis in a media report of an Audit Office enquiry was held to reflect unfairly on him.[61] The New Zealand Herald suffered when it was found that a "report" of Parliamentary proceedings went further than just being ungarnished report and thus did not attract privilege.[62] Even attempts at humour have got into trouble recently. A supposedly funny poster was held to be defamatory in that it attributed sexist advertising to

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57 See the *Contempt of Court Act* 1981 (UK) s. 8 which provides that it is a contempt to "obtain, disclose or solicit" details of jury deliberations.

58 See the papers of the 1988 seminar (supra n 4) and the Proceedings of the New Zealand Law Conference (1987) pp. 121-130.

59 See *Press failure that helped a since swindler, Independent on Sunday* 8 December 1991 and *How the Libel Laws helped Maxwell get away with it, Daily Telegraph* 7 December 1991.

60 *The Press* and the *New Zealand Herald*, for example. See *Christchurch Press Co. Ltd v. McGaveston* [1986] 1 N.Z.L.R. 610 and *Brill v. Wilson & Horton Ltd, N.Z. Herald* 19 November 1988.

61 Part of the proceedings are reported: *Broadcasting Corporation of N.Z. v. Crush* [1988] 2 N.Z.L.R. 234.

62 *Birch v. Wilson & Horton Ltd, N.Z. Herald*, 19 November 1988.

a well-known company.[63] There was also an out-of-court settlement in New Zealand's first defamation claim against a gossip columnist.[64] I am not saying that any of these decisions was wrong. Obviously there have to be controls.

However as I and other speakers argued at a similar seminar in 1988[65] the law of defamation does tend rather to overdo it. A glance down the lists of summaries of defamation cases occasionally published in the English media shows just how far it can sometimes lack proportion. When an actor can get £50,000 for being described as boring and when two lawyers get £50,000 each for a claim that they had had words about the last remaining chocolate eclair in a cake shop,[66] something would seem to be amiss.

However I made mention of evidence of an incipient trend towards freedom of the press in some recent decisions of high authority. I will mention seven cases, all but two of them New Zealand ones.

1. In New Zealand Tipping J has affirmed what many believed to be the case anyway: that a company cannot sue for defamation unless it can demonstrate financial loss or the probability of it.[67] Companies do not have feelings, and can only recover damages in respect of commercial loss and not in respect of the more ephemeral damage to reputation which is available when the plaintiff is a human being. This is not to say that companies must prove special damage: it is enough that the publication is likely to cause commercial loss.

2. Fisher J has held[68] (in a case where the Auckland Area Health Board were attempting to stop a Frontline programme about a certain Spinal Unit,) that the established reluctance to grant an interim injunction against publication where the defendant proposes to plead justification extends to fair comment, qualified privilege and other defences as well. Thus a plaintiff seeking an interim injunction will normally have to show serious defamatory statements with no serious possibility of a defence. The public interest in the topic is relevant also. That reluctance to grant an interim injunction will ordinarily extend also to granting one until a transcript of the proposed publication is produced. Fisher J's orders that an interim injunction be not continued and that the transcript be not required were upheld on appeal by the Court of Appeal.[69] The Court of Appeal noted that this was not one of those "wholly exceptional cases" where an injunction or order for production would be justified. This decision follows in the wake of other Court of Appeal cases which similarly emphasise that prior restraint of the media is to be very much the exception.

3. The Court of Appeal is not anxious to encourage the development of other causes of action in respect of published material if they could cut across the law of defamation. It has rejected the idea that a plaintiff can sue in negligence for statements affecting reputation,[70] and it has liberally interpreted the media defence in the Fair Trading Act 1986.[71] This is a significant development too. In a field as important as the balance between reputation and freedom of speech it is important that there be a clear consistent single philosophy. Harsh though the law of defamation may be, and although it is true that it may not always have got the balance right, it does contain an appropriate armoury of defences such as fair comment and justification which have been developed precisely because freedom of speech requires them. This is not an area where alternative causes of action are a good idea. It would be quite unsatisfactory if the attempts at balance which the law of defamation makes possible were to be set at nought by employing the

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63 *Mount Cook Group Ltd v. Johnstone Motors Ltd* [1990] 2 N.Z.L.R. 488.

64 By Kent Baigent against *Metro* Magazine.

65 Supra n. 4.

66 *Roache (Ken Barlow of Coronation Street) v. The Sun* (referred to in the *Sunday Telegraph* 16 February 1992) and *McCartney and Boal v. Sunday World, The Times*, 22 October 1988.

67 *Mount Cook Group Ltd v. Johnstone Motors Ltd* [1990] 2 N.Z.L.R. 488.

68 *Auckland Area Health Board v. Television N.Z. Ltd* H.C. Auckland CP 438/92, 2 April 1992. Cf *Eveready N.Z. Ltd v. TV3 Network* H.C. Auckland, CP 1701/91 where the Court re-instated a claim for a mandatory injunction in the nature of corrective advertising.

69 CA 81/92, 9 April 1992.

70 *Bull-Booth Group Ltd v. Attorney-General* [1989] 3 N.Z.L.R. 148.

71 *Ron West Motors Ltd v. Broadcasting Corporation of N.Z.* [1989] 3 N.Z.L.R. 520.

law of negligence which recognises none of those defences, or the Fair Trading Act which imposes absolute liability. Cooke P has put it thus:[72]

> "The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element. The duty in defamation may be described as a duty not to defame without justification or privilege or otherwise than by way of fair comment. The duty in injurious falsehood may be defined as the duty not to disparage goods untruthfully and maliciously. In substance the appellant would add to these duties a duty in such a case as this to take care not to injure the plaintiff's reputation by true statements. .... In our opinion to accept it would be to introduce negligence law into a field for which it was not designed and is not appropriate."

4. It has been held in England[73] that someone pleading fair comment does not have to prove they actually honestly held the opinion they expressed, only that the opinion is one that could have been held by an honest person. It is then up to the plaintiff to prove malice if they can. The subjective or objective nature of fair comment has long been a source of difficulty and disagreement. This decision is important therefore for its clarification of the issue and important also for its emphasis on freedom of expression. Its consequence is that editors are safe in publishing letters to the editor provided only that the views expressed in those letters are ones which the writer might honestly have held. (Obviously invective which would appear to be excessive to any sensible observer is not covered). Any other view would have been quite destructive of a newspaper's function as a forum for the expression of diverse opinion. The House of Lords disagreed with an earlier Canadian case[74] which had somewhat surprisingly held the opposite, in other words that editors were not safe in publishing readers' views unless they believed those views themselves. The doubts raised by that earlier decision seem now to have been properly set at rest. (Unfortunately on another point the House of Lords case is not quite so generous: it held that in deciding whether statements in a letter criticising a certain article written by someone else were fact or comment one must consider the letter alone and not the article as well).

5. Parliamentary privilege has long been a bastion of free speech. A Member of Parliament can within the four walls of the House say anything without fear of defamation, and the press, provided they report fairly and accurately, are safe too. This privilege of MPs is guaranteed by the Bill of Rights of 1688; it reflects a comity between Courts and Parliament that neither of those great organs of state will control the proceedings of the other. But the consequence is a small oasis where freedom of speech is truly free, and that freedom is in the hands of people who should be in a position to acquire the background knowledge to exercise it responsibly. No doubt Parliamentary privilege is abused at times. Most privileges are. But I do not myself believe that that risk should be a reason for diluting the privilege. A freedom such as this should not be whittled away. That means it must work both ways. If a plaintiff cannot sue on statements made in the House nor should a defendant be able to resort to them to assist a defence. So while *Prebble v TVNZ*[75] which establishes the latter point has been criticised for operating against the media's interests,[76] the privilege as a whole is so valuable that it must be embraced in its totality.

6. The next two decisions seem to me to be the most important. The first of them is a High Court Master's decision in a interlocutory matter. It is thus not binding. But it is notable in that it takes the vexed question of a qualified privilege for the media a step further. While the media are privileged by statute (and used to be at common law too) in reporting the proceedings of various kinds of meeting and

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72 The *Bell-Booth* case (supra n. 70) at 156.

73 *Telnikoff v. Matusevich* [1991] 3 W.L.R. 952.

74 *Chernesky v. Armadale Publishers Ltd* (1978) 90 D.L.R. (3rd) 321.

75 H.C. Auckland, A785/90, 24 June 1992. Cf *Hyams v. Peterson* [1991] 3 N.Z.L.R. 648 where the point involved was very different. Note also *Prebble v. TVNZ* judgment 29 June 1992 refusing an application to have the case tried without a jury.

76 Some of the media reacted critically.

enquiry, the courts have always been wary of holding that there is a wider privilege protecting other kinds of publication on matters of public interest. The argument that the media have a duty to impart, and the public a corresponding interest to receive, communications of real public interest has not been wholeheartedly accepted.[77] Nevertheless in some significant cases the courts have intimated that such a privilege *might* be arguable and they have refused to strike out such a defence.[78] However the Cooke P. has noted that, in view of the fact that Parliament has not acted in the matter, great caution is needed in judicially developing such a defence.[79] In *Johannink v Northern Hotel Hospital & Restaurant IUW*[80] Master Kennedy-Grant took the matter as far as it has yet been taken in this country. A publishing company was being sued for damages in respect of an article about an industrial dispute in the restaurant business. The defendant pleaded qualified privilege in the following terms:

> "The articles referred to in paragraphs 12 & 24 covered issues which the 3rd defendant had a duty to publish and the readers had a legitimate interest in knowing about. By reason of such matters the occasions of both publications were privileged."

Master Kennedy-Grant held that this defence must not be struck out, saying that in his view the defence of qualified privilege might be available to a newspaper. He said the availability of the defence will be determined by four principles which he gleaned from other cases, both English[81] and New Zealand,[82] where the matter had been discussed. The principles are as follows:

(i) The defence will be available if and only if the newspaper publishes the article or articles in pursuance of a duty, legal, social or moral, to persons who have a corresponding duty or interest to receive it.

(ii) A newspaper does not have a duty to publish unsubstantiated material.

(iii) The privilege if available does not extend to protect unconnected and irrelevant matters.

(iv) Defamatory matter about an individual in an article about a general topic of public interest (which is otherwise protected by qualified privilege) is not protected if it is unconnected and irrelevant to the protected material.

Although this is not the first time the Courts have refused to strike out such a defence, it is the first time in which the parameters of the defence have been so clearly defined in this country. If the Master's formulation is accepted it is likely to be the second principle which will be the most controversial. What is required to "substantiate" material? Presumably this is not a requirement that the information be true, otherwise the privilege would be unnecessary. Is it then equivalent to the test of reasonable care proposed in the McKay Report 15 years ago or the test of "appropriate inquiry" which currently appears in bills before the legislatures of some of the Australian States? If it is, the courts may be approaching a point where they are themselves creating a privilege which the legislature has been reluctant to do - despite the caution of Cooke P referred to earlier.

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77 See Burrows, *News Media Law in New Zealand* (3rd ed.), 58-60.

78 E.g. *R. Lucas & Son (Nelson Mail) Ltd v. O'Brien* [1978] 2 N.Z.L.R. 289.

79 *Templeton v. Jones* [1984] 1 N.Z.L.R. 440 at 459-460 per Cooke J.

80 H.C. Auckland, CP 1888/90, 29 April 1992. Cf the much more conservative view taken in *Nationwide News Pty. Ltd v. Wiese* (1990) 4 W.A.R. 263.

81 In particular *Blackshaw v. Lord* [1984] 1 Q.B. 1.

82 In particular *Dunford Publishing Studios Ltd v. News Media Ownership Ltd* [1971] N.Z.L.R. 961.

7. The seventh decision could be of enormous importance, although it is English and not New Zealand. It holds, over-ruling earlier authority,[83] that a local authority cannot sue in defamation to protect its governing reputation. Thus, when a newspaper alleged that the Derbyshire County Council was involved in certain share dealings which included the investment of money from its superannuation fund the Council was held disentitled to sue.[84] The court said that a local authority could bring an action in malicious falsehood in appropriate cases, and individual councillors could bring defamation actions in their own right. That being so, a right in the authority to bring a defamation action itself could not be said to be necessary in a democratic society, and would be an unjustified fetter on the freedom of speech protected by the European Convention on Human Rights.

The case raises interesting points. Section 10 of the European Convention was central to the judgments, and some may argue that that distinguishes it from the New Zealand situation. But section 10 is virtually identical to section 14 of our Bill of Rights Act, which could well inspire a similar holding in New Zealand. Of course the New Zealand Bill of Rights Act applies only to actions of the executive judicial and legislative branches of Government[85] and of persons and bodies in the exercise of duties imposted by law. It probably does not apply directly to defamation litigation between private citizens and it may not even have direct application in cases involving local government. But even if it does not, our courts are getting used to applying statutes by analogy, and I cannot believe that the Bill of Rights Act which has been embraced so whole-heartedly by the courts in other areas will have no effect at all on the law of defamation. The very atmosphere it generates may well permeate private law. The members of the English Court of Appeal took the guarantee of freedom of speech very seriously. Butler-Sloss CJ said:[86]

> "[To give more protection to the Council] would be out of proportion to the need shown and would entail too high a risk of unjustifiable interference with the freedom of expression of the press and public. In carrying out the balancing exercise I, for my part, come down in favour of freedom of speech even though it may go beyond generally acceptable limits, since there is adequate alternative protection available to a council."

If this decision is accepted in New Zealand its wider implications could be interesting. Why should it be confined to local authorities? It could for example presumably apply to State-Owned Enterprises. In the fullness of time it might even be possible to extend it to public figures and bodies of all kinds, in which case one would be approaching the American public figure rule. There is no sign in the *Derbyshire* case itself of any such projected development, for the judges all assume that individual councillors retain defamation actions; but the broadening of initially narrow ideas has been a function of legal development since the beginning.

Reform: In current society a collection of factors favours extending freedom of speech. We live in an age where those who govern us are making decisions which can hurt; increasing competition in the commercial sector does not always lead to fair dealing; and when customers have to pay more for service they are less tolerant when that service is not good. Such factors make the free and frank discussion of issues in public desirable. As I have already said, increasing international emphasis on human rights, and now the local emphasis in New Zealand as a result of the Bill of Rights Act, have led to increasing awareness of the importance of rights such as freedom of speech. We are also subjected today to such quantities of information from all the media, both print and broadcast, that I doubt that isolated statements have the capacity for harm that they once did. If we are

83 *Bognor Regis UDC v. Campion* [1972] 2 Q.B. 169 was overruled.

84 *Derbyshire County Council v. Times Newspapers Ltd* [1992] 3 W.L.R. 28.

85 Section 3.

86 Supra n. 84 at 65.

wondering how much media comment can prejudice juries,[87] we perhaps ought also to be asking how seriously statements about public figures really harm their reputations.

There has long been talk of a loosening up of the law of defamation. The last legislation on the subject was passed in 1954, and society has changed a great deal since then. There are few other acts of parliament which have remained unchanged for so long. As we have already seen, the judges are beginning to show signs that they are prepared to do a little modest moving of the law. But these signs are still tentative and in the end there are limits to what judges can do. If there is to be far-reaching reform it will need to be by statute. There are really not many options. No-one seriously suggests we should abolish the law of defamation, for protection of reputation is a vitally necessary function of any legal system. All we are talking about is a degree of loosening up and an increasing recognition of the importance of freedom of speech. The approaches one could take can be classified under four heads.

1. One could simply tinker with detail: one could for example change the rule that attribution of bad motives is not fair comment, and one could modify the "pick and choose" rule of *Templeton v Jones*.[88] That would be unexciting reform, although sometimes changes of detail can also affect our view of principle.

2. One could try to simplify the enormously complex procedures which defamation trials now involve. Those procedures are costly, and can lead to cases rumbling around in the courts for years.

3. One could experiment with remedies. One could for example attempt to control damages awards. One suggestion is that judges rather than juries should assess damages, although the New Zealand experience suggests this would be unlikely to make much difference. One could introduce new non-monetary remedies like correction orders and declarations, and one could try some form of arbitration or mediation.

4. Then one could change the very definition of defamation and the defences to it. One could for example require that rather than a defendant having to prove truth, the plaintiff should have the burden of proving falsity. One could grant a new qualified privilege for the media, or even adopt the American public figure rule. This would really be to go to substance and make significant alteration. The examples I have just given would significantly alter the balance of our law. Not all of them are yet appropriate to New Zealand society.

Of course there is currently a Bill before the New Zealand Parliament.[89] It has been there for some four years. It contains a little of all the first three approaches. It tinkers with detail - indeed it does the two very things that I gave as examples under (1) above. Some of the changes of detail are as small as merely changing names: justification for example becomes "truth" and fair comment becomes "honest opinion". In an attempt to simplify procedures and reduce the opportunities for obstructionism it provides for a judicial conference, and for such things as the striking out of an action after one year if it has not been prosecuted. Its most significant suggestions are perhaps in the field of remedies, in providing that an amount of damages should not be stated in a statement of claim against a media defendant. This has the potential for controlling the gagging writ.

But most significantly, the Bill proposes the correction order. In an attempt to encourage plaintiffs to use it to the exclusion of damages there are incentives in the form of solicitor/client costs. The correction order is an interesting suggestion. But the more one considers it the more difficulties it seems to contain. There is for one thing a philosophical objection. The media do not like it because they say it could force them to publish facts with which they disagree; that is certainly not freedom of speech. There are practical difficulties too. The very point at issue in many big defamation cases is the truth or otherwise of the statements made. Since a correction order cannot be made until the correct facts have been ascertained this could require days of evidence. Any hope that the correction order might have been a speedy remedy will not be realised in all cases. The incidence of the burden of proof would need to be clarified too. It would seem logical that

87 See above at n. 52.

88 [1984] 1 N.Z.L.R. 448.

89 The Defamation Bill 1988. It has been reported back from Select Committee but has currently gone no further.

the plaintiff who seeks a correction order might have to establish what the correct facts are, but that would be to reverse the current burden of proof in defamation actions - a far reaching change which needs to be carefully thought through. The issue of burden of proof is simply not clear as the Bill now stands.[90]

However the New Zealand Bill steers clear of major reforms of substance. It has not taken up the McKay Committee's suggestion of an extended qualified privilege for the media, and no-one has ever seriously suggested the statutory adoption of the American public figure rule in New Zealand. However although the New Zealand Bill is largely comprised of matters of detail, any reform is better than nothing. While I think the correction order may need to be looked at, even a set of such modest tinkerings is a step in the right direction. But the Bill continues to languish on the parliamentary agenda.

The three east-coast states of Australia have also produced Bills.[91] They differ very slightly amongst themselves but the expedients they have opted for do include this qualified media privilege. It is to be dependant on the matter published being of public interest and on its being published in good faith and after appropriate inquiries. The Australian states are also looking at correction statements but the philosophical objections to which I referred previously seem to have had some influence on their thinking and their Bills speak of court-*recommended* corrections rather than court-*ordered* corrections. Compliance with such a recommendation would have an influence on damages.

Legislative reform is unlikely to be quick or radical anywhere. It took New Zealand 11 years after the McKay Report even to introduce a Bill: after four years that Bill remains unenacted. In England the Faulks Report of 1975 was never implemented; a committee under the chairmanship of Neale LJ is currently reviewing the area (and coming up with some interesting suggestions about arbitration). Nothing came of the recommendations of the Australian Law Reform Commission in 1979, although twelve years later the Attorneys-General of the east coast states have taken initiative of their own.

One reason for the slowness of the reform process is no doubt the complexity of the issues involved. The reconciliation of reputation and free speech is a matter on which opinions may differ sharply. There is no simple solution; there is no solution at all that will please everyone. Cynics may also say that legislative reform is tardy because Legislatures are composed of politicians. I do not altogether blame politicians if after years of being targeted by the media they have become somewhat jaundiced in their views of it.[92] I suppose it is easy to advocate free speech until that free speech hurts you yourself. However the mood internationally is clearly in favour of reform and there is little doubt that something will eventually happen. Ironically in this country it may be the judges who get there first.

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90 Burden of proof is a question which is likely to have to be faced one of these days by the Broadcasting Standards Authority when it deals with a complaint about inaccuracy.

91 The Defamation Bill 1991 of New South Wales, Victoria and Queensland.

92 Sir Geoffrey Palmer, a long-time supporter of the media, is very critical of its performance in his latest book, *New Zealand's Constitution in Crisis.*

TWO ASPECTS OF ADVERTISING LAW:
(1) SOUND-ALIKES, LOOK-ALIKES AND PHOTOGRAPHS
(2) ENVIRONMENTAL ADVERTISING

INTRODUCTION

It is a well-known phenomenon in every decade that, with the wisdom of hindsight, we look back on previous eras with some degree of superiority and derision and marvel at their lack of sophistication. So it is with advertising. Of course today's advertisements are more sophisticated, witty and contemporary - at least until tomorrow.

This paper addresses (in a rather eclectic fashion) two trends or features of modern advertising - (1) the commercialisation of likenesses, voices and persona and (2) environmental or 'green' advertising.

COMMERCIALISATION OF LIKENESSES, VOICES AND PERSONA

The use of personalities to endorse or promote a product has been a feature of advertising for many years. Traditionally it took the form of direct product endorsement where the celebrity openly recommended the product or service in question. While this traditional form is still used, personalities today are often used in more subtle ways to capture the public's attention so as to lift that particular advertisement above all the others which crowd in on us - on radio, in print or on television. This subtlety, which is particularly seen in television advertisements, was summarised by Burchett J in one of the Paul Hogan cases[1]:

> The whole importance of character merchandising is the creation of an association of the product; not the making of precise representations. Precision would only weaken an impression which is unrelated to logic, and would in general be logically indefensible. Yet the impression must be powerful to be effective. The only medium likely to convey the vague message of character merchandising, while giving it the force and immediacy of exciting visual impact, is television. That is why the technique has grown in importance with the rise of the television industry. Its implications have hardly yet been explored in the courts. The exploration involves the application of established principles in an unfamiliar setting, where a pervasive feature is not so much the making of statements that may mislead the mind directly, as suggestions that may inveigle the emotions into false responses.

The law of character merchandising or personality endorsement has been well discussed in a number of articles and books in recent years[2]. The courts, particularly in Australia, have shown themselves willing in appropriate cases[3] to use a generous form of a passing off action

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1 *Pacific Dunlop Limited v Hogan* (1989) 14 IPR 398,429-30

2 S Murumba 'Commercial Exploitation of Personality', Law Book Co (1986); Brown 'Character Merchandising: A view from Australasia' (1986) 2 IPJ 93; Howell 'Character Merchandising: The Marketing Potential Attaching to a Name, Image, Persona or Copyright 'Work' (1991) 6 IPJ 197

3 *Henderson v Radio Corp Pty Limited* (1960) SR (NSW) 576; [1969] RPC 218; *Childrens Television Workshop Inc v Woolworths (NSW) Ltd* [1981] RPC 187; *IPC Magazines v Black and White Music Corporation* [1983] FSR 348 (UK); *Hogan v Koala Dundee Pty Limited* (1988) 12 IPR 508; *Pacific*

and/or breaches of the Fair Trading Act 1986[4]. The cause of character merchandising, at least as it relates to **real** people, has received some judicial endorsement in New Zealand (albeit in part obiter) in the very recent Buzzy Bee case, *Tot Toys Limited v Mitchell*[5]. Fisher J observed[6] in that case that the desirability of consistency in commercial matters between the two CER countries suggested that if at all possible in New Zealand courts should follow the character merchandising approach favoured in Australia, although he expressed some caution in "following too quickly down that path" - particularly in the case of, what he called, "artificial" character mechanising (ie fictional, inanimate and other man-made characters). The judge drew a distinction between such "artificial" character merchandising and the promotional use of names, reputations and images of real persons[7]:

> Few would dispute that real persons should generally have the right to prevent the unauthorised promotional use of their persona. There may be a case for going beyond existing causes of action - defamation, confidentiality, contract and passing off in its less controversial form - to North American causes of action for appropriation of personality and/or breach of rights of privacy and publicity.[8]

Two aspects of personality endorsement merit closer attention. These are:

- The use of Sound-alikes and Look-alikes;
- The unauthorised use of photographs.

The Use of Sound-alikes and look-alikes

In one recent US case[9] the court stated:

> The voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. We are all aware that a friend is at once known by a few words on the phone. At a philosophical level it has been observed that with a sound of a voice 'the other stands before me".

A face and a voice are both part of a person's unique identity - just as much as their signature or name. The point is illustrated by a few contemporary examples - Sir Harry Secombe's high pitched laugh, the late Sir Robert Muldoon's gravel voice and chuckle and John Cleese's clipped staccato delivery.

Dunlop Limited v Hogan (1989) 14 IPR 398

4 Sections 9, 13(e) and (f); in Australia ss 52, 53(c) and (d) Trade Practices Act 1974

5 Tauranga CP 186/88, 15 July 1992 - to be reported in IPR

6 Ibid, 54

7 Ibid, 60

8 Breaches of ss 9 and 13 Fair Trading Act 1986 must be added to the list of causes of action available in New Zealand

9 *Midler v Ford Motor Co* 849 F 2d 460, 463 (1988)

In radio advertising the use of sound-alikes has become quite common. Local advertising has used sound-alikes of English television presenter Alan Whicker, actor Gordon Kaye from the television series "'Allo 'Allo" and the inimitable (but nonetheless imitated) John Cleese. Look-alikes are not as frequently used locally in print or television advertisements but have certainly been the subject of advertisements (and court action) in Australia, the United States and England.

One of the earliest cases of voice imitation is the 1959 English decision of *Sim v H J Heinz Co Limited*[10]. There a television advertisement used a voice-over impersonating the well-known film and stage actor Alistair Sim. The plaintiff sought an interlocutory injunction to restrain broadcasting of the advertisements on the basis they were defamatory and would lower the plaintiff in the estimation of right-minded people, since it would be beneath his dignity and standing as an actor to endorse commercials. (How far times have changed since then!) A second cause of action, described as "novel", was passing off. The interlocutory injunction was refused (both at first instance and on appeal) on the basis of the established principle of not granting interlocutory injunctions in a defamation action and that it would be equally inappropriate to do so under the passing off action where this was jointly pleaded. In the Court of Appeal the court regarded as a novel, but undecided, point whether the plaintiff's voice could be regarded as property and its imitation could be said to be in the nature of unfair trading or passing off.

Fisher J's observations in the Buzzy Bee[11] case strongly suggest that New Zealand courts would now regard a person's voice as being sufficient to sustain an action in passing off and under the Fair Trading Act. The voice is an essential part of one's persona.

While it would seem an obvious point, it should also be emphasised that for use of sound-alikes and look-alikes even to pass the threshold of actionability, the original personality or characterisation must be sufficiently famous or well-known. This is unlikely to be a problem in most cases since an advertiser will only want to use a recognisable look-alike or sound-alike as the means of attracting the consumer's attention in the first place.

One of the most well-known sound-alike cases is the *Bette Midler*[12] case in the United States. For the purposes of a Ford Motor Company commercial, the advertising agency Young & Rubicam approached Bette Midler to see if she would sing the 1973 hit song "Do You Want to Dance". When she refused, Young & Rubicam hired a former back-up singer for Bette Midler and instructed her to sound as much like the singer as possible. The song was to form part of a yuppie campaign, to bring back memories of the 1970s when the "yuppie baby boomers" were in college so that these could be linked with the cars being advertised. The sound-alike was very successful and most of those who heard the commercial thought it was in fact Bette Midler singing. The Ninth Circuit Court of Appeal held that Bette Midler's distinctive voice was a "common law property right" which had been wrongfully appropriated and was actionable under

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10 [1959] 1 WLR 313

11 Supra, fn 5

12 *Midler v Ford Motor Co* 849 F 2d 460 (1988). For comment see J Thomas McCarthy "Public Personas and Private Property: the Commercialisation of Human Identity", (1989) 79 TMR 681; Leonard M Marks "The Bette Midler case: Judiciary finally listens to sound-alike claim", (1989) The Licensing Journal 15.

Californian law as a tort. The Court went on to observe that not every imitation of a voice could be actionable but "only. . . when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product"[13].

Interestingly Bette Midler was not able to take advantage of a statutory **right of publicity** cause of action granting damages for use of a person's "name, voice, signature, photograph or likeness in any manner" because the voice used was that of the back-up singer not Midler's.

A frequent defence raised in any sound alike or look-alike case is that the advertisement is a parody, a joke or caricature. It is suggested that, on their own, such labels are largely unhelpful since they obscure the real issue, which is whether the ingredients of the appropriate cause of action have been satisfied.

Where reliance is placed on either breach of the Fair Trading Act or passing off, the critical question will be whether there is demonstrable or likely confusion and deception (passing off) or misleading and deception (s9 Fair Trading Act). More specifically, as Beaumont J put it in *Pacific Dunlop Limited v Hogan*[14]:

> The question for the judge to decide . . . was whether a significant section [of the relevant public] would be misled into believing, contrary to the fact, that a commercial arrangement had been concluded between the first respondent and the appellant under which the first respondent agreed to the advertising. If such a misrepresentation were established to the satisfaction of the judge, the case of both passing off and conduct contrary to [s9] would be made out.

The label 'parody' **of itself** does not assist in answering or deflecting this question. (In the copyright context, for example, it has been held that parody is not a defence by itself; the key issue is the normal statutory test, ie has the defendant reproduced a substantial part of the plaintiff's work[15].)

An ever-present irony is that the better the impersonation the more likely it is that the plaintiff will succeed since a greater number of consumers will be misled and deceived. But what of those cases where the impersonation is readily apparent, but not so apparent as to dupe consumers, or a significant number of them, into believing that the voice is from the **real** celebrity? Yet nonetheless the association with the celebrity is still apparent. It is after all the impersonation or sound alike which attracts attention to the advertisement in the first place. Is there not something unfair in allowing the celebrity's persona to be used as "the hook". Furthermore, a sound-alike or look-alike may over-expose a particular celebrity's voice or face - albeit through obvious impersonation. Such debasing of the persona may deprive the genuine celebrity of other endorsement opportunities or reduce the fee which could otherwise be commanded. As it was put by Gummow J in *Hogan v Pacific Dunlop Limited*[16]:

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13 Ibid, 463

14 (1989) 14 IPR 398,426

15 *Schweppes Limited v Wellingtons Limited* [1984] FSR 210, 212. For further discussion of parody see Gummow J in *Hogan v Pacific Dunlop Limited* (1988) 12 IPR 255,243 et seq.

16 (1988) 12 IPR 225,249

"... the less the celebrity engages in these activities, the more selective he or she is seen as being and the more valuable his or her favour.

This more subtle form of association was addressed in the well-known case of *Pacific Dunlop Limited v Hogan*[17] where Paul Hogan sued in respect of an advertisement for shoes which used an easily recognisable parody of the "knife scene" from the film Crocodile Dundee. The "Mick Dundee" figure in the advertisement did not appear to be Mick Dundee/Paul Hogan but (as Beaumont J observed[18]) you were given the impression that a variant of Dundee was endorsing the shoes. Beaumont J, one of the majority judges in the Full Federal Court, stated the essential question as being whether the advertiser had conveyed the message that the celebrity has agreed to an advertisement in which an image[19] identified with the celebrity is seen to endorse the goods[20]. If there is mere caricature or parody such that viewers or listeners would receive the impression that the celebrity would **not** have agreed, no action will flow, but where there is more than mere caricature, so that the personality or even a **variant** of the personality's image is seen as sponsoring the product, then a remedy is available[21]. Burchett J (also one of the majority) rejected any defence of parody in this case, calling the advertisement a "parasitic copy - parasitic because its vitality is drawn entirely from the audience's memory of the original"[22]:

> It would be unfortunate if the law merely prevented a trader using the primitive club of **direct misrepresentation**, while leaving him free to employ the more sophisticated rapier of suggestion, which may deceive more completely.[23]

A New Zealand perspective - the *Buzzy Bee* case

In his *Buzzy Bee* decision[24] Fisher J explored some of the subtleties of merchandising and use of images. And, as already seen, he saw an important distinction between, on the one hand, the promotional use of names, reputation and images of **real persons** and, on the other, "**artificial**" character merchandising in the sense of fictional, inanimate and other man-made characters. In the **latter** case Fisher J felt reservations about protection notably:

(a) Whether the protection in some recent Australian cases might have sprung not so much from a finding of actual deception or damage as the tacit assumption that there should

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17 (1988) 12 IPR 225; (1989) 14 IPR 398

18 Ibid, 427

19 Which, it is submitted, would include a voice

20 Supra, 427

21 Ibid, 427-8

22 Ibid, 430

23 Ibid, 431

24 *Tot Toys Limited v Mitchell* (Tauranga CP186/88 15 July 1992)

be a right of property in names, reputations and artificial images for character merchandising[25].

(b) Whether passing off is the best vehicle for protection. "What of the obvious satirist, the obvious backyard copyist or the advertiser who expressly disowns any association with the originator of the image"[26].

(c) The identified competing policy issues. The incentive principle favours more protection in that the opportunity to protect a monopoly would encourage individuals to create and promote new images giving pleasure and value to mankind. On the other hand, against creating any fresh monopolies are freedom of enterprise, community access to its progress and the public interest in competition[27].

Fisher J concluded that no case had been made for a strained or special application of the conventional laws of passing off in order to protect **artificial** character merchandising rights in New Zealand and emphasised that the onus continues to be on the plaintiff to show deception[28]:

> This may take the form of inducing the public to falsely believe that there is a commercial connection between the defendant and/or his goods and the plaintiff and/or his but there can be no predisposition towards any particular finding on that essentially factual issue. In addition the plaintiff must be able to point to some form of damage beyond the loss of an opportunity to exploit character merchandising rights the existence of which is the very subject under inquiry.[29]

In standing back from this decision several comments may be offered:

(a) One wonders whether the distinction between real persons and artificial merchandising is as clear a distinction as the decision makes out. While in some cases an image is close to the celebrity or actor's real persona and physical appearance (Paul Hogan as Mick Dundee; Andrew Sachs as Manuel in Fawlty Towers), in other cases the persona or image is well removed from the real person behind it - for example Bella Lugosi as Dracula, Barry Humphreys as Dame Edna Everage. The voice used for Donald Duck or Woody Woodpecker is a long way from the actor's normal voice. Moreover where there has been a substantial reputation and goodwill created in "artificial" characters such as the Ninja Turtles or Batman (who has crossed the threshold from a comic-strip to

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25 Ibid, 59

26 Ibid, 59

27 Ibid, 61

28 Ibid, 61

29 As to the cause of action under section 9 Fair Trading Act, Fisher J held, 69, that to gain a remedy the plaintiff "will normally need to demonstrate that the deception would have a significant impact upon the consumer. If in the particular situation proposed by the defendant a consumer would not be interested in the subject of an association between the two parties, and that his or her conduct would not be influenced by any assumptions on that subject, the plaintiff is likely to be denied a remedy".

reincarnation as a real actor in two movies) why should there be any difference in the scope of protection available?

(b) Fisher J's requirement that the plaintiff in passing off must be able to point to some form of damage "beyond the loss of an opportunity to exploit character merchandising rights" seems, with respect, not to reflect the commercial reality. Traders in New Zealand already recognise (by entering licences and paying licence fees) the commercial value of associating the name, persona and image of a character with products or services, be they real persons such as John Cleese or cartoon characters such as the Ninja Turtles. Where a plaintiff can show an exclusive reputation in a persona, be it his own, a character he portrays, or an "inanimate" character he has created, why is it necessary to show loss beyond loss of an opportunity to exploit character merchandising rights? The reality is that where others are seeking legitimately or illegitimately to use that reputation to endorse their goods or services they are doing so because of a perceived commercial value in the persona.

Other look-alike cases

Other look-alike cases have been disposed of on more conventional principles. In *Newton-John v Scholl-Plough (Australia) Limited*[30], the advertisement in question contained a photograph of an Olivia Newton-John look-alike[31] and bore the words "Olivia? No 'Maybelline!'. A further copy of the advertisement used the words 'Maybelline makes anything possible' and 'For the Olivia look' use Blooming colour'. Burchett J held that there was no misleading or deceptive conduct involved. The advertisement told "even the most casual reader, at even the first glance that in fact it is not Olivia Newton-John who is represented in the advertisement"[32]. While the advertising was taking advantage of Olivia Newton-John's name and reputation in a not particularly praiseworthy way, it was equally making it perfectly clear that the product did not have any relevant association with her.

This latter comment suggests that the court was uncomfortably aware that the whole "look" of the advertisement was the persona of Olivia Newton-John but, at least on the application of conventional principles, was unable to find a remedy. As has already been seen in the subsequent *Paul Hogan* cases the courts have been prepared to give a remedy where persona is used in more subtle ways.

In *10th Cantanae Pty Limited v Shoshana Pty Limited*[33] the plaintiff, Sue Smith, a well-known Australian television personality, sued an advertiser for publication of an advertisement for a video recorder. The advertisement depicted a young woman in bed watching the screen of a television set and bore a heading in large print "Sue Smith just took total control of her video

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30 (1986) ATPR 40-697

31 The model having earlier answered an advertisement seeking a person of similar appearance to Oliver Newton-John

32 Supra 47,633

33 (1987) 10 IPR 289

recorder". The plaintiff failed in her action to show that readers would be likely to read the advertisement as containing a reference to her[34].

> "In the present case, there was nothing more than the bare name. The advertisement contained no information pointing unequivocally to Ms Smith. There was no relevant context. The two names "Sue" and "Smith" are common enough, whether considered separately or as a combination. The only additional material was a picture of the "Sue Smith" referred to in the advertisement. But, because it was a picture of a person dissimilar in appearance to the second respondent, it pointed the other way. It should be noted that, although such evidence would not have been conclusive, the respondents did not call any evidence to establish that somebody had in fact been misled into thinking that the "Sue Smith" of the advertisement was the second respondent."

Unauthorised use of photographs

The unauthorised use of a photograph of a person in an advertisement raises a number of challenging issues[35] and can affect not just celebrities but ordinary members of the public. It is generally standard practice for advertising agencies to obtain appropriate consents where the photographs are used, but where such consents are not obtained then liability can arise.

(a) **Defamation**

While defamation is not perhaps the first cause of action to spring to mind, this was pleaded in a recent English case[36] where Jill Goolden, a presenter for BBC's Food and Drink Programme, sued in respect of a newspaper advertisement for the cleaner Domestos. Ms Goolden contended that the advertisement (which featured a photograph of her alongside an extract of an article about hygiene from Today newspaper) suggested that her kitchen was dirty. She sued the advertiser and the advertising agency. The advertiser blamed the agency for apparently failing to obtain Ms Goolden's consent to the advertisement. The case was settled before trial for an apology and "substantial undisclosed damages and costs". The case is a salutary example of the risks of such endorsement advertising and the absolute necessity of obtaining the consent of those who are depicted in the advertisement. Other cases where defamation has been pleaded[37] have involved the use of a photograph of an ex-policeman in an advertisement for a cure for sore feet[38] and that of an actress without her teeth in a dentist's advertisement[39].

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34 Ibid, 292 per Wilcox J. See the same page for discussion of three ways in which misleading and deception **might** arise in such cases

35 For a general discussion see Pannam 'Unauthorised Use of Names or Photographs in Advertisements' (1966) ALJ 4; Terry 'The Unauthorised Use of Celebrity Photographs in Advertising' (1991) ALJ 587

36 Referred to in ISBA Legislative and Regulatory Review, August-September 1992, p10

37 Cited by Pannam, fn 35, supra, 5

38 *Plumb v Jeyes*, The Times, 15 April 1937

39 *Funston v Pearson*, The Times, 12 March 1915

In New Zealand one of the leading cases is *Taylor v Beere*[40]. In that case, a grandmother with five children and seven grandchildren had had her photograph taken (in the company of one of her granddaughters) by a skilled amateur photographer. She discovered that the defendant proposed publishing this in a book called "Down Under the Plum Trees". Despite oral and written objection the defendant went ahead and used the photograph. The book purported to be a manual about sex and was subsequently classified by the Indecent Publications Tribunal as indecent in the hands of children under eighteen. The immediate context of the photograph of the book was some text in which a small girl describes staying with her "old grumpy and ugly grandmother". It was claimed that the inclusion of the photograph led to the defamatory meaning that the plaintiff had consented to the use of her photograph in the book and had thereby approved or condoned the book and/or the plaintiff was a person who was willing to approve and be associated with an indecent document or a document closely bordering on the indecent and/or that the plaintiff had in consideration of a money payment allowed a photograph of herself and her granddaughter to appear in an indecent document.

The High Court ruled that the publication was capable of conveying each of those meanings and before the Court of Appeal counsel for the appellant was recorded as "quite rightly acknowledging] in argument in this court that he would not dispute that the publication was capable of being defamatory of the plaintiff as alleged and that the jury were entitled to award some damages". Similarly in *Kirk v A H & A W Reed*[41] decimation was pleaded in relation to a coloured picture of the plaintiff printed in a volume called "The New Zealanders in Colour" together with the caption "Christmas Beer. A reveller with his Christmas beer supply waits for the bus at High Street, Lower Hutt". The photograph had been obtained on representations that it was for the photographers personally and not for publication. On a striking out claim Wild CJ held that it was open to a reasonable jury to hold that the publication of the photograph obtained in the way it was and with the caption was defamatory.[42]

(b) **Breach of privacy**

Although in the UK the Court of Appeal has held that English law knows no right of privacy (*Kaye v Robertson*[43]), in New Zealand there has been an acceptance of this cause of action. In *Tucker v News Media Ownership Limited*[44] Jeffries J (in the

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40 [1982] 1 NZLR 81

41 [1968] NZLR 801

42 For a recent example, not involving a real person, see the *Mount Cook Group Limited v Johnstone Motors Limited* [1990] 2 NZLR 488; (1990) 19 IPR 482

43 [1991] FSR 62. See Comment [1991] 9 EIPR 340

44 [1986] 2 NZLR 716

interim injunction context) and McGechan J (in a subsequent judgment) both accepted the cause of action - albeit with limitations. Jeffries J stated[45]:

> A person who lives an ordinary private life has a right to be left alone and to live the private aspects of his life without being subjected to unwarranted, or undesired publicity or public disclosure. Obviously such a right must be subject to certain exceptions, but on the state of the evidence before the Court the plaintiff does not seem to come within one of them . . . . The gravamen of the action is unwarranted publication of intimate details of the plaintiff's private life which are outside the realm of legitimate public concern, or curiosity.

While McGechan J stated[46]:

> 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.

In several subsequent New Zealand cases[47] breach of privacy has been pleaded - two of them successfully. In the most recent case, *Bradley v Wingnut Films Limited*, the tort of breach of privacy was unsuccessfully pleaded in relation to the inclusion of footage of a family vault bearing the family name in a horror movie "Brain Dead". The scope of the new tort was further commented on by Gallen J[48]:

> "The present situation in New Zealand then is that there are three strong statements in the High Court in favour of the acceptance of the existence of such a tort in this country and an acceptance by the Court of Appeal that the concept is at least arguable. I too am prepared to accept that such a cause of action forms part of the law of this country but I also accept at this stage of its development its extent should be regarded with caution and I note too the concerns expressed in the article [Bedingfield "Privacy or Publicity? The enduring confusion surrounding the American tort of invasion of privacy" (1992) 55 MLR 11] so that there is a constant need to bear in mind that the rights and concerns of the individual must be balanced against the significance in a free country of freedom of expression. I note also the difficulty in formulating bounds which will ensure that both concerns are appropriately recognised."

The possibility that this new tort might conceivably offer a remedy for the unauthorised use of photographs is an intriguing one. The connection is not as tenuous as it might seem at first. Although McGechan J's formulation of this emerging tort in *Tucker*[49] is limited in terms, that of Jeffries J[50] would seem wide enough to cover situations where

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45 731-2

46 Ibid, 733

47 *T v Attorney-General* (1988) 5 NZFLR 357; *Morgan v Television New Zealand Limited* (Christchurch CP 67/90 1 March 1990, Holland J) *Marris v TV3 Network Limited* (Wellington CP 754/91, 14 October 1991, Neazor J) and *Bradley v Wingnut Films Limited* (Wellington CP 248/92, 27 April 1992, Neazor J and 1 August 1992 Gallen J)

48 *Bradley v Wingnut Films Limited* (Wellington CP 248/92, 1 August 1992 Gallen J, 11-12)

49 [1986] 2 NZLR 716,733

50 Ibid, 731-2

photographs of a member of the public are used in an advertisement without consent. For non-celebrities such use of a photograph can be acutely embarrassing. In one instance with which I am familiar, an amateur and non-celebrity sportsman claimed to have been ribbed by his work mates and to have suffered serious embarrassment amongst friends when his photograph, taken during a sporting encounter, was featured in a liquor advertisement.

In the United States, Prosser & Keeton on Torts[51] make it clear that there is no one tort of privacy but rather a "complex of four":

> To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone'.

In the 'Brain Dead' case[52], Gallen J in fact directly considered two of the four US privacy torts listed by Prosser & Keeton, namely

(a) Public disclosure of private facts which is highly offensive and objectionable to a reasonable person of ordinary sensibilities; and

(b) Publicity which places the plaintiff in a false light in the public eye.

However, another of the four US torts of privacy is more apposite to the context we are discussing. It is the tort of "**appropriation**" ie the appropriation for the defendant's benefit or advantages of the plaintiff's name or likeness[53]. As the well-known US commentator, J Thomas McCarthy, has stated in relation to this aspect of privacy:[54]

> The theory is that using without permission a persons's identity to help sell products causes an indignity and mental distress analogous to that created if one were physically forced to get up on the stage and tout someone's products.

This aspect of privacy would clearly seem to present an arguable cause of action for **ordinary members of the public** whose photograph is used without consent for commercial purposes[55]. Whether it would also be available in New Zealand for

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51 Prosser & Keeton on Torts, 5th ed, 851 et seq

52 Supra, 12

53 Prosser & Keeton 851

54 J Thomas McCarthy 'Public Personas and Private Property: The Commercialisation of Human Identity' (1989) 79 TMR 681, 687

55 As Prosser & Keeton make it clear the US courts have held that where photographs are published by newspapers, magazines, television companies or motion picture companies, there must be some connection "for the purposes of trade" beyond the mere fact that the newspaper is sold or the television item is broadcast. Any other conclusion would lead to interference with the freedom of press (and the constitutional implications in the US). Thus in the English case of *Kaye v Robertson* [1991] FSR 62

celebrities is more contentious since, at least in terms of nomenclature, it would scarcely seem appropriate to refer to **privacy** where persons are already in the public domain.

It was because of this apparent contradiction that the US courts (and subsequently State legislatures) have created a **right of publicity** for public figures. Rights of privacy and the right of personal liberty were held to include the right to exhibit oneself before the public at proper times and places and in a proper manner. As a corollary this liberty included the right of a person **not** to be exhibited before the public[56].

(c) **Passing off; Breach of the Fair Trading Act 1986**

The causes of action most readily available for cases of unauthorised use of photographs in advertising are clearly passing off[57] and breaches of ss 9 and 13(e) of the Fair Trading Act 1986. Where the photograph used is that of a celebrity with a commercial reputation the action will pass the initial threshold of actionability. This is much less certain where photographs of ordinary members of the public are used and no commercial reputation or persona is at stake.

Such a case involving a celebrity was *Honey v Australian Airlines Limited*[58]. Gary Honey was a well-known Australian long jumper and winner of a gold medal at the 1986 Commonwealth Games. Australian Airlines produced a poster (being part of a series depicting persons competing in sport) featuring the plaintiff jumping at the Commonwealth Games. No consent was sought from him for use of the photograph. On the bottom right hand side of the poster, in a much smaller area compared with the size of the poster, there was a statement:

> ATHLETICS
> Commonwealth Games
> Edinburgh, Scotland
> Long jump
> Gary Honey, Gold Medal winner
> (Photography by: Tony Feder, Melbourne)
> AUSTRALIAN AIRLINES (Logo)

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where the complaint concerned the taking of unauthorised photographs of actor Gordon Kaye in hospital, there would have been no cause of action in the US since the photographs were used for newspaper reporting rather than any additional commercial purpose.

56 *Pavesich v New England Life Insurance Co* 50 SE 68 (1905); *Haelan Laboratories Inc v Topps Chewing Gum Inc* 202 F 2d 866 (1953); *Prosser on "Privacy"* 48 California Law Review 383 (1960) In many States of the United States this cause of action has been bolstered by statutory enactment.

57 *Henderson v Radio Corporation* (1960) SR (NSW) 576 is one of the earliest successful passing off cases. Here a photograph of a well-known ballroom dancing couple was used without authorisation on the cover of a long-playing record.

58 (1989) 14 IPR 264 (Northrop J); (1989) 18 IPR 185 (Full Federal Court)

To the right and slightly below the words Australian Airlines appeared the Australian Airlines' logo.

The photograph was also used on the cover of a religious book and of a religious magazine (with the approval of Australian Airlines but again without the plaintiff's consent). The plaintiff claimed that such unauthorised use of his photograph was in breach of the Australian equivalent of ss 9, 13(e) and (f) Fair Trading Act 1986 and passing off.

Surprisingly the plaintiff failed at both first instance and on appeal. As to the **poster** the reasons for this were:

(i) The photograph was not contrived or posed so as to convey a connection between the athlete and product or services being advertised.

(ii) Nothing on the poster, apart from the name and logo of Australian Airlines, suggested any association between the athlete and Australian Airlines. The name and logo were not in a prominent position, and the focus of the viewer's attention would be on the photograph.

(iii) Those to whom the poster was directed and even who saw it for the first time would have concluded it was one of series.

(iv) Viewers of the poster would perceive it not as an advertisement or promotion of Australian Airlines but rather as promotion of sport by the airline.

As to the **book and magazine**, again there was no liability. Some rather tenuous distinctions were drawn in this regard:

(i) Only members of the public who visited Christian bookshops would have been likely to see the book.

(ii) The appellant was not named in the book or magazine, and any perceived association or connection would not be between Gary Honey and the publisher of the book but between Honey and its theme or contents.

(iii) The Court agreed with Northrop J in the Court below that between Commonwealth and Olympic Games the high profile given to competitors declines and the memories of the public fade.

The impression one has of this case is that the plaintiff was hard done by - particularly in relation to the book and magazine - and that the Court was very conservative in its conclusions. Even if, as Northrop J found, the profile of Gary Honey had declined after the 1986 Games, he would still have been known to a substantial number of Australians. Should it not be his choice as to whether his persona was used on a Christian book and magazine, the contents or theme of which he might not agree.

(d) **Advertising codes of Practice**

The advertising Codes of Practice (Part 7) contain a number of rules governing the portrayal of people in advertising. One particular rule may in some contexts give grounds for complaint where a person's photograph has been used in an advertisement without consent. Rule 1 states:

> Advertising should not portray individuals or groups within society in a manner which is likely to expose them to violence, exploitation, hatred, contempt, abuse, denigration or ridicule from other members of the community.

A member of the public or a celebrity may be able to make out a case that use of his or her photograph without consent (for example, in an advertisement for abortion) has or will expose them to denigration or ridicule from other members of the community. Given that advertising agencies in general do obtain consents, it may also be timely for the Advertising Standards Authority to consider adding to part 7 a specific provision covering the unauthorised use of photographs of persons in advertising.

Finally, it is to be noted that rule 6 of this part of the code does contain some allowance for humour and satire:

> Humour and satire are natural and accepted features of the relationship between individuals and groups within a community. Humorous and satirical treatment of people and groups of people is equally natural and acceptable in advertising, provided the portrayal does not encourage intolerance, prejudice and bigotry.

ENVIRONMENTAL ADVERTISING

One of the great consumer movements in the last 10 years has been the phenomenon of "green consumerism", ie consumers who wish to eat food and use products which have minimal impact on the environment and are healthy, clean, and safe. Amongst the public there has been a growing awareness of the degree to which harmful pesticides, fertilisers, processing methods, and packaging have become part of the products we buy, and how they can affect dramatically the food we eat and the environment we live in.

The environmental movement of the 1970s swept up many of the baby boomers' generation. Green consumerism arguably reflects the fact that this generation has reached positions of affluence and consumer spending power. Furthermore, the environmental message of organisations such as Greenpeace and the Maruia Society has had an impact on the population and on consumer purchase decisions. In turn, businesses have realised that there is money to be made in having products which are (and can be advertised) as having no or minimal impact on the environment.

The late 1980s brought a startling outbreak of green consumerism. In Britain a poll taken by the research organisation MORI between November 1988 and May 1989 found that the proportion of respondents who said that they had chosen the product because of its "environmental friendliness" shot from 19% to 42%[59]. This coincided with a strong environmental emphasis by the government and the media in Britain (and indeed in many other countries).

Research in New Zealand has shown similar trends towards green consumerism. In one survey[60] 70% of consumers interviewed stated that they were prepared to pay a little more for a "green product". In another survey 86% of consumers questioned put in at least some effort to buy greener products[61].

The first environmentally friendly product labelling scheme began in West Germany in 1977 with the "Blue Angel" scheme. This is now regarded as rather unsophisticated and far too narrow in its environmental assessment of products. One local commentator has observed, however, that the Blue Angel Scheme has "done the world a great service because it has brought attention to the labelling of environmentally friendly products"[62]. Where previously caring for the environment used to be a battle and a chore, it has now become a marketing opportunity. A perceptive comment made by Economist Magazine in September 1990 was that green

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59 "Spend a pound and save the planet", The Economist, September 8 1990. This reports that in Autumn 1988 a number of forces came together in the UK. Margaret Thatcher made her major two famous "green speeches"; the press gave considerable space to such environmental topics as dying seals, burning rain forests and diminishing ozone; and a consultancy published a "green consumer guide" giving a star rating to companies and products.

60 Admark, National Business Review, 20 February 1991, "Sanctions Plan to Ensure Green is Really Green"

61 "False Labelling Comes Unstuck" Marketing, May 1991, 37

62 Comment by Fiona McKenzie, Marketing Manager, Telarc, 'Marketing', May 1991 38

consumerism "has done more to bring the environment to the attention of managing directors than any number of worthy commissions and earnest reports".

Green marketing has also received a major boost in New Zealand as a result of governmental and other trade development initiatives to emphasise New Zealand's clean, green image in the marketing overseas of this country and its products. Feedback from the 1991 ANUGA trade fair in Germany testified to New Zealand's image as a leading environmentally friendly country whose products carry a consumer perception that they are "clean and green". This strategic emphasis in our marketing has been carried through to the theme of New Zealand's Expo pavilion in Seville 1992 and the trading drive in Europe which has accompanied it[63].

Downsides of environmental/green claims

The consumer mania and consumer receptiveness that has accompanied the "environmentally friendly" product boom has, however, real dangers to both consumers and responsible companies alike. Where conflicting claims are made about so-called green products then consumer scepticism will arise. Where there is no independent definition or regulation of the seductive marketing buzz words such as "environmentally friendly", "natural", "organic", "compostable", "recycled", or "100 percent ecologically sound", then consumer frustration and confusion results. For example, a claim may be made that something is "biodegradable". But how long does it take - two hours or two hundred years?

To be effectively "green", consumers need to be able to make educated and fully informed decisions. Consumers have been faced with the understandable dilemma of determining which products and companies are **genuinely** green. Conversely bona fide "green" manufacturers have had equal difficulty defending their integrity.

In New Zealand one particular range of cleaning products came under the scrutiny of "Fair Go" and Consumer Magazine. Was it misleading to advertise that products were "phosphate free" when all popular handwashing detergents are too? Forest and Bird Magazine[64] gave some publicity to "Naturelle milk" which had gone onto the market in 1990 bearing on the packaging the words "Fresh Organic". The magazine reported that "unfortunately pesticide residues turned up in this brand".

New Zealand moves to regulate green advertising and labelling

Following the lead of Germany, Canada, the European community and Australia, three different governmental and private initiatives have been taken in New Zealand to control and regulate environmental labelling and advertising.

1. **Environmental Choice labelling**

   Arising out of a government discussion paper of December 1989, an "environmentally-friendly" labelling scheme has been set up through the government quango, Telarc. The scheme, known as Environmental Choice New Zealand (**ECNZ**) awards ECNZ labels to those products that can prove they cause as little damage to the environment as is

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63 'Exposure in Seville for Kiwi Creativity', New Zealand Herald 10 October 1992

64 Major, "Eco-labelling" Forest & Bird Magazine (1991) p48

practically possible. The scheme is an environmental rather than a green scheme, the difference being that "green" has connotations of no negative impact on the environment, whereas "environmental" means an objective independent assessment of the impact. The aim of the ECNZ scheme is to encourage manufacturers to meet minimum standards so that they can qualify to use the Environmental Choice label. Telarc has chosen various product categories and has been releasing final criteria which will enable companies to apply for the ECNZ label. Batteries and recycled plastics are two product categories which have already been considered. Other areas which Telarc are considering are engine oil, recycled paper, household detergents and paints. Telarc wishes to encourage manufacturers to meet the criteria and recognises that this may take some time.

A licence to use the ECNZ label will last for two years and must then be renewed.

2. The Fair Trading Act - guidelines on environmental claims

In March 1992 the Commerce Commission issued guidelines to manufacturers, distributors and retailers on environmental claims made on labelling and in advertising[65]. The Fair Trading Act, in ss10 and 13(a) and (e) contains provisions prohibiting misleading and deceptive conduct and misrepresentations of various kinds. Environmental claims about a product or service will be in breach of one or more of these sections of the Act if they mislead or deceive the ordinary consumer about:

- a product's impact on the environment
- an endorsement given to a product by an organisation concerned with environmental issues

Some of the Commission's guidelines are:

(a) Do not make sweeping statements about a product's "environmental friendliness".

(b) Do not claim benefits which cannot be substantiated.

(c) Do not use misleading graphics or logos on product packaging.

(d) Do not claim benefits which are unreal or illusory.

(e) Do not make unauthorised use of endorsements.

The Commerce Commission has already taken action in relation to an advertising campaign by Suzuki New Zealand for its Swift motorcar[66]. After an approach by the Commission Suzuki cancelled an advertising campaign which proclaimed how "clean" and "green" its Swift cars were. According to the Commission publicity:

> Suzuki used independent American research which judged the new one litre Swift to be 'the most environmentally effective vehicle in the USA'.

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65 "Environmental Claims and the Fair Trading Act" March 1992, Commerce Commission

66 'Fair's Fair', Commerce Commission, May 1992, 5

The model generated the lowest CO_2 exhaust emissions of the tested cars and used the least fuel. However, the model was required by American law to have a catalytic converter to reduce CO_2 emissions.

There is no such requirement in New Zealand the models sold here did not have the converter, but Suzuki did not state this in their advertisements.

Such a claim was clearly misleading under the Fair Trading Act. The Commission approached Suzuki which agreed to run advertisements in all the Sunday newspapers in mid-April to correct the impression.

Suzuki also instructed its dealers to destroy all advertising material relating to the model.[67]

3. Advertising Standards Authority - code for environmental claims

In February 1991 the Advertising Standards Authority issued new guidelines on environmental claims. The code came into effect on 1 March 1991 for new advertising material and on 1 June 1991 for existing material. The introductory comments to the code expressed generally the concerns which the Authority had:

> The spurious use of environmental claims and claims which mislead by omission or by implication may not only bring the advertiser into conflict with this Code and the Fair Trading Act but may also cause confusion amongst consumers and potentially lessen their confidence in advertising generally.
>
> This code covers all advertising containing claims for environmental benefit and includes packaging shown in advertisements.

The six guidelines set by the Advertising Standards Authority are as follows:

(a) Generalised claims for environmental benefit must be assessed on the complete life-cycle of the product and its packaging taking into account any effects on the environment of its manufacture, distribution, use, disposal, etc. Thus absolute claims for environmental benefit, either stated or implied, are not appropriate.

eg "Environmentally friendly"
"Environmentally safe"
"Environmentally kind"
"Product X has no effect on the environment"
"100% ecologically sound"

are absolute claims and therefore not acceptable.

(b) Qualified claims such as "environmentally friendlier/safer/kinder" may be acceptable where the advertised product, service or company can demonstrate a significant environmental advantage over its competitors or a significant improvement on its previous formulation, components, packaging, method of manufacture or operation.

(c) All claims must:

(i) be able to be substantiated, and

(ii) meet local or international standards of biodegradability if such a benefit is claimed (ie to Australian or OECD standards), and

(iii) explain clearly the nature of the benefit,

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67 Ibid

eg "our product X is kinder to Mother Nature" is unclear and thus unacceptable but "our CFC-free product X is kinder to the ozone layer" would be acceptable.

(d) Advertisements, packaging and promotional material must not falsely suggest or imply official approval for a product, whether by words, symbols or any other means.

(e) Claims based on the absence of a harmful chemical or damaging effect are not acceptable when other products in the category do not include the chemical or cause the effect.

(f) Scientific terminology is acceptable provided it is relevant and used in a way that can be readily understood by consumers without specialist knowledge.

The Advertising Standards Complaint Board has had occasion to consider a number of claims of infringement of the code. In complaint 92/87 a complaint was made concerning a brochure published by Kapiti Cove Developments which promoted a subdivision in Paraparaumu. In describing the development the brochure used such phrases as "environmentally friendly", "unprecedented attention to preservation of the natural environment" and "the emphasis on environment and lifestyle is such that about 50% of the completed first stage of the development will be water". There was also a billboard which included the words "this environmentally unique lakeside residential development". The Board accepted an assurance from the advertiser that it was unaware that the words "environmentally friendly" could not be used (Rule 1 of the code) and that they would be removed from future promotional material. As to other aspects of the promotion, the evidence provided by the advertiser satisfied the Board that their claims in the advertisement were justified.

In complaint 91/36, a complainant contended that an advertisement for Johnsons Toilet Duck infringed the code since it made the claim that the product was "friendly on the environment". Again this was held to breach rule 1 of the code because it was an absolute claim. Similarly an advertisement by BP for its Envron oil was held to contravene this same provision (complaint 91/57). BP's television advertisement contained a voice-over stating:

> Every year New Zealanders dump 30 million litres of crude oil. It finds its way into our rivers, lakes and sea, but now BP is turning this tide of waste by collecting, purifying and refining the oil. . . .So now you can protect your engine and the environment.

The Board held that the meaning attributable to this statement was that all the total waste oil of 30 million litres was being re-refined. However as collection sites existed in Auckland and Christchurch only, the statement was incorrect. The Board therefore construed it as an absolute claim and held it breached rule 1 of the code.