DEFAMATION REFORM
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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