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 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 don't believe that damages stamps alone are sufficient for a judgment. The public interest is such that the courts should be left to juries to determine as the best 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 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.

The means of resistance isn't the gagging writ or the threat of legal action. The government probably count on the fingers of one hand the number of journalists who understand it.

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.

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 and breaches of ss 9 and 13(c) 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. 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)

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.

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.

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.

(1989) 14 IPR 264 (Northrop J); (1989) 18 IPR 185 (Full Federal Court)
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 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, 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, i.e., the appropriation for the defendant's benefit or advantage of the plaintiff's name or likeness. As the well-known US commentator, J Thomas McCarthy, has stated in relation to this aspect of privacy:

The theory is that using without permission a person'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. Whether it would also be available in New Zealand for 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 possibility 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 incomprehensible. 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 protestations 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 yourself, 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 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.

interim injunction context) and McGeachan 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 an unwarranted publication of intimate details of the plaintiff's private life which are outside the realm of legitimate public concern, or curiosity.

While McGeachan 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 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 III 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 McGeachan J's formulation of this emerging tort in Tucker is limited in terms, that of Jeffries J would seem wide enough to cover situations where

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45 Jeffries J, 1 August 1992
46 Ibid, 731-2
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
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 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 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

**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 80
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
44 [1986] 2 NZLR 716
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 disapproval 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 Bythioue, News Media Law in New Zealand (3rd edition 1990) p 53

Defamation

While defamation is not perhaps the first cause of action to spring to mind, this was pleaded in a recent English case 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 surreptitious advertising and the absolute necessity of obtaining the consent of those who are depicted in the advertisement. Other cases where defamation has been pleaded have involved the use of a photograph of an ex-policeman in an advertisement for a cure for sore feet and that of an actress without her teeth in a dentist's advertisement.

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

For a general discussion see Pannam 'Unauthorised Use of Names or Photographs in Advertising' (1996) ALJ 4; Terry "The Unauthorised Use of Celebrity Photographs in Advertising" (1991) ALJ 587

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

Cited by Pannam, fn 35, supra, 5

For a cure for sore feet and that of an actress without her teeth in a dentist's advertisement.

Plumb v Jeyes, The Times, 15 April 1937

Funston v Pearson, The Times, 12 March 1915