MEDIA LAW: RECENT DEVELOPMENTS

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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 *Clements* 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]
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> . 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
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> . 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]
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> . 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;

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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

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.*