INTRODUCTION

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

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

COMMERCIALISATION OF LIKENESSES, VOICES AND PERSONA

The use of personalites to endorse or promote a product has been a feature of advertising for many years. Traditionally it took the form of direct product endorsement where the celebrity used, personalities today are often used in more subtle ways to capture the public's attention—(1) the commercialisation of likenesses, voices and persona and (2) environmental or 'green' advertising.

The whole importance of character merchandising is the creation of an association of the product; not the making of precise representations. Precision would only weaken an impression which is unrelated to logic, and would in general be logically indefensible. Yet the impression must be powerful to be effective. The only medium likely to convey the vague message of character merchandising, while giving the force and immediacy of exciting emotions into making statements that may mislead the mind directly, as suggestions that may inveigle the emotions into false responses.

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

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. 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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1 Pacific Dunlop Limited v Hogan (1989) 14 IPR 398, 429-30
2 S Murumba 'Commercial Exploitation of Personality', Law Book Co (1986); Brown 'Character Merchandising: A view from Australasia' (1986) 2 IPR 93; Howell 'Character Merchandising: The Marketing Potential Attaching to a Name, Image, Persona or Copyright 'Work' (1991) 6 IPR 197

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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 Davidson CJ in Solicitor-General v Broadcasting Corporation of N.Z. (1977) 2 N.Z.L.R. 100.
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 and in 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 Mr Justice Madsen observed that even if the convictions had been a matter of public record in the past 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 private 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 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 it to be a considerable difficulty in that matter 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 McAllister 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 must 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 facts, 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 and/or breaches of the Fair Trading Act 1986. The cause of character merchandising, at least as it relates to real people, has received some judicial endorsement in New Zealand (albeit in part obiter) in the very recent Buzzy Bee case, Tot Toys Limited v Mitchell. Fisher J observed in that case that the desirability of consistency in commercial matters between the two CER countries suggested that if at all possible in New Zealand courts should follow the character merchandising approach favoured in Australia, although he expressed some caution in "following too quickly down that path" - particularly in the case of, what he called, "artificial" character merchandising (ie fictional, inanimate and other man-made characters). The judge drew a distinction between such "artificial" character merchandising and the promotional use of names, reputations and images of real persons:

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

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

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

The Use of Sound-alikes and Look-alikes

In one recent US case the court stated:

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

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

Dunlop Limited v Hogan (1989) 14 IPR 398

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

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

Ibid, 54

Ibid, 60

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


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

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

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

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

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

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 1990, which confers significant powers on the Broadcasting Standards Authority. The Act provides that every broadcaster is responsible for maintaining in its programmes and their presentation standards which are consistent with the privacy of the individual. 28 The Authority can determine complaints about breach and can award up to $5000 compensation. Although the number of complaints squarely based on infringement of privacy have been gratifyingly few so far, 29 the Broadcasting Standards Authority has in a number of decisions established a useful set of principles. 30

The Authority has found in favour of the complainant

- where a radio station gave the telephone number of a public figure and invited listeners to ring him (the Walker case); 31
- and where a box 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 underling 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. Nevertheless 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. It 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

10 [1959] 1 WLR 313
11 Supra, fn 5

28 Section 4.
29 See above n 5.
30 They are conveniently set out in Clements 19/92.
31 Walker 6/90.
32 Clements 19/92.
34 See the discussion in McAllister (supra).
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 easy to demonstrate that an arguable case existed. But there has been unanimity in the cases that such a cause of action is indeed arguable. Interim injunctions have been granted in cases:

- where the media were preparing to disclose past convictions for indecency of a sick man on whose behalf public subscriptions were being solicited to send him to Australia for a heart operation (the Tucker case).18
- where a TV documentary was to be broadcast giving the personal history of a little girl involved in a terrible custody battle (the Morgan case).19
- 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 Morris case21 where Morris had suffered no more than upset and anger as a result of his 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 Films22 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 McGeehan 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 using a 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

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16 The Emory case, supra n. 14.
17 Tucker v News Media Ownership Ltd [1982] 2 NZLR 716 at 733 per McGechan.
18 Ibid.
20 C v Wilson & Partners Ltd H.C. Auckland, CP 75/92, 27 May 1992. (Possible infringement of privacy was one of two grounds.) In these cases the deterrence possible consists of court by depriving the侵权者 of its right to enjoy the privacy of its home. There was no disclosure of the privacy issue.) See also Ellis J in T v Attorney-General (1986) 5 NZFLR 357 at 378.
21 Supra n. 15.
23 The Morris case (supra n. 13) at p. 7 of the judgment.
24 Crimes Act 1961 s. 216 A-E.

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13 Ibid, 463
14 (1989) 14 IPR 398,426
16 (1988) 12 IPR 225,249

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

This more subtle form of association was addressed in the well-known case of Pacific Dunlop Limited v Hogan17 where Paul Hogan sued in respect of an advertisement for shoes which used an easily recognisable parody of the "knife scene" from the film Crocodile Dundee. The "Mick Dundee" figure in the advertisement did not appear to be Mick Dundee/Paul Hogan but (as Beaumont J observed18) you were given the impression that a variant of Dundee was endorsing the shoes. Beaumont J, one of the majority judges in the Full Federal Court, stated the essential question as being whether the advertiser had conveyed the message that the celebrity had agreed to an advertisement in which an image19 identified with the celebrity is seen to endorse the goods20. If there is mere caricature or parody such that viewers or listeners would receive the impression that the celebrity would not have agreed, no action will flow, but where there is more than mere caricature, so that the personality or even a variant of the personality's image is seen as sponsoring the product, then a remedy is available21. Burchett J (also one of the majority) rejected any defence of parody in this case, calling the advertisement a "parasitic copy - parasitic because its vitality is drawn entirely from the audience's memory of the original"22:

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

A New Zealand perspective - the Buzzy Bee case

In his Buzzy Bee decision24 Fisher J explored some of the subtleties of merchandising and use of images. And, as already seen, he saw an important distinction between, on the one hand, the promotional use of names, reputation and images of real persons and, on the other, artificial character merchandising in the sense of fictional, inanimate and other man-made characters. In the latter case Fisher J felt reservations about protection notably:

(a) Whether the protection in some recent Australian cases might have sprung not so much from a finding of actual deception or damage as the tacit assumption that there should be 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 in order of 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.2 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 cause 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 compare 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 - to protect private/confidential 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: employers/husbands may not use confidence information imparted has come to assume at least equal importance.13 The more obviously it is 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 antipodes court. 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 Morris v Tynagh39 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.

19 In a life of three years the Broadcasting Standards Authority has decided only five complaints in which privacy was the principal concern (McDariill 5/90, Walker 7/90, Cooke 1/91, Glentane 829 7/92 and Clemens 1992/93).
23 [1990] 2 All ER 471.

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Having said in an equivalent seminar four years ago* 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 extended (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 is it 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 in a way which respects the necessity 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 overrode 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.

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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 in a way which respects the necessity 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 unilined there. And of the team of journalists who obtained entry to the Hospital room while he was still in a semi-conscious state. The law here certainly did not behave very effectively: when the Gorden case went to the Court of Appeal the Court held itself to be powerless to grant remedies for
reincarnation as a real actor in two movies) why should there be any difference in the scope of protection available?

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

Other look-alike cases

Other look-alike cases have been disposed of on more conventional principles. In Newton-John v Scholl-Plough (Australia) Limited26, the advertisement in question contained a photograph of an Olivia Newton-John look-alike27 and bore the words "Olivia? No 'Maybelline'. A further copy of the advertisement used the words 'Maybelline makes anything possible' and 'For the Olivia look' use Blooming colour". Burchett J held that there was no misleading or deceptive conduct involved. The advertisement told "even the most casual reader, at even the first glance that in fact it is not Olivia Newton-John who is represented in the advertisement"28. While the advertising was taking advantage of Olivia Newton-John's name and reputation in a not particularly praiseworthy way, it was equally making it perfectly clear that the product did not have any relevant association with her.

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

In 10th Cantanae Pty Limited v Shoshana Pty Limited29 the plaintiff, Sue Smith, a well-known Australian television personality, sued an advertiser for publication of an advertisement for a video recorder. The advertisement depicted a young woman in bed watching the screen of a television set and bore a heading in large print "Sue Smith just took total control of her video...

26 (1986) ATPR 40-697
27 The model having earlier answered an advertisement seeking a person of similar appearance to Olivia Newton-John
28 Supra 47,633
29 (1987) 10 IPR 289

MEDIA LAW: RECENT DEVELOPMENTS

J.F. Burrows

INTRODUCTION

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

Not only do the media supply the information which enables us to govern our lives; they also provide an important vehicle for comment. In a democracy it is vital that there be informed comment on the way we are governed and on the many decisions of both the public and the private sector which affect us. That is free speech in its classical sense. Sometimes freedom may be used to expose wrong doing, reguosity 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 cases30 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.31 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 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 newspaper 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 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:32

31 Section 4.
32 (1969) 15 Current Legal Problems 133 at 137.

*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
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 ofordinary people against the powerful and privileged.

But the point as I said is that it must be done in good faith. The attack on 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.

Unauthorised use of photographs

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

(a) Defamation

While defamation is not perhaps the first cause of action to spring to mind, this was pleaded in a recent English case 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) suggested that her kitchen was dirty. She sued the advertiser and the advertising agency. The case was settled before trial for an apology and "substantial undisclosed damages and costs". The case is a salutary example of the risks of such endorsement advertising and the absolute necessity of obtaining the consent of those who are depicted in the advertisement. Other cases where defamation has been pleaded have involved the use of a photograph of an ex-police officer in an advertisement for a cure for sore feet and that of an actress without her teeth in a dentist's advertisement.

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

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' (1966) 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

Plumb v Jeyes, The Times, 15 April 1937

Funston v Pearson, The Times, 12 March 1915
In New Zealand one of the leading cases is Taylor v Beere\textsuperscript{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 skilful amateur photographer. She discovered that the defendant, proposed publishing this in a book called “Down Under the Plum Trees”. Despite oral and written objection the defendant went ahead and used the photograph. The book purported to be a manual about sex and was subsequently classified by the Indecent Publications Tribunal as indecent in the hands of children under eighteen. The immediate context of the photograph of the book was some text in which a small girl describes staying with her “old grumpy and ugly grandmother”. It was claimed that the inclusion of the photograph led to the defamatory meaning that the plaintiff had consented to the use of her photograph in the book and that 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\textsuperscript{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.\textsuperscript{42}

\begin{center}
(b) Breach of privacy
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Although in the UK the Court of Appeal has held that English law knows no right of privacy (Kaye v Robertson\textsuperscript{43}), in New Zealand there has been an acceptance of this cause of action. In Tucker v Neus Media Ownership Limited\textsuperscript{44} Jeffries J (in the

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Having discussed what isn’t in the defamation bill, I come back to what is.
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The changes the bill proposed in the defences seem to me to be unexceptional. They are essentially a tidying up and clarification. They aim to simplify the language of the defences, changing for example “fair comment” to “honest opinion” and “justification” to “truth”, both of which will make it easier for juries to understand exactly what it is they are looking for.

The bill proposes new remedies.

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

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

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

This provision was objected to in submissions to the select committee by representatives of the news media, who took exception on the grounds of freedom of speech to the proposed action. Professor Burrows also drafted is unclear as to where the burden of proof might be. It may rest on the plaintiff, as the court could not issue a correction order unless it had found as a fact what the truth of the matter was. Professor Burrows also points out that a correction order may have a somewhat narrow application, in that a simple error of fact is easily enough corrected but a more complex defamation may not be. I would not argue for a shift in the burden of proof, and I would like to see the order renamed a remedial order on the understanding that the court might order correction, retraction or rebuttal in whatever form it deemed an appropriate response to the damage done to the plaintiff.

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

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

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

If politicians and other potential plaintiffs were greatly restricted in their ability to sue in defamation, there would eventually be a change in the climate of opinion. If you're open to attack and you can't defend 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. Having been hurt enough in the past by untrue publications, I'm not sure I could cope with the "now it can be told" variety which would certainly follow any relaxation of the law.

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 McGechan J (in a subsequent judgment) both accepted the cause of action - albeit with limitations. Jeffries J stated:

"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 unwanted, 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 McGechan J stated:

"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:

"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 concern expressed in the article [Bedingfield "Privacy or Publicity? The enduring confusion surrounding the American tort of invasion of privacy" (1992) 15 MLR 11] so that there is a constant need to bear in mind that the rights and concerns of the individual must be balanced against the significance of a free country of freedom of expression. I note also the difficulty in formulating bounds which will ensure that both concerns are appropriately recognised."

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

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45 731-2
46 Ibid, 733
48 Bradley v Wingnut Films Limited (Wellington CP 248/92, 1 August 1992 Gallen J, 11-12)
49 [1986] 2 NZLR 716,733
50 Ibid, 731-2
photographs of a member of the public are used in an advertisement without consent. For non-celebrities such use of a photograph can be acutely embarrassing. In one instance with which I am familiar, an amateur and non-celebrity sportsman claimed to have been ribbed by his work mates and to have suffered serious embarrassment amongst friends when his photograph, taken during a sporting encounter, was featured in a liquor advertisement.

In the United States, Prosser & Keeton on Torts51 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' case52, Galen 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 appropriation53, ie the appropriation for the defendant's benefit or advantage of the plaintiff's name or likeness54. 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 purposes55. Whether it would also be available in New Zealand for

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51 Prosser & Keeton on Torts, 5th ed, 851 et seq
52 Supra, 12
53 Prosser & Keeton 851
55 As Prosser & Keeton make it clear the US courts have held that where photographs are published by newspapers, magazines, television companies or motion picture companies, there must be some connection 'for the purposes of trade' beyond the mere fact that the newspaper is sold or the television item is broadcast. Any other conclusion would lead to interference with the freedom of press (and the constitutional implications in the US). Thus in the English case of Kaye v Robertson [1991] PSR 62
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 seems to me to be a diminishing pool of practitioners. A full-blown action can't in any way be described as a swift form of justice. The most energetic plaintiff may wait two years after publication before the case comes to trial.

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

There isn't any obvious answer to the problem of uncertainty in awards. It is inherent in an action where the hurt at issue can rarely be easily quantified. I do not believe that damages should be left to juries for a judge alone to consider. Simply because the law is uncertain about the measurement of damages, they 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 said inside the house that hasn't been reported without privilege in various newspapers, and reported a great deal more coherently and pointedly than anything that's been said in parliament. It seems to me that the case for some kind of inquiry into the bank's recent history was long ago overwhelmingly established, by journalists and analysts and others, without attracting a single writ in defamation. The simple fact that this publicly-owned entity came to the point of collapse is grounds for inquiry in itself. The inquiry is being resisted because the political will to clean out the stable is almost non-existent.

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) Advertising codes of Practice

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

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

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

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

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

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

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

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

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

Research in New Zealand has shown similar trends towards green consumerism. In one survey60 70% of consumers interviewed stated that they were prepared to pay a little more for a "green product". In another survey 86% of consumers questioned put in at least some effort to buy greener products61.

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

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


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

62 Comment by Fiona McKenzie, Marketing Manager, Telarc, 'Marketing', May 1991 38
consumerism "has done more to bring the environment to the attention of managing directors than any number of worthy commissions and earnest reports".

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

**Downsides of environmental/green claims**

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

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

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

**New Zealand moves to regulate green advertising and labelling**

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

1. **Environmental Choice labelling**

Arising out of a government discussion paper of December 1989, an "environmentally-friendly" labelling scheme has been set up through the government quango, Telarc. The scheme, known as Environmental Choice New Zealand (ECNZ) awards ECNZ labels to those products that can prove they cause as little damage to the environment as is
practically possible. The scheme is an environmental rather than a green scheme, the
difference being that "green" has connotations of no negative impact on the environment,
whereas "environmental" means an objective independent assessment of the impact. The
aim of the ECNZ scheme is to encourage manufacturers to meet minimum standards so
that they can qualify to use the Environmental Choice label. Telarc has chosen various
product categories and has been releasing final criteria which will enable companies to
apply for the ECNZ label. Batteries and recycled plastics are two product categories
which have already been considered. Other areas which Telarc are considering are
engine oil, recycled paper, household detergents and paints. Telarc wishes to encourage
manufacturers to meet the criteria and recognises that this may take some time.

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

2. **The Fair Trading Act - guidelines on environmental claims**

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

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

Some of the Commission's guidelines are:

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

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

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

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

(e) Do not make unauthorised use of endorsements.

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

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

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

66 'Fair's Fair', Commerce Commission, May 1992, 5
The model generated the lowest CO₂ exhaust emissions of the tested cars and used the least fuel. However, the model was required by American law to have a catalytic converter to reduce CO₂ emissions.

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

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

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

3. Advertising Standards Authority - code for environmental claims

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

The spurious use of environmental claims and claims which mislead by omission or by implication may not only bring the advertiser into conflict with this Code and the Fair Trading Act but may also cause confusion amongst consumers and potentially lessen their confidence in advertising generally.

This code covers all advertising containing claims for environmental benefit and includes packaging shown in advertisements.

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

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

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

are absolute claims and therefore not acceptable.

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

(c) All claims must:

(i) be able to be substantiated, and

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

(iii) explain clearly the nature of the benefit.

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

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

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

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

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

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

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

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