F. W. GUEST MEMORIAL LECTURE

THE LAW AND THE PRESS

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The F. W. Guest Memorial Trust was established to honour the memory of Francis William Guest, M.A., LL.M., who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the Univrsity of Otago, serving from 1959 until his death in November 1967. It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

It is a very great honour to have been invited to deliver this lecture in memory of Professor Frank Guest, the first professor of law in this University. I was privileged to meet Professor Guest only twice, at a time when I was a very young and inexperienced assistant lecturer at the University of Canterbury. But I recall those meetings well, and the impression he made on me of someone who combined the academic with the practical, and who had a vast knowledge of things legal and non-legal. Those were the days when most law teachers were, one might say, general practitioners who could turn their hands to teaching anything; and somehow they seemed to know more about each part of the field than many specialists today know of their field of expertise. Frank Guest was one of them. I have a feeling there is a message there if we look for it.

My subject is "The Law and the Press"—in which term I include the electronic media as well as the newspapers.

I find it helpful to ask what the function of the press is in modern society. It does not, of course, have functions which are legally prescribed. There are just things it does, has always done, and is expected to do. Those things include entertaining and amusing us, and servicing the commercial community through advertising. But the two major functions are so important that they are part of the very life blood of democracy. First, and so obviously that it ought to go without saying, the press supplies us with news and information about what is going on around us. Indeed, apart from word-of-mouth, rumour and our extremely limited first-hand experience, it is our only source of knowledge of what is going on round us. To borrow a graphic phrase from columnist Walter Lippmann, without the press we would live in an "invisible environment". We depend on it totally; we could not possibly exercise our right to vote responsibly without it. Second, the press is a forum for opinion, for both its own editorial opinion and that of individuals and groups in the community. I refer of course to the editorials and correspondence pages in our papers, to television and radio current affairs

* LL.M.(Canterbury), Ph.D.(Lond.). The above text is the substance of the Guest Memorial Lecture delivered by Professor Burrows on 11 October 1978.

programmes, and to the many reports of the activities and views of pressure groups. Not only does all this serve to stimulate discussion in the community, but it also operates as one of the most important checks on government. Particularly in a time of strong government and weak opposition, that can be an important function.

Forgive me for indulging in these introductory platitudes, but I like to remind myself that the press should never be taken for granted. It is clear that we must have a press, and also that our press should be free: that it should be restricted as little as possible in what it can publish. Indeed "freedom of the press" appears as a prime requirement in most international conventions on human rights, and in the constitutions of most countries which have them. I hope that we never dismiss those exhortations as empty rhetoric.

Clearly, then, any legal system worth its salt must nurture the press and guarantee press freedom. So it is at first sight paradoxical that the British system of justice which we have inherited has traditionally been wont to say that the press has no more rights than any citizen; that this essential organ of democracy has no legal protection. Lord Shaw of Dunfermline once put it thus:[1]

> Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Pres as distinguished from the members of the public . . . . the range of [the journalist's] assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

That is not quite as bad as it sounds: it means no more than that the freedom of the press is the freedom of speech of the ordinary citizen: and that freedom is reasonably well preserved by British law. But one result of Lord Shaw's dictum is that press freedom appears very seldom as an express ground of decision in the cases. But it is there, all right, as a tacit assumption underlying and explaining the twists and turns of many branches of law, copyright and defamation among them.

Freedom of the press cannot of course be an absolute right: it could never be the law that I can publish anything I like, however harmful to others. Press freedom, in fact, constantly clashes with other rights, and the major question is how and where the legal system draws the balance between them. This depends on many imponderables, and the balance may change with time and circumstance. We shall see that our own law is currently in the process of shifting the balance a little.

But in one respect there has been consistency. British and New Zealand law have always opposed what Blackstone called "previous restraint". In 1765 Blackstone said: "The liberty of the press consists in laying no previous restraint upon publications. . . ." For "previous restraint" is censorship, and no device is more calculated to raise emotional hackles. In other words, the British principle is—let there be no censorship, let a man publish what he likes, but after he has done so, let him be liable to punishment or damages if he has infringed the rights of others. The principle, in other words, is publish and be damned.

1 *Arnold* v *King Emperor* (1914) 30 T.L.R. 462, 468.

So our press has seen little that one could call official censorship. Our papers have seen none of it;[2] apart from certain restrictions as to overseas shareholdings[3] there have been no controls in this country on who can set up a paper; anyone can burst into newsprint provided he complies with the formality of registration in the Supreme Court office.[4] It is not quite the same with radio and television; broadcasting stations have to establish to the satisfaction of the Broadcasting Tribunal that they are fit to hold a warrant before they can go on the air.[5] But once on the air, they are not subject to anything that can realistically be called censorship. The government can direct the Broadcasting Corporation on questions of policy, but there is specific provision in the 1976 Broadcasting Act that a ministerial direction may not be given in respect of a particular programme.[6] It was different in the early days of New Zealand radio, when there was direct governmental control of the service. Ministers sometimes quite blatantly took advantage of their position to prohibit the broadcasting of items they felt contrary to their interest. An example was the well-known "rule" that the day before an election only government M.P.s were allowed to broadcast messages.[7] But that, as I say, was a result of the direct government control of broadcasting. That has gone now.

This dislike of "previous restraint" also manifests itself in the courts' reluctance to grant interlocutory injunctions to stop publication. A court will normally not restrain publication of a defamatory article if the defendant says he intends to justify it or plead fair comment, nor of an article which is in breach of confidence if there is ground for supposing it is in the public interest that it be published. In such cases, Lord Denning has recently said, the courts should leave the complainant to his remedy in damages.[8] There are echoes of Blackstone there. Publish and be damned. But, of course, if the prospect of being damned after publication is great enough, it deters as effectively as any censor.

I return now to the obvious point that freedom of the press cannot be absolute, and that there must be some things which it is illegal to publish. I want now to examine the limitations on this freedom, and will do so in the context of the two major functions of the press of which I spoke at the start of this lecture.

First, let us take that function of the press which is to express, and serve as a forum for, opinions and criticism. There is in New Zealand, as in all British countries, substantial freedom of ideas. Indeed the full and free liberty to express one's opinions is what many regard as the very essence of freedom of speech. That is well recognised even in the law of defamation, where it is encapsulated in the defence of fair comment. A man cannot successfully sue another for defamation if that other was merely expressing his opinion on a matter of public interest. And there

2 Cf. the ban imposed on publication of news during the recent journalists' strike. This led to a leader in a Christchurch newspaper entitled "A Censored Newspaper": *The Press*, 12 October 1978.
3 News Media Ownership Act 1965, s.4. This statute was repealed by s.133(2) of the Commerce Act 1975.
4 Newspapers and Printers Act 1955, ss.3,4.
5 Broadcasting Act 1976, Part XI.
6 Ibid., s.20.
7 Mackay, *Broadcasting in New Zealand* (1953) 104-113.
8 *Woodward* v *Hutchins* [1971] 1 W.L.R. 760, 764.

is considerable latitude. "People are entitled," to quote Lord Diplock, "to hold and to express freely on matters of public interest strong views, views which some of you may think are exaggerated, obstinate or prejudiced. . . . [T]he crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on the jury."[9] So the law of defamation deliberately cleaves apart fact and opinion and holds that whereas false statement of fact is defamatory, untenable opinion by and large is not. It is, of course, not quite as simple as that and the defence sometimes fails—in particular the fact/opinion cleavage is not as easy to operate as one might have hoped—but the defence is a valuable one for all that.

Beyond the law of defamation the major limitations on the expression of opinion lie in the public sphere. If the expression of opinion is so violent as to endanger the public order, one of a number of offences may be committed: sedition, inciting lawlessness, and inciting racial hatred. And, incidentally, the retention of blasphemy as a statutory crime is now justified on this ground (i.e. that it might provoke a breach of the peace) rather than on the old rationalisation that Christianity is part of the law of England.[10] Prosecutions for this kind of publication are rare: there have been none for either blasphemy or sedition in New Zealand for a very long time.[11]

The law also imposes restrictions on opinion for the purpose of protecting certain important organs of state which cannot function effectively without a minimum of public respect. I refer of course to that branch of contempt of court which imposes penalties on those who scandalise, or disrespectfully abuse the courts; to that type of breach of parliamentary privilege called contempt of parliament which forbids improper comment about our House of Representatives; and to one type of sedition, for sedition as it is statutorily defined in New Zealand includes any statement expressing an intention to bring the government into hatred or contempt, or to excite disaffection against it.[12] For the most part, these institutions (courts, parliament, government) know that the best way to ensure respect is through their own actions rather than by suppressing criticism; so reasonable criticism goes untouched (it would be appalling if it were otherwise) and the power to punish is confined to exceptional cases where the published comment far transcends the boundaries of what is reasonably acceptable. Yet, at least in respect of contempt of court and parliament, the law on this topic is not moribund. Only last year Radio Avon, the Christchurch private radio station, was fined $200 for a misplaced and unjust criticism when it said that Roper J. was again at the centre of a closed court controversy.[13] Far from it: not only had the Judge never previously been at the centre of such a controversy, but there was nothing controversial about this instance either; it was the sort of case commonly heard in chambers. Nor is it unheard of in recent times for an unfortunate news editor to be called before the House to apologise for some statement in his paper which has brought parliament into disrepute.

9 *Silkin* v *Beaverbrook Newspapers Ltd.* [1958] 1 W.L.R. 743, 747.
10 *R.* v *Glover* [1922] G.L.R. 185, 187 per Hosking J.
11 In 1976 in England, however, a magazine was successfully prosecuted for blasphemy: *R.* v *Lemon* [1978] 3 W.L.R. 404. The appeal was dismissed.
12 Crimes Act 1961, s.81.
13 *Solicitor-General* v *Radio Avon Ltd.* [1978] 1 N.Z.L.R. 225.

Some people are concerned at the unclear definition of these opinion offences. Indeed they are defined somewhat vaguely. What precisely, for the purposes of sedition, is a statement which shows an intention to bring the government into hatred or contempt? Consider Erskine May's definition of contempt of parliament:[14]

> [I]ndignities offered to [a] House by words spoken or writings published reflecting on its character or proceedings have been constantly punished . . . upon the principle that such acts tend to obstruct the Houses in the performance of their functions by diminishing the respect due to them.

There is no doubt that these definitions could be applied in a most restrictive way. Probably it is not possible in such a matter to be any more precise. In the last analysis, I suppose, the question is one of degree: how extreme must be an attack be before it becomes unacceptable? That will be decided according to the instincts of the particular age. Institutions tend to be less tolerant of criticism when they are in their infancy than when they have an established tradition behind them. They are also understandably more sensitive when under threat in time of social turmoil. Interestingly enough, there also seems to be greater desire to control expressions of opinion within a new medium. When broadcasting was in its infancy, criticism broadcast over radio was treated as being of much greater concern than criticism in the old warhorse — the newspaper — which everyone knew and, presumably, trusted. There was actually provision in our first Radio Regulations that nothing controversial was to be broadcast. And even enlivening and interesting programmes, for example one entitled "Is Democracy a Failure?", were taken off the air.[15] You don't trust what you don't know.

But clearly, in modern New Zealand, the application of the law is liberal enough, even if the way it is defined could give opportunities for abuse.

Before leaving the question of opinion, may I mention a modern trend? In the old days it was accepted that a paper was entitled to carry crusades of its own. These were the days of vigorous personal journalism, and at times the media carried swingeing criticism of a kind that today would make us shudder. Some papers today still do. But nowadays there is an increasing recognition that it is an obligation of the media to purvey to the public a representative sampling of views; if a paper holds one opinion itself it should also open its columns to those of different persuasion. Thus from being just an organ of opinion, the newspaper or broadcasting station has become a mirror of the various opinions in society. The law does not enforce such a balance through the courts, but the requirement is now so well recognised that it has become a kind of quasi-law. The broadcasting stations are bound by the Broadcasting Act 1976 — and I quote — to have regard to:[16]

> [T]he principle that when controversial issues of public importance are discussed, reasonable efforts are made to present significant points of view. either in the same programme or in other programmes within the period of current interest.

Failure to comply could be the subject of a complaint to the Broadcasting Tribunal. The Press Council applies the same standards to the news-

14 *Parliamentary Practice* (19th ed.) 144.
15 Mackay, *Broadcasting in New Zealand* (1953) 114-116.
16 Broadcasting Act 1976, ss.24(1)(e), 95(1)(d).

papers as a matter of ethics rather than law. This was made clear in its most recent adjudication which involved the abortion controversy. (The media these days have to serve two masters: the courts in respect of "real" law, and these other tribunals in respect of non-legal, pre-eminently ethical, standards.) This view of the press as a reflector of the diversity of opinion is, I suppose, based on the notion that if all available ideas in the marketplace are presented to us we can assess them and mould our own opinion in accordance with the most reasonable of them. That is sheer romanticism. For one thing there is sometimes simply no space for all available views to be presented and no time to collect them all (the Press Council firmly said so in that recent adjudication), and so the view which is really the most reasonable may never see the light of day. Moreover, the view which commends itself to the reader or viewer is not necessarily the best, but that which is argued most forcibly. The techniques of persuasion, I am afraid, sometimes have little to do with logic or reason. But while the goal of balanced presentation will not achieve perfect results, it is nevertheless vastly better than the single-minded pushing of a barrow by one of the media. Such an attempt to force public opinion would be quite unacceptable. I might here perhaps also foreshadow the point that this accessibility of the media to different viewpoints is showing signs of bearing legal fruit in the law of defamation under the guise of the right of reply.

So much for opinion. More important is the press's function of supplying news: giving the public information and hard fact about the city, country and world which surrounds it. This is the more important function, because without the facts there is no basis on which to form an opinion; and without knowledge of what is going on in society we have no right to call ourselves responsible voters.

Of course, for the media to present information to us their reporters must be able to get that information in the first place. There are criticisms that in New Zealand this is not always as easy as it should be in respect of matters of government: that it is more difficult to get information about matters of government than is desirable. So there are pressures for an opening up of sources to reporters and the public.

There is something in this criticism. There are not many official documents in this country that members of the public have a *right* to see — a few property and occupational registers, minutes of local authorities, some court documents and the like. We are left with the rather empty dream that what we cannot see now may end up in the archives in twenty-five years time. And while meetings of parliament and local bodies are open to the press, there are many meetings of bodies of national importance to which, and to the records of which, there is no public access at all. Not only is there no *right* to much information: there are positive duties on employees of the state not to disclose it. The Official Secrets Act, in so far as it is possible to extract any meaning from its convoluted drafting, can be read as prohibiting any state servant from telling anyone about anything.[17] I suspect that if the opportunity arose today our courts would hold that the scope of the Act is much narrower than it has often been supposed to be, and that it does not impose the blanket prohibitions it is often said to. Recent British

17 Official Secrets Act 1951, s.6.

litigation involving the *Sunday Telegraph* certainly suggests that.[18] But in the current climate of uncertainty, the Act certainly casts a pall over the scene. With sources as tight as they are, the media must get their information about the workings of government either from "legitimate" sources such as parliament and the dull ministerial handouts on which New Zealand journalism has thrived so long, or else from non-attributable sources and highly illegitimate "leaks". Much good information has been "leaked" to the New Zealand press in recent years. This air of furtiveness no doubt can make for enthralling journalism, but it has its drawbacks. Quite apart from the fact that publication of the leaked information could sometimes itself lead to prosecution under the Official Secrets Act, one is never quite sure of its authenticity and accuracy — not a good start in any ensuing defamation proceedings. And, of course, the risk is increased that the reporter's strong ethical duty not to disclose his sources will conflict with his legal duty to disclose them in a court of law. Incidentally, it is a point of interest that last year both a court and a parliamentary select committee declined to force a reporter to disclose his sources.

So there is currently pressure for some kind of freedom of information legislation. Indeed a senior newsman once told me that he would trade reform of the law of defamation for a satisfactory law on freedom of information. The whole question is under review, not just in New Zealand but in other Commonwealth countries too. We can never have a totally open system, of course, and nor should we. There will always be documents whose disclosure would prejudice national security; there will be others (working papers and the like) whose disclosure could prejudice negotiations and hinder frankness of communication. And surely discipline within the civil service could not tolerate a situation whereby any state servant, even an eighteen-year-old youth in his first week of employment, should be able to talk freely to the press about his job. So freedom of information legislation, if and when it comes, will doubtless be hedged around with numerous exceptions. That has been the experience elsewhere. Indeed the Report of an Interdepartmental Committee recently released in Australia recommended legislation riddled with exceptions. Some commentators have already called for a reconsideration of the proposals.[19]

But, despite these difficulties in obtaining information, floods of information pour into the newsrooms daily: so much indeed from agencies and local reporters that only a fraction of it can be used. So the next question is the most important of all: what are the legal restrictions on publishing information? When can publication of factual information land the press in trouble? There is a huge miscellany of prohibitions, of course, including the laws of indecency, copyright and breach of confidence. But the only two really worth discussion are the law of defamation and that branch of contempt of court we call the sub judice rule. I have recently been in correspondence with newspaper editors throughout New Zealand, and what has come out very clearly from their letters is that it is these two parts of the law that really worry them — not necessarily because they think the law is wrong, or too hard, but just because they are concerned to stay on the right side of it. And it is

18 *R. v Aitken and Sunday Telegraph, The Times,* 4 February 1971.
19 See, e.g., McMillan (1977) 8 *Federal Law Review* 379.

pleasant to be able to record that both these branches of the law are substantially concerned with the protection of the individual: the law of defamation protects his reputation, and one undercurrent of the sub judice rule is the desire to guarantee to the individual a fair trial, although I agree that its most commonly expressed rationale is to protect our system of justice as a whole. I think it can be argued that the tightest fetters on press freedom have to do with the rights of the individual. And we are beginning, I believe, to see another aspect of this protection: the outlines of a law of privacy, although still somewhat imperfect, are beginning to be discernible, behind such things as the law on breach of confidence and the increasing restrictions on court reporting.

But let us take two major areas. Contempt first. Once judicial proceedings are "pending" (another of the law's delightfully unsure terms), one must not publish any information which could create a real risk of prejudice to a fair trial. Once a matter becomes the subject of court proceedings the guillotine falls on discussion in the media except for brief statements of the most banal and incontestable bare facts. It does not matter that the subject matter of the case is of the most intense public interest. In the famous *Sunday Times* case[20] in 1973, publication of an article discussing the drug thalidomide and the responsibility for its marketing was held up for years simply because a civil action had been brought by the children deformed by it. At that rate, that great journalistic event that we know simply as "Watergate" would never have got off the ground in New Zealand or Britain, because as the *Washington Post* was first beginning its investigations the cases of the "Watergate plumbers" were already before the courts.

The main reason, no doubt, for imposing restrictions on such discussion is that those involved in the case, in particular jurymen and witnesses, will be influenced by what they read, which will prejudice the determination of the case. But another reason, which one detects in the judgments in the *Sunday Times* case, is simply that the *courts* are the only tribunals to try and determine guilt of wrongdoing; the media should not compete with them. British judges have recently made reference to the "horror" of trial by newspaper — an antipathy which has also had its influence on defamation.

So the sub judice rule after the *Sunday Times* case is rigid. It places the interest of the proper administration of justice ahead of any interest which could be served by publication. Yet one can perhaps detect a few hints of liberality in the modern law.

For one thing, in New Zealand contempt cases are brought very seldom — and when they are they sometimes fail. Someone will probably correct me, but the last instance I know of in New Zealand where the press was found guilty of breaching the sub judice rule was in 1956.[21] And this despite the fact that I have seen some newspaper reports of crime, even after an arrest has been made, in a detail which would certainly have lit up a warning light in my mind if I had been advising before publication. Not many, but some. And in Britain after the *Sunday Times* case the courts have been fairly gentle with the media; to refer to a dictum by Lord Reid, they have required that the publication must

20 *Attorney-General* v *Times Newspapers Ltd.* [1974] A.C. 273.
21 *Attorney-General* v *Noonan* [1956] N.Z.L.R. 1021. Even then, no penalty was imposed.

create a *real risk* of prejudice before it can be held in contempt.[22] Moreover there have been statements, pleasing for the media, that gagging writs (i.e. defamation writs filed simply to keep the press quiet and with no real intention of bringing it to trial) should have no effect in stifling continuing discussion in the press.[23] The problem there, of course, is how you discern whether the writ really is just a gagging one.

In other words, although the law on contempt looks tough on paper, its application in practice has not been as confining as one might have expected. Yet one must be careful here: in New Zealand, at least, the lack of prosecution is undoubtedly attributable at least in part to the commendable determination of the majority of our press to abide by the law. Most of the press is very wary, as indeed it should be. And the law reform committees which have recently reported on contempt (the Phillimore Committee in England and the Committee on Defamation in New Zealand) have both recommended clarification and cautious and far from spectacular liberalisation of the law in favour of freedom of the press. The New Zealand Committee's proposals are very limited. For one thing its mandate extended only to civil cases. And most of its recommendations go only to clarification of the existing law.

Now to defamation. It is fair to say that the average newspaper and broadcasting company is more afraid of that than of all the other sanctions put together. The law of defamation reflects the enormous value the law places on the individual's reputation. It has always done so. The Old Testament says, "Thou shalt not go up and down as a talebearer among thy people" (Leviticus XIX, 16). In the days of the Anglo-Saxons it was visited by the most terrible punishments such as cutting out the tongue. So we are speaking of a value which is firmly embedded in our legal system.

Today, on paper, our law of defamation reads well enough. You are not liable in damages for defamation if what you publish about a man is true, however dreadful the things you say about him. You are liable only for false statements which injure his reputation. That certainly sounds like a law that the media have no right to complain about — and, to give them their due, many of them do not complain about it. Yet the rule does work somewhat harshly. The important thing is that the onus of proving truth is on the defendant — in our case the press — and it is often much harder to prove truth than one could imagine. If the case does not come to trial for a year or two, witnesses' memories may have faded; and in any event sometimes the sources from which the paper obtained its information may be unwilling to be compromised in a court of law. It is one thing for an editor to know something is true, quite another thing for him to prove it in a court of law. Moreover, if the newspaper cannot prove that what it wrote was correct, its liability is strict, and it may find itself liable for slips which were barely its fault at all. And, of course, damages can be very high and sometimes bear no relation to the loss actually suffered by the plaintiff. Indeed, although in theory damages are supposed merely to compensate the plaintiff, it is quite clear that they are often laced sub silentio with a punitive element to deter the hapless defendant from doing it again. To be fair, though, the Report of the New Zealand Committee on Defamation reveals that amounts

22 E.g. *Blackburn* v *B.B.C., The Times,* 15 December 1976.
23 E.g. *Wallersteiner* v *Moir* [1974] 1 W.L.R. 991.

actually paid out in defamation claims in this country have not been as high overall as many had thought. It is rather that the amounts claimed are often high enough to frighten the defendant into silence or an out-of-court settlement.

Defamations are of many different kinds, of course. But let me take three categories which seem to raise problems. They shade into one another, no doubt, but I think it helps to look at them separately. *First,* there are those cases where the paper has merely innocently repeated defamatory statements made by someone else. The clearest example, of course, is the paper which publishes material circulated nationwide by the Press Association, and later finds that it contains a mistake. I heard of one case recently where a P.A. release, in a news item on a certain company, described a certain person as a shareholder: in fact he was not — he was a director. In the context in which the remark appeared it rather mattered which he was. The last I heard, a threatening letter had been received by the innocent local paper which published the release verbatim. Other cases are even clearer. Statements issued to the public by spokesmen for organisations, or remarks made by prominent people on interview, may contain errors of which the hapless medium which conveys them to the public is unaware. So may letters to the editor (although perhaps different issues are raised there). In these cases the paper, or broadcasting station, is only acting as a medium for channelling someone else's remarks, and it seems a little hard to visit it with heavy damages. In some cases already a form of qualified privilege protects the press, but the range of circumstances is limited: it is principally confined to official press handouts by government officials and reports of things said at various sorts of meetings. Surely even in the wider range of derivative statement of which I am speaking the publication of a retraction, or the provision of a right of reply to the aggrieved person, ought often to be enough to satisfy his honour.[24] Let him claim damages from the source of the remark if he can. I note with interest that the Australian Law Reform Commission in its most recent discussion paper on defamation was thinking along these lines. It is proposing a defence of fair report where the defamatory matter is contained in an attributed statement which it was reasonable to publish, and a full reply is afforded to the plaintiff. I think also that the new reasonable care privilege recommended for the media by the New Zealand Committee on Defamation should cover at least some cases of this kind.

Second, the pressures of time and space under which our media work ensure that they will make a few slips and mistakes. An enormous amount of copy goes through a newsroom in one day, and the deadline for going to press is short and inevitable. I know of few other professions which work under such constant pressure. There are problems of space as well. The printed page is only so big, the news broadcast is only for so many minutes, and many items simply have to be abridged to fit them in; and as sure as can be someone will allege that the abridgement has altered the sense for the worse. Let me take a true example of

[24] Before any blanket rule is laid down, however, the various types of situations would need to be carefully examined. Remarks made on radio talk-back, or on a live television broadcast, for instance, may well raise special considerations. Even items circulated by the Press Association, which is simply a co-operative of the daily newspapers, may need a special rule.

the sort of thing that can happen. A paper reported the sad description of how a horse had been killed in a road accident in a small town. The butcher, said the paper, had come and cut the animal up to facilitate removal. They meant to put *a* butcher, but they put *the* butcher. There was only one in the town, and it had not been him. He was very distressed and alleged, inter alia, that the townsfolk would immediately connect him with horsemeat. The paper settled for $1,250. One little word — but how expensive.

Errors like this are due to carelessness, and no doubt additional care would cut down their incidence. But what one must accept is that slips of this sort are an inevitable risk of the business of journalism just as much as the occasional transposition of figures is a risk of an accountant's business. As an American commentator has said, "the odds against preparing a reasonably accurate and complete draft of the day's history are long and still mounting." No one is suggesting that a newspaper ought not to be responsible for these mistakes, but I think we could afford in the interests of our press to experiment a little with remedies. We do at the moment have a defence of "unintentional defamation" which involves a rather cumbersome procedure of making an offer of amends,[25] but it is rather unsatisfactory; it covers a very limited range of cases, and is of no avail if there has been any carelessness by the paper. I believe we ought to be thinking of other ways of approaching this sort of problem. One could, for instance, insist that the only damage recoverable in this sort of case is actual damage which the aggrieved person can prove was suffered by him. Another possibility is to allow much more effect to apology, retraction and right of reply than we do now, and sometimes to allow them as the only remedy. Continental countries almost universally do. After all, if an obvious, silly mistake has been made, an apology and retraction removes most and sometimes all of the slur on the plaintiff's character; in fact it does it more effectively than a damages award under the present system. Indeed it is all many people require now; only a few decide to go for some money as well. The common law has too long had an unfortunate propensity to think only in terms of money.

The *third* sort of defamation is, however, getting right to the core of press freedom. It raises large questions as to the functions of the press. This is where a paper, or a broadcasting station, indulges in investigative journalism: it deliberately goes after someone in high places to try to expose some villainy he has been committing. In other words, it tries to do to him what the *Washington Post* did to Richard Nixon and his associates. We do not see much of it in New Zealand. There have been a few attempts, though, and occasionally the media have had their fingers burnt doing it. You may recall the *Holloway* case in 1960,[26] resulting in one of the highest damages awards ever in New Zealand. The Court of Appeal ruled that the press cannot plead privilege in this situation. This is another glimpse of what we saw a little earlier in this lecture: the general dislike of judiciary and public for trial by newspaper. A press which indulges in this activity is running naked without protection. It must pay heavily for its mistakes, and it will be shown no mercy unless every single fact it has published can be proved true to the rigorous standards required by a court of law.

25 Defamation Act 1954, s.6.
26 *Truth (N.Z.) Ltd.* v *Holloway* [1960] N.Z.L.R. 69; aff'd. [1961] N.Z.L.R. 22.

Is this too hard? A newspaper may not be prepared to publish facts, even facts of which the public should be informed, if it is scared of expensive defamation consequences. When the Committee on Defamation asked, in a questionnaire to all media, "Have you excluded material from your magazine because of the defamation laws which you felt would have been in the public interest to publish?" the great majority of those who replied said that it had. One of the greatest points of debate in media law at the moment is whether the press ought sometimes to have a special privilege to pursue and publish matters of public interest, so that if it makes errors it should be excused its mistakes in the absence of malice or perhaps recklessness.

Some argue vigorously against such a privilege, and their arguments have some force. They include the following points. Although the press is our constitutional safeguard, these protagonists will say, most of the press is private enterprise out to make a profit, and if given free rein will be drawn to sensationalism to sell its product. Moreover, simply because there are no controls in New Zealand over who may set up a newspaper, one could in theory have irresponsible proprietors and editors, perhaps even powerful chains of them, who might try to slant news if our defamation laws were to be slackened. These are overstated arguments, for most of our media are thoroughly responsible. But without strong legal controls there might be one or two journalists who would not be, and I suppose our law must set its standards to deal with the worst examples of journalism rather than the best. These opponents of privilege will further argue that New Zealand already has a range of legitimate means of investigating trouble in high places—for instance, question time in parliament, the ombudsman, and the commission of inquiry—which do the job better than the press because they have more satisfactory means of getting at the truth. After all, a press reporter cannot subpoena witnesses, and the information he receives is neither on oath nor subject to cross-examination. Trial by newspaper does not carry with it any of the constitutional safeguards for a fair trial which have been so meticulously worked out by our courts of justice. Further, the publicity which attends press inquiries can sometimes do more harm than good, and can sometimes contribute to a hardening of attitudes which makes resolution of a dispute harder rather than easier. This publicity can do lasting damage to the victim of it, which is all very well if he is as bad as the press says he is, appalling if he is innocent. And the press's findings are recorded for posterity — at least a newspaper's are. We often tend to forget that a newspaper is not just a one-day wonder of no use after the day of publication. Copies will go on file, and may be referred to years later by historians and researchers. It is the record of that day for all future days. So, these opponents of privilege will argue, certainly the press may indulge in this sort of reporting, but it should have no special protection, and if it makes a mistake it should be fully liable for it, and should have to pay heavily.

But there is a case the other way too. There is no doubt that some abuses will never come to light and will never be investigated at all unless the press does it. There are cases on record in New Zealand of commissions of inquiry being sparked off by newspaper reports of abuses in certain quarters. A glance at *Hansard* is revealing too: surprisingly often a matter is raised in parliament, for example in question time, only because an honourable member has read something in the press which

has aroused his curiosity. Further, there may well be certain kinds of abuse of power both in the political and commercial fields for which publicity is the best deterrent: unfair marketing practices, for instance. And there are other kinds of situations of which the public needs to be warned before it is too late. Warnings to the public not to invest in certain companies or finance houses are perhaps the prime examples, although one could draw others from politics. For a person to exercise his vote responsibly on the national or local level there may be things he ought to know about the people in power and the way they are spending the public's money. So, this side of the debate will argue, the law ought not to be so severe that the press is frightened away from investigative reporting.

Those are the sorts of arguments, and one can debate vigorously the pros and cons of it all. For whatever reasons, our New Zealand press probably does less critical and investigative reporting than its counterparts in some other countries. Dr. Leslie Cleveland's description of it as being not a watchdog but a well-behaved drafthorse[27] is well known, although it may not be quite as accurate now as it was when he wrote in 1970. The cold hand of the law of defamation undoubtedly plays some part in this. Indeed a typical New Zealand daily paper bears some resemblance to the first schedule of the Defamation Act: it is full of press handouts and reports which carry privilege within the terms of the Act. And as I have already said, the great majority of our press said, when asked, that it had occasionally left out material of public interest simply for fear of defamation proceedings. But the law is by no means the only cause. Lack of funds and lack of appropriately qualified staff contribute. What New Zealand paper could afford to assign two reporters for a month to investigate one matter as the *Washington Post* was able to do? The size and nature of our community have something to do with it too. I somehow doubt whether even the most determined investigative reporting will very often produce a real scandal in this country.

But the law does play some part, and I think one detects a tendency both in the courts and the law-making bodies towards some liberalisation in the law of defamation. The whole trend of the Report of the New Zealand Committee on Defamation is in favour of a gentle relaxation. In particular it has recommended a new privilege under which the media will have a defence if they have been reporting a matter of public interest, have acted with reasonable care, believed the facts to be true, and gave the aggrieved person a right of reply. There are two interesting things about this proposed privilege. First, it demonstrates a tendency, you will note, towards this right of reply as a substitute for damages. Second, it is an attempt to do what Lord Shaw said should not be done: to elevate the media above the ordinary citizen and give them a special privilege. If enacted, such a provision would have the potential to relax the law considerably; everything would depend, I think, on the interpretation the courts were prepared to place on the requirement of reasonable care. Even without this new privilege, though, there is some evidence that the climate of opinion in the courts in defamation cases may be a little more favourable to the press than it was. In a few recent defamation cases the plaintiff has failed dismally, and on a number of

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

occasions in the last few years the courts have refused to strike out defences of privilege based on a duty in the press to convey matters of public interest to the public.[28] Could it be that times have changed since the *Holloway* case?

My time has run out. Let me close with a few random reflections. I think it can be said that the climate of opinion in all the areas of law we have discussed today is becoming a little more favourable to the press, although in some cases it is not so much the law which is relaxing as the way it is being applied. And there have been committees investigating change in the law in a number of areas concerning the press: defamation, contempt of court, and freedom of information. The thrust of the reports of those committees which reported, in this country and others, seems for the most part to be in favour of moderate relaxation. Attitudes shift slowly. What causes these shifts of attitude is a question for a sociologist as much as a lawyer; I suspect that the factors which contribute cannot be analysed in terms of logic. As I said earlier, where one strikes the balance between freedom of the press and the other competing interests is a question for the particular society, and the answer must be reassessed from time to time. It is perhaps interesting to note that America, for so long an upholder of extreme press freedom, is showing signs of retreating a little from that extreme position. It is ironic that this retreat, or some of it, should be happening after Watergate. Perhaps one day we and the Americans will meet in the middle at the ideal point of balance.

28 The most recent is *O'Brien* v *R. Lucas & Son Ltd.* C.A. 102/77.