DEFAMATION IN NEW ZEALAND — AN ALTERNATIVE APPROACH

I. INTRODUCTION

Almost every law, at some time or other, will become the object of controversy: for some its provisions will go too far, for others not far enough. As a result of such conflict of interests the draughtsmen of such a law must walk a constitutional tightrope. Any attempt to balance them can never truly be successful; however the problem is approached and the remedy proposed there will always be some dissatisfied with the result.

Such is the case of the law of defamation in New Zealand; a law principally governed by the Defamation Act, 1954, as interpreted by the British and New Zealand common law Courts. Those who champion freedom of the press claim the law is unduly oppressive; others to whom reputation is a fundamental right, consider that the present law gives the most leeway desirable to the press, without prejudicing that right.

In the past, attempts to provide a just balance of interests in New Zealand have taken the stance whereby the right to reputation is guaranteed, except in certain specific justified circumstances. If that right is breached, damages must be paid.

However, the time has now come for such an approach to be challenged. American libel laws have consistently turned away from such a viewpoint,[1] and the position in England has recently been reappraised, and changes suggested.[2] In recognition of this, a Law Reform Committee on Defamation has now been set up in New Zealand to look into possible reforms.

The obvious suggestion, it may seem, is that the Committee's reforms should follow those of its British counterpart; that is, it should clarify certain areas of the law which are at present considered deficient. However, it will be suggested that such a proposal is unwise, as the flaws apparent in the British Bill make minimal the effect that any changes made may have in regard to the issues it did tackle, and it is totally indaequate to deal with the one real issue involved in defamation law reform: how to maintain the right to reputation, without reducing freedom of speech to a weak and ineffective concept. To achieve such a reconciliation of the two, almost mutually exclusive ideals, piecemeal reform is useless; the whole basis of the law must be re-examined; it must be pulled apart and reconstructed along more practical lines.

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1. E.g. *New York Times* v. *Sullivan* 376 U.S. 254 (1964); *Rosenbloom* v. *Metromedia* 403 U.S. 29 (1971), *Gertz* v. *Welch* 418 U.S. 323 (1974).
2. 'Report of the Committee on Defamation', 1975, H.M.S.O. London, Cmnd. 5909.

This paper is an attempt to present a viable alternative to the recognised approach, by abolishing the need for such controversial areas of defamation law as privilege and fair comment, and modifying also that most ineffectual remedy which seems to pervade the most inappropriate areas of our law: damages.

II. THE FAULKS COMMITTEE ON DEFAMATION

The present controversy surrounding the law of defamation has led to widespread demands in many countries for a reinvestigation of the legal position of the publisher and the defamed individual, to determine the adequacy of the current statutory and common law provisions governing defamation suits. Such pressure in England led to the setting up in 1971 of a Committee;

> "to consider whether, in the light of the working of the Defamation Act 1952, any changes are desirable in the law, practice and procedure relating to actions for defamation"[3]

in England, Scotland and Wales.

The Committee in its report, after hearing a substantial amount of evidence both supporting and challenging the present law, presented a Bill in draft form encompassing the changes it considered to be necessary and expedient. While the Committee considered the arguments both for stricter and more liberal amendments to the law, the line which they finally adopted did not differ greatly, in regard to the balance of interests, from the status quo. That is not to say that the Committee failed to give consideration to sweeping reforms; but, as they appeared satisfied overall with the balance of interests upheld by the present law, they were more concerned with the clarification of the principles involved, and easing the burden of its administration. Unfortunately, if one accepts the present format of the law, the attempts at clarification still contain several major defects, and will, it is considered, merely serve to hamper efficient administration.

Defining Defamation

As its initial, and probably most fundamental reform, the Committee attempted to provide a statutory definition of defamation, to set down a clear guideline to publishers, prospective plaintiffs, the Court and the jury.

It is recognised that whenever the effect of a defamatory statement is to be evaluated, some sort of guideline is necessary. Several definitions have been proffered in the past in an attempt to achieve clarity; for example

> would the words tend to lower the plaintiffs in the estimation of right-thinking members of society generally?[4]

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3. Note 2, op. cit. p. 1.
4. *Sim* v. *Stretch*, per Lord Atkin, (1936) 52 T.L.R. 669, 671.

> A defamatory statement is a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned, or avoided, or which has a tendency to injure him in his office, profession or trade.[5]
>
> Speaking generally the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.[6]

The definition arrived at by the Committee is contained in clause 1 (1) of the draft Bill:

> Defamation for the purpose of civil proceedings shall consist of the publication to a third party of matter which, in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally.

The wisdom of such a definition may be seriously questioned. While the clarification of the principles involved in a defamation suit is a laudable aim, it appears that this will not be achieved as a result of the Committee's recommendation. As the minority report indicated, it may be strongly argued that such a statutory definition is not only unnecessary, but is also unduly restrictive. There seems to have been no pressing reason for the embodiment of the definition within one statutory provision. As Lord Lyndhurst said in the minority report[7]

> I have never yet seen, nor been able myself to hit upon, anything like a definition of libel . . . which possessed those requirements of a definition; and I cannot help thinking that the difficulty is not accidental but essentially inherent in the nature of the subject matter . . . I have not found this to be the point in which the law of libel is deficient.

There also seems to be no suggestion that the past definitions which have evolved from case law are uncertain, to the extent that either of the parties, or the Court, is unsure as to the nature of the statement.[8]

It may be argued that such definitions can be construed as having a range of application far in excess of that desirable, and that what they include is unclear. This may be countered in two ways: first, that the many years of case-law concerning whether a statement is defamatory or not, have established a fairly well defined set of circumstances for allowing such a defamation claim to succeed.

Secondly, examination of the effects of the provision would tend

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5. Fraser on Libel, 7th Ed., p. 1, approved in *Myroft* v. *Sleight* (1921) 37 T.L.R. 646, 647.
6. *Scott* v. *Sampson* (1882) 8 Q.B.D. 491, 503, approved in *Youssoupoff* v. *M.G.M.* (1934) 50 T.L.R. 581, 584.
7. '1834 Select Committee of the House of Lord on the Law of Defamation and Libel'.
8. For present classifications of defamatory matter see note 2, pg. 190.

to show it to be a dismal failure in terms of eliminating the vague and ambiguous terminology which was a feature of past definitions, and which provided a great deal of uncertainty until clarified by case law. The Committee itself embodies in its definition some of the worst forms of generalisation, such as "in all the circumstances", "affect a person adversely" and "in the estimation of reasonable people generally". Whereas, in the past, the situations where defamatory statements were actionable were eventually reduced to within fairly clear guidelines, this new definition will be the subject of many years of litigation to re-establish the class of statements where a claim will be upheld.

There is one further, major, criticism of this section. The enactment of a statutory definition, it may be argued, is neither expedient nor just. There is an inherent danger in any attempt to codify within one sentence several hundred years of case law, that the resulting definition will not be wide enough to cover all past circumstances, as well as future unforeseen, but justified, causes of action. By its nature, a statutory definition circumscribes all the available causes of action, and robs the Court of the flexibility it formerly had to expand the definition to include all worthwhile claims that had previously fallen outside that definition.

This reform, therefore, appears to be ill-advised, as it serves merely to introduce further facets of confusion into an area of the law which had evolved a reasonably stable format for discriminating between actionable and non-actionable statements, and restricts the future capacity of the Court to consider each case subjectively on its merits. To this end, the minority view of maintaining the status quo can be endorsed.

Partial Truth as a Complete Defence

The next reform which may come under criticism is cl. 4 (2), which provides that

> where an action for defamation has been brought in respect of the whole or any part of matter published the defendant may allege or prove that the truth of any of the charges contained in such matter, taken as a whole, does not materially injure the plaintiff's reputation having regard to any such charges which are proved to be true in whole or in part.

It is fundamental if a fair balance of interests in defamation is to be achieved that only those deserving of good reputation should be entitled to the protection of the law, and to this extent the section serves to safeguard the publisher from undeserving technical cases. However, it has been contended that there is no practical problem involved here; the defendant, although unable to prove certain facts in mitigation of damages, may rely on those facts in a form of partial

9. *Speidel* v. *Plato Films* [1961] A.C. 1090.

justification.[9] If he is prevented from doing so by the format of the proceedings, it was argued, the publisher would still not be at a disadvantage as no jury would award more than nominal damages to a successful but undeserving claimant.[10]

The objections to such reasoning seem to justify some amendment to the law as that proposed. First, it is still not right that such a plaintiff should succeed if, indeed the balance of the accusations made in the article are true, and secondly such a determination is often very important in making an order as to costs. If the technical claim is upheld, the publisher may still be liable for substantial costs as a result of a basically unjustifiable action.

Even though the theory of such an amendment is applauded, it is suggested that it would be bad policy to allow the defence of justification, or 'truth' to extend to matters which, in the light of the whole statement, have no relevance to the point in issue, even if they do not further the actual damage. The inclusion of such irrelevant facts cannot be warranted as necessary in bringing the merits of the case before the public. The Committee stated[11]

> It goes without saying that such imputations can only fall within the ambit of the defence if they are relevant to the facts stated or relied on

in reference to fair comment; it is equally applicable to partial justification.

It is therefore suggested that some requirement as to the relevance of all material be included in the section, as is included in cl. 5 of the Bill.

A Variation on Fair Comment and Malice

A similar attempt at restructuring is seen in cl. 5, in relation to the defence of fair comment, and is reasonably successful in its aim of protecting the publisher from unjustified claims.

Unfortunately, the abolition of the principle of malice overruling the defence, and its replacement by the requirement of 'genuine opinion', appears to be a pointless exercise, as it is subject to similar considerations and therefore similar difficulties. To prove the existence of a 'genuine opinion' one must still look subjectively into the mind of the publisher, which is, by its very nature, impossible. The object, as stated by the Committee, was to eliminate the possibility, under the malice principle, of people recovering where a commentator could be shown to have a 'malicious' attitude, even if a reasonable person would have reached the same conclusion.

In fact, the test which would seem most appropriate would be a 'reasonable man's' interpretation; that is, could a reasonable man given

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10. Ibid., 1142-43.
11. Note 2, 43.

the bare facts reach a similar conclusion? It is suggested that this approach would be far more satisfactory, as the proving of 'genuine opinion' in its subjective form would allow occasions of abuse to be covered up by the burden of having to prove that the opinion was not genuine, even if some malice is shown to have existed.

In the case of qualified privilege the Committee seems to have recognised this difficulty in switching from a subjective test of malice, to the more objective "took improper advantage of the occasion giving rise to the privilege", a much more satisfactory approach than that suggested by the Committee in regard to this section. Thus the Committee's recommendation of adopting the test of 'genuine opinion' can be discounted as failing to make any significant improvement.

An Offer of Amends

Under cl. 13 a person innocently publishing a defamation may offer to make amends, which, if accepted, will preclude the defamed person from claiming damages through the legal process. If such an offer is not accepted, that fact may be used in mitigation by the publisher.

Innocent publication is taken here to mean either the *Hulton* v. *Jones*[12] type situation, where it is not known that such a person as the plaintiff exists and that the publication could be defamatory to him; or where the extrinsic facts of an innuendo are not known to the publisher,[13] thus not being able to realise its defamatory nature, where reasonable care has been taken in preparing the publication.

This provision, an extension of the apology principle, has two unfortunate, and unacceptable, consequences as it stands. By limiting the recovery of damages as a result of this 'offer of amends' the Committee appears to have disregarded the underlying and fundamental aim of the damages remedy, that is true compensation for the individual and the fullest possible redemption of the damaged reputation in all cases.[14] It is not the principle of the suggestion which is opposed; it is the inequality of its application. As the minority report states[15]

> it ignores an important principle of defamation law — the need to provide appropriate remedies for victims irrespective of the motives, the 'innocence' or 'guilt' of defamers,

and later[16]

> the punishment of non-innocent defamers is evidently regarded

12. [1910] A.C. 20.
13. *Cassidy* v. *Daily Mirror* [1929] 2 K.B. 331; example of innuendo.
14. Although some redemeption is only possible through some publication of rebuttal to others, damages redeem in the form of compensation and, under the present structure, are considered the best means of redemption available. See Fleming, 'The Law of Torts', The Law Book Co., Australia, 4th Ed., 1971, p. 456.
15. Note 2, 200.
16. Ibid., p. 201.

by those who endorse this view as a more important object of the law of defamation than concern for the interests of the victims. I do not accept this order of priorities.

Thus, the Committee should be consistent in either making damages available to all victims of defamatory statements, or making provision for an offer of amends to all. If it is considered bad policy to allow deliberate defamers to escape 'punishment', thus providing the rationale for not extending the 'offer of amends' to that extent, the Committee has taken a perplexing course of action in enforcing this concept. Surely it would be more appropriate to deal with the deliberate defamer within the field of punitive damages, than in an area dealing with the redemption of the reputation of the individual.

It is contended that the latter approach of an offer of amends to all defamed persons, irrespective of the fault of the publisher, would be the most appropriate remedy in trying to right the reputation of the individual in the public's eye, in preference to merely paying a lump sum to the victim. Such a provision would still not be adequate as a total remedy. Whenever a statement is made, some damage will have been done to the individual, even if apology follows. The original imputations will still be associated with the individual no matter what attempts are made to withdraw such accusations.

In the light of this problem, it is necessary to ensure that any apology to take the place of compensatory damages goes as far as possible to attain the absolute redemeption of the reputation. To achieve this, it is insufficient to publish a mere apology in a certain publication. As will be discussed later[17] the role that the Press Council could play in such a decision where the press are concerned may tend to elevate the apology to a more influential and acceptable level.

There is a second reservation arising from this section: that is, the unconditional nature of the offer of amends. Where an offer of amends is accepted by a defamed individual, some provision should be made for the payment of such special damages as can be shown to have occurred,[18] as agreed by the parties. If such damages cannot be agreed on, the refusal of the plaintiff to accept the offer of amends should not be held against him, to the extent of claiming such damages in Court.

The offer of amends as suggested in the section is the germ of a very important factor of defamation law. However, its potential has not been recognised by the Committee: it approaches it tentatively and tinkers with the idea, only to restrict its application to make it all the more discriminatory, rather than to provide the equitable coverage which can result from its full utilisation and implementation.

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17. See Part IV.
18. See Part III.

Damages Reviewed

The remaining section which raises doubts as to its merit is cl. 18, which abolishes the award of punitive damages, restricting recovery to compensation only. There is recognisable injustice in allowing a plaintiff to profit unduly from a defamation suit through the awarding of punitive damages against the publisher.

Such damages do, however, perform a useful function. Especially if provision for an offer of amends is extended to cover all defamatory statements, some form of censure on those publishers guilty of gross misconduct must be maintained to discourage deliberate or highly negligent actions. The problem of abolishing such claims altogether, and at the same time recognising the need for payment by non-innocent publishers through not extending the 'offer of amends' to cover them, would tend toward the inclusion of some consideration as to the blameworthiness of the publisher at the time of assessing general damages. Such a tendency would defeat the purpose of the proposal.

The logical approach in reconciling the two factors, it is suggested, would be to retain the possibility of an award of punitive damages, but channelling the proceeds away from the plaintiff, to eliminate the problem of undue profit. The machinery for achieving this will be discussed later.[19] However, on the basis of these considerations, it is contended that it would be unwise to abolish absolutely the imposition of punitive damages.

Summary

In summary, the following specific amendments to the proposed Bill are submitted, if it were to be adopted in its present form:

(i) That the suggested statutory definition of defamation be rejected in favour of retaining the common law classifications of defamatory and non-defamatory statements as established by case-law;

(ii) That a restriction as to relevance of material be inserted into cl. 4 (2) relating to the defence of truth;

(iii) That the test suggested in cl. 5 be not adopted, and that the test of 'whether a reasonable man could reach the same conclusion' be substituted for the test of genuine opinion;

(iv) That the provision of an 'offer of amends' under cl. 13 be extended to cover both innocent and deliberate defamation;

(v) That the scope of such an offer of amends be as wide as possible so as to best achieve the redemption of the defamed individual's reputation, possibly through the authority of the Press Council;

(vi) That provision be made for an accompanying payment of special damages which can be proven, where an offer of

19. See Part VI.

amends is accepted; and where it is not, that such refusal shall not be considered to the detriment of the plaintiff in regard to a claim for such damages;

(vii) That punitive damages not be abolished as suggested in cl. 18, but be limited to occasions of gross misconduct, with the proceeds not accruing to the plaintiff.

However, it must be stressed that such reforms do not eliminate the serious uncertainty relating to whether or not privilege will apply, nor the two associated, fundamental, problems. The publisher will still be inhibited in his actions to the extent of liability for large awards of damages in some cases. The abolition of punitive damages has little relieving effect, as such damages are at present only awarded in a small number of cases, and generally where such a sanction is deserved. The restricted scope of the offer of amends fails to provide the comprehensive relief necessary to publishers before they can truly feel free to publish what may have been borderline cases, possibly carrying heavy penalties, under the present law.

Further, the defamed person is still subject to the inequality of being compensated for damage in one situation, but in different circumstances, either because of the nature of the occasion or the publisher's action, the same damage would go unrelieved.

For these reasons, although the Bill is an improvement on the present law, it cannot be accepted as the most equitable solution possible. The provisions in this Bill may, however, be useful as guidelines to be followed in consideration of cases in the alternative proposed below.[20]

III. THE DAMAGES REMEDY

It is a sad fact that the law of defamation is often accused of being the stumbling block of freedom of discussion and dissemination of material through the media. The reason: the unpredictable and often crippling damages that may result if a statement is considered detrimental to the reputation of the plaintiff. It is this area of the law, therefore, which must be reformed, before any appeasement of those opposing the present law can be achieved.

The difficulty is once more that of achieving a proper balance of interests. While some may claim that all statements defamatory of another should be free from sanction, regardless of their consequences to society or its members[21], in the light of the present law such a suggestion is unlikely to be seriously entertained. The law of torts is, after all, regarded as one of the individual's most effective safeguards:

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20. See Part VI.
21. E.g. T. I. Emerson, "The System of Freedom of Expression", Random House Inc., New York, 1970; Justice Black in "One Man's Stand for Freedom", ed. Dilliard, Alfred A. Knopf Publications, New York, 1963; A. Meiklejohn, "Political Freedom, The Constitutional Powers of the People", Oxford University Press, New York, 1965.

it exists to protect his right to reputation, and to enforce the payment of compensation where that right has been unlawfully interfered with. To reach a just balance is not easily done. As Fleming says:[22]

> It poses the cruel dilemma of a choice one way or the other between the aim, on the one hand, to furnish a ready means of vindicating a man's integrity and the competing policy of shielding from the impact of a heavy verdict those who are encouraged to speak without let or hindrance.

Present Trends in Awarding Damages

It may appear that in the past the Courts have not considered this a dilemma at all; awards in recent years have consistently become more disproportionate to the actual harm done. Juries tend to award damages as a result of their emotional reaction to the statement in issue and its circumstances, rather than on the basis of the actual damage done.[23] Hopefully this trend is now reversing.[24]

Several reasons for such large damages can be proposed. The first is the obvious difficulty of fixing an arbitrary money value on an intangible loss,[25] such as hurt feelings. Coupled with this is the desire of the jury to ensure that the injured party is truly compensated, leading to a tendency to be overgenerous. Thirdly, one award of damages tends to be compared with another in a similar case and is taken as a measure of the vindication the Court feels appropriate in each, possibly leading to the Court's overcompensating in its efforts to be fair. That these problems exist is due solely to the entrenchment of our legal system on the principle of pecuniary compensation for non-economic loss, and so long as such a system continues we will be faced with these difficulties.

The Present and Possible Scope of Damages

Under present law damages may be claimed in three situations: 'special' or 'specific' damages can be claimed in cases where actual pecuniary loss can be shown to be a direct consequence of the libel; 'compensatory' or 'general' damages, payable for natural injury to the plaintiff's feelings, such as distress, mental pain and suffering, hurt pride, or loss of self-confidence and respectability;[26] and 'exemplary' or 'punitive' damages, levied against the publisher as a result of his gross irresponsibility or guilty motive in distributing defamatory material.[27]

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22. Note 15, 455.
23. Probert, 'Defamation — A Camouflage of Psychic Interests: The Beginning of a Behavioural Analysis', 15 Vanderbilt Law Review, 1173, 1189.
24. *Rookes* v. *Barnard* [1964] A.C. 1129, 1228; *Broome* v. *Cassell* [1972] A.C. 1027.
25. *Ley* v. *Hamilton* (1935) 153 L.T. 384, per Lord Atkin.
26. *McCarey* v. *Associated Newspapers Ltd.* (No. 2 [1964] 2 Q.B. 86, 104.
27. *Broome* v. *Cassell* (supra); *Uren* v. *John Fairfax Ltd.* (1966) 117 C.L.R. 118.

(a) Special Damages

It would appear to be a fundamental principle that any person causing specific monetary loss to another by a statement should restore that person to the relative financial position he would have been in had the statement not been made. Clear cases of such damage would be drastic cut-backs in sales, not attributable to other causes; cancellation of orders; loss of credit facilities; loss of employment.

Such consequences can be fairly tied to monetary values, so the problem of assessing appropriate damages does not arise.

To this extent, it is considered that damages for specific loss are justified, so long as they are shown to be readily ascertainable, and a direct consequence of the libel. Further, they should remain available to all who can fulfill these conditions, including those who at present cannot recover because of some privilege attaching to the occasion.

If one person suffers loss as a result of a defamatory statement, he has as much right to recover damages as any other person so injured, irrespective of the occasion on which it is published. The amount of extra cost that may be incurred by the publisher as a result of this reform would not, it is submitted, place him under great hardship, as cases where such damage could be proven would not be common. In the light of the further reforms suggested,[28] he should be prepared to make some concession to the injured person.

(b) Punitive Damages

Punitive damages are often accused of seriously stifling the press in many areas of publication, especially where a small independent newspapers is without solid financial backing, cannot pay high damages, and is thus forced to be overcautious in selecting and publishing information. The difficulty has been one of reaching a proper balance between what is effective as a deterrent and what leads to an unduly restricting self-imposed censorship.

Such damages in New Zealand are determined by the test laid down in *Australian Consolidated Press* v. *Uren*,[29] that is, if the publisher acts "with the utmost degree of malice or vindictively, arrogantly or high-handedly with a contumelious disregard for the plaintiff's rights."[30] The English Courts have adopted a more restrictive test, because of the difficulty they found in making the punitive nature of the award compatible with the tortious remedy of compensation for the individual's loss.[31]

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28. Part VI.
29. (1966) 117 C.L.R. 185.
30. *Uren* v. *John Fairfax Ltd.* (1966) 117 C.L.R. 118, quoting 'Mayne and McGregor on Damages' 12th Ed. (1961) p. 196.
31. *Broome* v. *Cassell*, note 24.

However determined, these awards will always draw vociferous opposition from those likely to be their 'victims', partially on the grounds that they are nearly always too high, and therefore too great a burden for the press to bear, and because of the great temptation of taking a case to Court in the hope of receiving a "pure and undeserved windfall."[32] The major dissatisfaction centres around the fact that the plaintiff fortuitously recovers more than he is actually entitled to. The remedy would appear to be the continued awarding of such damages, coupled with the chanelling of such awards away from the plaintiff. In this way a minimum standard of deterrent is maintained, with no encouragement being given to a potential plaintiff through the possibility of immense profit.

(c) Compensatory Damages

The question of fixing compensation to non-specific loss is really the one which provides the greatest problems for the press. Punitive damages are controllable; to a large extent situations which lead to an award of compensatory damages do so through no fault of the publisher. To some extent this has been recognised, in the creation of various privileges and associated defences, as well as covered to some extent by the 'offer of amends' proposal of the Faulks Committee. If it provides so many problems for the Press, does the corresponding value to the plaintiff outweigh such a consideration? The problem then boils down to: Is monetary payment the most appropriate means of redeeming the individual's reputation?

Few would contend that damages have the desired effect of redeeming the individual's reputation. Money may compensate for the plaintiff's own hurt feelings, but does little to inform those in whose esteem he has fallen, that the statement had no foundation. Even if the award of damages is widely publicised, it still lacks an emphatic contradiction of the statement under review.

An attempt was made to deal with this problem in New Zealand in s.6 of the Defamation Act, 1954, allowing for an offer of amends to be made, to replace a damages suit in the area of unintentional defamation. This does have the potential to bring to the attention of the public the fact that the statement was false, and was accepted by the publisher to be false, and as such is a definite advance on the earlier damages remedy. This approach was basically the same as that adopted by the majority of the Faulks Committee.

However, such an offer seldom fully redeems the damaged reputation. There may well be those who read the full defamatory statement, which will usually be of the nature to attract a large amount of public attention, but who fail to see the retraction. This may be attributable partly to the failure of the press to publish it with sufficient prominence, so that it is glossed over, rather than

32. Ibid., per Lord Reid, p. 1086.

considered with the same authority as the earlier statement. It is perhaps understandable that the press are unwilling to publish apologies in too eye-catching a manner, as it may tend to reduce their credibility, and possibly lead to a drop in circulation.

However, it is a fact of life that the press must accept, as the result of the inherent risk that such errors may occur, that the consequences of their action may sometimes work to their detriment. Further, it is extremely unlikely that the loss of profit suffered through the publication of an apology would exceed damages payable under a successful libel action. Such an approach appears to work to the overall advantage of the press.

There remains the problem that such an apology may not fully redeem the defamed person's reputation, as it may fail to circulate to all those who read the original statement, and the stigma attached to such an attack on the plaintiff will remain in the minds of most, and be associated with him, no matter what apology is made. Further, such an apology may be inadequate in that it relates solely to unintentional defamation, rather than allowing for such a remedy for all victims of defamatory statements. As mentioned earlier, it is the redemption of the individual's reputation which should be taken into account, rather than the relative culpability of the publisher, and, as such, any offer of amends should be extended to all defamatory statements.

If adopted, such an approach would eliminate the need for the complicated and controversial distinctions between statements made on differing occasions, and thus lead to a more simple and adequate remedy, both for the press and the individual.

The remaining problem appears to be one of making such an apology authoritative, widely publicised, and available to all defamed persons. It is in regard to the extent and authority of the apology that the role of the Press Council becomes important.

IV. UTILISATION OF THE PRESS COUNCIL

The Press Council is a body seldom utilised under our present system of defamation law. While there is an opportunity for obtaining damages, there is a substantial incentive to take a case to Court, rather than accept a straight apology. However, if that encouragement were to be withdrawn, as is suggested, it would seem logical that the Press Council should take a more prominent role in the policing of the replacing law. This would merely be an extension of its present role.

The Workings o the Press Council

The concept of a Press Council originated in England, following a Commission of Inquiry into the Press and associated problems.[33]

33. Royal Commission under Sir David Ross, established in 1947, originally to enquire into the running of the press, but later to enquire into journalistic standards; followed by a second Commission in 1961.

This resulted in a body being formed, consisting of lay persons and representatives of the press, independent of Government, to watch over the operations of the press, and see that expected standards were maintained. The Council, thus established, deals with charges of unethical or negligent conduct on the part of the press, and corresponding complaints by the press about the actions of the public, or private individuals. Through the varied interests of its members, it presents a balanced outlook which takes the welfare of both the media and the individual to heart, and its decisions, though not legally enforceable, carry weight in most quarters, its directives seldom being ignored.[34]

The concept was adopted in New Zealand in September 1972, with the establishment of the New Zealand Press Council; a body consisting of an independent chairman, Sir Alfred North, a representative of the public, and two press representatives, one a journalist and the other a publisher or editor. It deals with the same basic problems as its English counterpart,[35] referred to the body by members of the public and the press.

It must be stressed that the Council at present will not consider any complaint which is, or might be, subject to a Court hearing. Two reasons for this have been advanced:

> First it is obviously undesirable that two sets of proceedings should be running at the same time; in any case Press Council proceedings must give way to court proceedings . . . In the second place the Press Council will not allow process before it to be used as a means of 'discovery' to enable a complainant to obtain material for a legal action.[36]

The temptation would be great to have a trial run to establish the chances of success of an action, before outlaying vast sums of money for the Court case. The choice is at present one or the other; either the case will be contested in court, or considered on its merits by the Council.

Potential of the Press Council

The actual effect that the Council has had in New Zealand is difficult to gauge, however, it has great potential as a workable alternative to the bringing of a defamation suit for damages.

As commented on earlier, the possibility of an offer of amends replacing compensatory damages is very real, if it can apply to all cases of defamatory statement, and be sufficiently authoritative to eradicate as far as possible the false suggestions made in the statement complained of. It is here suggested that an apology sponsored by a

34. H. P. Levy, 'The Press Council', Macmillan, London, 1967, 32.
35. See stated objectives in the Constitution of the Council, 'First Annual Report, 1972-73, New Zealand Press Council', 14.
36. Notes 34, 27.

prestigious Council, if published, at a minimum to the same public as the original statement, with the same, if not more prominence than that statement, would have the most likelihood of success in the aim of restoring the damaged reputation to the status quo.

This would, of course, only apply to statements made by members of the press.[37]

With no compensatory damages being awarded, and the apology being supervised by the Council, it would appear unnecessary to keep such cases within the bounds of the present Court structure. Proof of specific damage will be relatively mechanical, and should provide no administrative problems for the Council. Punitive damages, it is envisaged, would also be levied by the Council. Appeals from awards of punitive and special damages may lie to the Supreme Court. However, this form of remedy would be the only one available to the defamed person. If an apology is rejected, no alternative remedy will be possible. To provide otherwise would be to defeat the purpose of the reformed structure.

Changes in Structure of the Council

There are recognised difficulties which would arise from such an expansion of the Press Council's role. It would possibly be necessary to expand its membership to spread the increased workload; however, considering the relatively small number of cases coming before the Courts at present, it would not appear necessary to make it a full-time body.

The second problem is the possible restriction on the Council's autonomy, should it be given statutory recognition. This was a very real fear in England, when Parliament threatened to establish a Council if the Press did not act quickly on their own initiative.[38] However, as the Council is now established here, the fears of political influence on its membership and constitution do not apply. Further, it has also been seen in other areas of administration and public welfare, that statutory recognition does not place restrictions on the activity of the body, but instead adds to its authority and public standing.[39]

The third major problem is the financial cost of coping with the increased workload. While it would be undesirable, and unrealistic for those bodies at present financing the Council[40] to carry the whole burden of the increased expenses, it may be reasonable to expect some increased contribution from them, as they would have been freed from the threat of large awards of damages against them as a result of the new role of the Council.

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37. For statements involving members of the public see Part V.
38. Note 34, 9-10.
39. E.g., the Ombudsman, as set up by Parliamentary Commissioner (Ombudsman) Act, 1962.
40. New Zealand Newspapers Publishers Association Inc.; The New Zealand (except Northern) Journalists Union; and the Auckland Journalists Union.

The remainder of the burden, it is suggested, could be met by the channelling of punitive damages into the funds of the Council, to contribute to its running costs and expansion. This way, the damages do not unjustly enrich the plaintiff, but benefit the community by providing for better standards of publication being enforced, and for less likelihood of such defamatory statements recurring. Such damages would have to be levied by the Council itself, as to have them decided on by the Court would necessitate virtually a separate hearing of the case in the Court. Such a provision is necessary, as, with the case no longer being subject to a Court hearing, it would otherwise be possible for a publisher, guilty of gross misconduct, to be exempt from liability, merely because the punitive machinery was no longer available.

It may be argued that it is undesirable for the Council to take such a positive role in sanctioning the press; that their role is merely that of watchdog; and, further, that they may be motivated in times of need, or plenty, to make differing and possibly inconsistent awards. To contend with this, it is suggested that any levy against an offending publisher be referred to Court for approval. The Council would thus not relinquish its independence in favour of becoming a statutory body; its role would be more advisory, or could even be considered to be that of a substitute plaintiff bringing the case to the notice of the Court. It is very unlikely that any impropriety would occur, in any case, on the part of the Council, as the press members would be unwilling to be too harsh on their fellows, especially if the body were subject to greater public scrutiny. It is equally unlikely that they would be too lenient in their action, as the protection of the good name and integrity of the press would be of paramount importance.

In this way, it is suggested, the true remedy of redemption of reputation will be achieved to the greatest possible extent, with the least possible hardship being incurred by the publisher in defamation cases involving members of the press. It would also reduce the workload of the Courts, and make the Press Council a more practical and effectual body. Most important, it will eliminate the impracticality, and virtual impossibility, of placing pecuniary values on reputation: leave the press, especially small publications with little financial backing, more leeway in publishing material in good faith without the fear of crippling damages; and remove the great temptation for people with a flimsy technical case to take it to Court in the hope of making a profit.

V. INJURY TO REPUTATION THROUGH INDIVIDUAL ACTION

Such a reform is obviously suited only to statements involving the press. They do, however, form, by far, the bulk of defamation cases presently considered by our Courts. There seems, nevertheless, no reason for not applying similar criteria to those employed under

the suggested Press Council scheme, in cases involving individuals. It would be impossible to take such cases out of the Court, as is suggested with press cases, but the basic format of deciding whether or not the case is defamatory; whether special damages can be shown; what form of apology would best achieve redemeption; and whether some punitive levy was necessary ,would be well within the Court's present capabilities.

The major problem is one of accessibility to means of revoking the statement. The individual does not have the same resources as the press. The most accessible means of doing so would appear to be through advertisement in publications with appropriate distributions. So long as the apology is made to the fullest extent possible, and to the satisfaction of the Court, the objects of this reform should be achieved.

VI. A REVAMPED DEFAMATION SYSTEM

It is submitted that, to achieve the most equitable result for both the publisher of a defamatory statement, and the person subject to that false statement, the following system be adopted in favour of the present defamation law:

(i) Where statements are made by the Press, they should be referred directly to the Press Council, initially by-passing the Court altogether. The Council will evaluate the statement, probably along the traditional lines referred to earlier,[45] and decide on the appropriate remedial action to be taken. It will have authority to order publication of a retraction or apology to the extent it thinks fit to best nullify the effect of the original statement.

Submissions on special damage may be made to the Council, and allowed if considered strictly justified, with the right of appeal to the Supreme Court.

The Council would also have the authority to levy subject to Court approval in all cases. Appeal from such a determination may also be heard by the Supreme Court.

(ii) Where statements involved two individual members of the public, the question would be referred to the Supreme Court for determination as to whether or not it was defamatory. If so, a decision as to the most appropriate form of supervised advertisement must be made, to suit the nature of the individual publication complained of. Special damages would be available on application and proof. Punitive damages may be levied in serious cases, and treated by the Court as a fine.

Such a system depends ultimately on the co-operation of the press. It would seem unlikely, however, that such co-operation would not be forthcoming, as they stand only to gain from such a system. The remedy suggested is far less oppressive to them than that offered under the present law. Moreover, support would make a major step in public relations, and aid them in maintaining public confidence in the integrity of the press.

As Fleming says:[41]

> The law of defamation never recovered from its false start. Its long history is marked by persistent dissatisfaction, clumsy judicial innovations, . . . and patchwork reforms which have made the law excessively complex without rescuing it from its endemic ills.

It is hoped that this grass roots reform, very basic and simplistic both in its nature and application, can provide an alternative which truly satisfies the needs of both the competing interests.

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41. Note 14, 456.