

P543
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Removing The Gag: Can The Press Breathe Easier Now?

*A consideration of the problem of gagging writs and the effectiveness of
the Defamation Act 1992 in inhibiting their use.*

*Submitted for the LL.B (Honours) Degree at Victoria University of
Wellington*

1 September 1994



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1994



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I INTRODUCTION

The Defamation Act 1992 seeks to bring some certainty and simplification to the law of defamation in New Zealand. Its predecessor the Defamation Act 1954 had often been criticised as outdated and unnecessarily restrictive. Nevertheless the new legislation passed without fanfare and has been described as "a useful if not spectacular reform".¹ An important aspect of the Act is the measures it takes to deal with the allegedly defamed person who issues proceedings for defamation claiming high damages, yet stalls and hesitates and has no intention of pursuing their case to the end. This tactical manoeuvre, known as a 'gagging writ', is intended to stifle publication of any further comment on a contentious issue.

This paper looks at the problem of gagging writs from the perspective of the effect these proceedings have on the freedom of the press. It considers the extent to which they are a problem, given that their very nature makes their prevalence difficult to determine. The paper discusses why they need to be addressed, focussing on the importance of the media, investigative journalism and free and open debate, and the need to be proactive in achieving these objectives in the light of our international and domestic commitment to freedom of expression. The law of contempt of court is examined because it exacerbates the muzzling effect of a gagging writ; the uncertainty surrounding this law may make the media more hesitant about continued publication once defamation proceedings are issued.

An evaluation of the new measures against gagging writs contained in the Defamation Act 1992 is made, and it is suggested that an alternative means of dealing with them may be to reconsider the excessive value we place on reputation. The increase in defamation awards has been mirrored by an increase in the amount of damages sought by plaintiffs. The paper suggests that if the remedies available for defamation were confined to non-monetary relief plaintiffs would no longer be able to manipulate the press into silence through fears of expensive awards of damages.

II REFORM OF DEFAMATION LAW IN NEW ZEALAND

A *Legislative History*

Reform of the law of defamation in New Zealand has been painfully slow. The reform process, culminating in the introduction of the new Defamation Act, began nearly two

¹J F Burrows *News Media Law in New Zealand* (3 ed, Oxford University Press, 1990), xiv.

decades ago. In July 1975 the Minister of Justice, Dr Martyn Finlay, appointed a committee to investigate the area of defamation. Their terms of reference were widely defined as “[t]o study and make recommendations on the law of defamation”.² The Committee, known as the McKay Committee, was comprised of practising and academic lawyers, journalists and members of the news industry.³

Dissatisfaction with this area of the law abounded at the time, with particular frustration evident in the media community. The law was criticised as too restrictive, imposing a ‘chilling’ effect on journalism. After sensational revelations of the Watergate scandal and the thalidomide tragedy were made overseas, there were claims that the New Zealand press were inhibited from engaging in similar investigative journalism.⁴ The Committee surveyed a number of news mediums to gauge the extent and nature of this disillusionment, and found that nearly 80% of those surveyed considered the existing defamation laws to be “moderately” or “very” restrictive on their journalistic activities.⁵ The Committee produced a detailed report which made a number of recommendations for reform and included a draft revision of the Defamation Act 1954.

The momentum for reform was lost, however, and these recommendations remained dormant for a number of years. Finally in 1984 the Labour Government promised in a policy document to revise the law of defamation in line with the Committee’s report. This promise was repeated in 1987, and the Defamation Bill was finally introduced by the Fourth Labour Government in 1988.⁶ When the Government was defeated in the 1990 election the Bill had only been read once and had not been passed, although the Bill and a number of submissions on it had been carefully scrutinised by a Select Committee. It was carried over and became the responsibility of the National government, and was finally enacted as legislation in November 1992.⁷

²NZ Committee on Defamation *Recommendations on the Law of Defamation* 1977, 5. Other jurisdictions were reviewing the law of defamation contemporaneously. Earlier in 1975 the Faulks Committee’s Report on Defamation had been presented to the United Kingdom Parliament, and towards the end of the Committee meetings the Law Reform Commission of Australia published a background paper on defamation and a discussion paper on options for reform.

³Above n 2, 5.

⁴Above n 2, 7.

⁵Above n 2, 139.

⁶Sir Geoffrey Palmer, then Minister of Justice. NZPD, Vol 491, 6369, 25 August 1988.

⁷NZPD, Vol 531, 12331-12334, 17 November 1992.

B Striking a Balance - the Competing Interests

The United Kingdom's Faulks Committee identified two basic purposes of the law of defamation:⁸ "to enable the individual to protect his reputation and to preserve the right of free speech. These two purposes necessarily conflict. The law of defamation is sound if it preserves a proper balance between them". However a suitable balance can be difficult to achieve. Lord Goodman has said:⁹

I still find the utmost difficulty in deciding precisely what middle course is most suitable in a civilised society to procure that no scandal can legitimately be concealed, no matter of public concern removed from public vigilance, while yet no inoffensive and law-abiding person can find himself pilloried and lampooned for the cruel delectation of a public either born or assiduously schooled to love sensation.

This observation of over 30 years ago still rings true today; the law of defamation is especially difficult to reform because of the delicate balancing required between the competing interests of freedom of speech and protection of personal reputation. Achieving the right balance has recently been defined as "one of the more difficult tasks of our legal system".¹⁰

The law of defamation has been described as freedom of expression's "uneasy bedfellow".¹¹ The shining light of freedom of speech is sometimes forced to stand in the shadow of this law which protects personal reputations. Defamation law recognises that every person must be protected from unjustifiable¹² attacks on their character. A defamatory statement is thought to sully someone's reputation and hold them out to contempt or ridicule; it may affect their career prospects, personal relationships and mental or emotional wellbeing. The law seeks to repair and quantify the damage to that person's reputation in an award of damages.

Against this background of long established principles the law must endeavour to achieve a satisfactory equilibrium which is conducive to the objectives Lord Goodman identified.

⁸*Faulks Committee - Report of the Committee on Defamation* (1975, Cmnd 5909), 4.

⁹Lord Goodman "Defamation and Freedom of Speech" (1960) 13 *Current Legal Problems* 135, 137.

¹⁰Burrows "Shackles in Defamation Law Too Tight" *New Zealand Herald* 22 September 1988.

¹¹Palmer "Politics and Defamation - A Case of Kiwi Humbug?" [1972] *NZLJ* 265, 266.

¹²There are of course defences to a defamation action, such as the defence that the material published is true.

C The New Zealand Experience

Naturally there are differences of opinion as to which way the balance should lean. The McKay Committee was appointed because of concern that the 1954 Act tipped the balance too far in favour of the protection of reputations,¹³ and it concluded that the law needed adjustment in favour of free speech and a free press.¹⁴

The Committee's recommendations and draft revision of the 1954 Act, which was largely adopted as the Defamation Bill 1988, found favour amongst the news media and defamation experts, who had widely criticised the existing law. They welcomed the proposed changes as an attempt to redress the balance which they saw as unfairly biased toward the plaintiff to the detriment of freedom of the press. Professor Burrows said in his submission on the Bill¹⁵ that:

Matters of public importance are sometimes not published for fear of possible consequences in defamation. The current state of the law can thus operate as an impediment to freedom of speech. Any encroachment on this essential freedom must be very carefully scrutinised.

Similarly J R Hampton observed that the law stifled investigative journalism, saying:¹⁶

Instead of loosening the shackles, it seems as though efforts are being made to gag anyone with strong views and to further restrict information ... [T]he present law ... works against the interests of the community. Journalists find they cannot get important stories to print because of the law.

Comments such as these welcoming the proposed changes came from many quarters despite the fact that the Government had found no justification for altering the existing balance of the law, and accordingly had not attempted to adjust the balance in the Bill.¹⁷ The source of this resistance may have been identified by Sir Geoffrey Palmer who observed in an American law journal that "[p]oliticians appear to be the major beneficiaries of defamation down under".¹⁸ As Minister of Justice in the Lange

¹³Above n 2, 7.

¹⁴Above n 2, 8.

¹⁵Submission 16.

¹⁶Submission 25W.

¹⁷Sir Geoffrey Palmer, then Minister of Justice, above n 6.

¹⁸"Defamation and Privacy Down Under" (1979) 64 Iowa Law Review 1209, 1213.

government, Sir Geoffrey was responsible for the Bill which he described as "a great political struggle".¹⁹ He had tried to convert thinking towards the freer American view of defamation, and had received solid opposition from colleagues when he attempted to reform New Zealand's defamation laws to give the press more freedom and flexibility. He noted:²⁰

Politicians have a particular interest in the law of defamation because they are frequently the subject of media attack and they feel very keenly the inaccuracy of which the media are very frequently guilty ... And they are not of the mind to change the balance of the law and I found that out very firmly.

Consequently the Defamation Bill 1988 and subsequent Defamation Act 1992 are not intended to tip the scales in the direction of greater freedom of expression. Nevertheless the Act may foster freedom of expression in one important area by curtailing the use of gagging writs as a muzzling device.

III WHAT IS A GAGGING WRIT?

The term 'gagging writ' is used to describe defamation proceedings which are filed²¹ primarily to intimidate the defendant into refraining from further publication of true information or an honest opinion which could be successfully defended in a defamation trial. Characteristically these proceedings claim large amounts of damages, although the plaintiff has no serious intention of advancing to trial. Vindication of reputation, defamation law's legitimate objective, is not the motivating factor. The gagging proceedings is in essence a smokescreen or a means of 'buying time' - the plaintiff can allow the writ to lie dormant, and while the defendant remains coerced into silence the public interest surrounding the matter will abate and be channelled away from the issue.

As the gagged defendant is most frequently a member of the news media gagging writs can impede the freedom of the press. The Committee identified as a real concern the writ designed to prevent reporting on the financial stability of a company.²² This kind of journalistic investigation is likely to be an ongoing report, which may be stopped in its tracks by gagging proceedings. A newspaper may have published an article on the

¹⁹"A 'Great Political Struggle'" *Evening Post* 21 September 1988.

²⁰Above n 19.

²¹Sometimes a threat of action is made with the intention of gagging the press, and is successful even though no proceedings are issued.

²²Above n 2, 94.

precarious financial situation of a public company, which might alert potential investors to its instability and act as a warning to them. The company could file a statement of claim claiming exorbitant damages for defamation as an attempt to scare the paper into dropping the issue. If they achieve the desired result the public are denied information which could prevent the subscription and subsequent loss of investors' funds. An experienced defamation barrister, Hugh Rennie, notes that sometimes these gagging proceedings are very carefully structured to maximise their suppressive effect. He cites one example where the plaintiffs issued defamation proceedings, widely publicising that they had done so, and immediately upon the expiration of the period within which a statement of defence in those proceedings would be filed issued a second set of proceedings of a slightly different nature claiming a second set of damages. The motivation for the plaintiffs was to prevent publication of information which indicated that the plaintiffs' group of companies was in serious financial difficulties. The companies were subsequently placed in receivership.²³

The issue of these proceedings can be a successful tactic because "mentioning large sums of money, in some cases an astronomical sum, scares quite rigid those that don't know the law."²⁴ The decision whether to proceed with publication is coloured with the consideration of the risk of an expensive award of damages or contempt of court proceedings. The prohibitive cost of legal advice and representation can lend added force to the effectiveness of a gagging writ. Every editor must weigh up whether the pursuit of an inquiry or further publication can justify the financial and other resources which may need to be devoted to defending their action in court. Smaller publications may opt to publish a retraction and apology rather than seek legal advice on their chance of success should the matter proceed to trial. A solicitor for the Broadcasting Corporation estimated that \$60,000 was spent preparing for one trial which didn't eventuate. The Corporation never doubted the accuracy of the item published, yet three smaller newspapers which had published similar material had retracted and apologised without even considering obtaining legal advice.²⁵ Even some larger publications feel forced to capitulate to threats of defamation proceedings. *The National Business Review* persisted with a report exposing an alleged conman after the *Auckland Star* had succumbed to gagging threats and refrained from publication. The Australian publication *The Bulletin* had also been about to yield to threats of action when the conman fled the country. *The Bulletin* had not only undertaken not to publish any

²³Personal communication with Mr Rennie.

²⁴Palmer in "Gagging Writs Under Fire" *New Zealand Times* 8 June 1986.

²⁵Leigh Hodgson, Submission 14.

related comments but had also agreed to withdraw and refute the veracity of the material already published.²⁶

IV ARE THEY A PROBLEM?

The idea that the media can be forced into silence on a contentious issue is undoubtedly an unwelcome intrusion on publishing freedom. However there is dissent as to whether muzzling of the press actually occurs. Goddard is sceptical about the force of a gagging writ, saying "[j]ust how effective such writs are in 'gagging' the press is a matter of considerable doubt".²⁷ The Right Honourable David Lange has acknowledged that a problem exists, but has suggested that gagging writs may only be a successful tactic in the hands of a wealthy individual or corporate plaintiff, and against less powerful publishers and newspapers. He doubts the effectiveness of gagging writs as a device for the most likely group of potential plaintiffs though:²⁸

The possibility of a gagging writ is hardly a deterrent to most reporting about politicians. The idea that a politician can slap a writ on Television New Zealand or Wilson and Horton and cow them into silence by the likely expense of the action or the mountainous sum of damages claimed is just laughable.

However a greater weight of opinion holds that gagging writs do exist and that they are capable of intimidating the press into silence. Definitive assessments of the extent of the problem are difficult though because it is hard to distinguish a gagging writ from a genuine one. It is speculative to state that at the time of commencement the plaintiff had no intention of bringing the action to trial, so the proceedings can not automatically be labelled a gagging writ from the outset. Hugh Rennie observes that the difficulty in assessing their prevalence may be because "plaintiffs do not openly state their objectives (or if they do [they] quite often mis-describe them), and this is particularly the case where the proceedings are intended to be gagging proceedings".²⁹

Nevertheless research into defamation cases seems to support the idea that a number of proceedings are of a gagging nature. Although no extensive empirical research has been

²⁶Personal communication with Hugh Rennie.

²⁷"Defamation, the Committee Reports" [1978] NZLJ 96. Hodgson observes similarly, "to my mind there is no such thing as a gagging writ". Submission 14.

²⁸"Defamation Reform" in *Media and Advertising Law* : papers presented at Legal Research Foundation Seminar, (Auckland, 1992), 9.

²⁹Personal communication with Mr Rennie.

carried out in this area there have been attempts to estimate the prevalence of gagging writs by analysis of the results of defamation writs filed as far back as 1970. Given the nature of the problem, this may be the most effective method of evaluating its extent.

The researchers for the McKay Committee included in their questionnaire the following questions:³⁰

How many times in 1975 did a person or organisation through a solicitor threaten your publication with an action for defamation?

How many of the 1975 threats or actions were in your opinion for the primary purpose of closing up public discussion rather than for securing damages?

How many times in the five years 1970 - 74 were proceedings for defamation started against your publication?

- a) How many of these cases were settled out of court?
- b) How many of those cases went to trial?
- c) How many of the cases that went to trial did you win?
- d) How many have been or appear to have been abandoned?
- e) How many are still pending?

(This question was repeated for the 1975 period.)

The statistical data obtained from the questionnaire revealed trends which suggested gagging writs were a problem for the media. Of the 197 threats by plaintiffs to bring an action in defamation in 1975, about 43% were considered by the news medium involved to be of a gagging nature. For the period 1970 - 1974 241 court proceedings for defamation were actually commenced against the surveyed publications. Ninety four of those cases appeared to have been abandoned (39%). There may be other reasons for abandoning the case before trial, but it is possible that a number of these cases were commenced for the primary purpose of coercing the press into silence. Significantly, only 31 cases of the 241 actually went to trial.

Statistical data included by the Broadcasting Corporation in its submission to the Select Committee supports the theory that some writs are issued without a serious intention to proceed to trial. The Corporation collected their data by researching defamation cases at

³⁰Above n 2, 133, 134.

the High Court in Wellington.³¹ A total of 138 defamation cases were noted in the period 1975 - 1985, 92 of which were filed against media defendants. Of the 138 writs, 41 claims lapsed and 31 were discontinued. Other cases were either struck out or dismissed, or were settled. Only 16 claims, or 11.6% of the writs filed, proceeded to a final hearing.

These figures, although obtained by methods which involve conjecture and approximation, at least show that a great number of defamation actions or threats to bring actions never result in a court trial. While there may be other explanations for the high attrition rate,³² it must be valid to conclude that some proceedings were issued merely to gag the press.³³

V WHY DO THEY NEED TO BE ADDRESSED?

A *Freedom of the Press and the Importance of the Media*

In addition to keeping us informed, the media plays a vital role as a medium for comment and debate. The press brings contentious issues to the attention of the public; frequently those issues concern government proposals or decisions, and the media becomes a forum for valuable discussion. On a return from the United States in 1972, Sir Geoffrey Palmer had said New Zealand needed "uninhibited, robust and wide open debate on public issues...".³⁴ Events of recent years have further highlighted the necessity of issues being brought to the attention of the public; the government has proposed and implemented social policies that have far reaching effects, and white collar crime and the collapse of several large companies has resulted in the loss of millions of dollars of investors' funds.

³¹Submission 14A. The researchers noted that detailed analysis of the Wellington data alone did not provide a complete picture, yet had merit as a preliminary analysis to determine if a pattern emerged.

³²It is possible, for example, that some threats of action were responded to with an apology, and no further action was taken by the prospective plaintiff.

³³The McKay Committee stated that "[e]ven if there is not a large number of gagging writs issued in New Zealand we accept that some writs do inhibit journalism". Above n 2, 94.

³⁴Quoted in an interview as Minister of Justice, *Evening Post*, 21 September 1988. (Above n 19). This statement echoed the words of the Supreme Court of the United States in the landmark case of *New York Times v Sullivan* stating that defamation standards were being considered against a "background of national commitment to the principle that debate on public issues should be uninhibited, robust and wide open". 376 US 254 (1964), 270.

In a joint media submission on the Bill³⁵ the press acknowledged a democratic duty:

to inform the public, to expose injustice and corruption, to report on the performance of public institutions and, probably above all, to enable communication between citizens, political leaders, institutions and public authorities, of the information and comment and ideas that in turn shape opinion and bring about action.³⁶

Given the important role the media play in our society, any impediment to their freedom and consequent disruption to the flow of information must be viewed with disfavour. The Defamation Act 1992 recognises that the gagging writ, which encourages self-censorship and discourages open discussion of contentious matters, has no place in a society built on democratic values of free speech and freedom of information.

B Bill of Rights Act 1990 - Section 14

Freedom of expression³⁷ is a firmly recognised democratic right and is now enshrined in the New Zealand Bill of Rights Act 1990. Section 14 provides;

Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

Various other domestic and international instruments also recognise this basic liberty. While all the provisions protect fundamentally the same ideal, the scope of the protection may differ from one to another depending on the text adopted. The protection afforded

³⁵Submission 19. The submission had the endorsement of The Newspaper Publishers' Association of New Zealand (Inc), The New Zealand Press Association, Television New Zealand, Radio New Zealand, The Listener, The Independent Broadcasters' Association, and TV3.

³⁶This statement reflects a change in attitude by the press. A decade earlier the McKay Committee questionnaire revealed that the media did not firmly believe that one of its appropriate responsibilities was to act as a watchdog for the public on decision makers in society. (See Palmer, above n 11, 1221. The responses were not reported by the Committee but were available to Sir Geoffrey as a committee member).

³⁷In common law jurisdictions, freedom of the press stems from the individual's right to freedom of speech. The Bill of Rights does not specifically protect media freedom, although it is recognised that freedom of the press falls within Section 14. (See Elkind and Shaw *A Standard for Justice* (Oxford University Press, New Zealand, 1986), 53. The authors note that the United Nations Human Rights Committee has emphasised on a number of occasions that freedom of the press is encompassed by Article 19(2) of the International Covenant on Civil and Political Rights).

by section 14 of the Bill of Rights extends to the right to *impart* information and *receive* information. Other provisions seem only to encompass the right to impart information. Gagging writs deny the media their right to impart information to the public, who are correspondingly denied their right to receive information.

The scope of section 14 was discussed by Thomas J. in *Police v O'Connor*.³⁸ His Honour expressly recognised the dual nature of the right saying, “[t]he significance of this freedom ... is at once apparent. It provides a right for the news media to publish information and a right for the public to receive that information”.³⁹ This appears to be a logical extension of his view that the freedom guaranteed by section 14 is a “public right ... The public interest in freedom of expression is to be recognised apart from the interest of the individual.”⁴⁰ In other words, Thomas J. recognises the genuine public interest in *receiving* information, and the media’s role in implementing that principle, as a distinct right protected by section 14.

Despite the powerful justifications underpinning the right, it can not be absolute. The Bill of Rights Act 1990 recognises the need for some infringement on the rights and liberties it protects by providing in section 5;

... the rights and freedoms ... may be subject only to such reasonable limitations as can be demonstrably justified in a free and democratic society.

The law of defamation conflicts with an absolute right to freedom of speech, yet it is a lawful acceptable limitation⁴¹ aimed at protecting another interest, personal reputation. It is difficult to envisage any democratically elected New Zealand Parliament enacting legislation placing unjustifiable prohibitions on free speech. But is there a corresponding obligation on legislators to positively uphold and foster freedom of expression?

Strossen suggests that there is such a responsibility. In discussing the *New York Times v Sullivan* case, she observed⁴² “... it is not enough for laws simply not to prohibit free expression outright, they must go further and avoid any deterrent or ‘chilling’ effect on

³⁸[1992] 1 NZLR 87.

³⁹Above n 38, 97.

⁴⁰Above n 38, 98.

⁴¹Other justified limitations on freedom of speech include laws relating to incitement to commit crimes, the unlawful release of official information, and seditious libel.

⁴²“Proposed Reforms of Defamation Law” in *Conference Papers NZ Law Conference*, 1987, 121.

free speech". *American Constitutional Law* author Laurence Tribe describes the activities protected by the First Amendment as "vulnerable". He says;⁴³

[they] must be protected from the *threat of sanctions* almost as much as from the actual application of sanctions. *For a great danger of self censorship arises from the fear of guessing wrong* [the outcome of a trial] ... And there is simply the cost of litigating a defamation suit, even where publishers are relatively confident that a court somewhere will vindicate their judgments.

In a local context, the President of the Court of Appeal has said;⁴⁴

The long title shows that, in affirming the rights and freedoms contained in the Bill of Rights, the Act requires development of the law where necessary. Such a measure is not to be approached as if it did no more than preserve the status quo.

The long title of the Bill of Rights Act states that it is "An Act ... [t]o affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". Section 14 is based on Article 19(2) of the International Covenant, which protects the right to "... seek, receive and impart information and ideas of all kinds ...". The United Nations Human Rights Committee has remarked:⁴⁵

... State parties have [given] ... little attention to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in [Article 19(3)].⁴⁶

Applying these observations, it would appear that, in the light of our domestic and international obligations, Parliament must be proactive in giving effect to the right of

⁴³(2 ed, The Foundation Press Inc, New York, 1988), 863-864. (Emphasis added).

⁴⁴Cooke P. *Ministry of Transport v Noort* [1992] 3 NZLR 260, 270. The President recently reaffirmed this observation in *Simpson v Attorney General* (the "Baigent case"), Unreported, 29 July 1994, Court of Appeal, CA 207/93, 11.

⁴⁵Human Rights Committee *General Comments* CCPR/C/21/Rev.1, 19 May 1989, 9.

⁴⁶Article 19(3) provides that the only restrictions which may be placed on the article 19(2) right are those which are provided by law and are necessary for the respect of the rights and reputations of others, or for the protection of national security, public order, or public health or morals.

freedom of expression.⁴⁷ The issue of proceedings intended to be of a gagging nature stifles freedom of speech and imposes unnecessary control on the media. Adopting Tribe's analysis, the public have a right to be protected from the threat of a defamation action, because that threat may motivate them to engage in self censorship rather than take the risk that a fact finder may not agree that their comments are justifiable. Tribe's comment on the financial burden of a defamation suit necessarily extends to the cost involved preparing a defence to a threat of action; these costs contribute to the chilling effect, encourage repudiation of controversial issues and create a financial barrier to freedom of speech.

C Contempt of Court

In the case of civil proceedings great uncertainty is harboured as to what conduct is liable to prejudice the proceedings, and at what stage of the proceedings liability for contempt may attach. The McKay Committee considered that this difficulty is "particularly acute for the media ... and of special importance in relation to the gagging writ".⁴⁸ The law of contempt is of uncertain scope. It is a composite of statute law and common law and gives rise to criminal liability, being widely defined as "anything which plainly tends to create a disregard of the authority of courts of justice".⁴⁹ There are many categories of contempt but of particular concern to the media is the sub judice rule. Burrows explains the rule in this way:⁵⁰

If a case is being tried in court, or even if it is *due* to be tried in court, one should not say or do anything which could interfere with the trial or the system of justice; such conduct may be dealt with as contempt of court. In other words, once a matter is sub judice, the right of outsiders to comment on it is strictly limited.

⁴⁷Section 4 of the Bill of Rights Act preserves Parliamentary Sovereignty, so Parliament could still enact legislation inconsistent with the Bill of Rights. However this argument does not attempt to suggest that Parliament can not enact certain legislation or that legislation inconsistent with the Bill of Rights should be struck down. Rather it suggests that as Parliament has responded domestically to its international commitments, it should promote the rights and freedoms it recognises. Arguably then it had a responsibility to address conduct which impeded freedom of expression, especially in the light of the comments by the United Nations Human Rights Committee. (Above at page 12).

⁴⁸Above n 2, 113. In June 1976 the Minister of Justice had extended the Committee's terms of reference to include "an examination of the law of contempt as it may concern the publication of matter relating to civil proceedings that are imminent or pending. Above n 1, 6.

⁴⁹Hinde & Hinde *New Zealand Law Dictionary* (Butterworths, Wellington, 1986), 82.

⁵⁰Above n 1, 253.

The rationale for the rule is that courts must be seen to approach a case impartially and without preconception. It is unclear exactly when a matter becomes sub judice although it seems clear that it is not necessary that proceedings have actually been instigated. The Court of Appeal has suggested that publication when proceedings are "highly likely" may amount to a contempt.⁵¹

If the motivation is to gag the press, then there is no intention to proceed to trial and therefore no proceedings to prejudice. However, as stated earlier, a gagging writ is not easily identifiable. Miller explains the problem facing the media when defamation proceedings are issued after one in a proposed series of articles is published:⁵²

[t]o require the press in general, and the investigating newspaper in particular, to dissist thereupon from further comment on the ground that it might prejudice the libel action would mean that a potential rogue had purchased immunity from exposure at a very small cost. The immunity might, moreover, continue over a long period if the opportunities for delay afforded by the civil process were cynically manipulated to "gag" the press ... He may genuinely intend to vindicate his reputation by proceeding with his action as soon as possible. If this is so, any future disparaging comments may be just as likely to prejudice the fair trial of the action as in any other case ... *The problem lies in distinguishing between the two and it is a problem to which there is no ready solution.*

The issue of proceedings therefore places the media in a dilemma whether it is a genuine action or not. However the law of contempt may be less restrictive on media practices than it appears to be, because the court will still look to whether the public interest in the matter at hand and freedom of the press should outweigh the possible prejudice of the court action. This balance was considered in *Wilson v Waikato and King Country Press*.⁵³ This case is considered to be the most important New Zealand case to consider the dilemma surrounding a decision to continue publication following the issue of proceedings in defamation.⁵⁴ It concerned an application for committal for contempt of a defamation action. Counsel for the defendant submitted that the plaintiff's \$75,000 claim had elements of a gagging writ. The court was required to determine whether the

⁵¹*Television New Zealand v Solicitor General* [1989] 1 NZLR 1, 3, in Burrows, above n 1, 256.

⁵²*Contempt of Court* (1976), 145, in *Wilson v Waikato and King Country Press*, Unreported, 9 February 1982, High Court, Hamilton Registry, M 248/79, 15-16. (Emphasis added).

⁵³Above n 52.

⁵⁴Burrows, above n 1, 281.

proceedings issued were merely intended to silence the press, because if it was not convinced the action was genuine then proceedings for contempt could not be sustained.⁵⁵

It is well established that there must be a real risk as opposed to a mere possibility that the publication prejudices the trial,⁵⁶ and the court considered how real that risk must be before the court would be forced to legally gag the press. Great emphasis was placed by defence counsel on the public interest in the plaintiff's activities, suggesting that the defendants should be free to continue publishing articles of public interest. Bisson J. articulated a strong belief in freedom of the press, saying;⁵⁷

[j]ournalism directed towards investigation and exposure of abuses is in the interests of justice and should not be inhibited by the rules as to contempt of court unless there is a real prejudice to the administration of justice.

Counsel for the newspaper referred the court to the obiter statements of Salmond LJ. in *Thomson v Times Newspapers Ltd*⁵⁸ where the Lord Justice said;

[i]t is a widely held fallacy that the issue of a writ automatically stifles further comment. There is no authority that I know of to support the view that further comment will amount to contempt of court ... I appreciate that very often newspapers are chary about repeating criticism when a writ ... has been issued because they feel they are running the risk of being proceeded against for contempt ... I think that they are mistaken.

Bisson J. held that the continued publications did not amount to a contempt of court. In doing so his Honour appeared to move the law towards the facilitation of investigative journalism. By stating with slightly more certainty the parameters of the law of contempt, the question of whether proceedings are of a gagging nature becomes less crucial. If the action is intended only to stifle discussion, there is no trial to prejudice. Alternatively, if the plaintiff is clearly resolved to pursue the matter to litigation, the media may not be

⁵⁵Above n 1, 280.

⁵⁶This test is drawn from the well known 'thalidomide case' *Attorney General v Times Newspapers Ltd* (1974) AC 273, 298-299.

⁵⁷Above n 52, 21. His Honour distinguished "cases [where] the freedom of the press has been abused by arrogant editors indulging their egos and resorting to trial by newspaper. There is an obvious contempt of court in those cases".

⁵⁸(1969) 3 All ER, 648, 651 in *Wilson*, above n 52, 17.

prevented from publishing further comment on the issue because the court seems to be setting a stricter test for contempt which leans more favourably towards a freer press.

VI THE DEFAMATION ACT 1992

The Defamation Act 1992 adopts a three tiered response aimed at abating or reducing the problem of gagging writs. The reforms are all essentially procedural.

A Section 43 - Claims for Damages

Subsection 1 of section 43 provides:

In any proceedings for defamation in which a news medium is the defendant, the plaintiff shall not specify in the plaintiff's statement of claim the amount of damages claimed by the plaintiff in the proceedings.

The McKay Committee stated that its primary recommendation to alleviate gagging writs was that a plaintiff who brings an action against a media defendant should not be able to state the quantum of damages claimed.⁵⁹ The rationale for this provision is sourced in the acceptance that a plaintiff intending to gag the press will normally employ a claim for exorbitant damages as their coercive tactic.

The force of this provision may be diluted in a number of ways though. First, the prohibition on specifying damages applies only to the statement of claim. It does not prevent discussion of the amount of damages sought during settlement negotiations, or during the trial itself. Ostensibly the section would not prevent the plaintiff indicating the amount of damages claimed through a medium other than the statement of claim, for example, orally. There is potential therefore for the objective of this section to be undermined.

Secondly, the very essence of the section may defeat its purpose. If the amount of damages is not stated, media defendants may uniformly expect the worst in each case. In other words, although a claim specifying a large sum of damages may have been intimidating, the defendant was at least aware of the extent of the threat against them; a balanced decision whether to continue could be made, considering the financial risk the paper was taking and the likelihood that the plaintiff seriously intended to pursue the matter to trial.

⁵⁹Above n 2, 95.

Thirdly, it is possible that the veil of secrecy surrounding the amount of damages sought may be lifted in certain circumstances. The statement of claim must be silent as to damages only when a news medium is involved. The National Press Club pleaded in its submission on the Bill,⁶⁰ “[c]ould not the individual defendant also be spared the million dollar fright of the gagging approach?” This plea was echoed by the New Zealand Journalists’ Union.⁶¹ The Department of Justice Report on the submissions replied;⁶²

[w]e believe this is unnecessary as the clause is designed to stop writs issued to stifle the publication of further matter on the subject. This is unlikely to be a problem where no news medium is involved.

Hugh Rennie would tend to disagree with this. He says:⁶³

In gagging writs, it is a common tactic to sue multiple defendants with the hope of applying pressure to individuals, or parties such as contract printers with little connection to the publication. I have seen occasions on which that pressure is very effective on individuals, including some cases where individual journalists or other personal defendants had become quite distressed.

If a plaintiff issues proceedings against an individual defendant as well as a news medium they are not prevented from specifying the extent of damages sought against the individual defendant. This would undoubtedly indicate to the media defendant some idea of the level of damages sought against it by the plaintiff. A likely scenario involving an individual defendant and a media defendant is when a journalist or editor and their paper or publishers are both sued. Non specification of damages only applies when the defendant is a “news medium”. This is defined as “a medium for the dissemination, to the public or a section of the public, of news, or observations on news, or advertisements”.⁶⁴ Whether ‘medium’ anticipates the inclusion of human beings or is confined to non-human organisations, such as publishing companies, television studios or radio stations, is debatable. In other words, can the journalist who researches and writes the story, or only the paper in which the report is published, be considered a news medium for the purposes of section 43(1)? It is submitted that on the plain language of

⁶⁰Submission 6.

⁶¹Submission 8W.

⁶²Secretary for Justice *Report of the Department of Justice*, 24.

⁶³Personal communication with Mr Rennie.

⁶⁴Section 2, Defamation Act 1992.

the definition a journalist is not a news medium because they are not able to disseminate news to the public on their own account; they require a vehicle through which to convey and distribute their reports, and it is submitted that it is this vehicle which is the news medium. Unfortunately this distinction has not yet been subject to any significant judicial consideration.

A recent defamation action involving two defendants was originally brought on the basis that both defendants were news mediums.⁶⁵ However the court held that the second defendant, named as "The Journalist Publishing Company, a duly incorporated company ... carrying on business as Publishers" was a news medium, but the first defendant, the "New Zealand Journalists and Graphic Process Union", was not. On appeal to the High Court on a procedural matter, Holland J. expressed concern at the lower judge's finding. He did not suggest that the finding was incorrect, but was concerned at the finding having been made on practically no evidence. Although the distinction between media and non-media defendants was not considered a material issue, the case foreshadows the problem which could arise in subsequent actions against multiple defendants. Holland J. recognised the significance of the distinction, noting that if the issue is material in a future case it will have to be determined on argument with the benefit of full evidence.

The real issue in this case illustrates another problem with non specification of damages. The defendants were appealing against an interlocutory order of the District Court declining to transfer the proceedings to the High Court. Section 43 of the District Courts Act 1947 provides for an absolute right to transfer where "the amount of the claim or the value of the property or relief claimed or in issue exceeds \$50,000". The issue therefore was whether a defendant to a statement of claim issued in the District Court claiming unspecified damages in accordance with section 43 of the Defamation Act 1992 had an absolute right to have the proceedings transferred to the High Court.⁶⁶

The District Court judge held that unspecified damages were outside the definition in section 43(1) of the District Courts Act 1947. Holland J. considered this to be a very narrow interpretation of the section. He noted that the defendants were at risk for up to \$200,000, the maximum jurisdiction of the District Court. His Honour disagreed with the lower court judge's concern that a finding that any claim in defamation for unspecified

⁶⁵*New Zealand Journalists and Graphic Process Union and The Journalists Publishing Company v Wilson* Unreported, 29 April 1994, High Court, Christchurch Registry, AP 356/93.

⁶⁶Above n 65, 2.

damages could as of right be transferred to the High Court had the effect that the District Court would never be able to hear an action in defamation. Holland J. said;⁶⁷

I can see no reason why a plaintiff wishing to have the jurisdiction of the District Court should not commence his proceedings in the District Court and unless the defendant applied to remove them, the District Court would have the jurisdiction to deal with the matter, being limited, however, to the jurisdiction of that Court in the sum of \$200,000.

Considering the earlier judge's finding that the first defendant was not a news medium, counsel acknowledged that in respect of the first defendant the plaintiff was required to nominate the amount of damages claimed. As these were proposed to be in excess of \$50,000, Holland J. held that there was no doubt that the defendants did have a right to have the proceedings transferred to the High Court.

This case is an important indication of the difficulties and deficiencies inherent in section 43. The judgment evinces several potential problems. Other difficulties associated with section 43 have already been identified. It is hard to predict whether the Act's primary weapon against gagging writs will be effective or not. Despite its apparent shortcomings "it is hard to see what even the most active imagination could suggest to combat the gagging writ".⁶⁸

B Section 45 - Proceedings Deemed to be Vexatious if No Intention to Proceed to Trial

Section 45 provides:

The commencement of proceedings to recover damages for defamation shall be deemed to be a vexatious proceeding if, when those proceedings are commenced, the plaintiff has no intention of proceeding to trial.

This provision is essentially an augmentation of the common law rules relating to abuse of the process of the court. At common law the defendant may apply to have an action

⁶⁷Above n 65, 3.

⁶⁸Burrows "Defamation Legislation Overhaul Overdue" NZ Journalism Review, Spring 1988, Vol 1, 7, 8.

struck out if it is frivolous or vexatious or is otherwise an abuse of process.⁶⁹ In *Spautz v Williams* Hunt J. said that the legal process of a court is being abused when it is being used;⁷⁰

- a) to exert pressure to effect an object outside the scope of the process; or
- b) for a purpose other than that for which the proceedings are designed and exist; or
- c) where the plaintiff is seeking a collateral advantage beyond what the law offers.⁷¹

Lord Denning MR has suggested that the collateral motive must be established as the plaintiff's predominant object. The fundamental purpose of civil defamation proceedings is to vindicate and protect the reputation of the allegedly defamed person; if proceedings are issued for the purpose of stifling debate and gagging the press, and the plaintiff has no intention to vindicate his or her reputation at trial, the process of the court is being abused in the manner identified in *Spautz*.⁷² This is explicitly recognised by Lord Denning in *Goldsmith v Sperrings* where his Lordship stated:⁷³

The issue of a writ for libel is an act which is lawful in itself, but if it is done with the predominant purpose of stifling discussion - as the word "gagging" so colourfully puts it - then it is unlawful. Once the court is satisfied that such is the predominant object of it, it will stay the action as an abuse of the process of the court.

However section 45 is slightly different to the common law abuse of procedure rules. The common law allows for dismissal of an action once the court is satisfied that the legal process is being abused, whereas section 45 is aimed at preventing the abuse of procedure

⁶⁹The High Court Rules also provide that proceedings may be stayed or dismissed in these circumstances. Rule 477 states:

Summary stay or dismissal - Where in any proceeding it appears to the Court that in relation to the proceeding generally or in relation to any claim for relief in the proceeding -

- a) No reasonable cause of action is disclosed; or
 - b) The proceeding is frivolous or vexatious; or
 - c) The proceeding is an abuse of the process of the Court, -
- the Court may order that the proceeding may be stayed or dismissed generally or in relation to any claim for relief in the proceeding.

⁷⁰[1983] 2 NSWLR 506, 539-541.

⁷¹Above n 70, 539.

⁷²Above n 70.

⁷³[1977] 1 WLR 490.

before it occurs. In other words, the effectiveness of this provision as an attempt to eliminate gagging writs lies in deterrence. The McKay Committee recognised that a gagging writ is an abuse of process and said "it is unethical conduct for a solicitor to be a party to such an action."⁷⁴ The rationale underlying the section is that it will discourage solicitors from taking on and pursuing claims that they know their client has no intention of persisting with to the end, because the section anticipates that a lawyer who commences a vexatious defamation proceeding may be liable to disciplinary proceedings before the Law Society Disciplinary Tribunal under the Law Practitioners Act 1982.⁷⁵

This section may face evidential problems though - how do you prove that the plaintiff had no intention of proceeding to trial from the outset? This question has been raised frequently in relation to section 45.⁷⁶ Goddard suggested that the provision might be dangerous because a plaintiff often loses enthusiasm with the passage of time,⁷⁷ but may have had a genuine desire to litigate his claim when he retained his lawyer. The Justice Department report emphasised that the section did not give rise to criminal liability,⁷⁸ and in any case it would be very unlikely that a Disciplinary Tribunal would deem a proceeding vexatious, and the lawyer guilty of unethical conduct, if it was evident that the plaintiff's interest had merely waned.

Given that the section is intended to act as a deterrent to lawyers, concerns about problems of proof may be redundant. The Department of Justice has said "[i]t is to be expected that few, if any proceedings will arise [under section 45]."⁷⁹ This is consistent with the provision's deterrent value.

⁷⁴Above n 2, 95.

⁷⁵This possibility of disciplinary action was recognised by both the Committee and later the Minister of Justice when the Defamation Bill 1988 was introduced. See Committee Report, above n 2, 95, and NZPD, Vol 491, 6371, 25 August 1988.

⁷⁶See for example Leigh Hodgson, Submission 14; National Press Club, Submission 6; J Manning "The Defamation Act 1992" [1993] NZ Recent Law Review 97, 100.

⁷⁷Submission 18.

⁷⁸Above n 62, 25.

⁷⁹Above n 62, 25.

C Section 50 - Striking Out for Want of Prosecution

Although section 50 is not positively directed at alleviating the problem of gagging writs, it may nevertheless remove the continued gagging effect of a writ by striking out lingering proceedings. Section 50 provides:

(1) In any proceedings for defamation, unless the Court in its discretion orders otherwise, the Court shall, on the application of the defendant, order the proceedings to be struck out for want of prosecution if-

(a) No date has been fixed for the trial of the proceedings;

and

(b) No other step has been taken in the proceedings within the period of 12 months immediately preceding the date of the defendant's application.

At common law the court has a discretionary power to strike out an action for want of prosecution at any stage of the proceedings if the plaintiff fails to comply with a procedural step or fails to take steps to bring their action to trial.⁸⁰ However this is a "drastic measure"⁸¹ and judges are generally reluctant to dismiss actions simply because of delay unless that delay is inordinate and inexcusable and there is a risk of prejudice to the defendant.⁸²

The common law position is reflected in Rule 478 of the High Court Rules. Rule 478 provides:

Application to dismiss for want of prosecution - Where the plaintiff fails to prosecute his proceeding ... to trial and judgment, any opposite party may apply to have the proceeding ... dismissed, and the Court may, on such application, make such order as may be just.

McGechan, applying the same basic principles, says that the importance of the delay depends on the character of the proceedings.⁸³ As to whether the defendant is prejudiced by the delay, the relevant consideration applicable to gagging writs is the "sword of Damocles" principle. McGechan says "[p]rejudice can take the form of difficulty

⁸⁰Committee Report, above n 2, 109.

⁸¹P Lewis *Gatley on Libel and Slander* (8 ed, Sweet & Maxwell, London, 1981), 520.

⁸²See Committee Report, above n 2, 109, and *McGechan on Procedure* Vol. 2 (Brooker & Friend Ltd, Wellington, 1985-1988), 3-570.

⁸³*McGechan*, above n 82, 3-571.

experienced by a defendant in conducting its affairs, with the prospect of the proceedings hanging indefinitely overhead".⁸⁴

However section 50 goes much further than the common law in alleviating the continued gagging effect of protracted proceedings. As stated earlier, the power of the court to strike out proceedings at common law is discretionary. Section 50 provides that where no step has been taken for one year the court *shall* order the proceedings to be struck out. The McKay Committee recommended that after the period of one year had passed the defendant should be entitled to have the action dismissed unless the plaintiff could show an adequate reason to justify an exception being made, remarking "[a] plaintiff who is really concerned at an injury to his reputation will not be dilatory".⁸⁵ This recommendation is reflected in the provision that the proceedings shall be struck out unless the Court in its discretion orders otherwise.

Section 50 is dependent on two requirements. The first is that no date has been fixed for the trial of the proceedings. The rationale underlying this requirement is that the plaintiff is able to employ delaying tactics in setting down a date for trial, but once a date is set delays may not always be within the control of the plaintiff.

The second requirement is that no step has been taken in the proceedings within the 12 months preceding the defendant's application for dismissal. The Justice Department rejected calls for the reduction of this period to six months, due to the peculiar nature of defamation actions. Even actions which are actively pursued can be characterised by prolonged delays and often take years to reach the courts.⁸⁶

However the damage done by a gagging writ occurs at its inception. The public interest in most issues is unlikely to survive twelve months of media silence. And twelve months is likely to be the minimum period which must pass before the defendant can apply to have the proceedings struck out for want of prosecution. Section 50(1)(b) refers to no other 'step' being taken in the twelve months immediately preceding the defendant's application; Hodgson points out that this is a vague term. Correspondence on interlocutory matters, to give the appearance that the action was still alive, could continue for years.⁸⁷ Arguably this correspondence constitutes a step in the proceedings. This is clearly not what the section anticipates and it may have to be clarified in this respect.

⁸⁴Above n 82, 3-572.

⁸⁵Above n 2, 109.

⁸⁶Above n 62, 26.

⁸⁷Submission 14.

However the power of the court to strike out proceedings at common law exists alongside this statutory provision. Proceedings which are clearly of a gagging nature could still be struck out earlier at the court's discretion, and the defendant would not be forced to wait until 12 months of inactivity had passed.

Despite its good intentions, section 50 may be used infrequently. The section provides that the proceedings may be struck out on the application of the defendant. It seems unlikely that defendants will rush to apply under this section and risk spurring the previously dormant plaintiff into action. Coupled with the ambiguity as to what constitutes a step in the proceedings, this section could backfire for the defendant. The plaintiff may be provoked into further delaying tactics to continue to gag the defendant. Burrows correctly describes section 50 as a "two-edged sword", noting it may be better to "let sleeping dogs lie".⁸⁸

Section 50 differs fundamentally from the common law in another important respect. At common law, if proceedings are struck out for want of prosecution the plaintiff is not prevented from bringing a fresh action based on the same cause of action, unless the action has become statute-barred by the expiration of the limitation period. In other words, no *res judicata* arises against a plaintiff whose proceedings have been dismissed for want of prosecution.⁸⁹ However section 50(2) states:

(2) Where any proceedings are struck out under subsection (1) of this section, no further proceedings may be commenced by the plaintiff against any defendant in the proceedings in respect of the same or substantially the same cause of action, except by the leave of the Court in which it is sought to commence those proceedings . . .

This provision prevents the plaintiff from prolonging the gagging effect of their action by issuing further proceedings once the defendant has been successful in getting the original action struck out. This section will prevent proceedings being carefully structured by plaintiffs with gagging motives so as to enable them to bring further proceedings based on a slightly different cause of action.⁹⁰ Section 50(2) addresses this concern by providing that no further proceedings may be commenced in respect of the same or substantially the same cause of action, except with the leave of the court.

⁸⁸Above n 68, 8.

⁸⁹McGechan, above n 82, 3-572.

⁹⁰A practical example of this tactic is given above at page 6.

VII ALTERNATIVE REFORM

A *Changing the Value We Place on Reputation*

It is widely accepted that in order to achieve the desired gagging effect, a plaintiff will claim a large amount of damages to scare the defendant into dropping the issue. The prospect of an expensive judgment against them is often the necessary inducement for a defendant to engage in self-censorship. This section considers how well founded that fear of financial ruin is, and how the disproportionate value we place on reputation provides the framework in which plaintiffs are able to claim large amounts of damages to manipulate defendants into silence.

Damages awards in defamation actions in New Zealand have undoubtedly increased in recent years, although they are still considerably less than the multimillion dollar awards seen in Britain and the United States.⁹¹ Burrows notes that “[a]wards of this magnitude lead plaintiffs to claim even larger sums”⁹² in their statements of claim. The McKay Committee documented writs issued for up to \$950,000 over twenty years ago.⁹³ In more recent years claims of up to \$2 million in damages have not been rare, and one action claiming a massive \$45.6 million was brought against a reporter and editor.⁹⁴

It is a fundamental axiom of tort law that a plaintiff should only be able to recover damages if they can prove that actual injury occurred and a causative link can be established between the injury and the allegedly tortious conduct. Defamation law runs contrary to this basic rule. The Supreme Court of the United States addressed the anomaly in *Gertz v Robert Welch Inc.*⁹⁵ The court said:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the

⁹¹Burrows notes awards of \$180,000 and \$102,000 in 1983. Above n 1, 47. The average amount of the highest awards noted by the McKay Committee was, in 1977 terms, about \$30,000. (See Committee Report, above n 2, 86). Astronomical awards of millions of dollars have been made against the British tabloid press.

⁹²Above n 1, 48.

⁹³Above n 2, 58. Significantly none of these cases went to trial.

⁹⁴These figures are taken from various newspaper reports on defamation actions. Burrows also notes that “[i]n New Zealand statements of claim running into millions of dollars are not unknown.” Above n 1, 48.

⁹⁵418 U.S. 323, 349 (1974).

traditional rules pertaining to actions for [defamation], the existence of injury is presumed from the fact of publication.

The doctrine of presumed damage leaves juries free to award "substantial sums of compensation for supposed damage to reputation without any proof that such harm actually occurred."⁹⁶ In a defamation action "the assessment of damages does not depend on any legal rule."⁹⁷ The calculation of damages is entirely at the discretion of the jury,⁹⁸ who are to be governed by all the circumstances of the particular case, including factors such as the conduct of the plaintiff, the mode and extent of the publication, the position and standing of the plaintiff, and the nature of the defamatory statement.⁹⁹

Compensatory or general damages may be awarded to compensate the plaintiff for:

- a) the injury to his or her reputation caused by publication of the defamation complained of, and;
- b) the injury to his or her feelings and sense of affront and indignation caused to him or her by the publication.¹⁰⁰

Burrows suggests that the term 'compensatory damages' is essentially a misnomer because it is artificial to speak of compensation in financial terms when the plaintiff has not suffered economic loss. He suggests that an award is really a consolation or solatium in respect of the injuries, the figure being determined by an almost "arbitrary process".¹⁰¹

There is no public interest in allowing plaintiffs to recover monetary damages which exceed genuine compensation for their actual injuries.¹⁰² Therefore compensatory

⁹⁶Above n 95.

⁹⁷Per Lord Watson in *Bray v Ford* [1986] A.C., 50 in *Gatley*, above n 81, 592.

⁹⁸The award is made by the judge if there is no jury. Burrows, above n 1, 43.

⁹⁹As to damages generally see *Gatley* above n 81, ch 32.

¹⁰⁰Committee Report, above n 2, 86. The latter may be increased by the high-handed or oppressive conduct of the defendant, and are then known as 'aggravated compensatory damages'. Punitive damages may be awarded only where the defendant has acted in flagrant disregard of the rights of the plaintiff. (Section 28, Defamation Act 1992).

¹⁰¹Above n 1. 43. He compares the situation to damages for loss of profit or property damages which are easy to calculate.

¹⁰²Strossen, above n 42, 121.

damages should be awarded at a level which restores the plaintiff to the position they would have been in but for the tortious action. It is not only in the area of defamation that the calculation of sufficient compensation is difficult or artificial; how for instance does one arrive at an equitable award to compensate an accident victim for the loss of the use of their legs? It is when the compensation which is actually available in these two areas is compared that the extraordinary value we place on reputation becomes apparent.

From 1 April 1972, when the Accident Compensation Act 1972 came into force, New Zealanders forfeited their common law right to sue for damages for personal injury by accident. The scheme introduced provided for lump sum payments for permanent loss or impairment of bodily function and for loss of enjoyment of life, disfigurement, pain and mental suffering. Prior to the revamping of our accident compensation law in 1992, the maximum payments available were \$17,000 and \$10,000 respectively, with the possibility of additional earnings-related compensation. The new accident compensation regime has abolished lump sum payments altogether, and provides what is considered to be even less generous compensation. When compared with some of the awards for damages in defamation actions, even the maximum lump sum of \$27,000 which had been available falls well short of the compensatory damages awarded for injury to reputation.

This discrepancy is not unique to the New Zealand situation. In the United States, where the common law right to sue remains, defamation defendants face higher awards than other civil litigation defendants. The average compensatory award in defamation cases in 1980 - 1982 exceeded the average awards in products liability and medical malpractice cases by approximately 300%. "To the extent that there is any actual injury' as a result of defamation, such injury 'is rarely of a quality or degree comparable to the massive physical impact and permanent, costly physical debilitation caused by medical malpractice or by defective, dangerous products'."¹⁰³

The words of the Joint Media submission on the Defamation Bill 1988 appropriately sum up this anomaly:¹⁰⁴

We fail to see how any general damages to reputation can be worth more in monetary terms than the maximum compensation able to be obtained by a person who suffers gross physical injury causing loss of enjoyment of life.

¹⁰³LDRC Bull. No 9 "Juries and Damages: Comparing the Media's Libel Experience to Other Civil Litigations" 26 (1984) in Strossen, above n 42, 122.

¹⁰⁴Submission 19, above n 35.

This is not to suggest that plaintiffs should not be compensated for actual loss attributable to the defamatory statement. Pecuniary loss might be sustained if, for example the plaintiff lost their job or were overlooked for a promotion as a result of a slur on their reputation. More often than not though such loss can not be proved¹⁰⁵ and most defamation awards are merely a means of soothing injured reputations and hurt feelings. It is questionable whether there even is any significant damage done to reputations by unfavourable publicity. It is well accepted that one doesn't believe everything one reads in the newspaper. Hodgson even suggests that the person may go up in our estimation, while the comment is more of an unfavourable reflection on the person who made it.¹⁰⁶ The public are often more likely to sympathise with a popular public figure and dismiss the truth of the statement. Burrows also questions the extent of the damage done by defamatory statements citing the example of a play being reviewed as "a flop". The production went on to become a box office success, and substantial damages were recovered in defamation.¹⁰⁷

It has been suggested that a statutory limit should be set on damages for loss of reputation¹⁰⁸ The Committee had earlier rejected this proposition.¹⁰⁹ There was concern that a calculated decision could be made to proceed with a publication which it was known or suspected to be untrue, weighing up the likely profit from a guaranteed bestseller with the potentially maximum liability in defamation. To counter this possibility a statutory limit could be imposed on compensatory damages, with special damages and punitive damages in excess of this amount available in extreme cases.

B Alternative Remedies

The Defamation Act 1992 provides for a number of new remedies in defamation actions.¹¹⁰ A common feature of these alternatives is their focus on non-financial relief. These options may provide the framework in which the media can be relieved from the threat of crippling damage awards and the disproportionate value we place on hurt feelings can be redressed.

¹⁰⁵Burrows, "Defamation - The Need For Reform", in *Conference Papers New Zealand Law Conference*, 1987, 129.

¹⁰⁶Submission 14.

¹⁰⁷Above n 105, 129.

¹⁰⁸Joint media submission, above n 35. The limit proposed was \$25,000.

¹⁰⁹Above n 2, 86.

¹¹⁰The relevant sections are reproduced in appendix A.

1 Section 24 - declarations

The Act now provides that a plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation. If this is the only remedy sought by the plaintiff, and the court makes the declaration, the plaintiff will ordinarily be entitled to solicitor and client costs against the defendant. The possibility of having their costs met by the defendant provides an added incentive for a plaintiff who is more concerned at seeing the truth made than to profit financially to apply under this section. However the plaintiff is not prevented from seeking both a declaration *and* damages, although the assessment of damages will take into account that the declaration has been made.¹¹¹

Strossen points to a study by law and journalism professors at the University of Iowa¹¹² which revealed that the cardinal motivation for bringing a defamation action is usually not to recover large amounts of damages. Rather it is to secure a collateral purpose such as retribution or to air the plaintiff's side of the story. Public figures, especially, may wish to be seen to be challenging statements made about them. Plaintiffs feel they can serve these purposes by the mere act of initiating the proceedings, regardless of the outcome. This is demonstrated by the fact that most plaintiffs and notably all public officials who had lost suits said they would have sued regardless even if they could have predicted their loss in court.¹¹³

Strossen suggests that, as the real purpose of defamation law is to enable vindication of reputations, a new structure should be put in place which focuses exclusively on this objective.¹¹⁴ It is submitted that the Defamation Act 1992 already provides the basic structure to achieve this purpose. The court is given the power to declare that the plaintiff has been defamed; this section could be amended to provide that no further claim for general damages¹¹⁵ is permitted. Instead, the alternative remedies of correction orders or retractions could be available to the plaintiff.

¹¹¹Section 29(c).

¹¹²Bezanson, Cranberg & Soloski "Libel and the Press, Seeing the Record Straight" 71 Iowa L. Rev. 215 (1985), in Strossen, above n 42, 122.

¹¹³Strossen, above n 42, 122.

¹¹⁴Above n 42, 122.

¹¹⁵Special damages could still be awarded where special damage is proven, and punitive damages could be available in extreme cases.

2 Correction orders and retractions

Section 26 provides that a plaintiff may seek a recommendation from the court that the defendant publish a correction of the matter complained of. If the correction is published the plaintiff will be awarded solicitor and client costs, but shall be entitled to no other relief, and the proceedings against the defendant shall be deemed finally resolved. If the correction order is not published, and the court gives final judgment in favour of the plaintiff, the failure to comply with the order will be taken into account in an assessment of damages.¹¹⁶

Section 25 allows for an allegedly defamed person to request the person responsible for the publication to publish a retraction of the matter or a statement of explanation or rebuttal. All costs of the person requesting the retraction must be met by the publisher, including any pecuniary loss suffered as a direct result of the publication. In its present form there is little incentive to comply with this section. If, like the correction order, a retraction could be ordered by the court, this provision would be more useful. Burrows notes that the appropriateness of the correction order may be confined to a small number of cases where the defendant's statement is demonstrably untrue, but may not be appropriate in respect of sweeping statements.¹¹⁷ An order to retract or explain could be made in a wider range of cases.

VIII CONCLUSION

The press have been plagued with the problem of gagging writs for a number of years. These proceedings are problematic because they cut off discussion on important public issues, and hamper the media in the exercise of their democratic right of disseminating information to the public. Although their incidence may not be substantial, there is little doubt that some plaintiffs are able to secure immunity from unfavourable publicity by instigating proceedings which they have no intention of seeing through to their conclusion.

¹¹⁶The defendant may also be liable in contempt of court. The press voiced disapproval of this section as they felt it was a restraint on their freedom to be forced to publish against their will. The Select Committee rejected this submission, commenting that the news media had a special duty to pursue the truth. "News Media Fail In Defamation Defence" *The Dominion*, 4 October 1992.

¹¹⁷Above n 1, 53. An example of the former is "X has a conviction for murder", and of the latter, "X is a cheat".

The new defamation legislation attempts to address this problem by amending existing rules relating to procedure. These reforms are primarily aimed at preventing plaintiffs from using coercive tactics to achieve their collateral purpose, and at discouraging solicitors from taking on cases which they know are designed merely to stifle discussion. The legislation also takes steps to relieve defendants of the persistent worry of unresolved defamation proceedings by simplifying the rules relating to striking out and abuse of procedure to facilitate the expeditious dismissal of proceedings which have lain stagnant.

The success of these measures in alleviating the problem of gagging writs may not even become apparent in practice, for they are aimed at preventing the use of a tactic, the present prevalence of which remains difficult to determine in any case. The provisions are nevertheless a useful attempt at curtailing their usage, although a definitive solution to the problem of gagging writs may always remain elusive. A reassessment of the value we attribute to reputations may be a viable solution. If the potential for essentially gratuitous financial bonuses for wounded feelings is removed, defendants would have no reasonable grounds for fearing financial ruin should they continue to print material they feel justified in publishing. The alternative grounds for relief contained in the Defamation Act 1992 provide adequate means by which plaintiffs who have been the subject of defamatory statements can vindicate their reputations. The legitimate objective of defamation law is therefore served, while at the same time freedom of the press is upheld and the law of defamation is harmonised with other areas of tort law.

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APPENDIX 'A'

REMEDIES

24. Declarations—(1) In any proceedings for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.

(2) Where, in any proceedings for defamation,—

(a) The plaintiff seeks only a declaration and costs; and

(b) The Court makes the declaration sought,—
the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the Court orders otherwise.

25. Retraction or reply—(1) Any person who claims to have been defamed by any matter published in a news medium may, not later than 5 working days after that person becomes aware of the publication of that matter in that news medium, request the person who was responsible for the publication of that matter to publish, in the same medium as the publication complained of, with substantially similar prominence, and without undue delay,—

(a) A retraction of the matter in so far as it includes or consists of statements of fact; or

(b) A reasonable reply.

(2) Where, in response to a request made under subsection (1) of this section, a person agrees to publish a retraction or a reply, that person shall also offer to pay to the person who made the request (in this subsection referred to as the requester),—

(a) Where it is agreed to publish a reply, the cost of publishing that reply; and

(b) The solicitor and client costs incurred by the requester in connection with the publication of the retraction or reply; and

(c) All other expenses reasonably incurred by the requester in connection with the publication complained of; and

(d) Compensation for any pecuniary loss suffered by the requester as a direct result of the publication complained of.

(3) In this section, "reply" means a statement of explanation or rebuttal, or of both explanation and rebuttal.

26. Court may recommend correction—(1) In any proceedings for defamation, the plaintiff may seek a recommendation from the Court that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings, and the Court may make such a recommendation.

(2) Where, in any proceedings for defamation,—

- (a) The Court recommends that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings; and
- (b) The defendant publishes or causes to be published a correction in accordance with the terms of that recommendation,—

then—

- (c) The plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the Court orders otherwise; and
- (d) The plaintiff shall be entitled to no other relief or remedy against that defendant in those proceedings; and
- (e) The proceedings, so far as they relate to that defendant, shall be deemed to be finally determined by virtue of this section.

(3) Where, in any proceedings for defamation,—

- (a) The Court recommends that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings; and
- (b) The defendant fails to publish or cause to be published a correction in accordance with the terms of that recommendation,—

then, if the Court gives final judgment in favour of the plaintiff in those proceedings,—

- (c) That failure shall be taken into account in the assessment of any damages awarded against the defendant; and
- (d) The plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the Court orders otherwise.

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