

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT
ON
THE CIVIL LAW OF DEFAMATION

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both House of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty-seven Reports containing proposals for the reform of the law. It has also published eleven Working Papers, five Consultation Papers and Annual Reports. Details will be found on pp20-23.

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NOTE

This Report was submitted on 19th December, 1991 to the Attorney General, Mr. Harold A. Whelehan, S.C., under section 4(2)(c) of the *Law Reform Commission Act, 1975*. It embodies the results of an examination of and research in relation to The Civil Law of Defamation which was carried out by the Commission at the request of the former Attorney General, Mr John Murray, S.C., together with the proposals for reform which the Commission were requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

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CHAPTER 1: INTRODUCTION

1.1 In January 1989 the Attorney General, pursuant to section 4(2)(c) of the *Law Reform Commission Act 1975*, requested the Commission to undertake an examination, and conduct research and formulate and submit to him proposals for reform, of the law of defamation and contempt of court.

The subject matter of this request can be divided into three parts: civil defamation, criminal defamation and contempt of court. In turn, criminal defamation takes four forms: criminal libel, obscene libel, blasphemous libel and seditious libel.

1.2 The Commission decided to undertake first an examination of Civil Defamation, the most extensive of these categories. Earlier this year, we published a Consultation Paper containing the results of that examination together with the provisional proposals of the Commission for reforms in the law. Since its publication, we have published further Consultation Papers on Contempt of Court and Criminal Defamation. This Report contains the final proposals of the Commission as to the reform of the Civil law of Defamation.

The publication of the Consultation Paper on the Civil Law of Defamation provoked widespread comment in the media and we also received numerous submissions on our proposals. In addition, we held a Seminar at the Law Society premises in Blackhall Place on the 27th April which was attended by representatives of the media, barristers, solicitors and academic lawyers among others.

1.3 In assessing the reaction to our provisional recommendations, we have been acutely aware that the most detailed and articulate responses predictably came in the main from the media and their representatives. Despite this inevitable imbalance, we have striven to give effect in our final proposals to the sometimes conflicting rights of the citizen to his or her good name and of all, whether media organs or individuals, to freedom of expression. We believe that reasonable people would accept that, in a democratic society, both values should be protected to the maximum degree, but understandably in some areas one must inevitably yield to the other.

1.4 We should refer in this context to a somewhat unusual feature of this Report. Our Consultation Paper provoked some spirited discussion as to the role which can, or should, be played by the Constitution in shaping a

reformed law of defamation. More than one commentator argued that the treatment of this aspect of the subject in the Consultation Paper was inadequate. The same criticism was urged, although with less vigour, of our treatment of the relevant provisions of the European Convention on Human Rights. We acknowledge the force of these criticisms and, in consequence, have conducted a more detailed analysis of both topics. We have also sought to bear in mind the constitutional dimensions of the subject throughout our formulation of our final proposals for reform.

1.5 We are grateful to all those who contributed to the lively and thoughtful debate which the Consultation Paper provoked, whether in the form of written submissions or participation in the Seminar. A list of those persons or bodies from whom written submissions were received will be found at the end of the Report. We should, however, emphasise that, while we much appreciate the assistance we were given, the Commission itself is solely responsible for the contents of this Report and its recommendations.

CHAPTER 2: THE CONSTITUTION, THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE LAW OF DEFAMATION

2.1 As we mentioned in the introduction, a number of commentators have suggested that the Consultation Paper failed adequately to address the Constitutional dimensions of the law of defamation and the relevance thereto of the European Convention on Human Rights and Fundamental Freedoms. A more detailed analysis of both topics will be found in Appendices A and B. At the outset, however, we should summarise the conclusions we have reached in relation to both topics.

- 2.2. (1) Three constitutional rights are of relevance: the right to a good name (guaranteed by Article 40.3) the right to freedom of expression (guaranteed by Article 40.6.1°) and the right to communicate (not expressly guaranteed but protected by implication by Article 40.3.1°).
- (2) Article 40.6.1° appears primarily to concern opinions, criticisms and comments and requires wide protection for their expression.
- (3) It is not clear whether Article 40.6.1° protects assertions of fact. To the extent that it does, the manner of the protection appears to be left to the legislature which must also take into account the right to a good name guaranteed by Article 40.3.2°.
- (4) The terms of Article 40.3.2° give no guidance as to whether an "unjust attack" on a person's good name consists solely of false statements.
- (5) The reference to "unjust attack" in Article 40.3.2° must be balanced against the wide protection for opinions afforded in Article 40.6.1°.
- (6) The reference in Article 40.6.1° to "organs of public opinion, such as the radio, the press, the cinema" does not necessarily suggest greater protection for media organs than is afforded to the citizens generally.
- (7) The relevant provisions of the Constitution, accordingly, leave a wide area of discretion to the Oireachtas in determining how

best the good name of the citizen may be protected and vindicated by the law. Ultimately, the Constitution leaves the competing rights of the citizen to his good name and of freedom of expression to be reconciled by the Oireachtas in accordance with the common good.

2.3 The European Convention on Human Rights and Fundamental Freedom appears to impose a number of requirements in the context of defamation law. They can be summarised as follows:

- (1) *Restrictions on freedom of speech must be prescribed by law.* Since our reforms envisage the enactment of new legislation on defamation, this requirement will have been observed.
- (2) *Restrictions must be accessible and formulated with clarity and precision.* We have endeavoured to comply with this requirement in formulating our proposals.
- (3) *Restrictions must be necessary in a democratic society for the protection of the interest in question, in this instance reputation.* This means that the restrictions must be proportionate to the end pursued. We have endeavoured to ensure that our proposals secure what is necessary for the protection of reputation and no more.

CHAPTER 3: PRELIMINARY ISSUES

Form of Legislation

3.1 The existing law of defamation consists of the common law as preserved in our law under Article 50 of the Constitution to the extent that it is not inconsistent with the Constitution, decisions of Irish courts since its enactment and of foreign courts which have been expressly approved of by Irish courts and the *Defamation Act 1961* which repealed, and to some extent replaced, various pre-1921 statutes.

3.2 The recommendations made in this Report, if implemented, will require the repeal or amendment of many of the provisions of the 1961 Act and will also require fresh statutory provisions. The sensible course in these circumstances, in our view, would be to repeal the 1961 Act in its entirety and to introduce fresh legislation in its place. In making this recommendation, we are bearing in mind that Part II of the 1961 Act is devoted exclusively to the law of criminal libel, on which we have already published a Consultation Paper but on which we have yet to present our final proposals to the Attorney General. While we would not wish to anticipate those proposals, it will be obvious from our Consultation Paper that the probability is that they will also involve many alterations to Part II of the 1961 Act.

We recommend the repeal of the Defamation Act 1961 and the enactment of new legislation giving effect to the recommendations contained in this Report and the Commission's forthcoming Report on the Crime of Libel.

Distinction between Libel and Slander

3.3 There was no dissent from our provisional conclusion that the distinction between libel and slander should be abolished. We adhere to our original view that the basis of the distinction is purely historical and has made the law unnecessarily complex. Nor was much unease voiced at the associated recommendation that a new cause of action in defamation should be introduced in which proof of special damages (ie. specific pecuniary loss) would not be necessary.

We recommend the abolition of the distinction between libel and slander. We further recommend that there be a new cause of action in defamation in which proof of special damage is not necessary.

Definition of Defamation

3.4 Considerably more disagreement was evoked by our proposal for a statutory definition of defamation. We had proposed *inter alia* that "defamatory matter" should be defined as consisting of "matter which tends to injure the plaintiff's reputation". We had also proposed the following standards by which injury should be measured, i.e.

- "(a) Matter shall be considered injurious to the plaintiff's reputation if it tends to injure his reputation in the eyes of the community or a section of the community.
- (b) Notwithstanding (a), matter shall not be considered injurious to the plaintiff's reputation where it consists of no more than a statement or implication that the plaintiff upheld, assisted or complied with the law".

There was some support for the view that no statutory definition was required. The more general criticism of our provisional recommendation was, however, that while a statutory definition was desirable, our definition was unsatisfactory in some respects.

We have not been persuaded that we were wrong in our view that a statutory definition is desirable. Defamation is well-defined in the common law but the definitions are scattered throughout the cases. We feel that a simple statutory definition would assist those engaged in the process of publication, such as journalists and authors. It would also ensure that our law is in harmony with the requirements of the European Convention on Human Rights that restrictions on freedom of speech should be accessible and formulated with clarity and precision.

3.5 We received some criticism of the phrase "tends to injure" on the ground that it would allow plaintiffs to be compensated in circumstances where they could not show that their reputations had in fact been injured. However, we favour the retention of this phrase. Before the plaintiff can recover damages, the court will have to find that the matter was in fact defamatory. Since our definition requires the plaintiff to show that the matter is defamatory, a requirement that he show actual injury to reputation might impose an onerous burden which would not accord with the law's view that damage is *presumed* to flow from a defamatory statement. Under the present law, it is not necessary for the plaintiff to call a multiplicity of witnesses in order to prove that a significant number of people in fact thought less of him as a result of the publication and the court is not required to expand the injury thus proved by taking into account the number of people who might have thought less of the plaintiff as a result of the publication but were not called. If the words are defamatory, it can only be because they are of such a nature that in the normal course of events a significant number of people on reading them would think less well of the plaintiff: hence the law's view that damage is presumed to flow from a defamatory statement. We think that this view is sound in principle and may indeed be reinforced by the constitutional undertaking to protect and vindicate the citizen's good name. We note that the common law definition has included the phrase "tends to injure" without causing any apparent difficulties.

3.6 We received submissions to the effect that the definition of defamatory matter should require the matter to be untrue. We accept this view and incorporate it into our definition. We note that since the plaintiff is required to show that the matter is defamatory, the inclusion of "untrue" in the definition means that the plaintiff must show falsity. This accords with the

view of a majority of the Commission that the plaintiff should no longer enjoy the benefit of the presumption of falsity (see para 7.29 below).

3.7 Criticism was also advanced of the expression "a section of the community" as being somewhat nebulous. In suggesting it, we had in mind defamatory statements which might lower the reputation of the plaintiff within a relatively confined circle of people, e.g. a particular profession, although not in the community at large. A number of other possible definitions were canvassed at the Seminar and in submissions we received. Having given the matter further thought, we accept that our own formulation was unsatisfactorily vague and might even require the courts to treat as defamatory statements which would lower the reputation of the plaintiff only in the eyes of minority groups holding fanatical or unsavoury views. On balance, we have come to the conclusion that the most acceptable formulation is that advanced in the Boyle/McGonagle proposal, i.e. "in the eyes of reasonable members of the community". We think that this is reasonably close to such traditional tests as "right-thinking members of society" but phrased in a manner which would command wider acceptance to-day and at the same time eliminates the need for establishing what precisely is meant by "a section of the community".

3.8 Criticism was also advanced of the recommendation that matter should not be considered defamatory where it consists of no more than a statement that the plaintiff upheld the law.

This provisional recommendation reflects to some extent the view of the law taken by the majority of the Supreme Court in *Berry v Irish Times Limited*.¹ Before considering the merits of our proposal, we should take the opportunity of correcting an error in our Consultation Paper to which our attention was drawn. We had said that the Supreme Court had held in that case that the words were not capable of defamatory meaning. This was wrong: what we should have said was that the Supreme Court held in that case that the words were not *necessarily* defamatory. (It will be recalled that in that case the jury had in fact determined that the words were not defamatory of the plaintiff).

We agree, on reconsideration that it is seriously open to question whether the law should provide that no action for defamation can be brought where the allegedly defamatory statement is to the effect that the plaintiff assisted the enforcement of the law in some way. If, for example, it were said of a politician that he had helped in the enforcement of a particularly controversial law in respect of which he had adopted a neutral stance, it might well be that the allegation should not be regarded as defamatory. However, if the facts were that the politician had been vocal in his condemnation of the law, it could well be inferred that he was being portrayed as a hypocrite. In that case, it would seem quite wrong that an allegation that he had assisted in the enforcement of the law could not be treated as defamatory, which might well be the case under our proposal.

This part of the definition also presents the problem that, in its terms, it is not confined to upholding Irish law. Hence, it might not be defamatory to say of a person that he actively assisted the enforcement in another country of a law which our society would view as cruel or barbarous.

1 [1973] IR 368.

We think that, on the whole, more problems would be created than solved by this part of our proposed definition. If the law is left unchanged, it will remain open to the courts to hold that *some* statements of this nature are capable of bearing a defamatory meaning, it then being a matter for the tribunal of fact to determine whether, in the particular instance, the words were in fact defamatory of the plaintiff. We think that this is more satisfactory than our original proposal.

3.9 One submission suggested that the expression "published" traditionally used in our law of defamation is misleading: it conveys to the layman the impression that the offending words have appeared in some publication, such as a book or a newspaper, whereas as a matter of law publication can take other forms, including oral statements. "Communicate" was suggested as a more appropriate legal term. We have some sympathy with that view, but we think that changing the law would also create difficulties out of proportion to the benefit to be achieved. The word "publish" and cognate expressions have been used in so many cases cited frequently in our courts that to change the terminology at this stage could lead to confusion without any major advantage being secured.

3.10 It was also suggested to us that the phrase "by any means" was superfluous. The use of these words was designed to emphasise the abolition of the distinction between libel and slander and that publication, whether oral or written, is defamation. We have therefore retained the phrase.

3.11 Concern was expressed to us that the definition should emphasise that defamation consists of injury to reputation and not injury to self-esteem. We feel that this is adequately dealt with in that injury is defined as injury in the eyes of the community, and therefore, by implication, not in the eyes of the plaintiff.

3.12 It was suggested to us that the definition should refer to the "unjust" publication of defamatory matter. We do not favour this view. The principles of defamation law will determine what is "unjust" and the inclusion of the term in the definition might suggest that there is a category of "unjustly" defamatory matter over and above what is determined to be unjust by those principles.

3.13 We accordingly adhere to our provisional recommendation that there should be a statutory definition of defamation, but with the amendments we have indicated. Some preference was expressed to us for a compact one-sentence definition. We prefer the segregated definition put forward in the Consultation Paper as it is simple and clear for those unfamiliar with the law. Furthermore, we have adhered to this style in other provisions recommended in this Report. *We accordingly recommend the following definition of defamation:*

- (1) *Defamation is the publication by any means of defamatory matter concerning the plaintiff.*
- (2) *Defamatory matter defined: defamatory matter is matter which (a) is untrue and (b) tends to injure the plaintiff's reputation.*
- (3) *Publication defined: publication is the intentional or negligent communication of defamatory matter to at least one person other than the plaintiff.*
- (4) *Standard by which injury is measured: matter shall be considered*

injurious to the plaintiff's reputation if it injures his reputation in the eyes of reasonable members of the community.

- (5) *"Concerning" defined: defamatory matter concerns the plaintiff if it would correctly or reasonably be understood to refer to the plaintiff.*
- (6) *Burden of Proof: the burden of proof is on the plaintiff to show that there was publication, that the matter contained in the publication was defamatory and that the defamatory matter concerned the plaintiff.*

The Meaning of the Words

3.14 Our proposals in this area were principally designed to improve and clarify the existing rules as to legal and popular innuendos. There was no dissent from these proposals. We had also invited comments on a proposal by RTE that, where the action is being tried by a judge and jury, the jury should be asked to determine whether the words complained of are defamatory *before* the plaintiff begins his evidence.

3.15 We would like to take the opportunity at this stage to correct an error made in our Consultation Paper. We said that the general rule that a witness may not be questioned as to his understanding of the words complained of admitted of one exception, namely where a legal innuendo is involved. At page 208, paragraph 194 we then incorrectly stated that this exception operated where "special damage" is claimed, which of course should have read "where a legal innuendo is involved".

RTE's submission to us was based on our incorrect statement of the law. We assume that RTE do not propose that the jury be sent out before evidence as to the meaning of words is received where a legal innuendo is pleaded. It would make no sense to ask the jury to decide the "libel or no libel" question before evidence supporting the legal innuendo is adduced.

3.16 However, we feel that a more substantial point underlies RTE's proposal. This is the question of whether witnesses, or more particularly the plaintiff, may be asked about the **effect** of the publication on him e.g. "I could not sleep for three days", "I was shocked, hurt and distressed". Such evidence is at present admissible as going towards the question of damages. The award of compensatory damages may reflect emotional injury, and we supported the retention of this factor in our Consultation Paper, although we expressed the view that it should not be the primary factor in the award. Assuming that damages in respect of such injury may be recovered and therefore that such questioning is permissible, RTE's fear is that the jury may confuse such evidence with regard to effect with evidence with regard to meaning, and that the jury cannot be adequately warned as to the dangers of such a confusion.

3.17 We are not convinced that such confusion occurs. If it does, it should be easily dispelled by the judge telling the jury that they should decide the "libel or no libel" question according to the views of reasonable members of the community. To assume that juries may not perform this function without confusing the issues seems to us unduly paternalistic. Furthermore, we feel that to send a jury out to decide the "libel or no libel" question at the very beginning of the trial would be asking the jury to render a decision on one of the main issues in the case in a very artificial context. It would indeed be *impossible* in some instances to assess the defamatory quality of an allegation without having a full account of the factual background.

3.18 We therefore recommend no change in the present law, which to avoid further confusion we summarise as follows:

- (1) As the question of defamatory effect is for the jury, the general rule is that witnesses may not be questioned as to how they understood the matter in question.
- (2) However, where a legal innuendo is pleaded, witnesses may be asked how they understood the matter in question.
- (3) Witnesses including the plaintiff may be asked about the *effect* of the defamatory publication on them.
- (4) The trial judge will at the end of the trial direct the jury to decide whether the matter was defamatory according to what reasonable members of the community would think and not according to any of the evidence given in court (unless a legal innuendo has been pleaded). He will also direct them that if they find the matter defamatory (and assuming no defence applies or has been made out) they should assess damages in the light of the evidence given. (It should be noted, however, that if a subsequent recommendation is implemented, the damages will be assessed by the judge alone).

Whether emotional distress should be a factor going to damages at all, and therefore whether there should be questioning of witnesses as to the effect of matter on them, is a separate issue which will be considered later.²

3.19 *We recommend that the rule of law under which each legal innuendo in a single publication gives rise to a separate and distinct cause of action be abolished and be replaced by a provision that a claim in defamation based on a single publication shall give rise to a single cause of action.*

The rules of court should state that where the plaintiff in a defamation action alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning:

- (i) *he must give particulars of the facts and matters on which he relies in support of such a sense and*
- (ii) *he must specify the persons or class of persons to whom these facts and matters are known.*

There should be a rule of court providing that:

- (1) *whenever a plaintiff alleges that words or matters are defamatory in their natural and ordinary meaning*
 - (i) *the plaintiff shall succinctly specify the meaning which he alleges the words bear if such meaning is not clearly apparent from the words themselves;*
 - (ii) *the pleaded meaning may explain but not extend the ordinary or natural meaning of the words;*
 - (iii) *the plaintiff shall be confined to his pleaded meanings.*

² *Infra*, paras 8.8-8.10.

Payment into Court

3.20 We pointed out in our Consultation Paper that there is a distinction in the Rules of the Superior Courts between actions for debt, damages (other than for defamation) or admiralty actions on the one hand and actions for libel or slander, *inter alia*, on the other. In respect of the former, the defendant may make a payment into court whether or not liability is admitted. (It must, however, be stated whether liability is admitted or denied). In respect of libel and slander actions, money may not be paid into court at all *unless* liability is admitted in the defence. We commented that there did not appear to be any obvious reason for the distinction and that it had been criticised as being unfair to defendants. We provisionally recommended that the rules on payment into court should be identical for defamation and other tort actions. There was no dissent from this proposal which, on the contrary, evoked wide support.

We recommend that Order 22 Rule 6 of the Rules of the Superior Courts be amended so that a defendant in a defamation action may make payment into court without admission of liability.

Apology

3.21 We referred in our Consultation Paper to the representations we had received on this subject. It appeared that, although s17 of the *Defamation Act 1961* enables a defendant to give evidence in mitigation of damages as to the making or offering of an apology, the section is frequently not availed of by defendants because of a concern that an apology will be regarded as an admission of liability. We provisionally recommended that s17 should be replaced by a new provision making it clear that an apology to the plaintiff is not to be construed as an admission of liability. This proposal was generally welcomed.

We accordingly recommend the following provision to replace the existing s17:

Apology

- (1) *In any defamation action evidence that the defendant made or offered an apology to the plaintiff shall not be construed as an admission of liability and, when the issues of fact are being tried by a jury, they shall be directed accordingly.*
- (2) *Subject to sub-section (3), in any defamation action, it shall be lawful for the defendant to give in evidence in mitigation of damage that he made or offered an apology to the plaintiff in respect of the matter complained of, prior to the commencement of the action or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.*
- (3) *The defendant must give notice in writing of his intention to give in evidence the fact of the apology to the plaintiff at the time of filing or delivering the defence in the action. Such notice shall not be construed as an admission of liability and, when the issues of fact are being tried by a jury, they shall be directed accordingly.*

Pleading of Words "Falsely and Maliciously"

3.22 We suggested that there was no reason for retaining the words "falsely and maliciously" in the statement of claim. There was no dissent from this

proposal. However, in view of the subsequent recommendation that the burden of proving falsity should be on the plaintiff, we think that the word "falsely" should be retained. We accordingly recommend that the practice of pleading that the publication was made "maliciously" should be discontinued and that the rules of court should expressly provide that it shall not be necessary.

CHAPTER 4: PRIVILEGED STATEMENTS

4.1 The present law of defamation distinguishes between two forms of privilege, absolute privilege and qualified privilege. Absolute privilege applies to utterances by the President in the performance and exercise of his or her functions and powers and by members of the Oireachtas in either House and official Oireachtas reports, utterances made in Parliamentary Committees, statements made in the course of judicial proceedings, statements made by one State official to another and statements made between spouses. Qualified privilege is sub-divided into common law qualified privilege and statutory qualified privilege. Common law qualified privilege attaches to statements made pursuant to a duty or interest to a person with a duty or interest to receive the information, and is defeated by a showing of malice, whence the term "qualified". Statutory qualified privilege attaches to reports of matters listed in the Second Schedule to the *Defamation Act 1961* and is also defeated by malice. Under the present law, communications between solicitor and client and reports of judicial proceedings are also privileged, but it is unclear whether such privilege is absolute or qualified.

4.2 The discussion of privilege in our Consultation Paper took a number of forms. First, we considered whether the notion of absolute privilege should be retained at all and concluded that the abolition of the concept of absolute privilege in the context of utterances in the Oireachtas and Oireachtas reports was impractical because it would require a constitutional referendum and also that it was desirable to retain at least one forum where freedom of speech is absolute. Secondly, we discussed what occasions should come within the concept of absolute privilege and what occasions should be left to be governed by qualified privilege and made certain proposals to this end.

4.3. A third aspect of the Commission's deliberations involved the consideration of a possible defence of "Fair Report". The defence was apparently first proposed by the Australian Law Reform Commission. In essence, it would mean that the existing defence of statutory qualified privilege attaching to reports of matters specified in the Second Schedule to the *Defamation Act 1961* would be extended to *all* reports of statements made by persons other than the defendant on matters of public interest. It would not be defeated by proof of malice. The defence would not be available, however, where the plaintiff requested the defendant to publish a reply to the defamatory matter and the defendant failed to do so. It would, moreover, apply only where the publication by the defendant was "reasonable".

The Commission invited views as to whether such a wide ranging defence of Fair Report should be created.

The Commission also provisionally concluded that, irrespective of whether such a new defence of Fair Report was created, the list of matters to reports of which the defence of qualified privilege at present extends under the Second Schedule to the 1961 Act was in need of amendment and clarification.

The Commission also provisionally recommended a number of changes in the defence of privilege at present afforded to fair and accurate reports of judicial proceedings by newspapers and the broadcast media where such reports are published contemporaneously with the proceedings. It was proposed that the nature of the privilege, i.e. whether it was absolute or qualified, should be clarified. The requirement of contemporaneity should be abolished. The defence should extend to the reporting of a judgment delivered in *in camera* proceedings where the judgment itself is made public. The defence should not be confined to the media, but should be available to all defendants.

A further aspect of the Commission's examination of privilege consisted of provisional recommendations to clarify common law qualified privilege and to reform certain elements thereof.

4.4 The broad thrust of our proposals in the area of privilege was therefore as follows:

- (1) To retain absolute privilege in respect of certain occasions but to define those situations with greater clarity;
- (2) To elicit views on the desirability of a defence of Fair Report;
- (3) To amend and clarify the lists of matters in the Second Schedule to the 1961 Act reports of which at present attract qualified privilege;
- (4) To amend and clarify the defence available in respect of reports of judicial proceedings;
- (5) To clarify and reform common law qualified privilege.

Following the publication of our Consultation Paper, most of the submissions received and views articulated at the Seminar dealt with the proposed defence of Fair Report and the response was uniformly in favour of the creation of such a defence. Few commentators referred to absolute privilege or common law qualified privilege, but there was little dissent from our broad approach that these categories be retained and clarified. We therefore proceed to deal with these two forms of privilege in the remainder of this chapter and consider the defence of Fair Report and possible changes to the existing defences available in respect of reports of specified matters in the next chapter.

1. *Absolute Privilege*

4.5 In our Consultation Paper, we provisionally recommended that the privilege attaching to utterances in parliamentary committees should be extended to witnesses before such committees and that the privilege attaching to statements made by judges and others in the course of judicial proceedings should be clarified. We invited views on whether statements between State officials should be absolutely privileged.

These provisional recommendations implicitly accepted that absolute privilege should be retained for the above occasions. It is perhaps unfortunate that we did not make this choice of option clearer, since we had stated at paragraph 209 of the Consultation Paper that there were in fact two options, assuming that a constitutional referendum to abolish parliamentary privilege was unlikely:

- (1) to reform the instances of privilege (with the exception of parliamentary privilege) so that they are *all* governed by qualified privilege, or
- (2) to maintain the current distinction between absolute and qualified privilege, so that there is a coherence of treatment with regard to statements in the Oireachtas, before the Courts and in the Executive.

However, one submission we received took issue with our assumption that the constitutional privilege was absolute, and suggested that it would be possible to provide for a qualified privilege in all cases. We do not agree. The constitutional immunity in respect of utterances in either House of the Oireachtas stems from Article 15.13 which provides that

"The members of each House of the Oireachtas ... shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself."

While the phrase "absolute privilege" is not employed, it is quite clear that the immunity is complete and unconditional, and therefore that a defamation action in respect of an utterance in either House would not be entertained.

4.6 The constitutional immunity in respect of reports of utterances made in the Oireachtas stems from Article 15.12 which provides that

"All official reports and publications of the Oireachtas or either House thereof and utterances made in either House wherever published shall be privileged."

This might be thought to raise a question as to the nature of the privilege, but in fact the Irish text - "táid saor ar chursai dlí" - makes it quite clear that the privilege is absolute. It is therefore clear that the privileges referred to are absolute and that it would require a constitutional referendum to abolish or modify them.

There is, however, some uncertainty as to what reports of utterances fall within this article. McMahon and Binchy take the view that media reports of parliamentary debates continue to enjoy qualified privilege only, which was the position at common law prior to the enactment of the Constitution.¹ McDonald says that the absolute privilege conferred by Article 15.12 applies to both the official reports and unofficial media reports.²

In the absence of any judicial decisions, the law cannot be stated with any degree of certainty in this area. The Consultation Paper did not explore the distinction, which we are now considering, between the official reports and media accounts of proceedings in the Oireachtas. The phrase "utterances ... wherever published" might be interpreted as referring solely to the statements made by deputies, senators and others (such as persons invited to address

¹ McMahon & Binchy, *Irish Law of Torts*, (2nd ed, 1990), 655.

² M McDonald, *Irish Law of Defamation*, 123.

both houses, e.g. visiting heads of state), and not to reports of such statements. In that case the words "wherever published" would extend protection to, for example, the supplying by a Dail deputy of the text of a speech he had made in the Dail to his constituents. (At common law, such a publication by a member of parliament appears to have been privileged).³ The alternative view that "utterances ... wherever published" refers to *reports* of such utterances seems more difficult to justify. In the first place, it is not clear why the draftsman would have used such a form of words, when the conferring of absolute privilege could have been put beyond doubt by the use of the expression "all reports, official or otherwise, of proceedings in the Oireachtas". In the second place, it is not easy to understand why it would have been thought necessary to extend immunity to media reports of proceedings, irrespective of their fairness or accuracy. The common law extended a qualified privilege to fair and accurate reports of parliamentary debates,⁴ a privilege which may have been preserved by Article 50.1 of the Constitution and which, if it was, was maintained in existence by s24(4) of the *Defamation Act 1961*.

It appears to us that the better view of the law is that the privilege enjoyed by the media to report proceedings of the Oireachtas is a qualified privilege only. We also are of the view that there are no convincing reasons for altering this qualified privilege to an absolute privilege.⁵

4.7 With this modification, the question remains as to whether the second option should be preferred, i.e. maintaining the current distinction between absolute and qualified privilege so that there is a coherence of treatment between the Oireachtas, the Courts and the Executive. We are of the view that, at least in the case of the Oireachtas and the Courts, the distinction should be maintained.

The privilege in respect of the organs of State performs quite a different function from the privilege in respect of statements made pursuant to a duty or interest to a person who has a duty or interest to receive. In the case of utterances in the Oireachtas the rationale is that the business of the legislature should be transacted without the fear of defamation actions. In the case of utterances in the Courts, it is that the administration of justice should be carried out without constantly spawning defamation actions. Such fundamental considerations do not underlie the occasions which are the subject of common law qualified privilege. Here the idea is rather that everyday life should not be punctuated by defamation actions and that, if people are guided by duty and interest, they need to be protected to some degree by the law. That protection is lost if there is malice, since the duty or interest alleged was probably not the dominant purpose. In view of the fundamental interests inspiring the defence of privilege in the case of the State organs, we do not feel that the presence or absence of malice is an appropriate criterion by which to decide whether legal protection should be

3 *Davison v Duncan*, 7 E & B 229, at 231.

4 *Wayson v Walter*, LR 4 QB 73 (1868).

5 A provision affording absolute privilege to media reports of Parliamentary proceedings provided they were fair and accurate would no doubt be generally acceptable. However, if the view taken by McDonald, among others, that such reports at present enjoy absolute privilege because of the use of the words "wherever published" in Article 15.12 is correct, imposing a further limitation, that the reports be fair and accurate, which does not appear from the article itself would, probably be unconstitutional. Thus, any acceptable clarification of the present law, confining absolute privilege to fair and accurate reports, would be susceptible to constitutional challenge.

available or not.

In conclusion, and after further thought, we support the view taken implicitly in our Consultation Paper, namely that *the present distinction between absolute privilege and qualified privilege should be retained.*

4.8 A question which we did not resolve in our Consultation Paper was which form of privilege should govern statements made in the course of proceedings of quasi-judicial and administrative bodies.

We are of the view that the type of interest served by affording privilege to such proceedings more closely resembles the function of absolute privilege than that of qualified privilege. However, we also feel that severe problems of definition arise. We think that this can be resolved in the case of quasi-judicial proceedings by modelling a definition on Article 37 of the Constitution and thus tapping into the caselaw on this provision. However, we feel that any attempt to define non-judicial proceedings would either be too narrow to be useful or so wide as to constitute a serious threat to the right to a good name. Accordingly we suggest that absolute privilege should attach to statements made in the course of the exercise of limited functions of a judicial nature but that statements made in other proceedings should be governed by qualified privilege.

4.9 So far we have concluded that absolute privilege should attach or continue to attach to the following: (1) utterances in the Oireachtas (2) official reports and publications of the Oireachtas (3) statements made in parliamentary committees (4) statements made in the course of judicial proceedings; and (5) statements made in the course of quasi-judicial proceedings.

We now examine the reaction to the details of our proposals as to absolute privilege, to the extent that they were part of our envisaged scheme in the Consultation Paper.

(1) Statements made in the Oireachtas

4.10 We had recommended no change with regard to this privilege. However, RTE expressed the view in a submission to the Commission that it should be clarified whether this privilege extended to documentary statements in the Oireachtas. It seems clear that the term "utterances" and its Irish counterpart "cibé caint" does not include signs, gestures, written statements or indeed perhaps reading aloud from a script. This is not as serious as it may seem, for, as McDonald observes, the protection of the pre-existing law is much wider in range than the constitutional protection. However, for the purposes of clarity, it might be preferable to enact a statutory provision which confers absolute privilege on statements in any form made in either House of the Oireachtas. *We therefore recommend a statutory provision stating that the members of each House of the Oireachtas shall not, in respect of the contents of any communication, whether written, oral or otherwise, in either House of the Oireachtas, be amenable to any court or any authority other than the House itself.*

(2) Reports of Statements made in the Oireachtas

4.11 We have already noted that, in our view, the privilege attached to media reports of statements made in the Oireachtas is a qualified privilege only. However, whether it be absolute or qualified, we have no doubt that it should be extended to reports of written or any other means of

communication as well as to oral statements. The same consideration should apply to the official reports which are, of course, absolutely privileged.

We accordingly recommend a statutory provision that official reports of communications in either House of the Oireachtas whether written, oral or otherwise, shall be absolutely privileged and that reports in newspapers and on television or radio of such communications, whether written, oral or otherwise, shall enjoy the same privilege as is at present extended to reports of oral statements in either House.

(3) Statements made in Parliamentary Committees

4.12 We had recommended in our Consultation Paper that the *Committees of the Houses of the Oireachtas (Privileges and Procedure) Act 1976* be amended so as to include witnesses within the privilege. No dissent from this proposal was recorded. However RTE noted that the section 2(2)(c) privilege afforded to members, advisers, officials and agents of the committee refers only to "utterances" and therefore omits written or other non-oral statements. On further consideration, we are also of the view that the absolute nature of the privilege should be stated. *We therefore recommend that s2(2)(c) of the Committees of the Houses of the Oireachtas (Privileges and Procedure) Act 1976 be amended by the insertion of the words "or witnesses before" after the word "agents", the replacement of the term "utterances" by the words "statements in any form", and the word "absolutely" before the word "privileged".*

(4) Statements made in the Course of Judicial Proceedings

4.13 (a) *Judges:* In our Consultation Paper we provisionally recommended a provision stating that a judge or other officer performing a judicial function and who is not knowingly acting without jurisdiction or performing a purely ministerial function should be absolutely privileged to publish defamatory matter in the performance of that function if the publication has some relation to the matter before him.

We were not made aware of any objections to this proposal. There was some discussion of judicial privilege at the Seminar, but it was agreed that, if the present protection were removed, the courts would be placed in a weaker position in exercising their duty to administer justice. *We accordingly affirm our provisional recommendation with respect to the privilege of judges.*

(b) *Parties, Witnesses, Advocates, and Jurors:* In our Consultation Paper we provisionally recommended a provision to the effect that statements made by parties, witnesses, advocates and jurors should be absolutely privileged provided the matter bore some relation to the legal proceedings in question. We received no objection to this proposal and accordingly *affirm our provisional recommendation.*

We note that the recommended privileges in respect of judicial proceedings are absolute. It might mistakenly be thought that the judicial privilege is qualified because it is contingent upon (i) the judge performing a judicial function, (ii) his acting within jurisdiction and (iii) the matter being relevant to the proceedings. The better view is that the above conditions specify the characteristics of the occasion on which the privilege arises in the first place, rather than specifying when it is lost. This is not a mere linguistic point. In the first place, it means that the onus would be on the judge as defendant in a defamation action to show that the conditions are satisfied, whereas if it were a case of qualified privilege the onus would be on the plaintiff to

overcome a *prima facie* privilege by showing that the judge was acting outside jurisdiction etc. Furthermore, qualified privilege is a privilege which is defeated by a showing by the plaintiff of "malice" on the part of the defendant. The conditions attached to judicial privilege as recommended above do not correspond with malice, even as defined under our recommendations for the reform of the malice element with respect to common law qualified privilege (see para 4.27 below). The judicial privilege is therefore absolute, not qualified.

(5) *Statements made in the course of proceedings other than judicial proceedings*

4.14 In our Consultation Paper we made no recommendation as to whether statements made in the course of other proceedings should be subject to absolute or qualified privilege.

As indicated earlier in this Chapter, we think that the best approach would be to base the privilege on the exercise of powers of a *judicial* nature, whether those exercising the powers are judges or otherwise. Article 37 would form a useful model for defining the scope of this privilege, thus allowing the courts some opportunity to tap into the case law on this provision. *Accordingly we recommend that absolute privilege should extend to statements made in proceedings, however informal, involving the exercise of limited functions and powers of a judicial nature in matters other than criminal matters.* Statements made in other proceedings should be governed by qualified privilege under the duty and interest tests.

(6) *Statements made by one State official to another*

4.15 We received no response to our request for views on this category of privilege. We see the force of the argument of the Australian Law Reform Commission that communications between Government officials are not essentially different from the exchange of information between university officers, officers of a statutory commission or directors of a public company. In considering the matter in the Irish context, we have borne in mind the significant number of people employed throughout the public service and have concluded that the public interest in ensuring that their business is conducted efficiently and without undue apprehension as to the possibility of defamation suits is adequately ensured by affording them a defence of qualified privilege in appropriate circumstances.

We are satisfied that a clear distinction exists between statements made by State officials to each other and (a) statements made in the Oireachtas and (b) statements made in the course of judicial or quasi-judicial proceedings. The principles that have justified the first category of absolute privilege - i.e. that there should be one forum in the State where freedom of speech is absolute and unrestricted - and the second category - that the administration of justice is of such importance that its operation should not be inhibited by any possibility of defamation actions - do not apply in the case of communications by members of the Executive to one another. In the result, we have not been able to identify any principled reason for maintaining absolute privilege in respect of communications between members of the Executive. We gave consideration to whether the privilege could be confined to communications between members of the Government (extended, for this purpose, so as to include the Attorney General) but concluded that again there was no clear principle which warranted their inclusion. It might indeed be said that, in the case of Ministers, actions for defamation would more readily arise out of communications between Ministers and their civil servants

and again, were the category of privilege in these instances to be absolute rather than qualified, the inevitable consequence might be the extension of absolute privilege to all ranks of the public service. We do not think that this is justified. *We recommend a provision stating that any rule of law whereby communications between members of the executive are absolutely privileged is abrogated.*

(7) Communications between Solicitor and Client

4.16 In our Consultation Paper, we provisionally recommended that communications between solicitor and client should attract qualified privilege only. It was suggested that we had not advanced reasons for our conclusion. As stated above, absolute privilege represents a substantial intrusion on the right to a good name. Although we have recommended its retention, we have done so on the basis that it should be retained only in areas relating to State business. Communications between solicitor and client, or counsel and client, are not of this type and we see no reason why qualified privilege should not be an adequate protection. *We recommend a provision stating that any rule of law whereby communications between solicitor and client or counsel and client are absolutely privileged is abrogated.*

(8) Defamatory Communication Between Spouses

4.17 In the Consultation Paper we did not address the legal position as to defamatory communications between spouses. On reflection, we are of the view that this is a matter on which it would be desirable to make proposals for reform of the law.

4.18 Under present law a communication between spouses about a third party, however defamatory its content and however damaging its effects, is not actionable for defamation. The courts have invoked the legal unity of spouses to justify the conclusion that there was no publication. A rationale commanding more general support among commentators in recent times is that the immunity amounts to one of absolute privilege, in the interests of the freedom and privacy of marital communications.⁶

Although the immunity, however properly characterised, is well recognised, it rests on relatively slender judicial authority. The crucial decision is *Wennhak v Morgan* in 1888.⁷

In *Wennhak*, Huddleston B thought that the question could be decided "on the common law principle that husband and wife are one",⁸ and that accordingly there had been no publication. Manisty J agreed:

"[T]he maxim and principle acted on for centuries is still in existence, viz, that as regards this case, husband and wife are in point of law one person."⁹

He noted that it would be enough to say that this was the law and the ground of the law, but he thought it worthwhile to examine its real

6 See generally McMahon & Binchy *op cit*, 611, 647, Salmond & Heuston, *The Law of Torts* (19th ed, by RFV Heuston & RA Buckley, 1985), 183 J Fleming, *The Law of Torts* (7th ed, 1987), 537, H Street, *The Law of Torts* (8th ed by M Brazier, 1988), 401, Prosser & Keeton, *The Law of Torts*, (5th ed, gen ed, 1984), 824.

7 (1888) 20 QBD 635 (Div Ct).

8 *Id.* at 637.

9 *Id.* at 639.

foundation:

"It is, after all, a question of public policy, or, as it has been well called, social policy. No doubt that principle has been interfered with by judge-made law. Public opinion has altered in some circumstances, and no better illustration of that can be given than the change of view as to deeds of separation between husband and wife.¹⁰ But, if public policy is considered, what is there to show any change in judicial opinion or public policy with respect to communications between husband and wife hitherto held sacred? It has been argued that in some cases it might well be that publication of slander by a man to his wife should be actionable. But look at the other side, would it be well for us to lay down now that any defamation communicated by a husband to a wife was actionable? To do so might lead to results disastrous to social life, and I for one would be no party to making new law to support such actions."¹¹

We will later return to these judicial utterances.

The question we must decide is a stark one: Whether the existing absolute immunity should continue to attach to interspousal defamatory communications.

A: *Maintaining the Status Quo*

4.19 In favour of maintaining the *status quo*, two arguments may be considered, one formal, the other substantive.

(1) *The legal unity of the spouses*

We mention this argument only because it is considered to underline the existing immunity, at least in part. Historically, the law treated spouses for several purposes as one legal person.¹² Thus, for example, their property merged, they shared a common matrimonial domicile (the husband's)¹³ and they could not sue each other in tort.¹⁴ In this general context, it was not, perhaps, surprising that the doctrine of the unity of the spouses should be applied in respect of defamation in relation to the requirement of publication. It is, however, somewhat surprising that it should have been endorsed so enthusiastically in *Wennhak v Morgan* since, in 1888, when that case was decided, the unity doctrine was already in an advanced state of decline. The Married Women's Property Acts had brought about a separate property regime and spouses had, since 1865, limited (though expanding) entitlements to sue one another with respect to interference with interests in property.

The process of dismantling the legal unity of the spouses has continued apace over the past century. We need only mention here the *Married Women's Status Act 1957*,¹⁵ which removed all remaining inhibitions on interspousal litigation and the *Domicile and Recognition of Foreign Divorces Act 1986*, s1

10 Formerly these had been considered contrary to public policy as tending to subvert marriage.

11 20 QBD, at 639.

12 See Williams, *The Legal Unity of Husband and Wife*, 10 Modern L Rev 16, (1947).

13 See Binchy, *Irish Conflicts of Laws* (1988), 77-82.

14 See Shatter, *Family Law in the Republic of Ireland*, (3rd ed, 1986), 184.

15 See Shatter, *op cit*, 184.

of which abolished the wife's domicile of dependency.¹⁶

We are firmly of the view that, whatever arguments of substance may be made in favour of retaining the immunity from liability for interspousal defamatory communications, it cannot rest on the ashes of a formalistic legal doctrine, which we suspect few courts would be comfortable in enunciating today.

(2) *Spousal Privacy*

We now turn to the crucial substantive argument in favour of maintenance of the status quo. This is that marriage is of its nature an intimate union in which the spouses may be expected, and encouraged, to exchange deepest confidences. Around this intimate zone, the law throws a net of privacy.¹⁷ Whilst the sexual life of the spouses "is of necessity and by its nature an area of particular privacy",¹⁸ communication of ideas, thoughts, plans and opinions is also of the essence of the matrimonial relationship. The idea that these should be exposed to public scrutiny may seem highly undesirable, leading to what Manisty J in *Wennhak v Morgan*¹⁹ feared would be "results disastrous to social life".

B: *The Case for abolition of the Immunity*

4.20 Several arguments may be made in favour of abolishing the present immunity. To these we turn.

(1) *Justice to plaintiffs*

4.21 Largely overlooked in the judicial analysis of the immunity is the question of justice to plaintiffs. A person who loses his life, his family, his job or simply his reputation as a result of a defamatory communication between spouses is no less a victim than one who similarly suffers from a defamatory communication between parent and child, or between close friends. Of course this point can be made about any instance of an absolute immunity, but it puts in perspective the social goals underlying the interspousal immunity.

It may be worth here considering the realities of abolishing the absolute immunity. What would be the result? We imagine that very little change would be effected, for several reasons. *First*, because many defamatory communications would be protected by the defence of *qualified* privilege (just

¹⁶ Moreover, the rule of evidence that spouses are generally not competent witnesses against each other was considered in *The People v T*, Court of Criminal Appeal, 27 July 1988 not to have survived the enactment of the Constitution. The Court's line of argument was anticipated in a perceptive article by Jackson, *The Competence and Compellability of Spouses as Witnesses*, (1989) 6 DULJ (ns) 46. It is interesting to note that *Gatley*, in its eighth edition, published in 1981, expresses the view (para 248) that "it is by no means certain" that the former rule as to non-publication between spouses is still the law. It notes that previous editions of the work had relied on cases in which one spouse was seeking to make the husband liable for the wife's tort, "which do not seem relevant" (*id*, fn 17). On the analogy of *Rumping v DPP*, [1964] AC 814 (HL), there is "no public policy against allowing a plaintiff to rely on evidence *aliunde* of communications between husband and wife. Thus, if such a case were to arise, the court would be concerned with a policy question analogous to those it has to consider when a claim is made to absolute privilege" (8th ed, para 248, fn 17).

¹⁷ Cf *McGee v AG* [1974] IR 284 (Sup Ct 1973).

¹⁸ *Per* Walsh J (emphasis added).

¹⁹ 10 QBD, at 639.

as many communications between parent and child are similarly protected).²⁰ There would often (though far from on every occasion) be at least a social or moral duty of disclosure.

Secondly, most interspousal communications would be oral rather than written, and thus slander rather than libel. It would therefore be necessary for the plaintiff to prove special damage, save in the four (albeit wide-ranging) exceptional cases where this is not required.²¹ (This argument would not, of course, apply, if our recommendation that the distinction between libel and slander be abolished is implemented).

Thirdly, there is the problem of proof. Tittle-tattle between spouses, however defamatory, will not come to the ears of the plaintiff, unless it is in turn passed on by one of the spouses to a third party, in which case the immunity is no longer relevant. *Fourthly*, and relatedly, in the majority of cases a defamatory communication between spouses will not result in tangible damage to the plaintiff.

(2) *Definitional Problems*

4.22 Any immunity based on the marriage relationship may have strong attractions in the clear case of spouses living together amicably, but may be a good deal less convincing in other cases. Is there, for example, any overwhelming social policy in protecting from suit a defamatory communication made by a spouse to the other when they have long been separated by court order? The subject-matter of the communication may have had nothing to do with their relationship, the intimacies of marriage or shared interests resulting from the marriage (such as the education of their children).

As against this, it might be replied that it is easy to criticise *all* absolute immunities by invoking peripheral cases. In the context of interspousal communications, it is likely that most communications, even when the spouses are estranged, will relate in the broad sense to their marriage or shared interests arising from it. In any event, if the separated spouses are sufficiently in harmony to engage in amicable conversations about other matters, there arguably is no reason why, if the immunity were retained, it should not attach to their communications.

C: *Our recommendations*

4.23 Having considered the matter in some detail, we have concluded that it would be better to abolish the immunity and to leave interspousal communications to be dealt with by the general law of defamation. We do not believe that this change will result in any undue intrusion into the privacy of marital communications; nor, realistically, do we imagine that it will to any appreciable extent encourage spouses to hold their tongue. What it will do is afford due compensation to the victim of such a defamatory communication who is able to surmount the formidable practical obstacles of proof. In some cases, where proof is easy, the case in favour of change seems to us overwhelming. Thus if the plaintiff is employed by one spouse and the other spouse maliciously makes a defamatory allegation about the plaintiff to the first spouse which results in the first spouse dismissing the plaintiff, it seems clear that the plaintiff should be able to succeed.

20 Cf. *Todd v. Hawkins* [1980] 1 All E.R. 411 (1837).

21 See *McManis & Birch*, *sup. cit.* 615-620.

We recommend that communications between spouses should not be immune from liability for defamation.

4.24 For completeness, we should mention that we considered, but ultimately rejected, two compromise options. The first would have conferred a *qualified privilege* on all interspousal communications. This had some attraction, as it would give partial effect to the goal of protecting these communications from the scrutiny of the law. A spouse guilty of malice in making a defamatory communication could scarcely complain about the law's intrusion. We ultimately rejected this option because we regard it as too wide-ranging. It would extend immunity to cases where there is neither duty nor interest in respect of the making of the communication (unless it could be contended that spouses have a legitimate interest in communicating or receiving any and every defamatory utterance that either chooses to make, however damaging it may be and however far removed it may be from serving their interests, as spouses). It seems to us that the parameters of the general defence of qualified privilege are sufficiently broad to accommodate an appropriate range of communications between the spouses.

4.25 The second option which we considered but ultimately rejected was to remove the immunity where the plaintiff suffered *special damage*. This also has some attraction since it would remove the shadow of litigation from much interspousal gossip. It suffers, however, from two defects. First, from the standpoint of principle, it represents a somewhat unappealing compromise. A general loss of reputation is not a trivial injury: it is an important loss which does not merit thus being ignored. Secondly, from the practical standpoint, a removal of the immunity in cases of special damage would work unsatisfactorily for spouses. Whether a plaintiff suffers such a loss is a contingency over which the spouse contemplating the defamatory communication will not have ultimate control. Therefore the inhibiting effects of the change are capable of ranging potentially more widely than would be desirable. (Having said this, we must reiterate our view that even a complete abolition of the immunity is unlikely to lead to any substantial change in behaviour, for the reasons which we have adumbrated).

2. *Qualified Privilege*

4.26 In our Consultation Paper we took the view that it was desirable to formulate a statutory definition of qualified privilege, which would include a definition of the instances in which the privilege would be forfeited, replacing the existing common law concept of "malice". We examined a number of possible reforms to the definition of qualified privilege, including the present requirements of reciprocity of duty and interest, and of actual duty or interest on the part of the recipient. Our provisional recommendation on the definition of an occasion of qualified privilege was essentially declaratory of the common law, with one reform. This was the provision that the defence would not fail by reason only of the fact that the recipient had no actual interest or duty to receive the communication if a reasonable person would have believed the recipient to have such an interest or duty.²²

4.27 Very few comments were made on our provisional recommendations for a statutory provision clarifying so-called common law qualified privilege. One submission, however, felt that the media should have the defence of

22 Thus altering the law as stated in *Hynes-O'Sullivan v O'Driscoll*, [1988] IR 349.

qualified privilege where the matter published is one of public interest. It will be recalled that we had excluded the media from the defence by subsection (4) of our proposed definition (at para 244), which provided:

"Persons shall not be regarded as constituting a particular group by reason only of the fact that they received particular published matter."

We should distinguish at this point between matters of public interest reported by the media (reported or secondary matter) and matters of public interest investigated and set out for the first time by the media (original or primary matter). We believe the existing defences based on fair and accurate reporting, if clarified and extended as we recommend in the next chapter, will be better designed to deal with this latter form of publishing than a defence of qualified privilege. As regards *primary or original material* of public interest, a defence of media qualified privilege would allow the media to publish defamatory matter without any restriction other than that malice, as re-defined, be absent. We have made recommendations for the reform of the defence of fair comment, and recommendations for a new defence of reasonable care. For the reasons set out in relation to those reforms, we do not wish to go any farther down a road which displaces truth as an essential aspect of a defamation case. *We accordingly affirm our provisional recommendations in relation to the defence of qualified privilege and recommend a statutory provision in the following terms:*

Qualified Privilege

- (1) *It shall be a defence to a defamation action that the publication of defamatory matter was made only to a particular person or group of persons and*
 - (a) *subject to subsection (3), the recipient(s) had an interest in receiving, or a duty to receive, information of the kind contained in the matter, and*
 - (b) *the publisher had an interest in communicating, or a duty to communicate, information of the kind contained in the matter.*
- (2) *In subsection (1), "duty" includes a legal, social or moral duty, and "interest" includes a legal, social or moral interest.*
- (3) *A defence of qualified privilege shall not fail by reason only of the fact that the recipient of the communication had no actual interest or duty to receive information of the type contained in the communication, if a reasonable person would have believed the recipient to have an interest or duty to receive information of the type contained in the communication.*
- (4) *Persons shall not be regarded as constituting a particular group by reason only of the fact that they received particular published matter.*
- (5) *The privilege shall be deemed forfeited and abused in the following circumstances -*
 - (a) *if the defendant did not believe the matter to be true,*
 - (b) *if the publication by the defendant was actuated by spite,*

ill-will or any other improper motive,

- (c) if the matter bore no relation to the purpose for which the privilege was accorded, or*
- (d) if the manner and extent of publication exceeded what was reasonably sufficient for the occasion.*
- (6) Notwithstanding (5)(a), a lack of belief in the truth of the matter will not result in forfeiture of the privilege if the defendant was reasonable in publishing the matter in all the circumstances.*
- (7) The burden of proof is on the plaintiff to show that the defendant has forfeited the privilege.*
- (8) Where there is a joint defamation in circumstances giving rise to an occasion of qualified privilege, forfeiture of the privilege by one defendant on any of the grounds set out in sub-section (5) shall result in forfeiture of the privilege by the other defendant only if that other was vicariously liable for the first.*
- (9) Section 11(4) of the Civil Liability Act 1961 is hereby repealed.*

CHAPTER 5: FAIR REPORT AND RELATED DEFENCES

5.1 As stated in the previous chapter, we received strong support for the introduction of a new defence of Fair Report. We are aware, however, that most of the views expressed represented media interests. We have therefore tried to take account of arguments that might be made on behalf of defamed individuals. From one point of view, the proposed defence is no more than a logical corollary of the process commenced in s24 of the *Defamation Act 1961*. From another point of view, the defence constitutes a significant inroad on the common law principle that repetition of a defamatory statement is no justification. The rationale of this rule is that the person who repeats a defamatory statement exposes it to a new audience and should be liable for the resulting damage. Wherever the emphasis may be placed, the adoption of this defence could have far reaching implications and we have accordingly found it necessary to assess its desirability with great care, despite the strong support for it voiced on behalf of the media.

5.2 We first bear in mind the objections to the defence put to the Australian Law Reform Commission, which were as follows. There is first, the possibility of abuse of the defence. Concern was expressed at the possibility that the defence might encourage irresponsible journalists to repeat scurrilous statements made by irresponsible persons, or indeed to connive with such persons to make statements and then report them. Second, attention was drawn to the fact that the original author might not wish his statements to be given wide publicity. The example given was that of a club president who might wish to make allegations in private to his committee but not to publicise these allegations in the general media. Third, it was objected that the right of reply was insufficient guarantee against abuse, for reasons such as the absence or illness of the person defamed, his lack of expertise at defending himself, or the general belief of the public that the person replying had an interest in defending himself.

5.3 As against these arguments, it is right to recall the safeguards embodied in the Australian proposals. First, the defence would only be available where the reported matter concerned a topic of legitimate public interest or concern. Secondly, the original publisher must be identified and the defamatory matter clearly attributed to him or it. Thirdly, the defendant must not have influenced in any way the substance of the attributed matter. Fourthly, the publication must have been "reasonable" in all the circumstances. Fifthly, the plaintiff was to have a right of reply to any such report or

attributed statement. Sixthly, the plaintiff's right of action against the original publisher would be unaffected.

5.4 In considering the desirability of this proposed defence, we have also to bear in mind that, at a later stage in this Report, we recommend that it should be a defence to a claim for general damages in respect of a defamatory allegation of fact that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth of the allegation. Hence, where a defendant who has reported a defamatory statement made by a third party shows that he exercised reasonable care in relation to the publication, the plaintiff will be entitled to no more than a correction order and/or declaratory judgment and, where appropriate, any financial loss he has suffered as a result of the publication. However, under the proposed defence of Fair Report, a defendant who repeats a defamatory statement made by another, without taking any precautions to verify its truth, will be exempt from all liability, no matter how serious the defamation and how easily its veracity might have been ascertained. (We do not overlook the fact that, under the Australian proposal, the publication must be "reasonable", but we can also appreciate the misgivings which that Commission entertained as to including so vague an element in the defence. It might well be said that, if the use of the expression "reasonable" was intended to cover the absence of reasonable care in the publication, it would render the defence of Fair Report redundant in the case of a claim for general damages).

5.5 Having carefully considered the arguments for and against the proposed defence, we have come to the conclusion that the dangers of abuse which it presents are so considerable that we would not be justified in recommending its adoption. It must be borne in mind that in many cases of reported statements, the publishers of the attributed statements are themselves a mark for damages and hence would be the obvious defendant in an action for defamation.

We accordingly *do not recommend the creation of a defence of Fair Report.*

Suggested Changes to the Existing Defences Based on Fair and Accurate Reporting of Specified Events

5.6 As we have made clear both in the Consultation Paper and in this Report, irrespective of whether a defence of Fair Report is created, a number of amendments and extensions to the existing defences are required. We think it would be helpful to set out at this stage the schedule of matters which we think should replace the existing Second Schedule to the 1961 Act.

SCHEDULE

Part 1

Statements privileged without explanation or contradiction

Judicial Proceedings

- (i) *A fair and accurate report of proceedings publicly heard before or judgement made public by any court established by law and exercising judicial authority within the State or in Northern Ireland.*
- (ii) *A fair and accurate report of proceedings publicly heard before or judgement made public by any international court or international arbitral*

tribunal, including (without prejudice to the generality of the expression) the Courts of Justice of the European Communities, the European Court of Human Rights and the International Court of Justice.

- (iii) *A fair and accurate report of any proceedings publicly heard before or judgement made public by a court (including a court-martial) exercising jurisdiction under the law of any legislature (including subordinate or federal legislature) or Constitution of any foreign sovereign State.*

Judges acting non-judicially

- (iv) *A fair and accurate report of the proceedings at any meeting or sitting of any Judge or Justice acting otherwise than as a court exercising judicial authority and any corresponding person so acting in Northern Ireland.*

Legislative Proceedings

- (v) *A fair and accurate report of any proceedings in public of a house of any legislature (including subordinate or federal legislatures) of any foreign sovereign State.*

Public Enquiries

- (vi) *A fair and accurate report of any proceedings in public of any body duly appointed, in the State or in Northern Ireland, under legislative, executive, judicial or Constitutional authority to hold a public enquiry on a matter of public importance.*
- (vii) *A fair and accurate report of any proceedings in public of any body which is part of any legislature (including subordinate or federal legislatures) of any foreign sovereign State or any body duly appointed by or under the legislative, executive, judicial or Constitutional authority of a foreign sovereign State to hold a public enquiry on a matter of public importance.*

International Organisations and Conferences

- (viii) *A fair and accurate report of any proceedings in public of an international organisation, official or otherwise, of which the State or Government is a member or the proceedings of which are of interest to the Irish public.*
- (ix) *A fair and accurate report of any proceedings in public of any international conference to which the Government sends a representative or observer or at which governments of any country are represented.*

Public Documents

- (x) *A fair and accurate copy or extract from any register kept in pursuance of any law which is open to inspection by the public or of any other document which is required by law to be open to inspection by the public.*

Notices

- (xi) *A fair and accurate report or copy or summary of any notice or advertisement published by or on the authority of any court in the State or in Northern Ireland or any Judge or officer of such a court.*
- (xii) *A fair and accurate report or copy or summary of any notice or other matter issued for the information of the public by or on behalf of any Government department, local authority or the Commissioner of the Garda Síochána or by or on behalf of a corresponding department, authority or officer in Northern Ireland.*
- (xiii) *A fair and accurate report or copy or summary of any notice or other*

matter issued by or on the authority of a committee appointed by either House of the Oireachtas or jointly by both Houses of the Oireachtas.

Part II

Statements privileged subject to Explanation or Contradiction

Associations

- (xiv) *A fair and accurate report of the proceedings, findings or decision of an association or of a committee or governing body of an association, whether incorporated or otherwise, relating to a member of the association or to a person subject, by contract or otherwise, to control by the association.*

Public Meetings

- (xv) *A fair and accurate report of the proceedings at any public meeting, held in the State or Northern Ireland, being a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern whether the admission to the meeting is general or restricted.*

Company Meetings

- (xvi) *A fair and accurate report of the proceedings at a general meeting, whether in the State or in Northern Ireland, of any company or association constituted, registered or certified by or under statutory authority or incorporated by charter.*

Local Authorities

- (xvii) *A fair and accurate report of the proceedings at any meeting or sitting of any local authority or local authorities or health board, and any corresponding authority, or committee thereof, in Northern Ireland.*

Press Conferences

- (xviii) *A fair and accurate report of a press conference convened by or on behalf of any of the bodies mentioned in this Part or the organisers of a public meeting within the meaning of (xv) above to give an account to the public of the relevant proceedings or meeting.*

Reports of Reports

- (xix) *A fair and accurate report of a report by another person or body where the first report would fall within the terms of (the relevant section).*

Commentary on the Proposed Amendments to the Existing Defence

5.7 If the existing defence is to be retained, we must first consider whether the ingredients of the defence, as set out in ss18 and 24 and the Second Schedule to the 1961 Act, should also be retained unaltered. We indicate below our proposals for changes to s18, which deals with the reporting of judicial proceedings. In the case of other matters, the essential ingredients are that the report should be fair and accurate, that its publication should have been made without malice, not prohibited by law and related to a matter of public concern or public benefit and that (in the case of matters set out in Part II) the person defamed should have been afforded an opportunity of explaining or contradicting the report.

We are satisfied that these elements of the existing defence should be retained. We see no reason why protection should be afforded to reports

which are unfair or inaccurate, which are actuated by malice or which relate to matters which are not of any public interest. We also consider that the right afforded under the present law to the defamed person to explain or contradict the defamatory report in the case of reports contained in Part II (which is to some extent reflected in the proposed Australian defence of Fair Report) should be retained. We also think that the existing distinction between Parts I and II of the Schedule is reasonable and should also be retained: in effect, it means that the right to explain or contradict a defamatory statement is confined to reports of proceedings other than legislative and court proceeding and public inquiries.

5.8 There is another feature of the present defence which we would not, however, be in favour of retaining. As it stands, it is restricted to the media. Although the media are indeed the main disseminators of information of public interest, they are not the sole disseminators. In the particular case of court proceedings, there seems no reason why legal textbook and article writers should not benefit from the same protection as they are performing an equally legitimate function. We had, in the result, provisionally suggested in the Consultation Paper that the defences provided by ss18 and 24 should not be confined to the media. There was no dissent from this proposal and *we now confirm our provisional recommendation.*

5.9 We now turn to the list of specific matters in the recommended schedule and address the differences between it and the Second Schedule to the 1961 Act. At the outset, we also wish to draw attention to a difference between our list and that proposed by the Australian Law Reform Commission.

They had included, in their list of matters, matters which are covered by the defence of absolute privilege. Thus if a judge had absolute privilege in respect of statements made in the course of judicial proceedings, a report of what the judge said would come within the defence of Fair Report. We prefer, however, to list the matters which come within the defence rather than expect reporters to cross-refer to the defence of absolute privilege. Furthermore, in respect of judicial proceedings, we have recommended that a judge would not be privileged if he uttered defamatory statements while acting outside jurisdiction or performing a non-judicial function, or if the defamatory matter bore no relation to the proceedings before him. We do not feel that it is appropriate to carve up the defence in this way, requiring reporters to ascertain whether the judge was acting within jurisdiction and so on. We prefer to give reporters a broad privilege, leaving it to the defamed party to sue the judge if he utters defamatory statements in circumstances not covered by judicial privilege.

5.10 Our statutory list consists mainly of the matters in the Second Schedule to the *Defamation Act 1961*, with some amendments. We have re-grouped the matters under headings for greater clarity. It will be found that certain provisions in the Second Schedule have been split up and spread over several of our headings.

5.11 The first heading in our list is *judicial proceedings*. The three matters under this heading are designed to ensure that reports of court proceedings, wherever heard, will be governed by the defence. **Number (i)** replaces s18 of the *Defamation 1961*. As noted above, there is no requirement of contemporaneity, and it is not limited to media defendants. It should also be made clear that it is an absolute privilege. **Number (ii)** encompasses proceedings of the EC Courts of Justice, the International Court of Justice, the European Court of Human Rights and so on, and therefore replaces paragraph 3 of Part 1 of the Second Schedule to the 1961 Act. **Number (iii)**

covers the proceedings of domestic courts of foreign States by retaining the equivalent of paragraph 4 of Part 1 of the Second Schedule to the 1961 Act. **Number (iv)** retains paragraph 3(b) of Part II of the *Defamation Act 1961*.

5.12 It was suggested in the Consultation Paper that a problem could arise in relation to the "fair and accurate" reporting of judicial proceedings. For example, if a journalist correctly recorded matters which occurred on the first day of a trial (such as the bringing of three charges against the accused) but neglected to report matters which occurred on subsequent days (such as the dropping of two of the charges), could that be regarded as a "fair and accurate" report? We had provisionally suggested that any uncertainty in the law should be removed by a provision that a report should not be deemed "fair and accurate" if the full proceedings were not reported. This proposal was criticised at the Seminar by some of the media representatives. It was said that a newspaper might have a daily deadline at which time a court case might not be completed. It was also urged that, even if it were made clear that a report could include more than one publication, the media might still be in difficulties. The case might receive extensive coverage when it began but that coverage might, quite reasonably, have to be reduced or eliminated if interest in the case was overshadowed by an event of world or national importance.

5.13. So far as the first objection is concerned, it is hardly likely that a newspaper would be found to have published an unfair or inaccurate report if it completed its account of the proceedings in a subsequent issue because of a deadline. So far as the second objection is concerned, while we appreciate that media organs are under considerable pressures of time and space, it must also be remembered that they have, in the circumstances envisaged, published defamatory matter about an individual. We think it would be highly objectionable if a defence were afforded to a defendant who published defamatory matter about a person by reporting the beginning of court proceedings, but failed to carry through the reporting function to the end of the proceedings, where perhaps the person was found not guilty or the prosecution was struck out.

5.14 Having considered the proposal further, however, we are satisfied that, no matter how carefully worded it might be, it could be construed in such a way as to place an unreasonable burden on the media. While there is, so far as we are aware, no decided case in this country as to the extent of the defence, it seems highly improbable, to put it no more strongly, that a court would treat as "fair and accurate" a report of court proceedings which gave publicity to the fact that the plaintiff had been charged with a particular crime, but completely failed to report the fact that he was subsequently acquitted of that charge. ***Accordingly, we do not pursue our provisional recommendation.***

5.15 We had also pointed out in the Consultation Paper that many simple errors of identity and fact in the reporting of court proceedings could be avoided if copies of the charge sheet were supplied to media reporters. At present, the making available of charge sheets to journalists appears to be discretionary, whereas it seems that in Northern Ireland the practice is to make them available as a matter of course. There was no dissent from our suggestion that a similar practice should be adopted in this jurisdiction. *We recommend that the Rules of the District Court should be amended by the inclusion of a provision entitling bona fide representatives of the media to obtain from the clerk of the District Court copies of charge sheets in cases other than cases which the media are prohibited from reporting.*

5.16 Legislative Proceedings - It should be remembered that absolute privilege governs official reports of utterances of members of the Houses of the Oireachtas in either House under Article 15.12 of the Constitution and, under our proposals in the previous chapter, absolute privilege will govern reports of non-oral communications by members of the Oireachtas in either House. **Number (v)** is designed to capture reports of the proceedings of foreign legislatures. It retains the first part of paragraph 1 of Part I of the Second Schedule to the 1961 Act.

5.17 Public Enquiries - **Number (vi)** retains the second part of paragraph 1 of Part I of the Second Schedule to the 1961 Act, but widens it slightly to include enquiries set up under judicial or constitutional authority. **Number (vii)** is new and is a corresponding provision in respect of foreign public enquiries.

5.18 International Organisations, Conferences - **Number (viii)** retains part one of paragraph (2) of Part I of the Second Schedule to the 1961 Act, but widens it slightly to include non-official as well as official international organisations and to include organisations of which Ireland is not a member but the proceedings of which are of interest to the Irish public.

5.19 Number (ix) retains the second part of paragraph (2) of Part I of the Second Schedule to the 1961 Act, but widens it slightly to include international conferences to which an Irish observer, as opposed to a representative, is sent, and international conferences at which there is no official Irish observer or representative but the governments of any country are represented.

5.20 Public Documents - **Number (x)** retains paragraph 5 of Part I of the Second Schedule to the 1961 Act. This would not appear to apply to documents relating to proceedings which are required to be filed in court offices before the proceedings are heard in open court, such as pleadings. It would appear to be the practice in such court offices not to make such documents available to representatives of the media or the public generally prior to the proceedings.

It is our understanding that the expression "proceedings publicly heard" in s18(1) of the 1961 Act extends not merely to oral evidence adduced, or affidavits read, to the court, but to all documents which are before the judge during the course of the proceedings. The constitutional requirement that justice must be administered in public, save in such special and limited cases as may be prescribed by law, would not be met if affidavits, exhibits, pleadings etc which were read by a judge before he pronounced his decision were not regarded as part of the "proceedings" for this purpose. (See the observations of Walsh J in *In Re R Limited*¹). We draw particular attention to this, because it was represented to us by a court reporter employed by one of the national newspapers that difficulty was experienced by the media occasionally where the contents of an affidavit were not opened in full by counsel or where affidavits and exhibits being used in support of an application heard in open court were read by the judge, for the sake of efficiency and expedition, in his chambers before the court sat. In such cases, the legal advisors to the parties frequently decline to make copies of the documents available to the media and they are perfectly entitled to adopt that attitude if they consider it in their clients' interests. However, the fact

1 [1989] IR 126. at 136.

remains that the documents in question, if handed to and read by the judge, whether before or during the proceedings, are part of the proceedings constitutionally required to be held in public. While it does not fall strictly within our terms of reference, we are satisfied that machinery should be in place enabling representatives of the media to obtain copies of all documents used in court proceedings and we think that this matter might well be considered by the Committee on Court Practice and Procedure. (We are not, of course, questioning in any way the propriety of the present practice in court offices whereby neither the public in general nor media representatives in particular are allowed access to documents filed for the purpose of court proceedings before the proceedings themselves are heard).

5.21 *Notices* - **Number (xi)** retains paragraph 6 of Part I of the Second Schedule to the 1961 Act. **Number (xii)** retains paragraph 5 of Part II of the Second Schedule of the Act. **Number (xiii)** is new and adds to these by dealing with reports of notices issued by a parliamentary committee. In our Consultation Paper we noted that notices issued by parliamentary committees are absolutely privileged under section 2(2)(b) of the *Committees of the Houses of the Oireachtas (Privileges and Procedure) Act 1976*. However, this means that members of the Committee are absolutely privileged in respect of such notices, not that reporters of such notices are privileged. There would appear to be no need to deal with notices issued by the Oireachtas since Article 15.12 provides that all official reports and publications of the Oireachtas or of either House are absolutely privileged.

5.22 *Associations* - **Number (xiv)** replaces paragraph (1) of Part II of the Second Schedule to the 1961 Act and adopts the more concise formulation adopted by the Australian Law Reform Commission.

5.23 *Public Meetings* - **Number (xv)** retains paragraph 2 of Part II of the Second Schedule to the 1961 Act.

5.24 *Companies* - **Number (xvi)** retains, appropriately amended, paragraph 4 of Part II of the Second Schedule to the 1961 Act, but extends its application to private companies.

5.25 *Local Authorities* - **Number (xvii)** retains paragraph 3(a) of Part II of the Second Schedule to the 1961 Act.

5.26 *Press Conferences* - **Number (xviii)** is a new provision: it does not extend to press conferences generally, but only to those convened by persons or bodies referred to in the Schedule.

5.27 *Reports of Reports* - **Number (xix)** is also a new provision and makes clear that if, for example, a newspaper reports a statement made by a person in a manner which would have afforded that newspaper a defence under these provisions, a report on the radio of the newspaper report would also have the defence.

5.28 The only matters listed in the Second Schedule to the 1961 Act which we have not retained are sub-paragraphs 3(c) and 3(d) which we feel are now adequately covered by number (vi) in our proposed Schedule.

5.29 We accordingly recommend that the existing law as set out in ss18 and 24 and the Second Schedule to the Defamation Act 1961 be altered by substituting the draft schedule set out at para 5.6 above for the Second Schedule. We further recommend that, in the case of reports of matters set out in the draft schedule, the existing law as set out in s24 be retained. The defence, accordingly,

will be available only where the defendant acted without malice and the publication was not prohibited by law and was of public interest or for the public benefit. (The latter requirement - as to public interest or benefit - should not apply to reports of court proceedings within the State or Northern Ireland. Those reports, if fair and accurate, should attract absolute privilege). We further recommend that the right afforded under the present law to the defamed person to explain or contradict the defamatory report in the case of reports contained in Part II should be retained.

5.30 If a defence under these provisions fails, but the defendant had published a reply, this should be taken into account in any assessment of damages. *We recommend a statutory provision to this effect.*

CHAPTER 6: STATEMENTS OF OPINION

General

6.1 Our general approach in the Consultation Paper to the question of the extent (if any) to which statements of opinion - as distinct from statements of fact - should be actionable may be summarised as follows. We were of the view that the existing law - enshrined, in effect, in the defence of "fair comment" - did not allow sufficient latitude to the expression of opinions. We were influenced in arriving at this conclusion by two factors which, in our view, made essential as wide ranging as possible a protection for statements of opinion. The first was that freedom of opinion is itself an individual liberty which demands vindication by the law. The second is the benefit which accrues to society as a whole from the free expression of differing opinions.

6.2 Consistently with this approach, we proposed a number of changes to the defence of fair comment. We suggested that it should be re-named "comment" or "comment based on fact". The adjective "fair" was, we thought, misleading because it could suggest that the law required that the comment be reasonable, whereas the law in fact protects comments, however unreasonable and prejudiced they might appear.

6.3 Having pointed out that a comment - as distinct from a statement of fact - was an opinion expressed on facts, whether set out in the course of the comment or not, we went on to consider the confused state of the law as to the obligation on the defendant to prove the truth of the supporting facts. Having examined proposals for reform in other jurisdictions, we provisionally concluded that the defence of comment would be strengthened and clarified if the law provided that the defendant must show (a) that the comment was supported by facts either set out, or expressly or impliedly referred to, in the publication containing the comment and (b) the truth of sufficient facts to support the comment. We also recommended that effect be given by statute to the rule in *Mangena v Wright*,¹ relieving the defendant of the necessity to prove the truth of the supporting facts where they had been published on an occasion of absolute privilege. We invited views as to whether the reach of this exemption, at present uncertain, should be extended to all cases of qualified privilege and to cases coming within our suggested

¹ [1909] 2 KB 958.

defence of "Fair Report".

Fair comment and malice

6.4 The next feature of this defence which we considered was the rule that it could always be defeated by proof of malice. We examined various problems that arise under the present law, one of particular importance affecting the media being the publication by them of opinions (as, for example, letters to a newspaper) with which they did not agree, hence exposing them, arguably at least, to a successful plea of malice. We indicated reforms which could be introduced in the present law, but ultimately came to the tentative conclusion that the better course would be to abolish completely the rule that malice defeats the defence. In coming to that provisional conclusion, we stressed that the underlying rationale of the defence was the value of an opinion *per se*. Since the protection of the statement was based on its contents, it seemed to follow that the state of mind of the publisher should not be a relevant consideration.

It would also follow, if this proposal were adopted, that there would be no necessity to eliminate certain anomalies and uncertainties that arise where the publication is by more than one person.

The rule in *Mangena v Wright*

6.5 The authorities, which are sparse, suggest that this rule can only be invoked if the comment is on a statement made in circumstances attracting absolute privilege - i.e. in Parliament or in the course of court proceedings - or on reports of such proceedings which at present enjoy protection either at common law, by virtue of the Constitution or under ss18 and 24 of the *Defamation Act 1961*. The *ratio* of the rule, as it emerges from the leading case, is somewhat unclear and, to the extent that it can be discerned, far from satisfactory. (The suggestion appears to be that comments on a factual statement made by a person other than the speaker will *always* attract the defence of fair comment, irrespective of the truth of the factual statement, and that *a fortiori* this should apply to comments on privileged statements). It would, however, seem reasonable that comments on statements of fact made in arenas where absolute freedom of speech is both desirable and/or constitutionally mandated - i.e. the Oireachtas and the courts - provided they observe the other requirements of the defence, including the requirement that the subject matter be of public interest, should be permitted even if defamatory. It should also be made clear - as is suggested by the leading case - that the defence is only available where the person making the defamatory comment does not adopt the factual statement as being true. The retention of the rule, strictly confined within those limits, would appear to be reasonable.

Distinguishing fact from comment

6.6 We also suggested that it might be desirable for the law to establish some guidelines as to how statements of fact were to be distinguished from statements of opinion. We provisionally recommended that the courts should have regard to the following factors:

- (a) the extent to which the statement is objectively verifiable;
- (b) the context of the statement, e.g. its appearance in a work of fiction or literary or other criticism;

- (c) the language surrounding the statement, including any qualifying or cautionary language.

The rolled-up plea

6.7 We suggested that the "rolled up plea", which enables the defendant to plead that words in so far as they are comment are fair and in so far as they are facts are true, should be abolished as being a trap for the unwary pleader and serving no useful purpose.

This proposal was objected to on the ground that it would force the defendant at an early stage of the proceedings to make a conclusive determination as to whether, and how much of, the matter is comment. We accept that the fact/comment distinction is a very difficult one to draw in practice and that it might impose hardship on the defendant if that which he designates at the outset of the case to be comment is found at the end of the trial to be fact, in respect of which more stringent proof is required. Having reconsidered the matter, we have concluded that our earlier proposal did not make sufficient allowance for these factors. *We therefore recommend the retention of the rolled up plea.*

Public Interest Requirement

6.8 We did not indicate any view as to whether it should remain an essential feature of the defence that the matter commented on was one of public interest. This is an unfortunate omission in the Consultation Paper. We had intended to indicate that our provisional view was that this requirement should continue. We considered it premature to recommend the abolition of the "public interest" requirement, having regard to the comparatively sparse and undeveloped nature of the concept of privacy in Irish law. We therefore prefer to maintain the existing law regarding the intersection of defamation law and privacy law, namely the requirement of public interest in the defence of comment.

Proposals for a Broader Fair Comment Defence

6.9 Our general approach was on the whole welcomed, although, in this area as in others, we were conscious of the fact that the most detailed submissions came from, or on behalf of, the media who were, of course, understandably anxious that the present defence should be broadened. Some among them, notably Professor Boyle and Ms McGonagle, on behalf of the National Newspapers of Ireland, urged that we give further consideration to the option of providing a defence for all statements of opinion, irrespective of the truth or falsity of the supporting facts.

We had pointed out in the Consultation Paper that the prevailing American view is that, following a dictum in *Gertz v Welch*,² actionability for all opinion statements has been abolished in that jurisdiction. We did not consider that Irish law should go so far. In its most extreme form, this doctrine would mean that a defamatory statement was protected by the law where it took the form of a 'comment' which was not based on facts, either stated or referred to by implication. We were impressed by this defence of the traditional view by one US judge:

2 418 US 323 (1974).

"This stricture on publication of opinion rests on the assumption that, given all the facts of the situation, the public can independently evaluate the merits of even the most outrageous opinion and discredit those that are unfounded. On the other hand, when an opinion held out for belief is stated so that the average listener could infer that the speaker had an undisclosed factual basis for holding the opinion, the listener does not have the tools necessary to independently evaluate the opinion and may rely on unfounded opinion that defames an individual."³

6.10 We remain of the view that this form of comment should not be protected in our law. We have, however, carefully considered whether the less radical course favoured by some of those we consulted should be adopted, i.e. giving protection to statements of opinion where the facts are available to the audience, even though facts sufficient to support the opinion are not shown to be true.

We have not been persuaded that this latter option is a desirable reform. We do not think that the protection which admittedly should be afforded to expressions of opinion should extend to comments based on alleged facts which turn out to be either untrue or, to the extent that they are true, incapable of supporting the opinion. To deny the plaintiff compensation for the injury to his reputation in such circumstances might well be regarded as inadequately implementing the constitutional guarantee, in the case of injustice done, to vindicate the good name of the citizen. We are also satisfied that, in the degree to which our law affords special protection to statements of opinion, it is in accord with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedom as interpreted by the European Court of Human Rights in *Lingens v Austria*.⁴

6.11 We should, however, point out that later in this Report we recommend that it should be a defence to a claim for general damages (but not to a claim for special damages, a correction order or a declaratory order) that the defendant exercised reasonable care in relation to the publication. It would be unfair to afford a defence to defendants who have made factual assertions and not to afford the same defence in relation to facts supporting a comment. We accordingly make provision in our recommendation for a defence of reasonable care in relation to the truth of the supporting facts.

6.12 As we have noted above, we provisionally recommended in the Consultation Paper the abolition of the common law rule that "malice" defeats the defence of fair comment. While there was no particular criticism of this proposal, we have carefully considered whether changes in the law should go that far. Our tentative proposal has certain advantages, i.e. in affording increased protection to statements of opinion and avoiding the complexities inherent in the concept of "malice", but it also appears to us on reconsideration somewhat extreme. Even at the cost of retaining some degree of complexity in this area of the law, there should be some inhibition on the expression of comments which are both defamatory and malicious. We think that this is best achieved by adopting the criterion of malice favoured by a number of other law reform bodies, i.e. whether the opinion was the genuine opinion of the author.

3 *Lauderback v American Broadcasting Company*, 741 F 2d 193, at 195-96 (8th cir 1984).

4 (1981) 4 EHRR 373.

Some further problems will then require to be addressed. First, there is the question of on whom the burden of proving malice should lie. We agree with the New Zealand Committee that it is preferable that the burden should be on the defendant, first, because if a defendant pleads comment, he should be prepared to testify as to his honest belief and, secondly, because it is preferable that a statutory provision should be drafted in a positive rather than a negative form.

Some provision must also be made for cases in which the publisher is not the author, as where a newspaper or broadcasting station publish a comment by a person which may be actionable. We are satisfied that the plaintiff should not succeed against the publisher, unless the opinion was not, *and was not believed by the defendant to be*, the genuine opinion of the author. However, consistently with the view we have taken as to where the burden of proof should lie, we think that such a provision should be so expressed as to place the onus of proof as to the state of his own belief upon the defendant publisher.

If the concept of malice is to be retained in the law in the more confined sense we have recommended, there will have to be a new provision dealing with joint defamations to replace s11(4) of the *Civil Liability Act 1961*, the repeal of which we have already recommended when dealing with qualified privilege. The most satisfactory proposal is that of the Faulks Committee, i.e.

"Where there is a joint defamation in circumstances normally protected by the defence of comment based on fact, the defence of one person shall not fail by reason only of the fact that the comment did not represent the genuine opinion of the other, unless that other is vicariously responsible for the first".

Distinction between Fact and Comment

6.13 RTE in their submission to us submitted that the fact/comment distinction was too difficult to operate in practice and that the only sure and workable basis for distinguishing between different statements was the public or private nature of the subject matter. They proposed that the fact that a *statement* concerns a public matter should be a reason for granting a defence on the lines of that recommended by the New Zealand Committee. We understand this reference to "statement" to include both factual and opinion statements. In our Consultation Paper, we expressed interest in the proposed New Zealand defence, which is available where the matter is one of public interest, where the defendant exercises reasonable care and where the victim has been given an opportunity to reply. However, because of our proposals as to an expanded defence of comment and a new defence of reasonable care, we do not feel it necessary to recommend a defence on these lines.

We may elaborate as follows, confining ourselves to statements of opinion. Under the New Zealand defence, the defendant must show:

- (1) Public interest;
- (2) That the opinion was, at the time of publication, the genuine opinion of the person by whom it was published and was capable of being supported by supporting facts;
- (3) That in relation to these facts the defendant acted with reasonable care and believed on reasonable grounds that the statements of fact were true; and

- (4) That an opportunity of reply was given.

Under our proposals regarding the defence of comment, the defendant would have to show:

- (1) Public interest;
- (2) That the matter consisted of comment;
- (3) That the comment was the genuine opinion of the defendant; and
- (4) That it was supported by true or privileged assertions of fact, or, failing this, reasonable care in relation to the supporting facts.

In the event of the supporting facts not being true or privileged, but reasonable care having been exercised in relation to them, no general damages would be recovered under our proposal, although a correction order, declaratory order or special damages could be recovered.

The main points of difference, accordingly, between our proposal and the New Zealand proposal are that we prefer a correction order to a right of reply and we allow special damages to be recovered, even if reasonable care is shown.

For reasons which we outline in more detail in the next chapter, when we consider the defence of reasonable care, we prefer our approach. However, it would be wrong to say that we have distinguished only between fact and comment, while the New Zealand proposal distinguishes between public and private interest. Rather, public or private interest is dealt with under our proposals *after* the enquiry as to whether the matter is fact or comment; whereas, under the New Zealand proposal, the enquiry as to fact or comment comes after the enquiry as to whether the matter is one of public interest.

We conclude that, in the light of our proposals with respect to the defences of comment and reasonable care, the adoption of a defence based on the New Zealand proposal is not necessary and, to the extent that it differs from our proposals, undesirable.

6.14 While there appears to be general acceptance as to the desirability of providing guidelines for the courts in distinguishing between statements of fact and opinion, the actual form of our recommendation attracted some criticism. In particular, it was suggested that the Annenburg Washington Report contained a more satisfactory statement of factors to be considered. We agree with this view.

6.15 *We accordingly recommend that:*

- (1) *The title of the defence of fair comment be changed to "comment based on fact."*
- (2) *There should be a statutory provision setting out the constituent elements of the defence of comment based on fact in a positive manner.*
- (3) *Section 23 of the Defamation Act 1961 should be replaced by the following provisions:*
 - (1) *In order to avail himself or herself of the defence of comment based on fact the defendant must show:*

- (a) *that the words complained of were comment*
 - (b) *that the comment was supported by facts either*
 - (i) *set out in the publication containing the comment, or*
 - (ii) *expressly or impliedly referred to in the publication containing the comment provided such facts were known to the persons to whom the publication was made.*
 - (c) *the truth of sufficient facts to support the comment.*
- (2) *If the defendant fulfils requirements (1)(a) and (b) above, the defence shall not fail by reason only of the fact that (c) is not established, provided the defendant exercised reasonable care in ascertaining the truth of the facts alleged to support the comment. In such a case, the plaintiff shall not be entitled to general damages, but shall be entitled to special damages, a correction order or a declaratory order.*
- (4) *There should be a statutory provision based on the rule in Mangena v Wright. This should allow the defendant to avail himself or herself of the defence of comment based on fact where the comment was supported by a statement of fact published on an occasion of absolute privilege or in circumstances where a defence under ss18 and 24 and Part 1 of the Second Schedule to the Defamation Act 1961 (as replaced) was available to the maker of the statement and the defendant did not adopt the statement of fact as being true.*
- (5) (1) *The common law rule that "malice" defeats the defence of comment should be retained, but should be confined to cases in which the comment did not represent the genuine opinion of the defendant.*
- (2) *Accordingly, a defence of comment by a defendant who is the author of the matter containing the opinion should fail unless the defendant proves that the opinion expressed was his genuine opinion.*
- (3) *A defence of comment by a defendant who is not the author of the matter containing the opinion should fail unless the defendant proves that he believed that the opinion expressed was the genuine opinion of the author.*
- (4) *Where there is a joint defamation in circumstances normally protected by the defence of comment, the defence of one person should not fail by reason only of the fact that the comment did not represent the genuine opinion of the other, unless that other is vicariously responsible for the first.*
- (6) *There should be a statutory provision making it clear that it is not a requirement of the defence of comment based on fact that the comment be fair.*
- (7) *For the purposes of clarification, there should be a statutory provision stating that allegations of base, dishonourable or other sordid motives should be treated in the same way as any other defamatory allegation and*

that such a statement should not be treated conclusively as fact or comment, nor should a more stringent defence apply if it is found to be comment.

- (8) *It should continue to be a requirement of the defence of comment that the comment should have been made on a matter of public interest.*
- (9) *There should be a statutory provision setting out guidelines for the court in distinguishing between fact and comment.*

Part (a) of the provision should state that in determining whether the statements giving rise to the litigation are defamatory statements of fact or statements of opinion, the court should consider

- (1) *the extent to which the statements are objectively verifiable or provable;*
- (2) *the extent to which the statements were made in a context in which they are likely to be reasonably understood as opinion or rhetorical hyperbole and not as statements of fact;*
- (3) *the language used, including its common meaning, and the extent to which qualifying or cautionary language, or a disclaimer, was employed.*

Part (b) of the provision should state that a statement unsupported by any facts set out in the publication or expressly or impliedly referred to in the publication and known to the persons to whom the publication is made should be treated as a statement of fact.

CHAPTER 7: STATEMENTS OF FACT

Renaming of Defence of "Justification"

7.1 We pointed out in the Consultation Paper that the title "justification" was originally used to describe all the defences available to a defamation action, but that when the defence of qualified privilege and fair comment developed in their own right, the term ceased to apply to them and continued to apply only to the defence of truth. Having observed that the title "truth" had been suggested as being more appropriate and simple, we invited views as to whether the title should be changed in this fashion.

7.2 Such comments as we received were in favour of the change. We had remarked that it was open to the criticism that the defence is available where the statements complained of consist partly of truth and partly of untruth. On balance, however, we have come to the view that "truth" would be a more appropriate and sensible description of the defence than "justification".

We accordingly recommend that the defence of justification should be renamed the defence of truth.

7.3 At a later stage in this Chapter, we recommend that the burden of proving falsity should in future be on the plaintiff. However, in any case where the plaintiff asserts in evidence the falsity of the statement, the burden of proving its truth will shift to the defendant. Hence, the defence of truth will still be relevant.

Substance and Sting

7.4 We referred in the Consultation Paper to the uncertainty in the law as to whether the defence is available where the defendant proves that the imputation was true in substance, but fails to prove the literal accuracy of every statement. We cited the passage in *Gatley on Libel*¹ which says that where the words impute a specific offence, e.g. stealing a watch, it is not enough to prove that the plaintiff was guilty of another offence though of the same character, e.g. stealing a clock. We considered that it was important that the law should make it clear that a failure to prove minor details would not necessarily be fatal to the defence. There was no dissent from our

¹ 6th ed. 1967, para 354.

provisional view. (We emphasise that the test recommended applies to *each* defamatory imputation. The issue as to a publication containing separate and distinct imputations is a different one).

We recommend that there should be a statutory provision stating that, in order to avail of the defence of truth in respect of a defamatory imputation, the defendant must show that it was in substance true or in substance was not materially different from the truth.

Section 22 and Partial Justification

7.5. We pointed out that the law as to "partial justification" - dealing with situations where the defendant proved the truth of some, but not all, the defamatory statements made by him - was in a somewhat unsatisfactory state. This was in part due to the changes in the previous law effected by s22 of the *Defamation Act 1961* and the decision of the House of Lords in *Plato Films v Speidel*.² We summarised the anomalous features of the law as follows. If a defendant makes four statements, three true and one false, there are two possible outcomes, depending on the way the plaintiff conducts his case:

- (i) If the plaintiff sues on foot of all four, and the defendant can prove the truth of three, the court may relieve the defendant of all liability, if it considers that the fourth statement does not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.
- (ii) If the plaintiff sues on foot of the fourth statement only, the defendant cannot introduce other parts of the publication and will be liable for the statement complained of (assuming he cannot prove its truth).

7.6 In the Consultation Paper, we suggested that the first result was objectionable in that it was open to the inference that proving the truth of three of the statements makes the fourth statement immaterial or, which is worse, the inference that the fourth statement is true. We also found the second result to be objectionable in that it leaves the outcome dependant on the manner in which the plaintiff may arbitrarily decide to conduct his case. We pointed out that, while some of the law reform bodies were in agreement that the present law was unsatisfactory in these respects, they differed in their proposals for reform. The Faulks Committee in England and the New Zealand Committee on the Law of Defamation recommended that the equivalent of s22 should be reworded as follows:

"Where an action for defamation has been brought in respect of the whole or *any part of* matter published, the defendant may allege and prove the truth of *any charges* contained in such matter and the defence of truth shall be held to be established if 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."

As a result, a defendant would still be able to rely on a 'partial justification', while at the same time *Plato* would be reversed. In contrast, the Australian Law Reform Commission proposed a return to the old common law position,

2 [1961] AC 190

under which a partial justification could never be a defence to the action, but accompanied by a provision enabling the court to look at the whole of the publication (whether sued upon or not) for the purpose of assessing the damages.

7.7 In the Consultation Paper, we expressed our provisional preference for the Australian position. In common with the Faulks/New Zealand proposal, it eliminated the unsatisfactory consequences of *Plato* from the law. We said that, however, unlike the latter recommendation, it seemed to us to be conceptually coherent, in treating a defence of partial justification as no more than that and eliminating what we thought to be the anomalous consequence of s22, i.e. the implication that a non-proven statement which was not material might be true. In addition, by treating the issue as one related to damages, it gave the court a degree of flexibility which seemed to us to be missing in the Faulks/New Zealand proposal.

We encountered no disagreement with our view that the effect of *Plato* should be removed from the law. Our preference for the Australian model was, however, criticised and it was suggested that s22 was sufficiently improved by the Faulks/New Zealand proposal.

7.8 Having reconsidered our original proposal, we are satisfied that, except to the extent that it envisaged the elimination of *Plato*, it was based on an erroneous view of the law. Contrary to what we suggested, it is not the case that, where s22 is successfully relied on, the truth of the charge which has not been proved is by implication established. The sole effect of the successful invocation of s22, so far as the unproved charge is concerned, is that it is immaterial in its effect on the plaintiff's reputation. Since, the gist of the defamation action is injury to the plaintiff's reputation, the plaintiff in such circumstances should not be entitled to any relief, including relief by way of nominal damages, a declaratory order or a correction order, in respect of the factually inaccurate statement.

We are, as a result, satisfied that the law would be adequately reformed in this area by replacing s22 with a provision on the lines of the Faulks/New Zealand proposal.

7.9 *We recommend that, in place of s22 of the Defamation Act 1961, there should be a provision that where an action for defamation has been brought in respect of the whole or any part of the matter published, the defendant may allege and prove the truth of any charges contained in such matter and the defence of truth shall be held to be established if 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.*

Previous Convictions or Acquittals and Justification

7.10 We pointed out in the Consultation Paper that the rule established by *Hollington v Hewthorn*³ - that evidence of a previous criminal conviction was not admissible in subsequent civil proceedings where the same issue was raised for determination - had given rise to problems in defamation actions in England. It could mean that if a publisher stated that X was guilty of an offence, he was not entitled to adduce evidence of the prior criminal conviction of X for that offence in order to rely on a defence of justification.

3 [1943] KB 587

We referred to the alteration of the law in England by the *Civil Evidence Act 1968*, s13 of which provides that in an action for libel or slander in which the question of whether a person committed a criminal offence is relevant, proof that he stands convicted of the offence is "conclusive evidence" that he committed it.

7.11 We remarked that it might well be that the rule in *Hollington v Hewthorn* would not be applied by our courts. It had recently been held that raising an issue in a civil action which had already been resolved in a criminal case may be an abuse of court process or may be excluded under the doctrine of issue estoppel.⁴

In *Kelly v Ireland*,⁵ the plaintiff brought an action for damages in respect of assaults which he claimed were inflicted on him by members of the Gardai. The claim arose out of events alleged to have taken place while the plaintiff was in Garda custody in 1976 pursuant to s30 of the *Offences Against the State Act 1939*. The plaintiff was subsequently charged with armed robbery and convicted in the Special Criminal Court. During his trial, the court held *inter alia* that no assault or battery took place on him while he was in Garda custody and that, accordingly, confessions made by him while he was in custody were admissible in evidence against him. An appeal against his conviction was dismissed by the Court of Criminal Appeal and the Supreme Court. O'Hanlon J concluded that the issues raised in the civil case were in the result *res judicata*, applying the well known principles set out by the House of Lords in *Hunter v Chief Constable of West Midlands*.⁶ A similar issue arose in *Breathnach v Ireland and Others*,⁷ and *Breathnach v Ireland and Others (No.2)*.⁸ It was held in these cases that the same principle applied even where the plaintiff's conviction had been quashed on appeal, but the Court of Criminal Appeal had confined itself to one ground and had declined to interfere with other findings of fact by the court of trial. But it was further held in the second of those cases that the Gardai were also precluded from reopening an issue which had been determined in favour of the plaintiff during the criminal proceedings, not by virtue of issue estoppel (since the Gardai were not a party to the criminal trial) but because it would be an abuse of process to reopen the matter.

We were, however, provisionally of the view that the law should be clarified and recommended that a conviction should be treated, not merely as evidence of the guilt of the person, but conclusive evidence. Where the issue was as to the guilt of a person not a party to the proceedings, we considered that the conviction should also be admissible evidence of the issue, but not conclusive evidence. We were satisfied that different considerations arose in relation to acquittals: while a person acquitted of a criminal offence may not under our law be charged with the same offence at any time thereafter, it did not follow that public discussion of the case should be effectively suppressed by rendering acquittals conclusive evidence of innocence in a defamation case in which the innocence of the person acquitted is an issue.

One submission we received suggested that difficulties might arise where the conviction is appealed. We are satisfied that this is not so. If the appeal is still pending, the undesirability of litigating the issue of the accused

4 *Kelly v Ireland*. [1986] ILRM 318.

5 *Supra*.

6 [1982] AC 529.

7 [1989] IR 489.

8 High Court. 14th March 1990.

person's guilt in civil proceedings is even greater. If the conviction has been quashed on appeal, the person no longer stands convicted of any offence and the provision will be of no effect.

The same submission pointed out that difficulties might arise where it was sought to rely on the conviction of a person before a court in another country. We agree that the principle should only apply to convictions recorded by our courts and that this should be made clear in the legislation. (This, of course, would not preclude a court from admitting evidence of a foreign conviction where it was relevant to an issue in the case).

7.12 *We recommend a statutory provision that:*

- (a) *where in a defamation action the question of whether a person party to the action committed a criminal offence is relevant, proof that he stands convicted of the offence by a court of competent jurisdiction in the State shall be conclusive evidence that he committed the offence;*
- (b) *the conviction of a person not party to the defamation action by a court of competent jurisdiction in the State should be evidence, but not conclusive evidence, of the facts on which it was based;*
- (c) *the acquittal of a person party to a defamation action should be evidence, but not conclusive evidence, of the facts on which it was based.*

Aggravated Damages

7.13 We provisionally recommended in the Consultation Paper that the rule that aggravated damages may be awarded where there is an unsuccessful defence of justification should be retained. Some of the submissions we received, notably from the National Newspapers of Ireland and the Irish Publishers Association, strongly dissented. They thought that we had given insufficient weight to the arguments in favour of abolishing the rule. The first is that it is wrong in principle to penalise a defendant for exercising a right conferred by the law. The second is that the rule is in conflict with the immunity which is accorded to statements made in the course of judicial proceedings. Apart from these arguments based on principle, the media also claimed that the rule in practice inhibited defendants from pleading justification and that this was contrary to the public interest since it tended to prevent the truth as to matters of public interest from being established.

7.14 We recognise the force of these arguments and acknowledge the difficulty in striking a balance between competing rights in this area. The ability of the law to protect and vindicate the plaintiff's right to his reputation is to some extent weakened if a defendant can, without adverse consequences, subject the plaintiff to additional harm as a result of the publicity given to the court proceedings. As against this, the interests of society in freedom of expression are also damaged by a rule which unduly inhibits defendants from standing over the truth of statements on matters of public concern.

7.15 We remain of the view that the rule should be retained. We think that the criticisms pay insufficient regard to the fact that the award of aggravated damages is always a matter of discretion. It is not necessarily the case, therefore, that a defendant who unsuccessfully pleads justification will, in all cases, have to pay increased damages. Much will depend on the circumstances of the individual case. For example, it would be highly unlikely that an award of aggravated damages would be made if the defendant justified most of the imputations. Furthermore, because of the new defence of reasonable care, damages, including aggravated damages, would be awarded only where the defendant had been negligent in the first place. Moreover,

the concern voiced at our provisional recommendation may, to some extent, be allayed if our proposal that the damages in defamation actions should be assessed by judges, rather than juries, is implemented. Finally, the argument that an award of aggravated damages penalises the exercise of a legal right overlooks the fact that the defence of truth in defamation has a potential to aggravate the injury quite unlike a defence in any other civil action. No defence raised in a personal injuries case, for example, can aggravate the injury caused in the first place.

We referred in the Consultation Paper to another solution put forward by RTE, i.e. a ban as in France on the reporting on defamation cases by the media, excepting the judgment itself. We are not satisfied however, that this is the most practicable solution to the problem and it could also present constitutional difficulties. Accordingly, we do not recommend its adoption.

7.16 We recommend that the rule that aggravated damages may be awarded where there is an unsuccessful defence of justification should be retained.

Defence of Reasonable Care

7.17 Much of the criticism directed to the present law of defamation is that it is a tort of strict liability, i.e. it is in general no defence for the person who publishes a defamatory statement to show that he exercised reasonable care in relation to the publication. In our opinion, it is at least doubtful whether the existing state of the law infringes the constitutional guarantees as to freedom of expression.⁹ We set out in some detail in the Consultation Paper the current position in the United States which was not, of course, the result of legislative reform but of innovative judicial decisions largely shaped by what were seen as the implications of the First Amendment to the Constitution guaranteeing freedom of speech. Those decisions had established that, a plaintiff who was a public figure or public official had to establish actual knowledge or reckless disregard of falsity on the part of the defendant in order to recover damages. In the case of plaintiffs not coming within these categories, it was necessary to establish negligence, i.e. a failure to take reasonable care in relation to the publication. In England, the Faulks Committee had considered but rejected a defence where the matter was one of public interest, the publisher believed the statement of facts to be true and the publisher exercised reasonable care in relation to such facts. This defence would apply to all defendants, unlike that recommended by the New Zealand Committee which was confined to media defendants. Under their proposals, a new defence of qualified privilege for the media was envisaged which, like that of Faulks, would arise where the matter was of public interest and the defendant acted with reasonable care in relation to the facts or believed them to be true on reasonable grounds. It also, however, proposed that it should be a condition of the defence that the publisher offered the plaintiff a right of explanation or contradiction.

7.18 Having considered the US position in detail, we concluded that the fault standard applicable in that jurisdiction to public figures or public officials should not be adopted. We were of the view that negligent defendants should not be exonerated in this manner and that the public interest would not be served by the defence, since it would protect negligent false factual assertions. In addition, if translated into Irish law, it would appear not to preserve the balance required by the Constitution between the

⁹ See Appendix A, para 30.

competing rights of reputation and freedom of expression. We were also of the view, however, that to adopt the less exacting standard of negligence in an unqualified manner would also insufficiently vindicate the right to reputation: excluding any remedies by way of damages or otherwise to a plaintiff who had been injured by a defamatory publication, in our view, went too far. This could be redressed by making the defence of reasonable care available only in respect of a claim for general damages. It would not prevent the plaintiff from obtaining the correction/declaratory orders which we proposed elsewhere in the Consultation Paper or from recovering damages in respect of financial loss in a case where they could be proved.

7.19 In arriving at these provisional recommendations, we were mindful of the difficulties which the absence of a defence of reasonable care posed for the media and publishers generally. At the same time, we were concerned to ensure that the law afforded appropriate remedies to persons injured in their reputation through no fault of theirs. In general, the reaction to the recommendation was extremely favourable. It was welcomed by the National Newspapers of Ireland, RTE and the Irish Book Publishers and we received no criticism of it from persons concerned with the position of plaintiffs. However, two objections were made to us which we would now like to address.

7.20 The first concerned the fact that the defence would not be available to a claim for financial loss. It was represented to us that the arguments which support the view that the defence of reasonable care should bar a claim for general damages apply equally to damages in respect of financial loss, and that proof of reasonable care should prevent any damages at all being recovered. In other words, it was felt that our approach was conceptually unsound.

This view overlooked the fact that one of the specific reasons for barring general damages where reasonable care has been established was that a correction order or declaratory order would be granted instead. In other words, we feel that where the defendant has exercised reasonable care, the appropriate remedy is a correction/declaratory order, not damages. It is perfectly consistent with this to say that even where reasonable care has been established, if there has been financial loss, the appropriate remedy will consist of damages. It is consistent to adopt these solutions because we have not changed the basis of liability itself; rather we have indicated that certain remedies are more appropriate than others in certain contexts. To spell out the point, if a statement is found false and defamatory (and no defence other than the defence of reasonable care applies), the defence of reasonable care bars liability for damages only, and not liability generally. The point is that by introducing new remedies we are trying to explode the direct equation between liability and damages on which such objections are founded. Therefore the defence of reasonable care is not a full defence: it is a partial defence, in the sense that it only applies to a certain claim i.e. a claim for general damages. Conceptually, this conclusion is sound. The *reason* we have shown a preference for recovery of financial loss, even where reasonable care has been exercised, is that we feel that a balancing of the competing interests requires that the person who has suffered financial loss through the publication, albeit carefully researched, of another, when he did not in any way solicit the interest of that other, should not have to bear that loss.

It has been objected that in torts of negligence, such as a claim for damages for personal injury, a successful defence of reasonable care will bar all damages, including financial loss. Quite apart from the fact that it is the arguable injustice of this situation that has led to calls for no-fault schemes.

this argument presupposes that we have introduced a standard of liability based on negligence, which we have not. We have simply proposed a defence of reasonable care in the context of a general damages claim. We note in passing that, in any event, the number of cases in which financial loss will be claimed is expected to be very low. We note also that the comparison with other torts, such as actions in respect of personal injuries, is misplaced, because in those situations the law has to operate on an "all or nothing" damages basis. The choice in defamation law is less stark if the remedies of the correction/declaratory order are introduced.

7.21 The second argument made to us - principally in the Boyle/McGonagle submission - was that it would be preferable to introduce a negligence standard into the tort, placing the burden on the plaintiff to establish a breach of the duty of reasonable care owed to him or her. The essential differences between this approach and ours are as follows:

- (1) it would place the burden of proof on the plaintiff to show breach of duty of reasonable care;
- (2) it would prohibit the plaintiff from recovering financial loss where he cannot prove negligence;
- (3) it would prohibit the plaintiff from recovering a correction/declaratory order where he cannot prove negligence;
- (4) it would require the plaintiff as part of his or her case to show particulars of damage.

It was suggested that a negligence-based model would provide an incentive for the media, and presumably others, to put in place and maintain the highest system of pre-publication processing of information.

7.22 We address each of these points in turn. First, we are still of the view, put forward in our Consultation Paper that it would be unfair to place the burden of proving a lack of reasonable care on the plaintiff. Where the defendant is a media organ, it will frequently be difficult for the plaintiff to accumulate evidence of negligence, since this will involve details of phone calls, memoranda and even the mental processes of the person writing the offending piece. The plaintiff could, no doubt, avail himself or herself of procedures such as discovery and interrogatories, but, apart from the fact that there are no documents in existence in some cases, we do not think it would be in anyone's interest that the cost and complexity of defamation actions should be increased by greater reliance on such procedures. It seems more just to place the burden of proof on the person who has all the details in his possession.

Second, if the view is taken that proof of negligence is a pre-requisite to a finding of liability, it follows that if reasonable care is shown, no remedy may be awarded. Thus neither financial loss nor a correction/declaratory order may be obtained, despite the fact that the plaintiff has shown the matter to be false and defamatory. For the reasons outlined above, we feel that it would be unfair for a plaintiff to be unable to recover financial loss in this situation. Similarly we feel that it would be unfair if a plaintiff could not obtain a correction order/declaratory order where the matter has been established to be false and defamatory simply because the burden of proof has been phrased in such a way as to prohibit any remedy unless negligence is shown. Therefore we feel that to introduce negligence as a pre-requisite to liability mandates certain conclusions which we do not support.

By contrast, where the defence of reasonable care may be introduced as a partial defence only (i.e. to a claim for general damages), such conceptual *cul de sacs* may be avoided.

Third, it appears that to place the burden on the plaintiff to show damages resulting from the breach of duty would require him, in every case, to show how he was injured in his reputation, and if financial loss was caused, particulars of such loss. This latter conclusion is unobjectionable and indeed we have proposed that a plaintiff must show particulars of financial loss to support a claim for financial loss. However, we do not favour the view that the plaintiff should be required to prove injury to his reputation. We have already expressed our preference for the traditional view that the law presumes injury to reputation to flow from the false and defamatory nature of the statement. A plaintiff would presumably have to establish injury to reputation by calling witnesses to testify that they thought less of him because of the defamatory publication. The tribunal of fact would have to expand the injury proved in this way by taking into account the number of people who might have thought less of the plaintiff as a result of the publication and who have not been called. If the present law is retained, the tribunal of fact will use its own common sense in reaching a conclusion as to the effect the defamatory material would have had on the mind of readers. Injury, as defined by defamation law, is not easy to prove, but this does not mean that it has not occurred.

It should also be borne in mind that a law which encourages the calling of witnesses to prove injury to the plaintiff's reputation carries with it the risk of unduly influencing the jury when they are determining the issue of "libel or no libel", a danger emphasised by RTE in their submission.

Finally, while it is said that the negligence model would induce high pre-publishing standards, it must be pointed out that the same is true of our proposals. Under the negligence model, if a publisher acts with reasonable care, he will be rewarded with full immunity from any remedy. Under our proposals, if a person acts with reasonable care, he will be rewarded with immunity from general damages. It has been persistently represented to us that the fear of publishers at present relates to high damages awards. Since the exercise of reasonable care will bar general damages and thus remove this fear, our proposal is also consistent with the maintenance of high pre-publishing standards.

We make one final point. Concern was expressed to us as to whether our proposals meant that, if financial loss is proved, all other types of damages may be awarded even though reasonable care was exercised. The answer to this is no. If financial loss is proved, financial loss only may be recovered. The defence of reasonable care is a defence to a claim for general damages.

7.23 The foregoing discussion has been confined to criticisms evoked by our proposals from those who were generally sympathetic to the provisional recommendation for a defence of reasonable care. As we have pointed out, no representations were made to us as to the undesirability of introducing such a defence into our law of defamation. Nevertheless, we have been conscious of the considerable change which will result in the law if our provisional recommendations were to be implemented and of problems to which it might give rise. It could be said that there is a basic injustice in a law which deprives a person of compensation in respect of a defamatory and untruthful statement, unless he or she can show actual financial loss. There could also be practical problems for those who receive unexpected and unheralded enquiries from the media as to the truth of allegations concerning

them and who may find that an unguarded response to an intrusive enquiry may lay the ground for a successful plea that reasonable care had been taken in ascertaining the truth of the publication. A majority of the Commissioners consider that the beneficial effects of the introduction of the defence of reasonable care outweigh any possible prejudice that may result to potential victims. They think that the introduction of a standard of reasonable care into the tort of defamation should be of benefit, not merely to the media, but generally, since the media beneficiaries will be those who are careful and responsible. There will be a corresponding disincentive to carelessness and inefficiency.

However, it is right to record that one of our members, Mr O'Leary, is satisfied that the balance between the exercise of journalistic freedom and the need to protect the citizen's good name is properly fixed at the moment. In his opinion, the level of self-censorship, not in itself a bad thing, secured by the present law ensures that the public can expect a high standard of reliability in what they read, see or hear. Adopting a reasonable care test would only tend to lower this standard and he feels that the public would rather maintain standards as they are than be presented with more, less reliable, information and lose some of the protection which they have against defamation at present. In any event, there appears to him to be no shortage at present of investigative reports, of revelations from reliable sources, of gossip, scoops and leaks. It is not known what standard of reasonable care would be set. In particular, Mr O'Leary is concerned that the change proposed might lead to a person forfeiting his right to general damages where he refrained from making comment, e.g. on defamatory allegations put to him by a journalist on the telephone. It is highly likely that a person's response on such an occasion would be influenced by shock, anger, tiredness or emotion and that from any point of view, it would be imprudent of him to respond immediately. Mr O'Leary would not favour giving the media any leverage to compel a reaction to defamatory allegations when sought.

7.24 In the course of our discussion in the Consultation Paper, we mentioned examples of behaviour which might be regarded as meeting, or failing to meet, a standard of reasonable care. We also made it clear, however, that, as in the case of actions for negligence under the present law, it would be for the tribunal of fact to determine in any case whether there had been a failure to take reasonable care. Some reservations were expressed as to this in the Boyle/McGonagle submission and by RTE. In particular, RTE said that it was not clear whether the issue of reasonable care would be decided by a judge or jury. They expressed anxiety as to whether the trier of fact would have a sufficient appreciation of the various constraints under which broadcasting is carried on.

7.25 We should make clear our understanding as to the respective roles of the judge and jury in determining such issues of fact, assuming, that is, that juries continue to resolve such issues (other than the quantum of damages) as provisionally recommended in our Consultation Paper. The question whether reasonable care was exercised in relation to the publication will only arise where it has been established, or admitted on the pleadings, that the words complained of were defamatory and untrue. The issue of reasonable care will then fall to be decided by the jury in the same manner as the issue of negligence was until recently so decided in personal injury cases. It would, in every case, be exclusively a matter for the jury to determine whether the defendant exercised reasonable care in relation to the publication. In accordance with normal court procedures, the trial judge would have power to direct the jury to answer the question in a particular way, if he was satisfied that any other answer would, in the light of the evidence, be

perverse.

7.26 We do not think that the legislation need or should go further than specifying that this question, in common with all other issues of fact, should be determined by the jury. Given the great variety of circumstances that may arise in cases, it would not be appropriate for the legislation to attempt to provide guidelines as to what, in particular instances, might be properly regarded as a failure to take reasonable care. Thus, RTE suggested that the legislation should provide that a publication made in the knowledge that the source of an allegation would not testify in court would not necessarily be regarded as a careless publication. They suggested a provision along these lines:

"The fact that a journalist or media defendant is aware before publication that the person from whom he received the allegation has made it a condition of the disclosure that he must not be named in the article or that he will refuse to testify as to the truth of the allegation in legal proceedings shall not on its own and without more be treated as matter tending to show an absence of reasonable care."

We think that a provision of this nature would impose unnecessary constraints on a court. There might well be circumstances in which publication subject to such a condition might indeed be properly regarded as showing an absence of reasonable care as, for example, where the accusation made against the plaintiff was one of having committed a crime. In such a case, the trial judge might well conclude that the jury would be within their rights in concluding that the defendants had failed to exercise reasonable care in publishing such an allegation about the plaintiff in circumstances where they knew that the relevant witnesses would never come to court. We think, indeed, that this example helps to illustrate the undesirability and impracticality of attempting to set out detailed guidelines for courts in this area.

Similar considerations apply to proposals by the Irish Book Publishers Association of examples of conduct which might be treated as indicating no want of reasonable care, i.e.:

"Where the defendant is a book publisher and has received a written assertion from the author of the non-fiction book or part of the non-fiction book that is the subject of a complaint in relation to defamation that the facts therein contained are true."

"Where the defendant is a book publisher and has sought and received written legal advice with the express intention of avoiding the publication of defamatory material and has implemented the changes proposed in the legal advice as it relates to the plaintiff".

Such factors might indeed be taken into account by the jury in deciding whether there had been a want of reasonable care, but again one does not require a specific legislative provision for this purpose.

7.27 *We recommend that:*

- (1) *It should be a defence to a claim for general damages in respect of a defamatory allegation of fact that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth of the allegation.*
- (2) *It should not be a defence to a claim for damages in respect of financial*

loss clearly linked with the publication that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth of the allegation.

- (3) *It should not be a defence to a claim for a correction order and/or declaratory judgment that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth of the allegation.*

Presumption of Falsity

7.28 In the Consultation Paper, we provisionally recommended that the presumption of falsity existing under the present law should be retained. We were influenced in arriving at this conclusion by what we considered would be the consequences of our recommendations as to a defence of reasonable care and the provision of new remedies in the form of correction orders and/or declaratory judgments. We said that a defendant who was not in a position to displace the presumption of falsity could always rely on the defence of reasonable care (unless special damages were proved). In the result, the removal of the present presumption of falsity would benefit only two categories of defendants:

- (1) those who fail to avail themselves of the defence of reasonable care and who by implication must have been negligent;
- (2) those who established that they exercised reasonable care but are contending that no correction order and/or declaratory judgment (or, we should have added, special damages) should be awarded.

We considered that, so far as the first category of case was concerned, it was wrong that negligent defendants should be facilitated by the abolition of the presumption. In the second category of cases, where the truth of the allegation (and, we should have added, the recoverability of the special damages) would be the only issues, we said that it was preferable that the benefit of the presumption should go to the injured plaintiff.

7.29 There was little support for our provisional view that the presumption should be retained and much vigorous dissent. Having given the question further consideration in the light of the criticisms advanced, we are satisfied that the reasons we gave for retaining the presumption are somewhat facile. In relation to the first category of defendants to which we referred, the fact, if it be the fact, that they have failed to take reasonable care in relation to a publication should not, of itself, be a ground for damages where what they said was true. Our approach could be criticised for not giving at least some weight to the argument that the publication of matter which is both defamatory of the plaintiff and untruthful is the core of the tort of defamation. If that view is correct, it is illogical and anomalous that the plaintiff should be relieved of the burden of proving one of the essential ingredients of the action. The same considerations apply with even greater force to the second category of defendants, where it may be assumed that the defendants have exercised all reasonable care in relation to publication, but wish to put in issue, as they are entitled to do, the plaintiff's assertion that the words were defamatory and untrue.

7.30 However, while the reasons we gave for retaining the presumption are of dubious validity, the possibility remains that, in some cases at least, plaintiffs will suffer injustice if the presumption is abolished. It is also argued by those in favour of retaining the present law that to abolish the existing presumption is to create an unfair and arguably unconstitutional

presumption that anything said of the plaintiff, no matter how damaging, is true. We have been unable to reach agreement on this difficult topic. A majority of the Commission (the President, Mr Buckley and Ms Gaffney) are in favour of the abolition of the presumption of falsity. The minority (Professor Duncan and Mr O'Leary) favour its retention. We set out first the views of the majority.

7.31 It is in principle unsatisfactory that the plaintiff should be relieved of the burden of proving all the essential ingredients of the wrong which he has alleged. The law of defamation should protect the citizen from defamatory statements which are untrue, not from those which are true. This is at present reflected in the absolute nature of the defence of justification. The approach of the law should be that, while there is no public interest in the publication of false statements, there is equally no public interest in penalising the authors of true statements, particularly when they relate to matters of public concern. The claim that an alteration in the present law may create difficulties for some plaintiffs is an argument based on pragmatic considerations rather than principle. The principled objection to the proposal - that it is unjust, and arguably unconstitutional, to presume that the defendant's defamatory assertion is true - is based, in our view, on a misconception. The proposal we favour would not involve, as is sometimes mistakenly suggested, the reversal of the existing presumption. It would simply mean that there were no presumptions of any sort in this area. The law would, in the result, adopt a neutral position: there would be no presumption that the defendant had wronged the plaintiff by the publication of an untrue defamatory statement and, equally, no presumption that what the defendant said about the plaintiff was true. The plaintiff would thus be required to prove the commission of the alleged wrong by the defendant, in accordance with the general principles of the civil law.

7.32 As to the practical considerations, we think that in practice it is almost unheard of for plaintiffs not to give evidence that the allegation about them was false. Whatever the position in theory may be, this will mean that in fact in virtually every case the defendant will, as now, have to prove the truth of what he has asserted or rely on some other defence.

The practical problems presented for defendants by the present law are, by contrast, serious. They may find themselves in the position that, while they have good reason for believing that what they said was true, they have difficulties in establishing its truth in court. Thus, witnesses who at one stage were willing to testify to the truth of the defendant's allegations may not be available for the trial. The plaintiff under the present law in such cases can issue proceedings for defamation in respect of perfectly truthful statements in the knowledge that he does not have to give evidence and face cross-examination. We do not think that it is either just or in the public interest that defendants should be affected in settling such cases by the existence of an artificial presumption of law at variance with the facts.

While it is suggested that the abolition of the presumption would leave little scope for the present defence of justification, we do not think that this is necessarily so. The form of the plea would, perhaps, be different: a defendant prepared to stand over the truth of what he said would simply put the plaintiff on proof of the falsity of the allegation. If, however, the plaintiff succeeded in such a case, precisely the same consequences should follow for the defendant as at present, including his exposure to an award of aggravated damages.

7.33 We considered whether the difficulties in the present law might be met

by a provision which would restore the presumption of falsity in the event of the plaintiff giving evidence that the allegedly defamatory statement was untrue or perhaps enabling the court to draw inferences from his failure to give such evidence. We do not think this could be considered a satisfactory change in the law. However it was framed, it would mean that, save in the most exceptional circumstances, a plaintiff would in effect be obliged to give evidence as to his or her good name if he or she were to have any real prospect of a verdict in his or her favour. This, however, is said by its critics to be the major flaw in principle in the proposal to abolish the presumption of falsity. In our view, an unhappy compromise of this nature would not meet what we acknowledge to be a principled (although in our view mistaken) objection to the proposed change. At the same time, it would introduce into the civil law of evidence an artificial and complex presumption which has no precedent of which we are aware.

7.34 We recommend that in all cases of defamation the onus of proof should be upon the plaintiff to establish that the words complained of were untrue.

Minority View as to Presumption of Falsity

7.35 We do not agree with the recommendation of the majority that in defamation proceedings the onus should fall on the plaintiff to establish that the words complained of were untrue. We favour retention of the existing rule under which the onus is on the defendant to establish the truth of what has been published.

The incidence of the legal burden of proof "is a matter of common sense"¹⁰ and the maxim, he who asserts must prove, usually quoted in this context has been described as "a useful starting point although ... a far from reliable guide".¹¹ It is felt that the presumption of falsity is an apparent rather than a real exception to the above maxim. The person who asserts, from his sources of information, that a particular state of affairs exists should bear the burden of proving his assertion.

Reversal of the onus of proof would result, in effect, in a presumption that anything said of the plaintiff no matter how damaging is true. Any plaintiff who wished to vindicate his or her good name through defamation proceedings would do so in the teeth of an assumed defect in his or her reputation. A situation in which the plaintiff would be required in effect to prove his or her innocence is, in our view, inconsistent with the spirit of the constitutional requirement that the State vindicate the good name of every citizen in the case of injustice done.

It is not always easy to prove a negative - for example, that the plaintiff was not at a particular place at a time when a crime was committed. In some cases the plaintiff will be able to do little more than deny the truth of what has been alleged against him or her, without being able to offer supporting evidence. It is then a matter for the court to decide whom it believes, the plaintiff or the defendant. If there is substantial uncertainty on this issue, under the majority's proposal the plaintiff will fail because he or she will not have discharged the onus of proving the falsity of the allegation against him or her on a balance of probabilities. The court will decide against the plaintiff, not because it is satisfied that the allegation made against him or her is true, but because, in a case of doubt its truth is assumed. It may be

¹⁰ Adrian Keating, *The Modern Law of Evidence*: 2nd Ed 50.
¹¹ *Id.*

argued that this view is unrealistic, and that in practice where a plaintiff denies the truth of a defamatory statement, a jury would in its wisdom in fact need to be convinced by the defendant that the statement was true. This may or may not be the case. If it is not the case, our argument stands. If it is the case, then the proposal to reverse the onus of proof is a cosmetic exercise, apparently designed to give greater protection to free expression, but in fact, intended to have little real effect. If the intended reality is that the onus of proving truth should, in effect, in the great majority of cases fall on the defendant, then it is better to leave the law as it is.

Difficult choices about competing social values are involved in the reform of defamation law. At the end of the day it will be for the Oireachtas to determine how the balance should be drawn. Do we wish to live in a society in which one person may with impunity publish a hurtful and damaging statement about another as long as it remains impossible or difficult for that other to prove that the statement was untrue? Or would we prefer to live in a society in which those who publish defamatory statements know that they may have to offer some kind of redress unless they can in some way substantiate their allegations? The matter goes to the heart of defamation law. We believe that the function of the law of defamation should be to provide redress - i.e. appropriate vindication of a person's good name - in any case where defamatory statements are made which are not capable of being substantiated. The majority's proposal to reverse the onus of proof involves a fundamental shift in underlying policy which in our view has not been justified.

The majority argue that there is no public interest in the suppression of true statements. In our Consultation Paper we advanced as the first argument in favour of the reversal of the presumption, that reversal would make it easier for media defendants to succeed in cases where what they have published is true but they are unable to prove this to the satisfaction of the court. In other words, it is sought to protect matter believed to be true which cannot be proved in evidence, a requirement fundamental to the proof of a fact in issue in *any* case - and this matter is defamatory. The minority have no interest in protecting defamatory assertions that cannot be proved. The fact that it is difficult for a media defendant to prove truth is no justification for requiring a person defamed to prove falsity.

A criticism of the existing law is that it enables a plaintiff to benefit by not giving evidence. We accept that this is not a satisfactory situation, but would prefer that it be dealt with by measures less radical than a reversal of the onus of proof. We suggest as one possibility an explicit statutory rule to the effect that "when, without reasonable explanation or excuse, a plaintiff refuses to deny in evidence the truth of any statement complained of, the court may, having regard to all the circumstances, draw what inference it thinks proper from such refusal, including the inference that the statement was in fact true".

"Timely and Conspicuous Retraction"

7.36 In our Consultation Paper, we discussed the problem of "unintentional defamation". This can arise in two ways: a statement innocent on its face may be defamatory because of circumstances unknown to the defendants and a statement not intended by the defendant to refer to the plaintiff may, because of circumstances unknown to the defendant, refer to the plaintiff. We pointed out that s21 of the *Defamation Act 1961* was an attempt to alleviate the position of defendants in both categories, by enabling them to make an "offer of amends", but that the defence provided by the section was

rarely availed of in practice. We discussed the various defects of the procedure under s21 and suggested ways in which it might be improved. However, we also concluded that a preferable course might be to repeal s21 and replace it with a procedure which would also be designed to encourage negotiations between the parties at an early stage and, as we hoped, to lead in many cases to a settlement. This proposal was linked to our recommendations that there should be a defence of reasonable care available to defendants and that there should be remedies in the nature of correction orders and/or declaratory judgments available to plaintiffs. Under our scheme, it would be a defence to a claim for a correction order and/or declaratory judgment that the defendant made a timely and conspicuous retraction of the allegedly defamatory allegation. It would not be a defence to a claim for general damages or special damages. In the case of such a claim, the defendant would continue to be liable, except where he availed of another defence, such as reasonable care in the case of a claim for general damages.

7.37 There was general agreement among those we consulted that s21 in its present form was of little practical benefit. There was no significant dissent from our proposal that it be repealed and replaced by our suggested scheme. Having considered the matter again in the light of the reactions to the Consultation Paper, we are satisfied that a proposal along the lines indicated would be a significant improvement on the existing scheme under s21. There was also, however, some helpful criticism of the detail of the proposal which we now proceed to examine.

7.38 Although we had intended that the request for a retraction should be a prerequisite to a suit for defamation, this did not clearly emerge in our recommendations. This, however, is an important feature of the scheme we were proposing. It was also suggested that there should be a time limit, such as three months, within which the plaintiff was to seek the retraction. We think, however, there could be difficulties with a rigid time limit: allowance would have to be made for cases in which the defamatory statements did not come to the attention of the plaintiff until after the expiration of the period.

7.39 It was also pointed out that our recommendation that a retraction must be in substantially the same place, of equal prominence and of the same length as the original matter could give rise to difficulties. It would not be easy for book publishers to meet the requirement that the publication of the retraction be in substantially the same place. The requirement that it should be of the same length is probably unnecessary: in the case of a long article, only some isolated sentences may be potentially defamatory.

7.40 We were also urged to deal with the situation where a plaintiff proceeded with a claim for damages when a retraction had been published. Under our provisional proposals, he would not have been prevented from doing this, but it was suggested that there should be an express provision that the publication of a retraction should be taken into account in assessing damages. It was also suggested that there should be an express provision that, if a retraction is given, it would not constitute an admission of liability should the plaintiff decide to proceed.

7.41 We agree with these suggestions and have incorporated them in an amended version of our original proposal.

7.42 *We recommend that:*

(1) *A claim for a correction order and/or declaratory judgment in a*

defamation action in respect of a defamatory allegation of fact should not be entertained by the court unless the plaintiff alleges that the plaintiff made a timely and sufficient request for a retraction and the defendant failed to make a timely and conspicuous retraction.

- (2) *It should not be a defence to a claim for general or special damages in a defamation action in respect of a defamatory allegation of fact that the defendant made a timely and conspicuous retraction of the allegedly defamatory allegation but the court should be entitled to take the publication of any such retraction into account in assessing the damages to which the plaintiff is entitled.*
- (3) *Definitions: A 'retraction' is a statement withdrawing and repudiating the allegedly defamatory allegations. A 'conspicuous retraction' in the case of a newspaper, broadcast or periodical publication is a retraction published in substantially the same place and manner as the defamatory statement being retracted. The placement and timing of the retraction must be reasonably calculated to reach the same audience as the prior defamatory statements being retracted. In the case of a book or other publication not of a periodic nature, a 'conspicuous retraction' is one published in such a manner and at such a time as to be reasonably calculated to reach the same audience as the prior defamatory statement being retracted.*
- (4) *A 'timely request' for retraction is a request made within three months of the publication of the defamatory statement or the date on which the plaintiff first became aware or ought reasonably to have become aware of the publication.*
- (5) *A retraction is 'timely' if it is published within thirty days of the original publication or the first request of the plaintiff for retraction.*
- (6) *Where the defendant customarily publishes retractions, corrections or opportunities to reply in a designated place, publication of a retraction in that place should be deemed conspicuous if notice of the retraction is published in substantially the same place and manner as the statements to which the retraction is directed.*
- (7) *The publication by the defendant of a timely and conspicuous retraction should not be construed as an admission of liability and where the issues of fact are being tried by a jury they should be directed accordingly.*

Protection of Sources

7.43 We said in the Consultation Paper that the media had complained that they are prevented from reporting matters which are in the public interest and which they know to be true but cannot prove in court. The main reason for their being unable to prove the truth of their statements, it was said, was a reluctance to disclose their sources. The reasons for this reluctance were twofold: that it would be professionally unethical for a journalist not to respect the confidentiality of a source and that the disclosure of the source in many cases will destroy its efficacy in the future.

7.44 We invited views as to the desirability and/or practicability of meeting, or at least alleviating, this difficulty in two ways. Under the first proposal, the court would have power in cases in which justification was pleaded to prohibit the reporting of the identity of witnesses specified by the court. We identified two objections to this proposal. First, the identity of the witness

could be revealed by the content of his testimony and the prohibition would be valueless. Second, there could be present in the court the very people from whom the source wished to conceal its identity.

7.45 The second proposal was more far reaching, i.e. to give the court a power in cases in which justification is pleaded to exclude the public, including the media, from the court while a specific witness was giving evidence. Again, we identified a number of objections to this course. The plaintiff and his counsel would clearly have to remain in court and, in some cases, these might be the people from whom the source wished to hide its identity. The professional ethics which would preclude judge and counsel from disclosing the evidence given at *in camera* proceedings would not apply to members of the jury. To the extent that the press's reluctance to disclose sources was based on ethical considerations, the proposal would be of no value. Finally, journalists whom we consulted thought the proposal would be impracticable in a relatively small country such as Ireland: it would be easy for a person to find out who the source is by simply sending some one to sit outside the court on the day in question and identify the source as he leaves.

7.46 None of the submissions we received from the media supported either of these proposals and it did not attract any support at the Seminar. As we indicated in the Consultation Paper, we had serious reservations as to the practicability of either of these proposals and our doubts as to their desirability have been reinforced by the unenthusiastic response they have evoked.

We accordingly do not recommend any change in the law in this area.

Fiction and Satire

7.47 We referred in the Consultation Paper to the peculiar considerations which governed two particular types of factual statements, the first being the fictional and the second the satirical statement.

7.48 We referred to RTE's concern that juries were inclined to ignore or pay insufficient attention to the fictitious context in which allegedly defamatory statements were sometimes made and their proposal that there should be a complete ban on defamation proceedings in respect of fictional works, unless the plaintiff could point to special circumstances which would cause the recipient to suspend his or her belief that the work was fictitious. We suggested that the problem in relation to works of fiction might be more appropriately met by imposing a more stringent test of *identification* where defamatory matter appeared in a fictional context. We, accordingly, invited views as to whether, in cases involving defamatory matter contained in a fictional context, the ordinary requirement of identification should be supplemented by a requirement that the matter be reasonably understood as referring to "actual qualities or events involving the plaintiff".

7.49 RTE in their submission to us following the publication of the Consultation Paper pointed out that we had not been entirely accurate in our reference to their earlier submission: their proposal had been that liability should be excluded where the "reference" (i.e. to the plaintiff) was fictitious, not that the "work" was fictitious. They went on to express doubts as to whether our proposed formulation - that the statement be reasonably understood as referring to actual qualities or events involving the plaintiff - was broad enough. They suggested that a piece of drama set among actual events and which may involve real persons from the present or the past but

which is obviously intended to be a work of a dramatic, creative or artistic nature should not be actionable. This is presumably a reference - perhaps among other things - to a form of television presentation which is becoming increasingly common in which contemporary events, involving living people, are presented in dramatic form with the people concerned portrayed by actors. However, we do not think there is any good reason for affording this form of presentation an immunity denied to other publications dealing with real events but presented in less dramatic form.

7.50 This general area was also addressed by the Irish Book Publishers Association. The Commission accepts the validity of the point made by them and RTE that creative, imaginative and fictional literature is of a different character from literature purporting to convey factual information in that the former necessarily involves the reader's being invited to suspend his disbelief. We do not think, however, we should go further than the proposal we made tentatively in the Consultation Paper.

7.51 We recommend that, in cases involving allegedly defamatory matter contained in a fictional context, the ordinary requirement of identification should be supplemented by a requirement that the matter be reasonably understood as referring to actual qualities or events involving the plaintiff.

7.52 In the Consultation Paper, we had mentioned the possibility of incorporating in the definition of defamation a provision that "matter which would reasonably be understood as satire is not defamatory". We had, however, expressed doubts as to whether such a proposal is really practicable, in view of the difficulty in securing agreement as to what constitutes "satire" as distinct from scurrility.

7.53 RTE urged us to reconsider our provisional view on this matter. They argued that there was a clear need for some special provision to protect what they described as "a valuable form of commentary on public life". They took issue with our suggestion that it might be difficult to distinguish between satire and scurrility, observing that scurrility was, after all, not necessarily actionable.

7.54 We accept that our reason for doubting the desirability of such a proposal was not particularly happily worded. However, we remain unconvinced as to the acceptability of the proposal. Publishers of satirical material will benefit, in common with others, from the range of new defences and new remedies that we have proposed in this Report. Beyond that, we do not see that a case has been made for affording them some form of special protection. We fully accept that satire is a well established and valuable form of criticism to which people who enter public life must expect to be exposed. But we do not see any public benefit in protecting material which is false and defamatory and, to the extent that it is factual, negligently published, solely on the basis that its object is to subject the target to derision or ridicule rather than hatred or contempt. *We accordingly recommend that there should be no special provision in relation to such material.*

CHAPTER 8: DAMAGES

8.1 We pointed out in the Consultation Paper that, under the existing law, the central remedy for defamation was the power to award damages and that this had significantly influenced the way in which the law operated. Elsewhere in the Consultation Paper, we canvassed the merits of other remedies which would, it was hoped, reduce to some extent the central role of damages with beneficial results. We recognised, however, that damages would continue to play some role in defamation and, accordingly, examined possible reforms that might be introduced in the manner in which they were assessed. At the outset, we referred to concern expressed by the media and publishers that the general level of damages was unjustifiably high.

8.2 We pointed out, in this connection, that awards generally were significantly lower than in England, but accepted that there might be some basis for the frequently expressed anxiety that they were too often out of proportion to the seriousness of the libel and, coupled with the high level of costs in defamation litigation, had a markedly inhibiting affect on the publication of material of public interest. We examined a number of possible alterations in the law which might help to ensure that damages were reasonably proportionate to the injury suffered.

8.3 We considered in detail one of the most frequently canvassed changes in the law, i.e., the modification, or even the abolition, of the role of juries in defamation actions. This topic is dealt with separately in the next chapter, in which we adhere to our provisional conclusion, i.e., that juries should be retained in such actions, but that the damages should be assessed by the judge. However, we also considered other possible changes in the present method of assessing damages and made some tentative recommendations.

8.4 We suggested that a statutory provision should set out the factors to be considered in the assessment of damages, whether or not the jury was to play a role in this area. These included the circulation of the libel, matters relevant to the plaintiff's reputation, the state of mind of the defendant, the durable or other nature of the publication and the extent to which the defendant proves the truth of the publication, irrespective of whether the plaintiff sues in respect of the whole or part of the publication.

8.5 There was general agreement with our view that statutory guidance as to the factors to be considered in the assessment of damages was desirable.

It was suggested on behalf of the National Newspapers of Ireland that these specified circumstances should also include the offer of an apology and the speed and prominence with which it is made, as well as other evidence of reasonable attempts to settle actions. However, we think that our recommendations in relation to retractions adequately meet these concerns. It should also be borne in mind that our guidelines are not intended to be exhaustive. Other factors may have to be taken into account, depending on the circumstances of individual cases.

RTE disagreed with our inclusion of "the state of mind of the defendant" as a factor, saying that, since they were vicariously responsible for the actions of their employees, it would be all too easy for plaintiffs to make a case for increased damages based on the alleged hostility of an individual journalist, thus increasing the likelihood that punitive damages would be awarded in the guise of compensatory damages. This objection would, of course, arise equally in the case of newspapers.

However, the objection does not appear to take account of s14(4) and (6) of the *Civil Liability Act 1961*. These provisions deal with "concurrent tortfeasors". In an action for defamation, where both a newspaper and its journalist were sued, they would be regarded as "concurrent tortfeasors" (or "concurrent wrongdoers" to use the expression more generally employed in the *Civil Liability Act*). The relevant enactment provides that, where punitive damages are awarded against one of concurrent tortfeasors, they are not to be awarded against another merely because he is a concurrent tortfeasor. Thus, under the present law, a jury would be directed not to include any punitive element in the damages to be awarded against a newspaper or broadcasting station, even though they were satisfied that the journalist responsible for the defamatory allegation had been particularly vicious or malevolent, unless there was other evidence justifying such an award. The award of punitive damages in such circumstances would have to be confined to the journalist. It also provides that where, in an action for defamation, one of concurrent tortfeasors would have been entitled to mitigation of the damages payable by him had he been a single tortfeasor, but another of the tortfeasors would not have been so entitled, the first tortfeasor is to be entitled to the mitigation of damages in question. Hence, a newspaper or broadcasting station which could show that its state of mind in relation to the allegedly defamatory publication was less culpable than that of the journalist who wrote or spoke the offending words could plead that state of mind in mitigation of damages even though the journalist could not.

We are, accordingly, satisfied that the state of mind of the defendant should be retained as one of the factors to be taken into account.

8.6 We also expressed the view in the Consultation Paper that one of the factors listed should include the plaintiff's reputation. In this context, we referred in some detail to the rule in *Scott v Sampson*.¹ We pointed out that, while the general rule is that the defendant may lead evidence of the plaintiff's bad reputation in order to mitigate damages, it has been held in England in *Scott v Sampson* that only evidence of general bad reputation could be admitted: the defendant would not be entitled to lead evidence of particular acts of misconduct of the plaintiff, even though these might show that he deserved a bad reputation. We referred to the criticism of this rule by the Porter Committee, the Faulks Committee, the New Zealand Committee

1 8 QBD 491 (1882).

and the Australian Law Reform Commission. While we thought it possible that Irish law had never in fact adopted the restrictive rule in *Scott v Sampson*, we considered it advisable to clarify the law. Accordingly, we provisionally recommended a proposal similar to that favoured by Faulks. This would allow the defendant to introduce in mitigation of damages any matter, general or particular, relevant at the date of trial to that aspect of the plaintiff's reputation with which the defamation was concerned. There was no dissent from this suggestion which, we are satisfied, would be a useful reform.

8.7 So far as actual financial loss resulting from a defamation was concerned, while we accepted that it should be recoverable, we considered that the present law was somewhat too loose and ill-defined. We suggested that damages in respect of financial loss should be recoverable only where the plaintiff showed the extent of such damage and that the loss was clearly linked to the publication. This proposal also met with general acceptance.

8.8 We expressed concern in the Consultation Paper as to the growing importance of emotional distress as a factor in the assessment of awards of damages. While we accepted that it was reasonable that a plaintiff who had suffered an injury to reputation and injury to feelings should be entitled to recover under both headings, we felt that it was undesirable that the factor of emotional distress should dominate the assessment of damages. In particular, we were concerned that cases might arise in which no injury to reputation was in fact sustained, but the plaintiff nonetheless recovered damages for the hurt to his feelings. We accordingly invited views as to methods of controlling this factor so that it dominated neither the presentation of the case nor the award of damages.

8.9 RTE had expressed particular anxiety at this trend in their initial submission and have again stressed the importance of the problem, as they see it, in their submission following the publication of the Consultation Paper. They commented that:

"While the Commission has referred to the issue, and expressed some concern about it, the Commission has not conducted its own analysis of whether emotional stress does have the effect which we suspect it may have".

The Commission is, of course, in the difficulty in conducting any such analysis of having no real guidance as to the extent to which jury awards in specific cases have been distorted by an unduly sympathetic response to claims of emotional distress. The question was debated to some extent at the Seminar and a view directly contrary to that of RTE was expressed by at least one speaker, i.e. that, far from seeking to discourage the courts from awarding damages based on emotional injury, the law should, as it was put, "listen to what juries are saying" and accept that society today places a higher value on emotional distress than it did in bygone times.

8.10 A specific proposal by RTE was that not more than 30% of any award of damages should be attributable to emotional distress. While we initially expressed some enthusiasm for this suggestion in the Consultation Paper, on reconsideration we find it less attractive. Any percentage limitation of this nature is bound to be unacceptably arbitrary and, on balance, we have concluded that the preferable course is to continue to allow tribunals of fact to determine, as best they can, the damages which should be awarded in a particular case for emotional distress. We think that the anxieties of RTE in this area may be allayed to some extent if our proposal in the next

chapter, i.e. that the assessment of damages should be a matter for the judge alone, is implemented.

8.11 *We accordingly recommend that:*

- (1) *in making an award of general damages, the court should be required to have regard to the following factors:*
 - (a) *the nature and gravity of the defamatory assertion(s);*
 - (b) *the method of publication, including the durable or other nature thereof;*
 - (c)
 - (i) *the extent and circulation of the publication, subject to sub-paragraph (ii);*
 - (ii) *in a case involving words innocent on their face which become defamatory by reason of facts known only to some recipients of the publication containing the defamatory matter, the publication of the libel should be deemed proportionate to the number of recipients who have knowledge of these facts;*
 - (d) *the importance to the plaintiff of his reputation in the eyes of particular, or all, recipients of the publication;*
 - (e) *in a case involving the defence of truth where the defendant has proved the truth of only some of the allegations, the whole of the publication and the extent to which the defendant has proved the truth of its contents, irrespective of whether the plaintiff brings an action in respect of the publication in whole or in part;*
 - (f) *the extent to which the publication of the defamatory matter was caused or contributed to by the plaintiff;*
 - (g) *the reputation of the plaintiff at the time of publication;*
 - (h) *the terms of any correction order, declaratory order or injunction that the court has granted or proposes to grant.*
- (2) *It should be permissible for the defendant to introduce any matter, general or particular, relevant at the date of trial to that aspect of the plaintiff's reputation with which the defamation is concerned, in order to mitigate damages under (1)(g).*
- (3) *The court may award damages in respect of financial loss clearly linked with the publication.*

Punitive Damages

8.12 We pointed out in our Consultation Paper that three out of the four reform bodies of whose reports we are aware had recommended the abolition of punitive damages (or exemplary damages, to use the expression now more in favour with the courts and which we shall henceforth employ). The merits of the competing arguments were analysed in some detail, but we made no recommendations at that stage, contenting ourselves with inviting views as to whether this category of damages should be retained in our law of defamation. We did suggest, however, that, if the power to award exemplary damages were to be retained, it should be made subject to certain guidelines.

8.13 Since the publication of the Consultation Paper, the judgments of the Supreme Court in *Conway v Irish National Teachers' Organisation*² have become available. They make it clear that, in addition to the categories of cases stated by the House of Lords in *Rookes v Barnard*³ to be the only cases in which such awards could be made, an award may be made in Ireland where the intended consequence of the defendant's acts is the direct deprivation of the plaintiff of a constitutional right, in that case the right to free primary education. Obviously this does not mean that exemplary damages must be awarded in every case of defamation: as Finlay CJ noted:

"This does not mean that every wrong which constitutes the breach of a Constitutional right in any sense automatically attracts exemplary damages ... many torts, such as assault and defamation, constitute of necessity a breach of Constitutional rights, but there are many types of assault and many types of defamation as well in which no conceivable question of the awarding of exemplary damages could arise."

While it is clear from *Conway* that the common law in Ireland, as judicially developed in the light of the Constitution, allows the recovery of exemplary damages in some cases of defamation, the question remains as to whether such a law is mandated by the Constitution or whether it would be open to the Oireachtas by legislation to amend the common law position so as to provide that exemplary damages were not recoverable in any case of defamation.

8.14 It appears to us that, in the light of the wide "margin of appreciation" which appears to be allowed to both the legislature and the courts in framing a suitable law of defamation, it would be constitutionally permissible for the Oireachtas, as a matter of policy, to determine that exemplary damages should not be recoverable in defamation actions. At the same time, however, we cannot exclude the possibility that such a law might be found to be constitutionally invalid as failing sufficiently to vindicate, in the case of injustice done, the good name of the citizen.

It should also be noted that, if awards of exemplary damages were to be confined (at the very least) to cases in which there had been an intentional violation of the right to one's good name, a question would arise as to what constituted such an intentional violation. The intention of the defendant, in this context, could mean:

- (1) An intention to publish the defamatory matter.
- (2) An intention that the matter should be understood in a defamatory sense.
- (3) An intention that the matter, thought to be defamatory or not, should refer to the plaintiff.
- (4) An intention to publish matter which was known to be false.

8.15 It would seem that, if exemplary damages are to be retained, they should apply only in cases where the constitutional invasion of the plaintiff's good name was anticipated and intended by the defendant. It would follow

2 [1991] ILRM 491.

3 [1964] AC 1129.

that exemplary damages should only be awarded in cases where the defendant intended to publish matter to a person other than the plaintiff, knowing that such matter would be understood to refer to the plaintiff and that it would tend to injure the plaintiff's reputation and with knowledge of, or a reckless disregard of, its falsity.

8.16 The policy question remains as to whether awards of exemplary damages in defamation actions should be abolished completely. Not surprisingly, the submissions received on behalf of the media were unanimously in favour of their abolition. We do not find it necessary to rehearse the arguments which are fully set out in our Consultation Paper. In a situation where the arguments on both sides are relatively finely balanced, the constitutional considerations incline us to the view that the power to award exemplary damages should be retained.

We recommend that there should be an express statutory provision that exemplary damages may be awarded in cases of defamation but only where:

- (1) The defendant intended to publish matter to a person other than the plaintiff, knowing that such matter would be understood to refer to the plaintiff and that it would tend to injure the plaintiff's reputation and with knowledge, or a reckless disregard, of its falsity; and*
- (2) The conduct of the defendant has been high handed, insolent or vindictive or has exhibited a disregard for the plaintiff's rights so gross as clearly to warrant punishment over and above that which has been inflicted upon him by an award of compensatory damages.*

CHAPTER 9: REMEDIES OTHER THAN DAMAGES

Injunctions

9.1 We referred in the Consultation Paper to the traditional reluctance of courts to grant interlocutory injunctions in defamation cases. This reflects a belief that the imposition of prior restraints on free speech is undesirable and that it is in any event wrong to usurp in advance the function of the tribunal which eventually tries the case. We pointed out that other law reform bodies had taken the view that the present law should be maintained and that, accordingly, interlocutory injunctions should not be granted if (a) there is any doubt that the words are defamatory or (b) the defendant intends to plead justification, and probably any other recognised defence, and it is not clear that such defence is bound to fail.

However, we also drew attention to two matters which seem to require clarification. In some cases where the defendant said that he would plead justification, fair comment or privilege, this was held automatically to preclude the granting of an interlocutory injunction whereas in other cases the affidavits were examined in order to see if there were any grounds for the defence. We suggested that the latter course was preferable: an automatic refusal of an injunction merely because the defendant has stated his intention to plead one of these defences might lead to abuses of the rule.

9.2 There was no dissent from our provisional recommendation on this matter and *we accordingly recommend that where, in the course of proceedings for defamation, the plaintiff seeks an interlocutory injunction restraining publication of allegedly defamatory material:*

- (1) *the court should grant such an injunction only if the matter is clearly defamatory and any defence raised is likely to fail;*
- (2) *an injunction should not be refused merely because the defendant has stated his intention to plead a defence: the court should examine the defendant's affidavit before assessing what weight (if any) should be given to such an assertion.*

9.3 We had also suggested that, having regard to what apparently occurred in at least one case, there should be an express provision that no prohibition may be imposed upon the reporting of the fact of an injunction having being granted. It was generally accepted that clarification of the law was also

desirable in this area.

We accordingly recommend that there be a provision making it clear that, where an injunction is issued to restrain a publication, the court has no power to prohibit the reporting of the fact of the injunction.

Proceedings for Declaratory Judgment

9.4 We pointed out in the Consultation Paper that it seemed possible, under the existing law, that an action for a declaration alone could be brought in defamation proceedings. We also referred to the suggestion in the Boyle/McGonagle Report that it should be made clear that this relief could be claimed in proceedings by way of special summons, thus affording plaintiffs who were not seeking damages as expeditious means of redressing the harm done to their reputation. This in turn led to a discussion in the Paper of two detailed proposals in the United States for the introduction of new forms of declaratory proceedings. We then set out our own proposals for a form of declaratory proceedings which we thought might be appropriate in Irish conditions and invited comments in general and, in particular, as to how our suggested procedure might be improved. We would stress again the distinction between this suggested "proceeding for a declaratory judgment" and the remedy of a "declaratory judgment" which we also suggested in the Consultation Paper. The latter remedy would be available in the ordinary action in defamation, set down for trial in the ordinary way and in which all the normal defences are available. We envisaged proceedings for a declaratory judgment to be a different type of proceeding altogether, the main features being that it would be set down for early trial, that it would be limited to the issue of the falsity of the statement and that the declaratory judgment would be the only remedy available.

9.5 Our proposal was generally welcomed as being beneficial to both plaintiffs and defendants: it would enable plaintiffs who did not require to be compensated in damages to obtain speedy redress and it might benefit the media by moderating the present emphasis on damages as the only remedy. We had pointed out in the Consultation Paper that the Schumer Bill in the United States had proposed that defendants in actions brought by public officials or public figures arising out of media publications should have the right to convert an action for damages into one for a declaratory judgment only. We were of the view, however, that this suggestion went too far, since it would, in effect, in such cases end the plaintiff's entitlement to damages.

9.6 Some of the provisions we suggested were linked with our earlier recommendations that there should be a new defence of publication of a "timely and conspicuous retraction". At an earlier stage in this report, we have confirmed our provisional recommendations in this area and they are, accordingly, incorporated in our final proposals, which also adopt the same burden of proof in relation to falsity as we have recommended in relation to proceedings for defamation generally.

9.7 It was suggested to the Commission that the declaratory proceeding in its proposed form would not be sufficient to encourage plaintiffs to avail themselves of it, and that legislation should provide that if the plaintiff does not avail himself of this procedure, he should be asked to satisfy the court why not. Indeed one submission suggested that the defendant should have the option to call upon the plaintiff to institute declaratory proceedings, and that if this request is refused such failure should be a matter which a court can consider in mitigation of damages. We believe that these objections are based on a misunderstanding of the purpose of the proposed declaratory

proceedings. Our purpose in recommending the introduction of such proceedings is to benefit plaintiffs by giving them a greater choice of proceeding. Perhaps most plaintiffs will indeed prefer to opt for damages, but we believe that some plaintiffs will simply prefer to put the record straight speedily and waste no more time or money in pursuing a full defamation action. We stress that the purpose of the proposed form of proceedings is not to reduce the number of damages actions. If fewer plaintiffs pursue their right to damages, this is a bonus of the procedure. However, its main purpose is as stated above. Accordingly we reject the various suggestions urging the plaintiff to be encouraged in a stronger way to take declaratory proceedings and to be penalised if he does not.

9.8 Regarding the defences to be available in proceedings for declaratory judgment, it is clear that the defence of truth should be available, since the precise issue at the core of the proceedings is the truth or falsity of the matter. In our Consultation Paper we invited views as to whether privilege (absolute or qualified) should be a defence in such proceedings, but received no comment on this issue.

We note that, although a court hearing an ordinary defamation action will have at its disposal the remedies of damages, a correction order and a declaratory order, none of these remedies may be obtained by the plaintiff where the defendant successfully pleads absolute or qualified privilege. If a plaintiff cannot obtain a correction order/declaratory order in an ordinary defamation action where the matter was published on an occasion of privilege, we see no reason to allow a plaintiff to recover a declaratory judgment in declaratory proceedings where such a defence can be successfully maintained. While the possibility of an award of damages may well be the most inhibiting factor to persons contemplating the publication of a potentially defamatory statement, the deterrent effect of litigation of any sort and its attendant costs should not be underestimated. If the law regards an occasion as one on which it is desirable that persons should be free to publish statements without the inhibition of a possible defamation action, the defence of absolute and qualified privilege should apply as much to a claim for a declaratory judgment as it does to an ordinary claim for damages.

9.9 It would also appear reasonable that a defendant should be able to resist a declaratory judgment by relying on a defence of fair comment based on fact. It would seem inconsistent and anomalous that he should be entitled to resist the granting of such an order where the statement consisted solely of facts on the ground that the statements were true, but should be obliged to submit to such an order where his statement consisted of a comment supported by facts which he could demonstrate to be true.

9.10 We invited views in our Consultation Paper as to whether the court should have power, in declaratory proceedings, to order publication of the declaratory judgment. We received no comment on this issue. We had said that we did not think that such a power was objectionable on the ground of unjustifiable interference with the editorial process. However, after further consideration, we agree with the view of Franklin set out in our Consultation Paper that it is sufficient if the plaintiff emerges with the judicial declaration which he can show to various parties, combined with the probability that other media organs will report the fact of the judgment. Accordingly, we do not recommend that the court should have the power to order publication of the judgment in an action for a declaratory judgment.

9.11 *We accordingly recommend the introduction of proceedings for declaratory judgment which should have the features set out below.*

Action for Declaratory Judgment that Statement was False and Defamatory**(a) Cause of action:**

- (1) *Any person who is the subject of any allegedly defamatory publication may bring an action for a declaratory judgment that the statement was false and defamatory.*
- (2) *No damages may be awarded in such an action.*

(b) Burden of proof:

The burden of proof as to publication and the defamatory nature of the publication and its falsity shall be on the plaintiff in the same manner and to the same extent as in any other action for defamation.

(c) Defences:

Privileges existing at common law, by statute and by virtue of the Constitution and the defences of truth and comment based on fact shall apply to the action.

(d) Bar to certain claims:

A plaintiff who brings an action for a declaratory judgment shall be barred from asserting any other claim or cause of action arising out of the same publication.

(e) Limitation period:

- (1) *The action must be commenced within one year of the date of publication.*
- (2) *The provisions as to the extension or postponement of limitation periods in cases of disability, fraud and mistake contained in the Statute of Limitations 1957 shall apply to the limitation period prescribed in (1).*

(f) *It shall be a complete defence to an action under this section that the defendant published a timely and conspicuous retraction before the action was commenced in accordance with the terms of the relevant provision (on timely and conspicuous retractions).***(g) *The procedure shall be by way of special summons in the High Court and by way of motion in the Circuit Court, in each case grounded on an affidavit.*****Correction Orders and Declaratory Orders**

9.12 We had also proposed in the Consultation Paper that, in every case where a defendant failed to establish the truth of a defamatory allegation, the court should have power to order the defendant to publish a correction of the mistaken impression caused by his publication.

9.13 It was an essential feature of our proposal that the correction order would be available as an additional remedy and not in substitution for damages. In cases where there was no special damage and the defendant met a claim for general damages with a successful defence of reasonable care, it would be the only remedy. However, where the defendant did not raise

a successful defence of reasonable care or where the plaintiff was entitled to special damages, it would be an additional remedy. We also said that, in awarding damages, the court should be required to take into account the likely effect of the correction and compensate the plaintiff for any residual damage to his reputation only.

9.14 We also pointed out in the Consultation Paper that the essence of a correction order was that it was directed at a particular defendant and required that defendant to publish particular material, i.e. a correction of the defamatory matter. We appreciate that, in certain cases, a correction order may not be appropriate, because the defendant is not a press or media organ. We suggested the remedy of the declaratory order for situations where the plaintiff wished to obtain a more general order of the court stating simply that the matter is false. For example, an employee who had been defamed by a fellow employee could present this judgment to his employer, or to a prospective employer, or could use it in proceedings in respect of unfair dismissal. A submission from the Irish Book Publishers expressed concern at the possibility of a correction order being directed at them and suggested that in respect of defamatory matter contained in a book, the correction should be published in a daily or Sunday newspaper. We expect, however, that a declaratory order and not a correction order would be made in respect of book publishers precisely because of the unsuitability of correction orders to this form of publication. We have considered the possibility of limiting correction orders to media organs, to eliminate the concern of the book publishers. However, we feel that it is better left to the Court to decide which remedy is suitable to the particular case. For example, if defamatory matter was published in a magazine, such as a student magazine, which has a limited circulation, a correction order might be appropriate but would not be available if this remedy was confined to the newspapers and broadcasting stations.

9.15 Our suggestions with respect to the correction order and the declaratory order were generally welcomed as being of potential benefit to both plaintiffs and defendants. *We accordingly recommend a statutory provision in the following terms:*

- (1) *The Court shall have the power to award a declaratory order or a correction order stating the matter to be false and defamatory in any case where the false and defamatory nature of the statement is established.*
- (2) *Where the Court makes an order for the correction of matter, the Court may specify the content of the correction and may give directions concerning the time, form, extent and manner of publication of the correction.*
- (3) *Unless the plaintiff otherwise requests, directions given by the Court in accordance with sub-section (2) shall ensure, as far as is practicable, that the correction will reach the persons who were recipients of the matter to which the correction relates.*
- (4) *In a defamation action arising out of the publication of a comment, the Court may make an order for the correction of the defamatory comment and any allegation of fact expressly or impliedly referred to in the published matter as a basis for the comment the truth of which is not established by the defendant or admitted by the plaintiff.*

9.16 We note that because of our recommendation that reasonable care is a defence to a claim for general damages, the correction order or declaratory

order will be the sole remedy available to the plaintiff where the defendant has succeeded in a defence of reasonable care and the plaintiff has suffered no special damage. The correction order or declaratory order will be an additional remedy where the defendant has not raised or is unsuccessful in a defence of reasonable care or the plaintiff is entitled to special damages.

9.17 When we discussed proceedings for declaratory judgment earlier in this Report, we noted that an issue arose as to whether the Court should have the power to order publication of the judgment.¹ We decided against such a provision. The same considerations would seem to apply to the publication of a declaratory order and we do not recommend that the court should have power to order its publication.

¹ See para 9.10 above.

CHAPTER 10: THE ROLE OF JURIES AND THE JURISDICTION OF THE COURTS

Juries

10.1 In the Consultation Paper, we considered in detail the role at present played by juries in defamation actions and the extent, if any, to which it should be modified or even abolished. Our provisional conclusion was that juries played a valuable role in the trial of such actions. The major criticism which could be advanced in relation to their decisions was their tendency to award disproportionately high damages. While we were satisfied that this tendency was not nearly so marked as it was in England, we felt that it was sufficiently serious to justify a change in this area. We accordingly proposed that, while juries should continue to decide the issue as to whether the words complained of were defamatory and should also determine the level of damages, i.e. whether they were to be nominal, compensatory or exemplary, the actual amount should be determined by the judge.

10.2 This proposal was the subject of much discussion following the publication of the Consultation Paper but, while many views were expressed, no clear consensus could be said to emerge. Support was voiced for the retention of the present system, for the abolition of juries in their entirety in this area, for introducing controls on the amounts which juries could award, i.e. by enabling the judge to fix a maximum and minimum figure for damages himself, and for our own proposal. Some of those who favoured our proposal were, however, unhappy with the suggestion that juries should determine the category of damages on the grounds that this would be difficult to operate in practice.

10.3 Having reviewed all the arguments again, we remain of the view that the case has not been established for abolishing the role of juries in defamation actions. It is a valuable feature of the present system that the ultimate decision as to whether the words are in fact defamatory is decided by a group of lay people rather than a judge.

The difficult question remains as to whether the assessment of damages should also continue to be the exclusive province of the jury. While we have referred to the criticisms which have been advanced of grossly disproportionate awards by juries, it was also strongly represented to us by some practitioners that the problem was not of anything like the magnitude suggested by the media. It was argued that there was nothing to prevent aggrieved defendants from appealing to the Supreme Court in such cases and

hence no reason to suppose that the present law was the source of any avoidable injustice to defendants.

We recognise the cogency of these arguments. However, it seems to us unsatisfactory in principle to defend the present law under which disproportionate awards are made with a significant degree of frequency on the ground that the resulting injustice can always be remedied on appeal. There is also, of course, the delay involved from the defendant's point of view in processing an appeal to the Supreme Court and the resultant pressure on defendants to settle for what is still an excessive amount. (We recognise that this latter problem may be alleviated to some extent by the establishment of the proposed Court of Civil Appeal). There is also a further factor of importance, however: the extensive publicity given to extravagant awards of damages by juries in defamation actions encourages a climate in which prospective plaintiffs are less inclined to compromise cases, even where the defamatory allegation was relatively insignificant. We remain of the view that this is not a satisfactory state of affairs from anyone's point of view. It is, of course, the case that we cannot be certain that transferring this function to judges will remove the danger of seriously excessive awards. But we think the problem has to be approached on the assumption, which appears reasonable to us, that judges by their training and experience are in a better position to arrive at a sum which bears an appropriate proportion to the seriousness of the libel or slander.

We considered but rejected alternative methods of introducing some degree of control in the assessment of damages, as, for example, by allowing the judge to indicate a maximum and minimum level of damages. If the risk of grossly disproportionate assessments of damages is sufficiently serious to warrant that degree of control over jury verdicts, then we think the more logical and sensible course is to transfer the function of assessing damages to the judge.

It was also suggested that some of the difficulties at present being experienced stem from the composition of juries. Proposals were made to us as to how this might be remedied, as, for example, by ensuring that employees do not suffer loss of earnings while serving on juries. However, if there are benefits to be gained by such changes in the present law as to juries, they should extend to juries in all cases, civil and criminal. They are thus clearly beyond the terms of reference of our present enquiry.

In the result, we remain of the view that the function of assessing damages should be transferred from juries to judges.

10.4 We are satisfied, however, that our provisional recommendation that the juries should continue to determine the category of damages, i.e. whether they are to be nominal, compensatory or exemplary, could lead to greater difficulties than we had allowed for. We accept that the distinction between the categories of damages is not easy to draw and that the decisions of the courts reflect continuing difficulties in this area. There is the additional consideration that the boundaries are particularly difficult to draw in the area of defamation: many awards in cases where exemplary damages, strictly speaking, should not have been awarded, will include a punitive element. Complications (not necessarily, of course, insoluble) could also arise where appeals were taken both from the categorisation by the jury and the actual assessment by the judge.

Having re-considered our provisional recommendation in this area, we have concluded that it would probably create more problems than it would solve.

We would, accordingly, propose that the change should be simpler in its nature and that the legislation should provide that the assessment of damages should be a matter for the judge alone. To this, we would add only one qualification. In a case where the jury concluded that the plaintiff had indeed been defamed, but that he had no reputation worthy of vindication, they can, under the present law, reflect that finding by an award of nominal damages. If our recommendation were simply confined to the transfer of the function of assessing damages to judges, a difficulty could arise in cases of this nature. The jury's finding on the issue of liability would not, of itself, indicate whether they considered the plaintiff had no reputation worth vindicating. We would therefore propose that the jury, in addition to determining the issue of liability, should also determine whether, in their view, there should be an award of nominal damages only.

We would also confirm our provisional recommendation, which met with no dissent, that the law should provide expressly, for the avoidance of doubt, that the Supreme Court may in defamation as in other civil actions assess the damages itself in the event of an appeal.

10.5 We also provisionally recommended in the Consultation Paper that the same procedure should apply in actions for defamation brought in the Circuit Court. We think it is anomalous and unsatisfactory that cases brought in the Circuit Court should be heard by a judge sitting alone and this will be seriously exacerbated with the increase in the jurisdiction of the Circuit Court from £15,000 to £30,000.¹ It was, however, pointed out at the Seminar that a problem could arise in relation to appeals from defamation actions in the Circuit Court. Under the present law, this would take the form of a rehearing, so that the verdict of a jury on liability could be reversed on appeal by a judge sitting without a jury. This would be a highly unsatisfactory and anomalous state of affairs and, accordingly, we would be in favour of a provision that, in actions for defamation, the appeal should be in all respects the same as an appeal from the High Court. This would mean that the appeal would be by way of motion to the Supreme Court based on a transcript of the hearing rather than by way of a re-hearing. We would also recommend that, in the event of a new court of civil appeal being established to hear appeals from the High Court, the appeal in defamation actions from the Circuit Court should be to that court.

10.6 *We recommend that:*

- (1) *In the High Court, the parties to defamation actions should continue to have the right to have the issues of fact other than the assessment of damages determined by a jury;*
- (2) *the damages in such actions should be assessed by the judge, but the jury should be entitled to include in their verdict a finding that the plaintiff is entitled to nominal damages only;*
- (3) *The similar right formerly enjoyed by parties in the Circuit Court to have such issues determined by a jury should be restored, subject to the same qualification as to the assessment of damages;*
- (4) *The appeal from the verdict in a defamation action in the Circuit Court should be by way of motion to the Supreme Court rather than by way*

¹ Courts Act 1999, s2

of re-hearing in the High Court or by way of motion to the new Court of Civil Appeal in the event of that court being established;

- (5) *For the removal of doubt, it should be expressly provided that the Supreme Court may in actions for defamation as in other civil actions assess the damages themselves in the event of an appeal.*

Jurisdiction of the Courts

10.7 Allied to the issue of the role of juries in defamation actions is the question of the jurisdiction of the courts to try defamation actions. The present jurisdiction of the courts in defamation actions is as follows.

10.8 The High Court has unlimited jurisdiction to hear defamation actions and may award damages up to any amount. Defamation actions are tried in the High Court with a jury. As was explained in the Consultation Paper, juries were abolished in the High Court in most civil actions by the *Courts Act 1988*, but were retained for a small number of actions, defamation included.

The Circuit Court has jurisdiction to hear defamation actions where the amount of damages claimed does not exceed £30,000. Defamation actions in the Circuit Court are tried by a judge alone. Section 6 of the *Courts Act 1971* abolished jury trials in civil actions in the Circuit Court.

10.9 The District Court has no jurisdiction to try defamation actions. Section 77.A (ii) of the *Courts of Justice Act 1924* provided that the District Court had jurisdiction in tort except in certain cases: slander, libel, criminal conversation, seduction, slander of title, malicious prosecution, and false imprisonment. These exceptions have been carried through in successive enactments. Section 33(1) of the *Courts (Supplemental Provisions) Act 1961* transferred to the District Court all jurisdiction which by virtue of, *inter alia* section 77 of the Act of 1924, was, immediately before the operative date, vested in or capable of being exercised by the existing District Court. Section 7 of the *Courts Act 1971* amended section 77 of the 1924 Act but re-enacted the exclusion of District Court jurisdiction in the case of libel, slander, criminal conversation and the other exceptions referred to above. Again, section 6 of the *Courts Act 1981* amended section 77 of the 1924 Act but maintained these exceptions.

10.10 An editorial in *The Irish Law Times* of April 1991 suggested that the District Court should be given jurisdiction to try defamation actions. The monetary jurisdiction of the District Court in tort actions has now been increased to £5,000.² It is quite possible that persons would wish to bring defamation actions seeking to recover less than £5,000. Thus, while the exclusion of defamation actions from the jurisdiction of the Circuit Court was less important when the jurisdiction of the District Court was at £2,500, the exclusion has now become more significant.

10.11 Why were slander and libel actions excluded from the jurisdiction of the District Court in the first place? The point does not appear to have been expressly referred to in the Dail Debates concerning section 77 of the *Courts of Justice Act 1924*. However, it seems likely that the reason for the exclusion of defamation and other specific torts was that these torts were felt

² *Courts Act, 1991*, s4.

to be suitable for jury trial only. This was certainly a view expressed in the Dail Debates on the *Courts Act 1971* in opposition to the abolition of the jury in civil actions in the Circuit Court.³ The answer given was that if a defamation plaintiff wanted a jury trial, he could proceed in the High Court. It may seem anomalous that juries were removed from defamation actions in the Circuit Court in 1971, and yet the District Court was never given jurisdiction over small defamation claims. However, it may have been thought that defamation claims for less than the District Court monetary limit were unlikely.

10.12 With the increase of the District Court monetary jurisdiction, it is necessary to consider whether the District Court should be entitled to hear defamation actions in the future. Earlier in this chapter we came to the conclusion that juries should be retained in defamation cases in order to determine whether the words complained of were defamatory and we recommended not only their retention in the High Court (albeit with a more limited function) but also the re-introduction of the jury in Circuit Court defamation actions. Since jury trial is not feasible in the District Court, we would not favour a proposal that would allow defamation actions to be tried in the District Court. *We therefore recommend no change in the law whereby defamation actions are excluded from the jurisdiction of the District Court.*

3 The Dail Debates, vol 256, col 1791 *et seq.*

CHAPTER 11: RIGHT OF REPLY

11.1 We discussed at some length in the Consultation Paper the question as to whether a legally enforceable "right of reply" should be introduced into Irish law. We pointed out that such a right existed in French and German law and had been the subject of discussion in England and the United States. (The Boyle-McGonagle submission draws attention to similar procedures in Belgium and Greece). We also referred to the existing practice under which some Irish newspapers offer a right of reply.

We should have referred in the Consultation Paper, in this context, to s8 of the *Broadcasting Act 1990*. This provision, which implements in part in Ireland Article 23 of the *European Community Directive on Broadcasting* (89/552) and the *Council of Europe Convention on Transfrontier Television*, enables a complaint to be made to the Broadcasting Complaints Commission that:

"On a specified occasion an assertion was made in a broadcast of inaccurate facts or information in relation to that person which constituted an attack on that person's honour or reputation".

The section also provides that the RTE Authority shall:

"Unless the Commission considers it inappropriate, broadcast the Commission's decision on every complaint considered by the Commission in which the Commission found in favour, in whole or in part, of the complainant, including any correction of inaccurate facts or information relating to an individual arising from a complaint under sub-section (1)(d) of this section, at a time and in a manner corresponding to that in which the offending broadcast took place".

This, of course, is more akin to our proposed correction orders, with the difference that it is made at the instance of the Broadcasting Complaints Commission rather than the Court.

11.2 We invited views as to whether there should be a statutory right of reply available to the media generally. Among the features we suggested should be included, if such a provision were thought desirable, were the following.

- (1) the right of reply could be available to a person named or designated in a publication. There would be no requirement that the references to the person be defamatory.
- (2) The right of reply could be available in respect of statements by the media only.
- (3) The reply would require to be printed or broadcast within a specified time and there would be provisions as to its prominence and length.
- (4) The author of the reply would be answerable to defamation proceedings, but the organ carrying the reply would not be liable for a statement which it was obliged to publish.
- (5) The right of reply would be suspended during elections, whether parliamentary, local or presidential.
- (6) The right of reply should extend to statements of opinion.

11.3 The suggestion met with a mixed response. RTE and the Provincial Newspapers Association of Ireland had no objection to the idea in principle, but pointed out a number of practical difficulties that would have to be met and safeguards that would be required. (RTE were presumably mindful of the fact that something akin to a right of reply already existed in their case in the form of s8 of the 1990 Act). The National Newspapers of Ireland were critical of the proposal, suggesting that the additional remedies outlined in Chapter 9 should provide sufficient protection to an individual concerned about a misstatement of facts. They argued that a statutory right of reply would be inflexible and would lead to enormous difficulties in practice, since newspapers would be obliged (within a very tight time scale) to make determinations as to whether the words complained of were statements of fact or comment and whether the alleged misstatement was material. They also said that our proposal to extend a statutory right of reply to statements of opinion would be unworkable in practice, pointing out that, if the right had existed during the recent referenda on abortion and divorce, there would not have been sufficient space to print the replies to opinions expressed during the heat of those debates. The Boyle-McGonagle submission also made the important point that the right to reply exists in countries where damages are not generally considered an appropriate remedy for defamation.

11.4 It will be observed that our proposal was not confined to defamatory statements. This was because experience in France had demonstrated that, if the right of reply is confined to defamatory statements, the remedy becomes of little value. The tendency in France was to contest every demand for a reply on the ground that the statement was not capable of causing harm and the resulting delay deprived the remedy of the speed which is crucial to its efficacy. However, to recommend its introduction in the case of all statements of fact or opinion, irrespective of whether they were defamatory, would go beyond the scope of the Attorney General's reference. We have also misgivings as to whether it would be practicable in Irish conditions and, even if practical, whether it would be an unnecessary constraint on the media. While we are far from saying that the proposal is without merit, we think that, along with proposals such as those which have been advanced for the establishment of an effective press council and/or a press Ombudsman, it is not strictly within the field of law reform as such. Accordingly, we make no positive recommendation in this area.

CHAPTER 12: IDENTITY OF PARTIES

Public Figure Plaintiffs

12.1 We discussed at some length in the Consultation Paper the US doctrine under which a plaintiff who is a public official or public figure must meet a significantly higher burden of proof than a private person. Such plaintiffs must establish that the material was published with actual knowledge of, or recklessness as to, its falsity. We also discussed the relevant law in a number of other jurisdictions and pointed out that, as in Ireland, a distinction was drawn between public officials and figures on the one hand and private persons on the other to the extent that, for example, a defence of fair comment on matters of public interest was recognised. We concluded, however, that, while the widest possible range of criticism of public officials and public figures is desirable, statements of fact contribute meaningfully to public debate only if they are true. As one US writer put it:

"If it is important for the public to know that Jones has been a faithless public official, it is equally important for the public to know that Jones has been a diligent public official falsely accused by the press".¹

Hence, we concluded that our law should not draw the distinction now reflected in US law in this area. We noted that this was consistent with our recommendation that the exercise of reasonable care by the defendant should exclude a claim for general damages. The overall result would be that a false assertion of fact about a public figure (as with any other) will be required to be *corrected* by the defendant who will in addition have to pay any special damages which that figure has incurred, but that general damages may only be recovered if the defendant additionally failed to exercise reasonable care.

12.2 The special burden of proof imposed on public figure plaintiffs in the US continued to attract support after the publication of the Consultation Paper, e.g. in the submissions received on behalf of the Irish Book Publishers and the Provincial Newspapers Association of Ireland. On the other hand, the Boyle\McGonagle submission suggested that the US distinction might not

¹ Epstein, *Was New York Times v Sullivan Wrong?* 53 U Chicago L Rev 782, at 813 (1986).

be required if the defence of fair comment was refashioned to ensure that it achieves its purpose in practice.

12.3 Having weighed the arguments again carefully, we remain of the view that there should be no change in the law based on a distinction between "public" and "private" figures, either in respect of factual or opinion statements. We consider that the reforms we have already proposed and which will result in a broadening of the defence of fair comment and the introduction of a new defence of reasonable care will allow sufficient latitude for discussion of all matters of public interest.

Group Plaintiffs

12.4 Under existing law, no member of a group or class can bring an action in respect of defamatory statements made about the group unless he can establish that he was specifically referred to. The circumstances or words of the statement may indicate a reference to the plaintiff. Furthermore where the reference is to a limited group the plaintiff may be able to maintain an action.

12.5 We referred in the Consultation Paper to the discussion in Australia as to whether some form of relief should be afforded to groups who had been defamed. We mentioned the concern expressed by the Law Reform Commission in that jurisdiction as to the possibility of the courts being used as a forum for interracial and interreligious feuding. They undoubtedly envisaged that most problems in the area would arise in the context of religious or racist statements. We suggested that there might not be any problem in this area in Ireland and, accordingly, recommended no substantive change in the law, although we felt it was desirable that the common law position, as we understood it to be, should be made clear by statute. Our view that no further change is necessary in this area is reinforced by the provisions of the *Prohibition of Incitement to Hatred Act 1989*.

12.6 We think that for the purpose of clarifying the law the best model is afforded by the United States Restatement (Second) of Torts. *We recommend that there should be a provision that:-*

One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it, but only if,

- (a) *the group or class is so small that the matter can reasonably be understood to refer to the member, or*
- (b) *the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to the member.*

Defamation of the Dead

12.7 We had provisionally recommended in our Consultation Paper that there should be a new cause of action in respect of defamatory statements made about a person who is dead at the time of publication. We thought that this should vest in the close relatives and, perhaps, the personal representative of the deceased. We envisaged that damages should not be available and that there should be a limitation period of three years from the death of the person defamed.

12.8 This proposal attracted strong criticism from the National Newspapers of Ireland and RTE. The principal concern of the media was, of course, the

inhibiting effects that such a change in the law would have on the publication of material of legitimate interest concerning recently deceased public figures and which would not be alleviated by the imposition of a limitation period, however short. In turn, it was urged, this would mean that historians would be deprived of valuable material.

12.9 These and other critics also argued that our proposed reform in the law would mean an extension of the law of defamation into an area where it had no proper role to play. On this view, the purpose of the law of defamation was to protect and vindicate personal reputations, whereas the function of the proposed new cause of action would be to alleviate the mental distress caused to relatives and friends of the deceased.

12.10 The practical difficulties that could arise were also stressed by critics of the proposal.² It would no doubt be possible to define what was meant by the term "relatives". But it would be difficult, it was urged, to provide for any disagreement among the members of a family as to whether proceedings should be brought. Some might consider, for example, that to institute proceedings would cause even greater distress and anxiety and might result in more publicity of an unpleasant nature. If, on the other hand, they seek to avoid these unpleasant consequences by not taking proceedings, they may in future years feel guilty because they have not taken the opportunity to restore the deceased's reputation.

12.11 As against these criticisms, we received one submission from relatives of a deceased public figure saying that they had been caused distress by the publication of an article about him at the time of his death and complaining that the law left them with no remedy against the newspaper concerned.

12.12 We remain of the view that it would be desirable for the law to afford some measure of relief to families whose deceased members are grossly defamed. We acknowledge that an argument can be advanced that, in the case of public figures, to introduce such a law might have an unduly inhibiting effect on the media in providing a balanced appreciation of such people with possibly deleterious consequences for the writing of contemporary history. There is, however, as we have repeatedly stressed, no public interest in the publication of false statements and the absence of any remedy for the family is particularly hard to defend where the deceased was not a public figure.

12.13 After carefully weighing the arguments, we have concluded that the legal system should be capable of affording some redress in circumstances where a person's reputation is destroyed by defamatory falsehoods as soon as he is dead. We are not convinced that the recording of contemporary history would be unduly inhibited by such a proposal, provided that a relatively short time limit is prescribed within which the proceedings must be brought. The reason for providing a new cause of action is, however, to enable the reputation of the deceased to be restored and not to compensate the family for their wounded feelings which, we accept, should not be an objective of the law of defamation. Accordingly, we do not think that damages should be awarded in such a case and that the remedy should be a declaratory order and, where appropriate, an injunction.

² See CR Symmons, *New Remedies Against Libel of the Dead? A Look at the Recommendations of the Faulks Committee on Defamation*. 18 U W Ontario L Rev 521 (1980).

There may, of course, be divided views among the relatives of a deceased person as to whether proceedings should be instituted. If, however, the right to institute proceedings is vested exclusively in the personal representative of the deceased, these difficulties are largely avoided. The personal representative should, no doubt, consult with members of the family before instituting the proceedings and, in the event of any serious dispute as to their desirability, would almost certainly refrain from bringing the action. Under the present law, personal representatives are afforded a degree of discretion in the manner in which they conduct the administration of the estate of a deceased person and we do not think it would be unduly extending the law to provide that they should have a discretion in the area now under consideration. (It appears to be assumed, incidentally in discussions of this topic that enabling defamation proceedings to be brought without the authority or consent of the defamed person and in circumstances where he or she did not even know of the defamation would be a radical departure. This can, however, happen under the existing law which has not, so far as we are aware, been seriously criticised. Thus, in the case of persons under disability, i.e. minors and those of unsound mind, defamation proceedings may be instituted by the guardian or committee of the person concerned).

The views so far expressed are those of the majority of the Commission. One member, Ms Gaffney, considers that the recommendation would constitute an unjustifiable inhibition on the assessment of the careers of the recently deceased and, to the extent that it is desirable, would be more appropriately dealt with by an evolving law of privacy rather than by changes in the law of defamation, the principles of which do not easily accommodate an action in respect of a dead person's reputation.

We recommend that:

- (1) *There should be a new cause of action in respect of defamatory statements made about a person who is dead at the time of publication;*
- (2) *The right to institute such proceedings should be vested solely in the personal representative of the deceased who should, however, be under a statutory obligation to consult the immediate family of the deceased, i.e. spouse, children, parents, brothers and sisters, before the proceedings are instituted;*
- (3) *The period of limitation within which proceedings must be instituted should be 3 years from the date of death of the allegedly defamed person;*
- (4) *The only remedy available should be a declaratory order and, where appropriate, an injunction.*

The Libel-Proof Plaintiff Doctrine

12.14 We had discussed in the Consultation Paper the possibility of introducing a new procedure which has been developed by the United States courts by way of response to the increasing length, cost and complexity of libel trials. This permits the court to dismiss a libel action where it appears that a plaintiff's reputation has not been significantly harmed and arises in two categories of cases. The first is where the judge determines that the plaintiff's reputation is already so tarnished that any harm caused by the publication challenged would lead to nominal damages only. The second category is where the judge determines that unchallenged statements within an article or group of statements challenged damage a plaintiff's reputation to such a degree that the additional harm caused by the challenged statement

would lead only to nominal damages. We were not in favour of the proposed change, since we were of the view that, however frail a plaintiff's case might appear, he was at least entitled to a trial. Cases falling into the second category, i.e. where the plaintiff challenges part only of an article or group of statements, are dealt with in our proposals in relation to partial justification. The doctrine attracted no support in any of the submissions we received and, accordingly, we adhere to our provisional recommendation that it should not be adopted in this jurisdiction.

Corporate Bodies

12.15 We pointed out in the Consultation Paper that trading and non-trading corporations appear to be capable of suing in defamation in respect of defamatory allegations concerning their business capacity (trading corporations) and more general allegations (trading and non-trading corporations), including treatment of employees and sponsorship of public events.

12.16 We observed that the existing law had been criticised. Some commentators suggested that, in the case of trading corporations, an action for defamation should lie only in respect of proved financial loss and that a similar principle should apply to government departments and trade unions. Others, more radically, proposed that the right to sue be withdrawn in its entirety from all corporate bodies. It was urged that such bodies were already afforded an adequate remedy in the form of an action for injurious falsehood and, in any event, as public bodies were legitimate targets for criticism and comment. (We pointed out in this latter context, however, that it did not follow that they should also be defamed with impunity).

12.17 We rejected the proposal that the right to sue should be completely withdrawn from corporate bodies since we felt that, although the type of reputation which they enjoyed was somewhat different from that belonging to an individual, they undoubtedly did have reputations which could be unjustly assailed. Nor were we disposed to favour the less radical proposal, i.e. that such actions should be restricted to claims for financial loss. We considered that, in many cases, there would in fact be harm caused by a defamatory statement, but one which it might be almost impossible to prove. Thus, the financial loss sustained by a defamed company might be as a result of individuals or bodies deciding not to trade or associate themselves with it, which is notoriously a difficult type of loss to prove. In the result, we recommended no change in the law respecting corporate and quasi-corporate plaintiffs. We did, however, provisionally recommend that it be set out in statutory form that all such bodies have a cause of action in defamation irrespective of whether financial loss is consequent upon the publication or was likely to become consequent upon the publication.

12.18 The National Newspapers of Ireland supported the proposal for the abolition in its entirety of the right of action, which had been put forward earlier in the Boyle/McGonagle report on *Press Freedom and Libel*. While conceding that such actions were rare, they expressed concern as to the confusion which they claimed was present in the minds of juries as to damages when companies were co-plaintiffs with individual directors. They suggested that this gave such plaintiffs an unfair advantage in that sympathy is generated for the individuals while the issue of damages becomes confused in the minds of the jurors by the introduction of evidence alleging enormous financial loss on the part of the company.

12.19 We have no empirical evidence as to whether this latter contention is correct. Given, however, that the number of actions in which it arises is

comparatively few, we doubt if the law is in any real need of reform. In any event, the confusion suggested to exist will be dispelled if our proposals as to the assessment of damages by judges alone are implemented.

12.20 We accordingly recommend that there should be no change in the law in this area. *We recommend that there be a statutory provision, for the avoidance of doubt, that all corporate bodies have a cause of action in defamation irrespective of whether financial loss is consequent upon the publication or was likely to be consequent upon the publication.*

12.21 We also invited views as to the broad immunity conferred on trade unions by s4 of the *Trade Disputes Act 1906*. However, we had unfortunately overlooked the fact that the 1906 Act had been repealed by the *Industrial Relations Act 1990*, s13 of which contains a restricted immunity from suit. The immunity in tort now only arises, in effect, where the tortious act is committed by or on behalf of the union in contemplation of furtherance of a trade dispute or in the reasonable belief that it was so committed. There is, accordingly, no necessity for any recommendation by us in this area.

Media Defendants

12.22 We discussed in the Consultation Paper the question as to whether the law should draw a distinction between media and other defendants in terms of the defences which may be relied on. We pointed out that, while in general no such distinction is drawn by the present law, there is one exception, i.e. defences provided by ss18 and 24 of the *Defamation Act 1961* in respect of the reporting of court proceedings and other matters. These latter defences may only be availed of by media organs.

12.23 We summarise the arguments in favour of having such a defence as follows. First, it may be argued that Article 40.6.1° of the Constitution either expressly or by implication recognises a wider right of expression for the media than is available to other citizens. We do not agree, however, with this view of the constitutional position.³ Secondly, since it is the function of the media to promote widespread communication of information, restrictions on its freedom carry more implications for democracy than do restrictions on individual speakers. In reply to this argument, we suggested that the fact that the media played such a vital role in democracy was precisely the reason for ensuring that their statements are trustworthy. We referred to the expansion of the defence of comment which we had proposed and the increased protection which would result to media defendants, as well as others, from the introduction of such a reform. We concluded that there was no case for giving the media a special position in relation to statements of fact.

12.24 While some, including representatives of the media, took issue with our view as to the Constitutional position, we remain of the view that the need for a special media defence has not been established. We emphasise again at this point the benefits which the media will derive from the other proposals in this report, particularly in relation to the defence of comment and the new defence of reasonable care.

Distributors and Printers

12.25 We summarised the present legal position of distributors as follows

3 See Appendix A. para 32.

in the Consultation Paper. Such persons may escape liability provided they show:

- (1) that they had no knowledge of the defamatory matter contained in the material published;
- (2) that there was nothing in the surrounding circumstances which should have led them to suppose that it contained defamatory matter; and
- (3) that there was no negligence on their part in failing to detect the defamatory matter.

We indicated that the last proposition was wide enough to cover the other two and that, accordingly, a disseminator of defamatory material was protected if he could prove that he was not negligent in failing to detect the defamatory matter.

12.26 We considered the attitude of other law reform bodies to the present state of the law. The Faulks Committee had rejected the view that the burden which the law now imposes upon distributors is either unduly onerous or unduly expensive. That committee had, however, recommended that the defence of innocent dissemination, at present not available to printers, should be extended to the latter category. They also considered that different considerations applied to booksellers as distinct from other distributors and recommended that where a plaintiff has either expressly or impliedly requested a defendant to withhold, withdraw or correct a book, he should not be entitled to recover additional damages on the ground that a defendant continued to publish the book, unless the plaintiff had given an undertaking to compensate the defendant for any loss incurred in complying with the request, should the action fail or be struck out.

The New Zealand committee adopted a somewhat similar approach, save that they did not draw the distinction drawn between booksellers and others by Faulks.

The Australian Law Reform Commission went further than the other two bodies. They recommended that a complete defence should be afforded to all distributors and printers, without any requirement of negating negligence on their part. They recommended, however, that the person claiming to be defamed should have the right to obtain an injunction restraining publication if he can satisfy the judge that the matter is defamatory and otherwise indefensible.

12.27 Our provisional recommendation in the Consultation Paper went further still. In the case of printers, we took the view that, in the light of the speed of modern printing methods and of the deadlines which it is necessary for printers to meet in order to remain viable in a competitive market, a reasonable care defence would not benefit this category. While we acknowledged that distributors did not operate under the same time constraints, we suggested that they were in a similar position to printers in the sense that they played no role in determining the content of the publication with which they are dealing. We considered, but rejected, the Australian proposal which would enable the plaintiff to obtain an injunction restraining a printer or distributor, while affording them in all other respects an absolute immunity from defamation actions.

12.28 Our proposals evoked little, if any, dissent and attracted much support. In particular, the Irish Book Publishers pointed to the difficulties involved in

the distribution of newspapers and other periodical publications, having regard to the volume of titles distributed throughout the Republic and the difficult time constraints involved.

12.29 Notwithstanding the absence of any substantial dissent from our provisional recommendations, we are conscious of their wide ranging nature and have given them further careful consideration. We remain of the view that, in the case of printers, modern technology makes the defence of reasonable care of little value. In the case of distributors, however, the question arises as to whether in the Consultation Paper we gave sufficient weight to the different considerations which apply to this category. It is certainly strongly arguable that we were wrong in rejecting the Australian proposal that, while an absolute immunity should be afforded to an action for damages, the plaintiff should be entitled to obtain an injunction where he could satisfy the judge that the matter was defamatory. Our provisional recommendation would mean that firms could continue to distribute with complete impunity material which was defamatory, although they were fully aware of its nature and had been asked by the victim to cease its distribution. In the case of a foreign publisher, with no assets in this country, this could leave a seriously defamed person without any remedy whatever. Our reason for rejecting the proposal in the Consultation Paper - that distributors would be constantly asked to refrain from distributing material - seems, on reconsideration, unconvincing. While the distributors stressed to us the difficulties which they encounter under the present law in being required to establish that they were not negligent, we did not understand them to take serious issue with a change in the law which would leave them liable to an injunction where the plaintiff had expressly demanded the withdrawal of a defamatory publication.

12.30 We would, accordingly, at the least modify our original recommendation so as to provide that, if distributors were to be afforded an immunity in defamation actions, this should not preclude the plaintiff from obtaining an injunction to restrain the further distribution of defamatory material where this was appropriate. The difficult question remains as to whether they should be afforded such a complete immunity to a claim for damages.

12.31 We recognise the force of the argument that distributors, who handle large volumes of material, cannot be expected to acquaint themselves with the contents of every book or magazine which they make available to the public. We think it is obvious, however, that, under the present law, distributors as a matter of common sense would exercise greater care in respect of some publications. We are not solely concerned in this context with magazines which regularly publish material of a nature that attracts defamation actions but also with other periodicals which may, on the cover, or in accompanying material, make it clear that they are carrying articles of a potentially defamatory nature. It is not altogether clear why a distributor who stocks material of this nature for sale should be wholly exonerated from blame for failing to carry out some check on the material he is distributing.

12.32 We recognise, however, that it might be difficult in practice for the law to distinguish between different types of publication so that, in the result, unless some relief is afforded to them, distributors will continue to be subjected to a difficult burden in this area. We accordingly remain of the view that the Australian approach is to be preferred to that of the Faulks Committee. We do not think it would be in the public interest that the law should continue to foster a spirit of self censorship among distributors. At the least, however, the law should afford the victim of defamatory material

the remedy of an injunction against the distributor. We are also satisfied that there are circumstances in which the complete protection against an action for damages which we had provisionally recommended would not be appropriate. We think that this would be best met by a provision that distributors should have an absolute defence, save where the plaintiff has by notice in writing called upon the defendants to cease the distribution of defamatory material and they have refused to comply with that request.

There should also be a provision that printers and distributors who refuse to disclose the identity of the publisher to the plaintiff on being requested so to do should be capable of being sued as if they were the publishers. (A corresponding obligation is placed upon reticent retailers by the European Community Directive on Products Liability which is in process of being implemented in Ireland).

We accordingly recommend that:

- (1) *No action shall lie against the printers of a defamatory statement, save where they are also the publishers thereof;*
- (2) *No action shall lie against the distributors of a defamatory statement, save where they are the publishers thereof, or*
 - (i) *The plaintiff has by notice in writing called upon the distributors to cease distributing the allegedly defamatory material; and*
 - (ii) *The distributors have, within 7 days from the receipt of such a request, failed to comply therewith;*
- (3) *Where a printer or distributor of a defamatory statement is not the publisher of the statement but refuses on request to disclose to the plaintiff the identity of the publisher, an action shall lie against the printer or distributor to the same extent as if he were the publisher.*

Broadcasters of Live Programmes

12.33 Broadcasters of live programmes, as we pointed out in the Consultation Paper, are in a particularly precarious position, as they run the risk of defamatory statements being made by contributors without any prior warning. While we recognise the difficulty, we think that it would be going too far to leave the defamed person without any remedy. The circumstances of the broadcast can always be relied on in mitigation of damages.

12.34 RTE identified a particular problem which broadcasters encounter. This is that an oral statement made in a programme may be very fleeting in nature. By contrast, at trial, the statement is reproduced in a document given to the jury, available to them throughout the trial, and is subjected to dictionary-type analysis. This presentation of the statement may distort its effect. Thus, if a person makes a defamatory statement in the heat of a dispute where feelings are running high, the listening public is likely to make allowance for the anger of the speaker and may not take the statement literally. However, at trial, the isolation of the phrase from its context may add a gravity to the words which they did not originally possess. RTE suggested that there should be a requirement that a tape of the programme should be played to the jury once or twice at trial, so that they could have a realistic impression of the statement.

12.35 While we accept the merits of that suggestion, we are doubtful if any

change in the law is necessary in this area. Under the existing laws of evidence, there is nothing to prevent the trial judge from allowing a video or tape of the offending passage to be played for the benefit of the jury so as to place the words or images relied on in their proper context.

CHAPTER 13: MISCELLANEOUS

Limitation Periods

13.1 At present, an action for libel must be brought within six years from the date on which the cause of action accrued while an action for slander must be brought within three years from that date. In the case of libel and slander actionable *per se*, the cause of action accrues when publication to a third party occurs. In the case of slander actionable only on proof of special damage, the cause of action accrues when the special damage is sustained.

If the distinction between libel and slander is abolished, as we have recommended, a single limitation period should be adopted in respect of all defamation actions. We had provisionally recommended in the Consultation Paper that the limitation period for all defamation actions should be three years.

There was no dissent from, and widespread support for, this proposal. *We recommend that a single limitation period should apply to all forms of defamation and that the period should in general be three years from the date on which the cause of action accrues. In the case of actions in respect of defamation of a deceased person, it should be three years from the date of death. In the case of an action for a declaratory judgment, it should be one year from the date on which the cause of action accrues. Save in the case of actions in respect of defamation of a deceased person the provisions as to the extension or postponement of limitation periods in cases of disability, fraud and mistake contained in the Statute of Limitations 1957 should apply to all actions for defamation.*

Striking Out and Dismissal for Want of Prosecution

13.2 We drew attention in the Consultation Paper to possible abuses of court procedures by persons seeking to stifle publication of particular material without any intention of pursuing the proceedings to finality (the process sometimes known as issuing "gagging writs"). We considered a number of suggestions that had been made to tackle this problem but were not satisfied as to their practicality. We provisionally concluded, however, that there was some merit in the suggestion that where defamation proceedings are not set down for trial within twelve months of the issue of the plenary summons, there should be a power in the courts to strike them out. (Under the Rules of the Superior Courts at present the court has such a power where no steps

have been taken in the action for two years). This suggestion was generally welcomed. *We recommend that there should be a provision stating that (I) where no step has been taken in a defamation action by the plaintiff within one year from the issue of the plenary summons, the defendant should be entitled to have the proceedings dismissed for want of prosecution, unless the court orders otherwise and (II) if such proceedings have been struck out or dismissed, no further proceedings in respect of the same cause of action should be issued without leave of the court.*

Survival of Actions

13.3 We discussed in the Consultation Paper the question as to whether the present law contained in s6 and s8(1) of the *Civil Liability Act 1961*, under which the cause of action in defamation does not survive the death of the defamer, is satisfactory. We observed that the rationale for the rule appears to be that it would be difficult to do justice if both parties cannot appear in the witness box, particularly in cases where a question of malice arises.

We referred to the views of the other reform bodies, who had pointed out that in many cases the issue of malice would not arise and that, where it did, the onus was on the plaintiff to prove malice. Thus, the inability to cross-examine the defendant would prejudice the plaintiff rather than the defendant.

13.4 Having considered the merits and demerits of the present law, we were provisionally of the view that the cause of action should survive the death of the defamer and should extend to both special and compensatory damages but not to exemplary damages.

13.5 We also adverted to the situation where the person defamed dies before judgment in the proceedings. We thought that, in this case also, the right to institute an action should survive in favour of the personal representative of a person defamed who dies without having instituted the action and that a pending action should survive similarly in favour of his personal representative. We were inclined to the view, however, that in this instance compensatory damages would not be appropriate. Thus, the remedy might be limited to an injunction alone; or it might include compensation for special damage.

13.6 There was a general welcome for our provisional recommendations in this area. In cases where the person defamed dies before judgment, we think that the remedy should be limited to an injunction, but should also include compensation for special damages.

13.7 *We recommend that:*

- (1) *A cause of action in defamation should survive the death of the defamer after publication. Compensatory damages, special damages, an injunction and costs, but not exemplary damages, should be available as remedies in such a case.*
- (2) *The cause of action in defamation should survive the death of the alleged victim any time after publication, whether or not proceedings were pending at the time of his death. The personal representative of the deceased should be entitled to obtain an injunction and/or special damages, but compensatory damages should not be recoverable.*
- (3) *Consistently with the foregoing recommendations, we recommend the deletion of the words "or for defamation" in s6 of the Civil Liability Act*

1961, which would remove defamation from the list of causes of action which die with the wrongdoer or the victim by virtue of the combined effect of ss6 and 8 of the Act.

Multiple Publication

13.8 We drew attention to a number of problems which arose in relation to multiple publication. We pointed out that, under the present law, every copy of a newspaper, book or written matter, or any form of broadcast, is a separate publication to each recipient of the publication. The problem was not merely one of simultaneous actions in different locations: it is also possible for the same or a different plaintiff to bring a second action in respect of words to the same effect as the publication involved in the first action. Although damages may be mitigated under s26 of the *Defamation Act 1961*, there is no prohibition upon such an action. That section, which enables the defendant to give evidence in mitigation of damages that the plaintiff has recovered damages in respect of the same publication, would also not appear to apply where the plaintiff in the second action is a different person from that in the first action.

We made provisional recommendations designed to prevent an undesirable multiplicity of actions in respect of the same publication. These proposals received general support.

13.9 *We accordingly recommend that:*

- (1) *As a general rule a person shall have a single cause of action in respect of a multiple publication by the same person. The court, however, in its discretion should be entitled to permit a second action to be brought. Multiple publication should be defined as the publication by a particular person of the same or substantially the same matter in the same or substantially the same form to two or more recipients.*
- (2) *It should be provided that (a) where proceedings have been commenced against a defendant in respect of defamatory matter, an action may be commenced in relation to the same or substantially the same matter published by another defendant only within thirty days of the first action, (b) where a second action is commenced within thirty days of the first action, the plaintiff must notify all the defendants involved of the existence of each action, and (c) the court may in its discretion extend the time limit in (a) to the time of setting-down of the first action for trial.*

13.10 Where the publication is in more than one country, the recommendation made in the last paragraph may have implications for the principles of private international law governing the choice of applicable law in actions for defamation. The entire subject of *Choice of Law in Tort* is at present under consideration by the Commission. It is accordingly sufficient at this stage to draw attention to the fact that the conflict of laws implications will need to be addressed if the foregoing recommendation is implemented.

Civil Legal Aid

13.11 We drew attention to the fact that, under the existing scheme of civil legal aid, certificates may not be granted in respect of proceedings involving defamation. Accordingly, a person who does not have the means to protect his reputation is left without remedy.

13.12 We expressed our view that the quality of a legal system should be judged, not only by the calibre of its content, but also by its accessibility. It appeared to us that many of the recommendations contained in the Consultation Paper will be rendered almost meaningless if they can be availed of only by a minority of defamed persons. We cited in this context the observation of the Pringle Committee on Civil Legal Aid and Advice which specifically rejected the argument that defamation be excluded from the civil legal aid scheme. Its comment bears quoting again:

"There seems to us to be no logical basis on which any particular case category should be excluded. The merits of any case and the question of granting aid should be assessed, not by reference to the category to which it belongs, but by reference to the circumstances of the case".

13.13 There was no dissent from this view, although one commentator pointed out that a reform which simply brought defamation within the category of cases for which legal aid would be available was insufficient: a comprehensive reform of the present legal aid system was desirable. In the context of the present report, however, we must clearly confine our recommendations to the subject matter of the Attorney General's reference.

13.14 *We recommend that civil legal aid be available to the victims of defamatory statements.*

CHAPTER 14: SUMMARY OF RECOMMENDATIONS

General

14.1 The *Defamation Act 1961* should be repealed and new legislation enacted giving effect to the recommendations contained in this Report and the Commission's forthcoming Report on the Crime of Libel.

Distinction between Libel and Slander

14.2 The distinction between libel and slander should be abolished. There should be a new cause of action in defamation in which proof of special damage is not necessary.

Definition of Defamation

14.3 Defamation should be defined for the purposes of the legislation. The definition should take the following form.

- (1) "Defamation" is the publication by any means of defamatory matter concerning the plaintiff.
- (2) "*Defamatory matter*" defined: defamatory matter is matter which (a) is untrue and (b) tends to injure the plaintiff's reputation.
- (3) "*Publication*" defined: publication is the intentional or negligent communication of defamatory matter to at least one person other than the plaintiff.
- (4) "*Standard by which injury is measured*": matter shall be considered injurious to the plaintiff's reputation if it injures his reputation in the eyes of reasonable members of the community.
- (5) "*Concerning*" defined: defamatory matter concerns the plaintiff if it would correctly or reasonably be understood to refer to the plaintiff.
- (6) "*Burden of Proof*": the burden of proof is on the plaintiff to show that there was publication, that the matter contained in the publication was defamatory (which also means that its falsity must be established) and that the defamatory matter concerned the plaintiff.

The Meaning of Words

14.4 The rule of law under which each legal innuendo in a single publication gives rise to a separate and distinct cause of action should be abolished and be replaced by a provision that a claim in defamation based on a single publication shall give rise to a single cause of action.

14.5 The Rules of Court should state that where the plaintiff in a defamation action alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning:

- (1) he must give particulars of the facts and matters on which he relies in support of such a sense and
- (2) he must specify the persons or class of persons to whom these facts and matters are known.

14.6 There should be a rule of court providing that:

- (1) Whenever a plaintiff alleges that words or matters are defamatory in their natural and ordinary meaning:
 - (i) the plaintiff shall succinctly specify the meaning which he alleges the words bear if such meaning is not clearly apparent from the words themselves;
 - (ii) the pleaded meaning may explain but not extend the ordinary or natural meaning of the words;
 - (iii) the plaintiff shall be confined to his pleaded meanings.

Payment into Court

14.7 Order 22 Rule 6 of the Rules of the Superior Courts should be amended so that a defendant in a defamation action may make payment into court without admission of liability.

Apology

14.8 (1) In any defamation action, evidence that the defendant made or offered an apology to the plaintiff should not be construed as an admission of liability and, when the issues of fact are being tried by a jury, they should be directed accordingly.

(2) Subject to (3) below, in any defamation action, it should be lawful for the defendant to give in evidence in mitigation of damage that he made or offered an apology to the plaintiff in respect of the matter complained of, prior to the commencement of the action or as soon afterwards as he had an opportunity of doing so, in case the action should have been commenced before there was an opportunity of making or offering such apology.

(3) The defendant should be required to give notice in writing of his intention to give in evidence the fact of the apology to the plaintiff at the time of filing or delivering the defence in the action. Such notice should not be construed as an admission of liability and, when the issues of fact are being tried by a jury, they should be directed accordingly.

Pleading of Words "Falsely and Maliciously"

14.9 The practice of pleading in the statement of claim that the publication was made "maliciously" should be discontinued and the rules of court should expressly provide that it shall not be necessary.

Privilege***(a) Absolute Privilege***

14.10 (1) The present distinction between absolute privilege and qualified privilege should be retained. Absolute privilege should apply to statements in the course of judicial proceedings, as well as to utterances by the President in the performance and exercise of his or her functions and powers and by members of the Oireachtas in either House and official Oireachtas Reports and utterances made in parliamentary committees, all of which are at present afforded absolute privilege under the Constitution.

(2) There should be a statutory provision stating that the members of each House of the Oireachtas should not, in respect of any communication, whether written, oral or otherwise, in either House of the Oireachtas, be amenable to any court or any authority other than the House itself.

(3) There should be a statutory provision that official reports of communications in either House of the Oireachtas whether written, oral or otherwise, should be absolutely privileged and that reports in newspapers and on television or radio of such communications, whether written, oral or otherwise should enjoy the same privilege as is at present extended to reports of oral statements in either House.

(4) Section 2(2)(c) of the *Committees of the Houses of the Oireachtas (Privileges and Procedure) Act 1976* should be amended by the insertion of the words "or witnesses before" after the word "agents", the replacement of the word "utterances" by the words "statements in any form" and the word "absolutely" before the word "privileged".

(5) A Judge or other officer performing a judicial function and who is not knowingly acting without jurisdiction or performing a purely ministerial function should be absolutely privileged in relation to any statements made in the performance of that function if the statement has some relation to the matter before him.

(6) Statements made by parties, witnesses, advocates and jurors in any judicial proceedings should be absolutely, privileged provided that the matter bears some relation to the legal proceedings in question.

(7) Statements made before a person or body of persons exercising limited functions and powers of a judicial nature and bearing some relation to the proceedings before such person or body should be absolutely privileged.

(8) Any rule of law whereby communications between members of the executive are absolutely privileged should be abrogated.

(9) Any rule of law whereby communications between solicitor and client or counsel and client are absolutely privileged should be abrogated.

(10) Any rule of law whereby communications between spouses are absolutely privileged should be abrogated.

(b) Qualified Privilege

14.11 There should be a statutory provision clarifying the common law defence of qualified privilege in the following terms:

- (1) It shall be a defence to a defamation action that the publication of defamatory matter was made only to a particular person or group of persons and
 - (a) subject to sub-section (3), the recipient(s) had an interest in receiving, or a duty to receive, information of the kind contained in the matter and
 - (b) the publisher had an interest in communicating, or a duty to communicate, information of the kind contained in the matter.
- (2) In sub-section (1), "duty" includes a legal, social or moral duty and "interest" includes a legal, social or moral interest.
- (3) A defence of qualified privilege shall not fail by reason only of the fact that the recipient of the communication had no actual interest or duty to receive information of the type contained in the communication, if a reasonable person would have believed the recipient to have an interest or duty to receive information of the type contained in the communication.
- (4) Persons shall not be regarded as constituting a particular group by reason only of the fact that they received particular published matter.
- (5) The privilege shall be deemed forfeited and abused in the following circumstances:
 - (a) if the defendant did not believe the matter to be true;
 - (b) if the publication by the defendant was actuated by spite, ill-will or any other improper motive;
 - (c) if the matter bore no relation to the purpose for which the privilege was accorded, or
 - (d) if the manner and extent of publication exceeded what was reasonably sufficient for the occasion.
- (6) Notwithstanding (5)(a) a lack of belief in the truth of the matter will not result in forfeiture of the privilege if the defendant was reasonable in publishing the matter in all the circumstances.
- (7) The burden of proof is on the plaintiff to show that the defendant has forfeited the privilege.
- (8) Where there is a joint defamation in circumstances giving rise to an occasion of qualified privilege, forfeiture of the privilege by one defendant on any of the grounds set out in sub-section (5) shall result in forfeiture of the privilege by the other defendant only if that other was vicariously liable for the first.
- (9) Section 11(4) of the *Civil Liability Act 1961* is hereby repealed.

Fair Report and Related Defences

14.12 (a) A general defence of "fair report" should not be introduced.

(b) The defence of privilege provided under s18 of the *Defamation Act 1961* to reports of court proceedings should be retained. It should be made clear that it is an absolute privilege. There should no longer be a requirement that the publication be contemporaneous and the defence should not be confined to media defendants. The defence should also extend to the reporting of a judgment delivered in *in camera* proceedings where the judgment itself is made public.

(c) Fair and accurate reports of the matters set out in the Second Schedule to the *Defamation Act 1961* should continue to be privileged. The existing elements of the defence, i.e. that the publication should have been made without malice and was not prohibited by law and that the subject matter of the report should have been of public interest or for the public benefit, should be retained. The defence should no longer be confined to media defendants. The list of matters in the schedule should also be revised, clarified and expanded as indicated in the body of this Report. The right afforded under the present law to the defamed person to explain or contradict the defamatory report in the case of reports contained in Part 2 of the Second Schedule (as replaced) should be retained.

(d) The Rules of the District Court should be amended by the inclusion of a provision entitling *bona fide* representatives of the media to obtain from the clerk of the District Court copies of charge sheets in cases other than cases which the media are prohibited from reporting.

Statements of Opinion

14.13 The title of the defence of fair comment should be changed to "comment based on fact".

14.14 There should be a statutory provision setting out the constituent elements of the defence of comment based on fact in a positive manner.

14.15 Section 23 of the *Defamation Act 1961* should be replaced by the following provisions:

- (1) In order to avail himself or herself of the defence of comment based on fact the defendant must show:
 - (a) that the words complained of were comment;
 - (b) that the comment was supported by facts either
 - (i) set out in the publication containing the comments, or
 - (ii) expressly or impliedly referred to in the publication containing the comment provided such facts were known to the persons to whom the publication was made;
 - (c) the truth of sufficient facts to support the comment.
- (2) If the defendant fulfils requirements (1)(a) and (b) above, the defence shall not fail by reason only of the fact that (c) is not established, provided the defendant exercised reasonable care in ascertaining the

truth of the facts alleged to support the comment. In such a case, the plaintiff shall not be entitled to general damages, but shall be entitled to special damages, a correction order or a declaratory order.

14.16 There should be a statutory defence based on the rule in *Mangena v Wright* [1909] 2 KB 958. This should allow the defendant to avail of the defence of comment based on fact where the comment was supported by facts published on an occasion of absolute privilege or in circumstances where the publisher would be entitled to rely on a defence of qualified privilege under ss18 and 24 of the *Defamation Act 1961* (as replaced) in respect of reports of judicial proceedings and the other matters set out in Part 1 of the Second Schedule.

14.17 (1) The common law rule that "malice" defeats the defence of comment should be retained, but should be confined to cases in which the comment did not represent the genuine opinion of the defendant.

(2) Accordingly, a defence of comment by a defendant who is the author of the matter containing the opinion should fail unless the defendant proves that the opinion expressed was his genuine opinion.

(3) A defence of comment by a defendant who is not the author of the matter containing the opinion should fail unless the defendant proves that he believed that the opinion expressed was the genuine opinion of the author.

(4) Where there is a joint defamation in circumstances normally protected by the defence of comment, the defence of one person should not fail by reason only of the fact that the comment did not represent the genuine opinion of the other, unless that other is vicariously responsible for the first.

14.18 There should be a statutory provision making it clear that it is not a requirement of the defence of comment based on fact that the comment be fair.

14.19 For the purposes of clarification there should be a statutory provision stating that allegations of base, dishonourable or other sordid motives should be treated in the same way as any other defamatory allegation and that such a statement should not be treated conclusively as fact or comment, nor should a more stringent defence apply if it is found to be comment.

14.20 It should continue to be a requirement of the defence of comment that the comment should have been made on a matter of public interest.

14.21 (a) There should be a statutory provision setting out guidelines for the court in distinguishing between fact and comment.

(b) Part (a) of the provision should state that, in determining whether the statements giving rise to the litigation are defamatory statements of fact or statements of opinion, the court should consider

- (1) The extent to which the statements are objectively verifiable or provable;
- (2) the extent to which the statements were made in a context in which they are likely to be reasonably understood as opinion or rhetorical hyperbole and not as statements of fact;

- (3) the language used, including its common meaning, and the extent to which qualifying or cautionary language, or a disclaimer, was implied.

(c) Part (b) of the provision should state that a statement unsupported by any facts set out in the publication or expressly or impliedly referred to in the publication and known to the persons to whom the publication is made should be treated as a statement of fact.

Statements of Fact

14.22 (1) The defence of justification should be renamed the defence of truth.

(2) There should be a statutory provision stating that, in order to avail himself or herself of the defence of truth in respect of a defamatory imputation, the defendant must show that it was in substance true or in substance was not materially different from the truth.

14.23 In place of s22 of the *Defamation Act 1961*, there should be a provision that, where an action for defamation has been brought in respect of the whole or any part of the matter published, the defendant may allege and prove the truth of any charges contained in such matter and the defence of truth shall be held to be established if 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.

14.24 There should be a statutory provision that:

- (a) Where in a defamation action the question of whether a person party to the action committed a criminal offence is relevant, proof that he stands convicted of the offence by a court of competent jurisdiction in the State shall be conclusive evidence that he committed the offence;
- (b) The conviction of a person not party to the defamation action by a court of competent jurisdiction in the State shall be evidence, but not conclusive evidence, of the facts on which it was based;
- (c) The acquittal of a person party to a defamation action shall be evidence, but not conclusive evidence, of the facts on which it was based.

14.25 The rule that aggravated damages may be awarded where there is an unsuccessful defence of justification should be retained.

14.26 (1) It should be a defence to a claim for general damages in respect of a defamatory allegation of fact that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth of the allegation.

(2) It should not be a defence to a claim for damages in respect of financial loss clearly linked with the publication that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth of the allegation.

(3) It should not be a defence to a claim for a correction order and/or declaratory judgment that the defendant exercised reasonable care

prior to publication in attempting to ascertain the truth of the allegation.

14.27 In all cases of defamation, the onus of proof should be upon the plaintiff to establish that the words complained of were untrue.

14.28 (1) A claim for a correction order and/or declaratory judgment in a defamation action in respect of a defamatory allegation of fact should not be entertained by the court unless the plaintiff alleges that the plaintiff made a timely and sufficient request for a retraction and the defendant failed to make a timely and conspicuous retraction.

(2) It should not be a defence to a claim for general or special damages in a defamation action in respect of a defamatory allegation of fact that the defendant made a timely and conspicuous retraction of the allegedly defamatory allegation but the court should be entitled to take the publication of any such retraction into account in assessing the damages to which the plaintiff is entitled.

(3) *Definitions:* a "retraction" is a statement withdrawing and repudiating the allegedly defamatory allegations. A "conspicuous retraction" in the case of a newspaper, broadcast or periodical publication is a retraction published in substantially the same place and manner as the defamatory statement being retracted. The placement and timing of the retraction must be reasonably calculated to reach the same audience as the prior defamatory statement being retracted. In the case of a book or other publication not of a periodic nature, a "conspicuous retraction" is one published in such a manner and at such a time as to be reasonably calculated to reach the same audience as the prior defamatory statement being retracted.

(4) A "timely request" for retraction is a request made within three months of the publication of the defamatory statement or the date on which the plaintiff first became aware or ought reasonably to have become aware of the publication.

(5) A retraction is "timely" if it is published within thirty days of the original publication or the first request of the plaintiff for retraction.

(6) Where the defendant customarily publishes retractions or corrections or affords opportunities to reply in a designated place, publication of a retraction in that place should be deemed conspicuous if notice of the retraction is published in substantially the same place and manner as the statements to which the retraction is directed.

(7) The publication by the defendant of a timely and conspicuous retraction should not be construed as an admission of liability and where the issues of fact are being tried by a jury they should be directed accordingly.

14.29 In cases involving allegedly defamatory matter contained in a fictional context, the ordinary requirement of identification should be supplemented by a requirement that the matter be reasonably understood as referring to actual qualities or events involving the plaintiff.

Damages

14.30 In making an award of general damages, the court should be required to have regard to the following factors:

- (a) The nature and gravity of the defamatory assertion(s);

- (b) The method of publication, including the durable or other nature thereof;
 - (c) (i) the extent and circulation of the publication, subject to sub-paragraph (ii),
 - (ii) In a case involving words innocent on their face which become defamatory by reason of facts known only to some recipients of the publication containing the defamatory matter, the publication of the libel should be deemed proportionate to the number of recipients who have knowledge of these facts;
 - (d) The importance to the plaintiff of his reputation in the eyes of particular, or all, recipients of the publication;
 - (e) In a case involving the defence of truth where the defendant has proved the truth of some only of the allegations, the whole of the publication and the extent to which the defendant has proved the truth of its contents, irrespective of whether the plaintiff brings an action in respect of the publication in whole or in part;
 - (f) The extent to which the publication of the defamatory matter was caused or contributed to by the plaintiff;
 - (g) The reputation of the plaintiff at the time of publication;
 - (h) The terms of any correction order, declaratory order or injunction that the court has granted or proposes to grant.
2. It should be permissible for the defendant to introduce any matter, general or particular, relevant at the date of trial to that aspect of the plaintiff's reputation with which the defamation is concerned, in order to mitigate damages under (1)(d).
 3. The court should be empowered to award damages in respect of financial loss clearly linked with the publication.
- 14.31 There should be an express statutory provision that exemplary or punitive damages may be awarded in cases of defamation but only where:
- (1) The defendant intended to publish matter to a person other than the plaintiff, knowing that such matter would be understood to refer to the plaintiff and that it would tend to injure the plaintiff's reputation and with knowledge, or with reckless disregard, of its falsity; and
 - (2) The conduct of the defendant has been high-handed, insolent or vindictive or has exhibited a disregard for the plaintiff's rights so gross as clearly to warrant punishment over and above that which has been inflicted upon him by an award of compensatory damages.

Remedies other than Damages

14.32 Where, in the course of proceedings for defamation, the plaintiff seeks an interlocutory injunction restraining publication of allegedly defamatory material:

- (1) the court should grant such an injunction only if the matter is clearly defamatory and any defence raised is likely to fail;
- (2) an injunction should not be refused merely because the defendant has stated his intention to plead a defence: the court should examine the defendant's affidavit before assessing what weight (if any) should be given to such an assertion.

14.33 There should be a provision making it clear that, where an injunction is issued to restrain a publication because of its allegedly defamatory nature, the court has no power to prohibit the reporting of the fact of the injunction having been granted.

14.34 Provision should be made for a new form of proceedings for a declaratory judgment which should be in the following terms:

- (a) *Cause of action:*
 - (1) Any person who is the subject of any allegedly defamatory publication may bring an action for a declaratory judgment that the statement was false and defamatory.
 - (2) No damages may be awarded in such an action.
- (b) *Burden of proof:*
The burden of proof as to publication and the defamatory nature of the publication and its falsity shall be on the plaintiff in the same manner and to the same extent as in any other action for defamation.
- (c) *Defences:*
Privileges existing at common law, by statute and by virtue of the Constitution and the defences of truth and comment based on fact shall apply to the action.
- (d) *Bar to certain claims:*
A plaintiff who brings an action for a declaratory judgment shall be barred from asserting any other claim or cause of action arising out of the same publication.
- (e) *Limitation of action:*
 - (1) The action must be commenced within one year of the date of publication;
 - (2) The provisions as to the extension or postponement of limitation periods in cases of disability, fraud and mistake contained in the Statute of Limitations 1957 shall apply to the limitation period prescribed in (1).
- (f) It shall be a complete defence to an action under this section that the defendant published a timely and conspicuous retraction before the action was commenced in accordance with the terms of the relevant provision (as to timely and conspicuous retractions).
- (g) The procedure shall be by way of special summons in the High Court and by way of motion in the Circuit Court, in each case grounded on an affidavit.

14.35 The legislation should provide for new remedies in the form of correction orders and declaratory orders, the principal features of which

should be as follows:

- (1) The court should have the power to award a declaratory order or a correction order stating the matter to be false and defamatory in any case where the false and defamatory nature of the statement is established.
- (2) Where the court makes an order for the correction of matter, the court may specify the contents of the correction and may give directions concerning the time, form, extent and manner of publication of the correction.
- (3) Unless the plaintiff otherwise requests, directions given by the court in accordance with (2) above should ensure, as far as is practicable, that the correction will reach the persons who are recipients of the matter to which the correction relates.
- (4) In a defamation action arising out of the publication of a comment, the court may make an order for the correction of the defamatory comment and any allegation of fact expressly or impliedly referred to in the published matter as the basis for the comment the truth of which is not established by the defendant or admitted by the plaintiff.

The Role of Juries and the Jurisdiction of the Courts

14.36 In the High Court, the parties to defamation actions should continue to have the right to have the issues of fact other than the assessment of damages determined by a jury.

14.37 The damages in such actions should be assessed by the judge, but the jury should be entitled to include in their verdict a finding that the plaintiff is entitled to nominal damages only.

14.38 The similar right formerly enjoyed by parties in the Circuit Court to have such issues determined by a jury should be restored, subject to the same qualification as to the assessment of damages.

14.39 The appeal from the verdict in a defamation action in the Circuit Court should be by way of motion to the Supreme Court rather than by way of re-hearing in the High Court or by way of motion to the new Court of Civil Appeal in the event of that court being established.

14.40 For the removal of doubt, it should be expressly provided that the Supreme Court may in actions for defamation as in other civil actions assess the damages themselves in the event of an appeal.

Right of Reply

14.41 It is considered inappropriate to recommend the introduction of a statutory right of reply in this Report.

Identity of Parties

14.42 *Public figure plaintiffs:*

There should be no change in the law based on a distinction between "public" and "private" figures, either in respect of factual or opinion statements.

14.43 *Group plaintiffs:*

There should be a provision that:

One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it, but only if;

- (a) The group or class is so small that the matter can reasonably be understood to refer to the member or,
- (b) The circumstances of publication reasonably gives rise to the conclusion that there is a particular reference to the member.

Defamation of the Dead

14.44 There should be a new cause of action in respect of defamatory statements made about a person who is dead at the time of publication.

14.45 The right to institute such proceedings should be vested solely in the personal representative of the deceased who should, however, be under a statutory obligation to consult the immediate family of the deceased, i.e. spouse, children, parents, brothers and sisters, before the proceedings are instituted.

14.46 The period of limitation should be three years from the date of death of the allegedly defamed person.

14.47 The only remedy available should be a declaratory order and, where appropriate, an injunction.

Corporate Bodies

14.48 There should be a statutory provision, for the avoidance of doubt, that all corporate bodies have a cause of action in defamation irrespective of whether financial loss is consequent upon the publication or was likely to be consequent upon the publication.

Distributors and Printers

14.49 No action should lie against printers of a defamatory statement, save where they are also the publishers thereof.

14.50 No action should lie against the distributors of a defamatory statement, save where they are the publishers thereof, or

- (a) The plaintiff has by notice in writing called upon the distributors to cease distributing the allegedly defamatory material; and
- (b) The distributors have, within seven days from the receipt of such a request, failed to comply therewith.

14.51 Where a printer or distributor of a defamatory statement is not the publisher of the statement but refuses on request to disclose to the plaintiff the identity of the publisher, an action should lie against the printer or distributor to the same extent as if he were the publisher.

Miscellaneous

Limitation of Actions

14.52 (1) There should be a single limitation period applicable to all forms of defamation which should in general be three years from the date on which the cause of action accrues. In the case of actions in respect of defamation of a deceased person, it should be three years from the date of death. In the case of an action for a declaratory judgment, it should be one year from the date on which the cause of action accrues.

Dismissal for Want of Prosecution

14.53 There should be a provision stating that:

- (1) Where no step has been taken in a defamation action by the plaintiff within one year from the issue of the plenary summons, the defendant should be entitled to have the proceedings dismissed for want of prosecution, unless the court orders otherwise and
- (2) If such proceedings have been struck out or dismissed, no further proceedings in respect of the same cause of action should be issued without leave of the court.

Survival of Causes of Action

14.54 A cause of action in defamation should survive the death of the defamer after publication. Compensatory damages, special damages, an injunction in costs, but not exemplary damages, should be available as remedies in such a case.

14.55 The cause of action in defamation should survive the death of the alleged victim any time after publication, whether or not proceedings were pending at the time of his death. The personal representative of the deceased should be entitled to obtain an injunction and/or special damages but compensatory damages should not be recoverable.

14.56 Consistently with the foregoing recommendations, we recommend the deletion of the words "or for defamation" in s6 of the *Civil Liability Act 1961*, which would remove defamation from the list of causes of action which die with the wrongdoer or the victim by virtue of the combined effect of ss6 and 8 of the Act.

Multiple Publications

14.57 As a general rule, a person should have a single cause of action in respect of a multiple publication by the same person. The court, however, in its discretion should be entitled to permit a second action to be brought. Multiple publication should be defined as the publication by a particular person of the same or substantially the same matter in the same or substantially the same form to two or more recipients.

14.58 It should be provided that (a) where proceedings have been commenced against the defendant in respect of defamatory matter, an action may be commenced in relation to the same or substantially the same matter published by another defendant only within thirty days of the first action, (b) where a second action is commenced within thirty days of the first action, the plaintiff must notify all the defendants involved of the existence of each action

and (c) the court may in its discretion extend the time limit in (a) to the time of setting down the first action for trial.

Legal Aid

14.59 Civil legal aid should be available to the victims of defamatory statements.

APPENDIX A

THE CONSTITUTION AND THE LAW OF DEFAMATION

1. Three Constitutional rights are of relevance: the right to a good name, the right to freedom of expression and the right to communicate. We observe at the outset, however, that in the absence of any detailed judicial discussion of these rights in the context of defamation, our views must necessarily be subject to any decisions by the High Court or the Supreme Court in the future.

The Constitutional Protection of the Citizen's Good Name

2. Article 40.3 provides that:

- "1° The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
- 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

3. A more detailed analysis of these provisions as they affect the law of defamation yields the following conclusions.

- (1) *The State by its laws must protect as best it may the good name of every citizen from unjust attack.* In the context of defamation law, this is the constitutional basis for granting injunctions to prevent the publication of defamatory matter. It is also, indirectly, a basis for the law of defamation itself, in the sense that, if the law of defamation offers compensation to a victim of defamatory matter, this may deter persons from publishing defamatory matter about others in order to avoid liability for compensation. Thus, the law of defamation itself helps to protect the good name of citizens prior to the publication of defamatory matter.
- (2) *The State by its laws must vindicate the good name of every citizen in the case of injustice done.* In the context of defamation law, "injustice done" consists of the publication of defamatory matter and the vindication of one's good name consists of the law's response to the

publication of such matter. However, this begs the question of what constitutes "injustice done" and "vindication".

4. *"Injustice done"*. Article 40.3.2° does not define what such "injustice" consists of and this has hitherto been left to the common law. One can infer from the decisions that "injustice", in the context of defamation law, means the publication to a third party of false and defamatory matter concerning a person, defamatory matter being matter which injures his reputation.

How does the common law concept of injustice accord with the Constitution?

- (a) The requirement of publication to a third party is probably implicit in the constitutional reference to "good name", which suggests a person's reputation in the eyes of others.
- (b) Article 40.3.2° itself does not necessarily require the matter to be false in order to be actionable. Arguably, it would allow the law to compensate a person for a *true* defamatory statement, if one were to take the view that it may be unjust to publish true but defamatory matter about an individual.
- (c) Defamatory matter is matter which injures a person's reputation, which is close to the Constitutional reference to an "attack" on "good name".

It follows that, while the requirement of the common law that the matter be defamatory, in the sense of injuring the person's reputation, is clearly in conformity with the constitutional guarantee, the common law requirement that the matter be false is not mandated by Article 40.3.2°. An "unjust attack" might consist of a statement which is defamatory but true. Under the present law, a defamation action based on such a statement could be successfully resisted by a plea of justification. One can envisage circumstances, however, in which the law could, with constitutional propriety, afford a cause of action to the victim of such a statement. This might arise particularly in the context of the evolving law of privacy. In the present context, it is sufficient to note that, viewed in isolation, Article 40.3.2°, in leaving open to judicial interpretation the definition of "unjust attack", is neutral on the issue of truth or falsity. The Article cannot, of course, be read in isolation in this manner; specifically, it must be read in the context of Article 40.6.1° dealing with freedom of expression.

5. *Vindication*. As noted above, the Article does not define the word "vindicate". The common law has provided the remedies of damages and an injunction as the only forms of vindication of good name available to the victims of defamatory statements. However, there is nothing in the Article to suggest that the concept of "vindication" should be limited in this way. Thus the introduction of new remedies, such as the correction order and the declaratory judgment, as well as new forms of action, such as the action for a declaratory judgment, are constitutionally permissible if the view is taken by the Oireachtas that such remedies will help to vindicate the good name of the citizen.

The Constitutional Guarantee of Freedom of Expression

6. Article 40.6.1° provides that:

"The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-

- i The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law."

We note at the outset that the third paragraph, which provides for the offences of the publication of blasphemous, seditious or indecent matter, is discussed in our Consultation Paper on the Crime of Libel¹ and is not pertinent to the civil law of defamation. We therefore confine our attention to the first two paragraphs.

The Article has been the subject of very little in the way of judicial interpretation and a number of different approaches are possible. The first is to construe it literally, examining such words as "convictions" and "opinions" and the implications thereof. The second is to look at the Article as a whole and attempt to ascertain its flavour. The third is to look at the intention of the framers of the Constitution. A use of all three techniques should be informative. However, whichever of them is adopted, any other relevant provisions of the Constitution must be borne in mind. Specifically, it must be read in conjunction with the guarantee referred to in the preceding section of the citizen's right to his good name. As Henchy J observed in *Hynes-O'Sullivan v O'Driscoll* when considering the law of qualified privilege:

"The law ... must reflect a due balancing of the constitutional right to freedom of expression and the constitutional protection of every citizen's good name."²

The learned judge added a comment which is of considerable significance in the present context:

"The articulation of public policy on a matter such as this would seem to be primarily a matter for the legislature."

Thus, while the Article does not expressly subject freedom of expression to restrictions in the interest of individual reputation, it is clear that a law of defamation, in the broad sense, is a constitutionally permissible, if not indeed mandated, restriction on freedom of expression.

7. We consider first the literal approach. It may be noted that the Article does not at the outset guarantee unconditional liberty for the exercise of freedom of expression. It guarantees specific rights "subject to public order and morality".

The guarantee in the first paragraph is of "the right of the citizens to express

¹ Consultation Paper on the Crime of Libel, August 1991.

² [1988] IR 436 at 449.

freely their convictions and opinions". In the Consultation Paper, we suggested that the word "opinion" referred to a subjective perception which is not capable of objective proof. "Conviction", however, is a more problematic word. One commentator has observed³ that the Oxford English Dictionary defines "convictions" as "a strong belief on the ground of satisfactory reasons or evidence; ... a firm or settled persuasion." He argues that, since the essence of a conviction includes an element of subjectivity, i.e. of subjective perception of fact, the clause mandates a protection for perception of facts at least to some degree. However, this commentator has concentrated solely on the first part of the OED definition which does relate to perception of fact, whereas the second limb does not. A "firm or settled persuasion" may be held in relation to matters which are not capable of objective proof, such as religion and politics. Furthermore, even if one were to accept that "convictions" is meant in the sense suggested, this does not mean that it could not be restricted by the requirements to protect the citizen's good name. (The same commentator, Mr Eoin O'Dell, suggests that the publication of a constitutionally protected 'conviction' could not constitute an 'unjust attack' on a person's good name). As Costello J said in *Paperlink Limited v Attorney General*:

"[There is a] distinction between a personal right guaranteed by the Constitution and the freedom to exercise a constitutionally guaranteed personal right, a distinction which is to be found throughout the entire Constitution"⁴

On a literal view of this clause, we are therefore left with at least two options, namely, that it requires protection for (I) opinions and (II) convictions in the sense of subjective impressions of facts *or* that it requires protection for (I) opinions and (II) convictions in the sense of religious or political convictions or convictions as to other matters not capable of objective proof. If the latter construction is correct, factual assertions do not appear to come within the guarantee at all, unless by implication.

We return at a later stage to the reference to "citizens".

8. We next consider the literal approach to the second paragraph of article 40.6.1°. The references to "education of public opinion" and "criticism of government policy" clearly refer to opinion and not factual matter. Indeed, they might even be said to refer, on the basis of the second phrase, to opinion in *political* matters. This might tie in with the possibility that "convictions" in the first paragraph means political convictions. It is interesting that the phrase "rightful liberty of expression" is used for the first time here in relation to organs of public opinion and not in relation to citizens more generally. If we are to interpret "expression" as encompassing both opinions and assertions of fact, there is arguably no such general right guaranteed to citizens under the first paragraph. Such a general right is guaranteed only to the organs of public opinion and even then hedged about with words such as "opinion" and "criticism" which even here leaves room for doubt as to whether "expression" encompasses assertions of fact.

It will be seen below that there is some doubt as to whether media organs are within the phrase "citizens" in the first paragraph. If they are, the reference to "freedom of expression" in this paragraph merely refers to whatever was guaranteed in the first paragraph, which may only be freedom

³ Submissions to the Commission of Eoin O'Dell, Lecturer in Law, Trinity College Dublin
⁴ [1984] ILRM 373, at 381.

of opinion. In other words, no *general* right of freedom of expression appears to have been guaranteed to citizens and may only have been guaranteed in the case of media organs; and it is possible that in this instance it in any event refers to freedom of opinion only.

9. What conclusions can be drawn from a literal reading of Article 40.6.1°?

- (1) It is arguable that assertions of fact are not within the Article 40.6.1° guarantee at all. If so, there is no constitutional protection under this Article for true assertions of fact, let alone false ones.
- (2) It is arguable that assertions of fact are protected under the Article, but only by implication. Such a view would leave it to the legislature to decide how factual assertions are to be treated and again there is no guidance as to how false statements are to be treated. It might be noted that an argument that the Article covers the right to receive and give information as well as opinions was advanced in *Attorney General (SPUC) v Open Door Counselling Limited*. Finlay CJ noted that:

"As part of the submission ... it was further suggested that the right to receive and give information which, it was alleged, existed and was material to this case was, though not expressly granted, impliedly referred to or involved in the right of citizens to express freely their convictions and opinions provided by Article 40.6.1°(i) of the Constitution, since, it was claimed, the right to express freely convictions and opinions may, under some circumstances, involve as an ancillary right the right to obtain information."⁵

However, the learned Chief Justice did not express a view on this argument, holding simply that no right could arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child.

- (3) It is arguable that factual assertions are encompassed by the term "convictions" which requires constitutional protection for the expression of subjective perceptions of fact, which in turn might point to the constitutional necessity in the law of defamation for a fault standard. This interpretation would suggest a protection for false statements, if the required fault standard is met. If this interpretation is correct, Article 40.6.1° may provide *prima facie* protection for those who make false assertions of fact, provided they meet the requisite fault standard. However, when balanced against the right to a good name, this fault standard might have to yield to the latter right in any event.

10. One might conclude from a literal reading of Article 40.6.1° that words are not used very precisely and that the literal approach may not be helpful. It is clear that the attempt to interpret Article 40.6.1° in this manner leaves open a number of questions. We now look to alternative methods of interpretation, the conclusions from which may reinforce one or other of the literal interpretations above.

11. Looking at the Article as a whole, it may be said that the general

⁵ [1988] IR 593 at 625.

concern is to protect expressions of opinion, persuasion, criticism and comment. The position in relation to assertions of fact does not appear to have been foremost in the mind of the draftsman. This leaves us in some doubt concerning the word "convictions" and the curious inclusion of the phrase "liberty of expression" in the second paragraph rather than the first. It is strongly arguable that the Article on a general reading mandates wide protection for expressions of opinion, but gives very little guidance as to how assertions of fact are to be treated. Following from this, it is also strongly arguable that it gives no guidance on the question as to whether a statement has to be true to be protected under the law of defamation or whether protection must extend to false statements on a fault basis or otherwise. From a general reading of the Article, it is arguable that it is left to the legislature to determine such issues.

12. We may finally approach the Article according to the doctrine of "original intent". We appreciate that this may be out of fashion as an exclusive approach to constitutional interpretation. In particular, while we have had recourse to the Dail Debates at the time of the draft Constitution, we appreciate that the somewhat less restrictive judicial attitude to taking into account the legislative history of an enactment, which has been apparent in recent times, has not so far been approved of in the case of the Constitution.⁶ While, accordingly, we do not suggest that what was said in the debates would necessarily be an appropriate guide for a court in construing the Article, in a broad ranging enquiry such as ours it must surely be useful as an additional approach and, in particular, it might helpfully supplement the literal interpretation which, as we have seen above, does not point firmly in any particular direction.

13. What was said in the Dail Debates is certainly illuminating in the present context. Most, if not all, of the debate at committee stage centred on the second paragraph of Article 40.6.1(i), a number of deputies being in favour of its removal. The main objection raised was that public order and morality had been dealt with in the opening sentence and that the second paragraph added very little to this, except the reference to undermining the authority of the State. It was felt by some deputies that this had potential for becoming a means of curtailing government criticism. It was also suggested that the phrase "the education of public opinion" was misconceived, it being thought that opinion should be allowed to compete with each other and that this was preferable to a set of opinions being approved in some sense by the State. However, the deletion of the clause was resisted by the government of the day, the President on several occasions saying that the clause was necessary to delimit the extent of permissible freedom of expression and that, while lawyers might know what the traditional boundaries of free speech were - sedition, blasphemy, obscenity and defamation - ordinary citizens were entitled to have the limits spelt out in the Constitution.⁷

The first point of note is therefore that this clause was perceived as a limiting, not a widening, clause. The second point of note is that it was felt by some deputies to contain danger in that censorship of certain opinions might be possible and that the clause was kept, not because it was felt that this danger was not present, but because curtailment of certain opinions was seen as desirable. A third point of note is that at no time was the distinction between citizens and the media adverted to: rather media organs

⁶ See J Casey, *Constitutional Law in Ireland*, 301 (1987).
⁷ Dail Debates, vol 67\8, cols 1631\1707.

were discussed because it was felt that such entities had a greater capacity for influencing public opinion. If a distinction was being drawn at all, it was that the influential nature of such organs required that their rights be carefully circumscribed. A final point of note is that during most of the debate the type of speech under discussion was opinion, and more specifically, political opinion. One opposition deputy argued that the article as drafted contained "no provision expressly providing against the publication of libellous matter": the President in reply referred him to the "good name" provision in Article 40.3.2°.

It would also appear that one of the purposes underlying Article 40.6.1° was the *silencing* of certain forms of communication rather than their *regulation*. This was clearly to be achieved by a censorship of books, periodicals and films (already in existence) and the retention of the existing legal prohibitions on the publication of obscene, seditious or blasphemous material. This would tend to reinforce the view that it is somewhat futile to seek for guidance as to the constitutional principles which should inform the law of defamation in this particular provision of the Constitution.

Thus, it may be said that an examination of the original debates reinforces the view (that the Article concerns expression of opinion) which emerged from a general reading of the article and from some literal interpretations. This conclusion is reinforced by the judgment of Costello J in *Paperlink*, which is considered in more detail below.

Citizens, Corporate Bodies and Media Organs

14. What is the meaning of the word "citizens" in Article 40.6.1.(i)? Is it confined to human individuals or does it include corporate bodies, including media organs? Following from these questions, does the reference to "organs of public opinion" in the second paragraph *delimit* a right guaranteed in the first paragraph or does it *acknowledge* a right of expression because such organs were not included in the guarantee to citizens in the first paragraph?

As Professor Casey has written:

"A more difficult question arises in regard to those provisions referring to "citizens". That word carries overtones of human rather than legal personality, as is shown by Article 9.2.'s demanding as fundamental political duties of all citizens 'fidelity to the nation and loyalty to the State'. It would seem impossible to require such pledges from artificial persons."⁸

There are undoubtedly a number of personal rights that may only be exercised, by their very nature, by individuals, such as the right to marry and found a family and the right to liberty. However, certain rights could in theory be exercised by corporate as well as natural persons and it is instructive to see how the term "citizens" has been construed by the courts in relation to such rights.

Article 40.1 provides that "All citizens shall, as human persons, be held equal before the law". Here the use of the word "citizens" has been interpreted so that the equality guarantee attaches to persons only by reason of their human personality. It was held in *Macauley v Minister for Posts and Telegraphs*,⁹

⁸ *Op cit.*, 345.

⁹ [1966] IR 345.

East Donegal Cooperative v Attorney General,¹⁰ and *Quinn's Supermarket v Attorney General*,¹¹ that it did not apply to corporate bodies. However, his restrictive interpretation was based on the use of the words "as human persons" and has, in any event been criticised.¹² The words "as human persons" do not qualify the word "citizens" in Article 40.3.1^o and 40.6.1^o.

15. In Article 40.3.1^o, the source of the unenumerated rights, the phrase used is "the personal rights of the citizen". The right of access to the courts is one of these rights, recognised in *Macauley v Minister for Posts and Telegraphs*. This right appears to apply to corporate bodies. For example, in *Bula Ltd v Tara Mines*,¹³ there was a dispute between two mining companies. The plaintiffs sought an order for inspection of the defendant's mining activities, which was resisted by the defendants on a number of grounds. Murphy J discussed the right of citizens to have access to the Courts, without referring to the fact that the plaintiff in this instance was a corporate body. Similarly, while Article 40.6.1^o.iii guarantees the right of citizens to form associations and unions, unions as distinct from citizens have been allowed to rely on this right: see for example *NUR v Sullivan*,¹⁴ where a trade union succeeded in having Part III of the *Trade Union Act 1941* struck down as unconstitutional.

16. However, the decisions in two cases suggest that it may matter very little whether the right in question applies solely to human persons. The *PMPS*¹⁵ and *Paperlink* cases support the view that even if "citizen" refers to human persons, an action on behalf of a company may be brought by the shareholders or directors of the company, relying on their individual rights. *PMPS* establishes this proposition in the context of property rights, while *Paperlink* does so in the context of two unenumerated rights, the right to communicate and the right to earn a livelihood. In *PMPS v Moore and the Attorney General*, the plaintiff society was a body corporate which sought to challenge legislation as violating the property guarantees of Article 40.3 and 43. Carroll J held that the society as such could have no rights under these provisions. However, she held that a shareholder in the society could claim that his or her constitutional rights had been invaded. On appeal the Supreme court accepted the latter proposition, and concluded that it was unnecessary to decide the question of the society's rights.

17. The right to earn a living was recognised as an unenumerated right in *Murtagh Properties v Cleary*. In *Attorney General v Paperlink*, the interpretation of the word "citizens" was examined in the context of this right. The second, third and fourth defendants, the directors of the defendant company, asserted that the *1908 Post Office Act* was unconstitutional on the ground, *inter alia*, that it infringed the right of citizens to earn a livelihood. The Plaintiffs raised an objection to this part of the defendants' counterclaim on the basis that company law provides that a company is a legal entity distinct from its shareholders and that the relationship of principal and agent does not exist between the company and its shareholders, so that it cannot be said that a company is carrying on business on behalf of its shareholder, citing *Salomon v Salomon*.¹⁶ Therefore the business of *Paperlink* was the business of a distinct legal entity, and the defendants as shareholders were not carrying on

10 [1970] IR 317.

11 [1972] IR 1.

12 J M Kelly, *The Irish Constitution*, 499 (2nd ed, 1984).

13 [1988] ILRM 149.

14 [1947] IR 77.

15 *Private Motorists Provident Society Ltd v Attorney General* [1983] IR 339.

16 [1897] AC 22 (HL).

any business so no interference with their constitutional rights was established. They sought to distinguish *PMPS v Moore and the Attorney General*. Costello J acknowledged that *PMPS* concerned property rights, while the case before him concerned the right to communicate. However, he went on to say that he did:

"not think that their failure to rely on this argument means that their claim must fail. If the defendants have a Constitutional right to earn a livelihood (as I believe they have) they can properly claim that they are exercising this right by becoming shareholders and directors in a private company. If the defendants bought shares in Messrs Guinness & Co Ltd, it could not be said that they were carrying on a business as brewers. But if they are actively engaged in a business carried out by a private company of which they are shareholders and directors then they are not merely investors in a company but are exercising a constitutional right to earn a livelihood by means of the company."

18. The *Paperlink* case also dealt with the right to communicate, an unenumerated right recognised in that case, discussed in more detail below. Again the constitutional attack was made by the second, third and fourth defendants. Costello J noted at page 381 of this judgment that this had been done because it had been accepted that the company had not constitutionally guaranteed personal rights on which to found a cause of action. This was a surprising concession to make, particularly as the defendants sought to base this right to communicate on either Article 40.3.1° or Article 40.6.1°. Costello J held that there was a right to communicate, that it arose out of Article 40.3.1°, but that it could be and had been validity restricted. He referred to the act of communication as inherent in the citizen by reason of his human personality. It may be, however, that the assumption that corporate bodies might have no rights in this context is still open to question, as the point was not fully argued. In any event, although the *Paperlink* case suggests that a company cannot directly rely on constitutional rights to earn a livelihood or to communicate, the fact that individual shareholders/directors were allowed to rely on their constitutional rights may make the practical effect the same as if the company were allowed to do so. In other words, all that has to be done to overcome the restrictive view of the word "citizens" is for the shareholders/directors to bring the challenge on behalf of the company.

19. In conclusion, while one may argue that the word "citizens" in Article 40.6.1° does not include corporate bodies, on the basis of judicial interpretation of the word in other contexts, it is far from clear that a Court would interpret the term restrictively in the context of Article 40.6.1° should the occasion arise. This latter view stems from the fact that the restrictive interpretation of the equality guarantee has, we think, been persuasively criticised; that in *Paperlink*, the point was assumed rather than argued; that in *PMPS*, the Supreme Court declined to make a ruling on the point; and that in the context of the right to form associations and the right of access to the courts, non-individuals have had *locus standi*. In any event, on the basis of *PMPS* and *Paperlink*, the point would appear to matter little in practice, for an action may be brought on behalf of a company by its shareholders relying on their personal rights.

20. Nonetheless, the interpretation of the term "citizens" in the first paragraph of Article 40.6.1.i may have some bearing on the construction of the reference to "organs of public opinion" in the second paragraph. RTE have invited us to re-examine the meaning of this reference to "organs of public opinion". The radio, the press and the cinema are specifically referred to but there would be no problem in extending this to television, periodicals

and any other form of publication which could be held to be an organ of public opinion.¹⁷

21. The real problem of interpretation arises as to the significance to be attached to the reference to such organs. There are three possible conclusions. First, it might be that the special reference suggests that wider protection should be given to media organs. Second, it might be that the special reference merely emphasises that media organs are included in the free expression guarantee. Third, it might be that the special reference suggests that less protection should be given to media organs.

22. It has been suggested to us that it was necessary expressly to include the organs of public opinion in the guarantee because they do not constitute "citizens" and would not otherwise come within the guarantee under the first paragraph. As we have already seen, it is not clear whether the word "citizens" is so limited. If it is correct that "citizens" in the first paragraph does not include corporate bodies, including media organs, then it is indeed arguable that the reference to such organs in the second paragraph was merely to bring such organs within the scope of the guarantee in the first paragraph. If this is correct, no significance should be attached to the reference to media organs, in terms of either greater or lesser protection.

It has also been suggested that the wording of the second paragraph indicates that it neither acknowledges nor guarantees rights but delimits previously guaranteed rights: in other words that the purpose of the second paragraph is to make the previously guaranteed liberty of expression conditional upon the organs of public opinion not undermining public order or morality or the authority of the State. This view is possible only if one takes the view that media organs are included in the reference to "citizens" in the first paragraph.

23. Let us assume that the first paragraph does include media organs and that the second paragraph delimits that right in the case of media organs. Freedom of expression is already made subject to "public order and morality" in the opening sentence of Article 40.6.1¹⁸. The second paragraph adds to this a reference to undermining the authority of the State. On this view, the special reference to media organs limits the freedom of organs of public opinion somewhat more than that of other citizens. Professor Casey appears to support this view:

"Not only is the citizen's right subject to legislative restriction in the name of public order and morality, but the 'organs of public opinion' may be subjected to control on the same grounds, as well as of 'the authority of the State'".¹⁸

Therefore instead of guaranteeing extra protection to such organs, this clause requires the State (by its laws) to be especially vigilant in respect of organs of public opinion to ensure that they do not abuse their freedom of expression in any of the specified ways. This may explain the special reference to media organs. Again, this does not suggest greater or lesser protection for media organs in the context of defamation law. This interpretation is supported by a reading of the Dail Debates, as outlined above. To the extent that a distinction between citizens and media organs was adverted to, it was on the assumption that the pervasive influence of media organs required the State to be careful in ensuring that they would not

17 Cf *The State (Lynch) v Cooney* [1982] IR 337.

18 *Op cit.* 428.

undermine the authority of the State or interfere with public order or morality. As we saw, there was considerable controversy as to whether the phrase "authority of the State" opened up the possibility of Government censorship of political criticism. It seems clear that the clause was not introduced to give the media greater protection, but rather to ensure that the State would be vigilant in ensuring that the media would not overstep what were seen as the boundaries of rightful liberty of expression.

24. There are therefore several explanations of the special reference to media organs which do not suggest that greater protection is mandated by the Constitution for such publishers. If greater protection does not stem from the fact of the special reference, it must stem from the wording of this clause. RTE appear to suggest that this is the case, by linking the type of speech published by them to the type of speech described in the second paragraph. RTE suggest that there is an inherent difference between media free speech and individual speech. They say that the media play a role in reporting events of public interest and providing a forum for public debate.

There is no doubt that the media play the primary role in performing these functions, in the sense that they do this *more often* than individuals, and that they have this as their *sole purpose*. However, RTE's argument overlooks the fact that media organs do not exclusively perform that role. Individuals also report and comment on events of public interest, whether through books, pamphlets, interviews or at meetings. It is true that individual speech does not always and exclusively deal with such matters, and may often involve communications which do not relate to matters of public interest. However the mere fact that individual speech *sometimes* does not concern matters of public interest is not a reason for treating it differently from media speech when it does.

25. We feel that RTE's concerns are unfounded. Their argument for greater protection in respect of their activities assumes that protection in respect of individuals performing such activities is sufficient. However, the view we have taken is that the common law scheme of protection has been insufficient for everyone. In addressing itself to reforms of the law of defamation, the Commission has been mindful of the types of speech used by media organs and has been at pains to foster the maximum possible freedom, subject to the right to a good name. The only apparent point of difference between the Commission and RTE is that we feel that the reforms proposed should apply additionally to individuals when they publish matter of a similar type to that published by media organs. In essence, the Commission is of the view that the content or form of communication is what is important, rather than who says it. RTE acknowledge this by drawing attention to the public interest aspect of the type of material they communicate. We do not deny this; we rather point out that communications in the public interest are not always made by the media. If Article 40.6.1^o were interpreted so as to confer greater protection on media organs, this would be unfair to individual citizens who perform, on occasion, the same functions. We therefore conclude that neither the reference to media organs nor the wording of Article 40.6.1^o suggest that media organs are constitutionally entitled to greater protection than individual citizens.

Article 40.3 and the unenumerated right of freedom to communicate

26. It was argued above on the basis of various methods of interpretation of Article 40.6.1^o that it concerns opinions, criticism and comment only. This view draws further support from an examination of the unenumerated right to communicate

27. The right to communicate was recognised in *Attorney General v Paperlink*. This case involved an action by the Attorney General and the Minister for Posts and Telegraphs against the defendant which operated a courier service in Dublin. The plaintiffs sought a declaration and injunction in support of the state postal monopoly, established by the *Post Office Act 1908* as amended by the *Ministers and Secretaries Act 1924*. In their counterclaim, the second, third and fourth defendants, directors of the company, asserted that the 1908 Act was unconstitutional because, *inter alia*, it infringed the right of citizens to communicate freely, which they alleged was a personal right under Article 40.3.1° or Article 40.6.1°.

Costello J said that the act of communication was the exercise of such a basic human faculty that a right to communicate must inhere in the citizen by virtue of his human personality and must be guaranteed by the Constitution. However, he went on:

"But in what Article? The exercise of the right to communicate can take many forms and the right to express freely convictions and opinions is expressly provided for in Article 40.6.1.i. But the activity which the defendants say is inhibited in this case is that of communication by letter and as this act may involve the communication of information and not merely the expression of convictions and opinions I do not think that the constitutional provision dealing with the right to express convictions and opinions is the source of the citizen's right to communicate. I conclude that the very general and basic human right to communicate which I am considering must be one of those personal unspecified rights of the citizen protected by Article 40.3.1°."

This is clearly a highly important passage with regard to freedom of speech and has been generally overlooked in submissions to the Commission. It supports the view that Article 40.6.1.i deals with 'opinion' and leaves remaining types of speech, including factual matter, to be dealt with in the context of the unenumerated right to communicate.

28. Costello J went on to consider the extent of the right to communicate. Having drawn the distinction referred to above between the guarantee of a personal right and the extent of its exercise, he went on to say:

"But the right to communicate is obviously not an absolute one. Laws may restrict the nature of the matter communicated (for example, by prohibiting the communication of confidential information or treasonable, blasphemous, obscene or defamatory matter) and laws may also restrict the mode of communication It follows, therefore, that it is not correct, and indeed, can be seriously misleading, to suggest that the defendants enjoy a right to communicate 'freely'. Along with other citizens they enjoy a right to communicate."

A Constitution which guarantees personal rights imposes co-relative constitutional duties on the State. In the case of those protected by Article 40.3.1° the duty imposed on the State is to guarantee in its laws to respect, and, as far as practicable, by its laws to defend *and vindicate* the right to communicate."

Therefore while this judgment recognises the right to communicate, which must be crucial to the law of defamation, it makes clear that such a right is not absolute and that it is for the Oireachtas and the courts to regulate the manner in which it may be exercised.

We have noted that it was accepted by the parties that the right did not inhere in a corporate body. However, as the point was not argued, it would appear to be open for a future case to decide whether the right applies to such bodies. Even if it does not, an action may be brought by the directors/shareholders on behalf of the company.

29. The right to communicate was again recognised by Costello J in *Kearney v Minister for Justice, Ireland and the Attorney General*,¹⁹ where the issue was whether the right was infringed by a prison rule providing for the reading and possible censorship of a prisoner's correspondence. Costello J reaffirmed his view that Article 40.3.1^o guaranteed a right to communicate which was not absolute and could be regulated by law. The right to communicate was also referred to in *Attorney General (Society for the Protection of Unborn Children Ireland Limited) v Open Door Counselling Limited*. In the High Court, Hamilton P simply stated at page 617 of his judgment:

"The qualified right to privacy, the rights of association and freedom of expression and the right to disseminate information cannot be invoked to interfere with such a fundamental right as the right to life of the unborn, which is acknowledged by the Constitution of Ireland".

In the Supreme Court, Finlay CJ said that there could be no implied and unenumerated constitutional right to information about the availability of a service of abortion outside the State.

30. Thus speech which potentially comes within the ambit of defamation law may derive protection from two sources: Article 40.6.1^o.i and the unenumerated right to communicate. If the former does refer to opinion only, then the latter may be said to refer to factual assertions as well as opinion. However, if so, there is no guidance as to how factual assertions are to be treated under the law of defamation other than that the unenumerated right may be regulated by law. Thus, under this interpretation also, whether an assertion must be false to be actionable, or whether a false assertion of fact may be protected, is left to be decided in the light of the balance to be achieved with the right to a good name. Under this view also, therefore, there is no *prima facie* entitlement to make false assertions, nor is a requirement of fault in defamation law constitutionally mandated.

Conclusions

31. Any interpretation of Article 40.6.1 which we put forward may be rejected at some point in the future by the High Court or the Supreme Court. All we can offer are possible interpretations. However, in suggesting possible readings of the Constitution, we have borne in mind practical and common sense considerations. We think it unlikely that the courts would infer detailed rules of law from particular terms of the constitutional guarantee of free speech. As Professor Kelly once wrote:

"[It is suggested] that Constitutional interpretation generally, including interpretation of the fundamental rights articles, should bear in mind that the Constitution, back in 1937, was not intended by anyone to become a sort of machine lathe, engineered to minute tolerances, which could shear away whole strips of legal timber on the strength of a linguistic usage which, at that time, no one thought it necessary to

¹⁹ [1986] IR 116.

scrutinise closely or indeed at all".²⁰

32. Where different canons of interpretation have seemed to yield conflicting results, we have adopted the approach which seems to accord with most interpretations. This has led us to the following conclusions.

1. A reading of Article 40.6.1° in general and an examination of the intent of the framers, as well as at least one literal interpretation indicates that it primarily concerns opinions, criticism and comment and requires wide protection for their expression.
2. Article 40.6.1° may protect assertions of fact by implication. If so, it does not give guidance as to how assertions of fact, especially false ones, are to be treated. This appears to be left to the legislature which must also take into account the right to a good name guaranteed by Article 40.3.2°.
3. Alternatively, Article 40.6.1° may be construed as not protecting freedom of factual assertion in any way. On this view, that freedom is protected by the unenumerated right to communicate implicit in Article 40.3.1°. Again, there is no guidance as to how assertions of fact, especially false ones, are to be treated having regard to the unenumerated right to communicate: it is again a matter for the legislature to determine.
4. The terms of Article 40.3.2° give no guidance as to whether true assertions of fact may be actionable under defamation law or some other law or whether an "unjust attack" consists solely of false statements.
5. The reference to "unjust attack" in Article 40.3.2° must be balanced against the wide protection for opinions afforded in Article 40.6.1°. We have borne this in mind in making recommendations for the widening of the defence of fair comment.
6. The purpose of the special reference to the media in the second paragraph of Article 40.6.1° is either:
 - (a) To include within the guarantee entities which would not come within the terms "citizens" in the first paragraph; or
 - (b) To emphasise that organs of public opinion shall not be permitted to undermine public order, morality and the authority of the State.

On either view, it does not necessarily suggest greater protection for media organs than is afforded to the citizens generally. If the provision was capable of being so construed, it would lead to a result which is undesirable in principle, since the functions of the media in these areas may be undertaken by individuals.

It follows, in our view, that the relevant provisions of the Constitution leave a wide area of discretion to the Oireachtas in determining how best the good name of the citizen may be protected and vindicated by a properly framed

²⁰ "Fundamental Rights and the Constitution" an essay contained in *De Valera's Constitution and Ours*, ed Brian Farrell, from the Thomas Davis lecture series, at p171.

law of defamation. This view appears to us to be wholly in accord with the approach adopted by Henchy J in *Hynes O'Sullivan v O'Driscoll*. It is essential, however, in framing such a defamation law to have full regard to the importance of freedom of expression, whether in the area of opinion and comment or factual statements. The limited protection which, on our analysis, is afforded by Article 40.6.1° to freedom of expression is not, in our view, a determining factor. Thus, we think it is highly doubtful whether, as has been suggested to us, the present categorisation of defamation as a tort of "strict liability" is Constitutionally suspect. But equally there is nothing in the Constitution to inhibit the Oireachtas in altering the law so that the tort becomes, to whatever extent, a fault-based tort. Ultimately, the Constitution leaves the competing rights of the citizen to his good name and of freedom of expression to be reconciled by the Oireachtas in accordance with the common good and that has also been our approach throughout this Report.

APPENDIX B

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The Convention's Guarantee of Freedom of Expression

1. Article 10 of the European Convention provides as follows:

- "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

2. Certain points of contrast between this guarantee and the right of free expression in the Irish Constitution may be noted. In the first place it is quite clear that "expression" in this Article encompasses all types of matter, since it refers to opinions, information and ideas. In the second place, interests which justify the imposition of restrictions on this right of free expression are more clearly delineated in Article 10 than in Article 40.6.1^o.i of the Irish Constitution. In particular, restrictions for the protection of the reputation of others are expressly mentioned. All restrictions must, however, satisfy the dual requirement of being "prescribed by law" and "necessary in a democratic society".

Restrictions on Freedom of Expression Generally

3. Review by the Strasbourg organs of domestic restrictions on freedom of expression or, indeed, any of the freedoms set out in the Convention, proceeds in the following way. The first question is as to whether the right in question has been violated. The second is as to whether this violation is

justified. This consists of an examination of three matters:

- (a) whether the violation was "prescribed by law";
- (b) whether the law on which the violation is based aims at protecting one of the interests mentioned as a ground for restricting the freedom (such as national security,¹ the prevention of crime, the protection of health, the protection of the reputation or rights of others,² or maintaining the authority and impartiality of the judiciary); and
- (c) whether the violation may be considered necessary in a democratic society.

"Prescribed by law"

4. While the interpretation of domestic law is a matter for the national authorities, as is the question of whether the enactment of the law complies with national formalities, the Strasbourg organs reserve to themselves the question of whether an alleged law is in fact a "law" for the purpose of this phrase. The phrase "prescribed by law" was discussed in *Sunday Times v United Kingdom*³ -

"In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."⁴

The Court also indicated that "law" includes unwritten as well as written law:

"it would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common

1 See for example the recent rejection by the Commission of the claim by the RTE broadcasting unions that s31 of the *Broadcasting Act 1960* is an unjustifiable interference with freedom of expression on the ground that s31 protects the interest of national security in the prevention of disorder and crime. (Reported in the Irish Times, Tuesday June 11th 1991). See also *Arrowsmith v United Kingdom* (1981) 3 EHRR 218.

2 See for example *Felderar v Sweden*, appl 1101/84 (1986) 8 EHRR 91 where the Commission found that Swedish legislation aimed at protecting the rights of people of a certain race, colour, national or ethnic origin or religious creed had the legitimate aim of protecting the rights and reputations of others.

3 (1980) 2 EHRR 245. The applicants (a publisher, editor and a group of journalists) had contested an injunction obtained by the Attorney General restraining the publication of an article on the so called Thalidomide children on the ground that it would constitute contempt of court. The Court found that there had been a violation of article 10. Following this judgment, the *Contempt of Court Act 1981* was passed. A challenge to this Act was held inadmissible by the Commission on the ground that the applicants had failed to establish a *prima facie* case of being victims of a violation of article 10: see *The Times v United Kingdom*, appl 10243/83 (1985) XXVIII Yearbook 53. See also our Consultation Paper on *Contempt of Court* at pp73/4.

4 The applicants had submitted that the English law of contempt of court was so vague and uncertain that the restraint imposed on them could not be regarded as "prescribed by law". However, the Court was of the view that no absolute certainty was required with regard to the consequences of the given conduct and concluded that the applicants were able to foresee, to a degree that was reasonable in the circumstances, a risk that publication of the article might fall foul of the law of contempt of court.

law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation: this would deprive a common law State which is a Party to the Convention of the protection of Article 10 para 2 and strike at the very roots of that State's legal system."

In the *Silver* case, however, restrictions on prisoner's correspondence established by unpublished administrative instructions were not "law" for the purposes of Article 10(2).⁵

5. The question as to whether an alleged law is in fact a "law" for the purposes of Article 10(2) has been further considered by the Commission in *Open Door Counselling Limited and Others v Ireland*. The applicants made their application to the Commission following the ruling by the Supreme Court in *Attorney General (SPUC) v Open Door Counselling Limited* that, in view of Article 40.3.3° of the Constitution, which protects the right to life of the unborn, the right to give and receive information under the Constitution does not include the right to provide information on abortion services available outside the State.

On May 6th 1991, the Court announced that the case had been referred to the Court by the Commission. Of the 13 members of the Commission, 8 were of the view that there had been a violation by Ireland of Article 10. Six of those who constituted the majority were of the opinion that the alleged law was not a law within the meaning of the expression "prescribed by law". In support of this position, they said that:

- (a) the provision of information as to how to obtain an abortion outside the State was not expressly prohibited by the Constitution; and
- (b) since the State itself had not instituted criminal prosecutions against the applicants, a lawyer advising a client, in advance of the High Court proceedings, could not reasonably have predicted that, on the basis of the then existing law, the provision of information on abortion facilities outside the State was illegal.⁶

The remaining two members of the majority were of the view that, while the prohibition was "prescribed by law" it was not "necessary in a democratic society" within the meaning of paragraph (2), which is considered further below. (In that view, they were joined by one of the six). The five members of the minority were of the view that the prohibition was "prescribed by law" and did not contravene paragraph (2).

"Necessary in a democratic society"

6. The condition "necessary in a democratic society" occurs in Articles 8-11 and Article 2 of Protocol IV. The national authorities are allowed a certain "margin of appreciation" in determining whether a given restriction is necessary. Of course, it is crucial to know, when formulating proposals for the reform of the law of defamation, what margin of appreciation or discretion is permitted by the Convention in the context of defamation law. If the Convention leaves very little discretion and suggests certain specific rules, the Law Reform Commission would naturally endeavour to follow these rules so that any Irish legislation ensuing from our proposals should not

⁵ Report of the Commission of October 11th 1980 cited in Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights*, at p296.

⁶ *The Irish Times*, 22nd May 1991.

subsequently be found to be in breach of the Convention. If, on the other hand, the Convention leaves a wide margin of discretion to the national authorities in the formulation of defamation law, we may be somewhat freer to make policy choices in accordance with the Irish Constitution. We approach the task of ascertaining the degree of discretion permitted in two ways; first, by examining the range of discretion permitted generally in relation to the formulation of restrictions on freedom of expression, and secondly, by examining the range of discretion permitted by the Convention specifically in relation to the formulation of restrictions on freedom of expression for the purpose of protecting reputation.

Van Dijk and Van Hoof⁷ trace the development of the "margin of appreciation" doctrine, designating its origin as *Greece v United Kingdom*,⁸ (where the State concerned was allowed 'a certain measure of discretion'), and *Lawless*,⁹ both of which concerned Article 15. The doctrine was extended to other articles of the Convention: see the *Iversen*¹⁰ case and the *Belgian Linguistics* case,¹¹ and thence into caselaw where the doctrine was applied with respect to the specific restrictions in Articles 8-10. In the *Handyside*¹² case, where the compatibility with Article 10(2) of restrictions imposed upon a publisher were at issue, the Court offered the following rationale for the doctrine:

"By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of the 'restriction' or 'penalty' intended to meet them".

The Court then discussed the meaning of the word "necessary" -

"The Court notes at this juncture that, whilst the adjective 'necessary', within the meaning of Article 10(2), is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable', or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.

Consequently, Article 10(2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force".

However, the Court immediately added that this margin was not unlimited:

"The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10.

7 *Op cit.*

8 Appl 176/56, Yearbook 2 [1958-59], p174.

9 Publ ECHR, series B, vol 1 [1960-61] p408.

10 Appl 1468/62, *Iversen v Norway*, Yearbook VI (1963) p278.

11 Judgment of July 23rd, 1968, publ ECHR series A, vol 6 (1968) p34.

12 [1979] 1 EHRR 737. The applicant was an English publisher who had been charged and convicted under the *Obscene Publications Acts 1959 and 1964* for having in his possession for publication for gain a text entitled "The Little Red Schoolbook".

The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court ... The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'."

These principles were identified as follows:

"Freedom of expression constitutes one of the essential foundations of such a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic' society."

7. As Van Dijk and Van Hoof have observed:

"The *Handyside* judgement thus formulated the point of departure on the basis of which in later case-law the discretion of the national authorities and that of the Strasbourg institutions were demarcated more specifically. However, this does not mean that the 'margin of appreciation' doctrine has now been developed into a test which can be based upon a clear and absolute norm. The exact scope of the national discretion will depend on different factors in each concrete case."

If the restrictive measures go very far and no reasonable justifications can be advanced for them, the Strasbourg organs may be quite willing to find a lack of "necessity" for such restrictions: see for example, *De Becker*,¹³ and *Golder*.¹⁴ However, where the restrictions are less far-reaching, the application of the "margin of appreciation" doctrine is less predictable. For example, in the *Handyside* judgement itself, the Court was guided completely by the views of the national court not only for the questions of fact but also for the questions of law. In no way did it apply a European standard nor was it persuaded by the objection of the publisher that the offending book was allowed to circulate freely in other parts of the United Kingdom and in most member states of the Council of Europe. Thus it appears that the fact that the legislation in the relevant State diverges considerably from what applies in the same field in most of the other contracting States is not decisive. On the other hand, if the relevant legislation conforms with the

13 [1979-80] 1 EHRR 43. A Belgian who had collaborated with the enemy during the Second World War was prohibited for life from engaging in any form of written publication, irrespective of whether its contents did or did not have a political character. The Commission found that such a rigid restriction exceeded what was necessary in a democratic society. After the Commission referred the case to the Court, domestic legislation was enacted which resulted in the case being struck off the Courts list.

14 Judgment of February 21st. 1975, publ ECHR series A, vol 18 (1975) p26. A prisoner had been refused permission to contact a lawyer. While the Court held that in principle it may be necessary in a democratic society to subject correspondence control where prisoners are concerned, the refusal of permission to write even a letter, particularly a letter intended to enable the prisoner to exercise a right granted by Article 6, was not "necessary", even having regard to the power of appreciation left to the contracting states.

situation in most other States this does appear to point towards its democratic necessity.

8. Furthermore, a wider margin of appreciation appears to be left to domestic States with respect to certain interests, such as state security. In *Arrowsmith v United Kingdom*,¹⁵ the Applicant had been convicted under the *Incitement to Disaffection Act 1934* primarily on the ground that she had distributed certain pamphlets to troops stationed at an army camp, endeavouring to seduce them from their duty of allegiance in relation to service in Northern Ireland. The Applicant claimed, *inter alia*, that her conviction and sentence interfered with her right to manifest her pacifist beliefs under Article 9(1) and freedom of expression under Article 10(1). Discussing whether the prescribed restriction was "necessary", the Commission observed that the purpose of the 1934 Act was the protection of national security, the prevention of disorder and the protection of rights of others. It accepted that the desertion of soldiers could create a threat to national security. Looking at the pamphlets distributed by the Applicant, the Commission found that they went further than merely expressing political opinion and rather incited disaffection. It referred by way of example to passages in the pamphlets listing possible courses for soldiers going absent without leave. The Commission found that neither Articles 9 or 10 had been violated.

9. In contrast to the cases where a wide margin of appreciation was allowed to national authorities, there are some cases where very little discretion was permitted. An example of this is the *Sunday Times* case, where the Court instituted a comprehensive independent inquiry into the question of whether the requirement of necessity in a democratic society had been satisfied, without apparently being guided to any great extent by the views of the national authorities, and concluded that the restriction was not necessary for the maintenance of the authority and impartiality of the judiciary. The decision of the Court does not even refer to the doctrine of the margin of appreciation. The *Silver* case¹⁶ may also be seen as an example of a narrow application of the margin of appreciation doctrine. Here a number of detainees complained of censorship of their correspondence by the British prison authorities in contravention of Articles 8 and 10 of the Convention. After examining the alleged violation of Article 8, the Commission concluded that, with certain exceptions, the grounds on which letters of the applicants had been censored were not justified. The Commission in reaching this conclusion gave little credence to the points of view of the relevant British authorities.

10. As we have already mentioned, in the case of *Open Door Counselling Limited and Others v Ireland*, the question has arisen as to whether the law as stated by the Supreme Court in *Attorney General (SPUC) v Open Door Counselling Limited* i.e. that the right to receive and give information under the Constitution did not include the right to provide information on abortion services available outside the State, is in breach of Article 10 and that one of the grounds of the challenge is that it is not "necessary" within the meaning of Article 10(2). As we there noted, the application was admitted by a majority of the Commission and has now been referred to the court.

11. Thus while a wide range of expression is *prima facie* protected under Article 10(1) of the Convention, Article 10(2) permits such expression to be

¹⁵ {1981} 3 EHRR 218.

¹⁶ *Supra*.

restricted if the restriction is "prescribed by law" and is "necessary". In determining what is 'necessary', the States have a margin of discretion. However, the degree of this power of discretion varies considerably according to the interest in question and the facts of the case, and it is somewhat difficult to anticipate what degree of discretion would be afforded to Ireland in its formulation of a law of defamation, or to put it another way, to anticipate what rules of defamation law would overstep Convention limits. Some assistance may be derived from looking at the cases in which Convention organs have examined restrictions on freedom of expression purportedly based on the interest in the reputation and rights of others.

Convention Caselaw on Restrictions on Freedom of Expression in order to protect Reputation

12. In *Germany*,¹⁷ a warning had been given to the Applicant by a German criminal court in respect of statements of an insulting character made to a small group of persons. It appears that the Applicant was expressing disagreement with the attitude of certain trade unions on abortion, and compared an association of trade unions with the former German Nazi party. The warning had been clearly based on a provision of German criminal law and the only question before the Commission was whether the restriction was necessary. The Commission noted that the criterion of necessity cannot be applied in absolute terms but calls for assessment of various factors, including the nature of the right in question, the degree of interference, the nature of the public interest and the extent to which it needed to be protected in the particular circumstances. The Commission observed that German courts acknowledge that freedom of expression may even justify the use of arguments which may affect the honour of a third party in a public debate on issues of general interest, but that the courts had felt that the statements made by the applicant went beyond admissible limits, not on account of factual issues referred to but because of the form in which the applicant presented his arguments. Under German law, the Applicant was free to express disagreement with the trade unions in critical forms without having to make an incriminating comparison. The Commission concluded that the measure taken against the applicant was justified as necessary in a democratic society for the protection of reputation and the application was held manifestly ill-founded.

It should be noted that the Commission expressly noted that the matter had gone beyond permissible limits, not because of the factual issues referred to but because of the form in which the Applicant presented his arguments. Thus it seems that while the Convention guarantees freedom to express opinion or criticism, such views must be expressed in suitable or moderate terms. Accordingly it would seem that the common law on "fair comment" is probably in accordance with the terms of the Convention. However, in our Consultation Paper and in this Report, we have taken the view that free exchange of opinion requires protection even for immoderately expressed opinion. Therefore the reforms proposed in our Report would appear to afford greater protection to expression of opinion than the Convention as interpreted in the above case.

13. Another relevant case, *Lingens v Austria*,¹⁸ was discussed at some length in our Consultation Paper.¹⁹ We expressed the view that if our reform

¹⁷ Application No. 12230/86 (1989) 11 EHRR 101.

¹⁸ Series A no 103, 8 EHRR 407.

¹⁹ See pp285-292.

proposals were adopted, Irish law would be in conformity with the Convention as interpreted in that case.

14. In *X v Austria*,²⁰ the concept of *parliamentary privilege* was upheld by the European Commission and a challenge to the Austrian form of the privilege was declared inadmissible. A member of the Austrian National Assembly had made certain remarks about the Applicant in the course of parliamentary proceedings. The Applicant brought an action demanding that a withdrawal of the remarks be published in a newspaper, but the action was declared inadmissible on the ground that under Article 57 of the Austrian Constitution a civil action may not be brought against a member of the National Assembly in respect of remarks made by him in the course of proceedings. The Applicant complained to the Commission, which said that it was a principle of public law generally recognised in States with parliamentary systems, particularly in States parties to the Convention, that no judicial proceedings be instituted against a member of Parliament in connection with views expressed by him in fulfilment of his Parliamentary functions. This principle had been embodied in Article 4 of the Statute of the Council of Europe in respect of members of the Consultative Assembly. It followed that Article 6(1), which provides that in civil matters everyone is entitled to a hearing by an independent and impartial tribunal, should be interpreted with due regard to parliamentary immunity. It was inconceivable, the Court said, that the States parties to the Convention wished by means of Article 6 to derogate from the fundamental principle of the parliamentary system, embodied in the Constitutions of virtually all those States.

It may be noted that parliamentary immunity was again upheld in the case of *Lingens and Leitgens v Austria*,²¹ discussed below. The central issue was the fact that the applicants were required under Austrian law to prove the truth of their allegation. To this end they wished to examine the prosecutor as witness, but they could not do so because of the witness's parliamentary immunity. The Commission said:

"The fact that certain crucial evidence thus remained outside the reach of the court due to the witness's parliamentary immunity cannot, however, be considered as an unfair element in the proceedings because it cannot be assumed that the States parties to the Convention wished, in undertaking to recognise the right set forth in Article 6 to make any derogation from the fundamental principle of parliamentary immunity which is embodied in the Constitutions of most States with a parliamentary system".

The implication is that the parliamentary immunity, encompassing defamatory statements, in Article 15.12 of the Irish Constitution, is in conformity with the European Convention. However, such a restriction is permissible rather than mandated, and the removal of such a restriction would presumably also be in conformity with the Convention, should a Contracting State provide for its removal by legislation and should its Constitution permit its removal in that manner.

15. The facts of *Lingens and Leitgens v Austria* were as follows: The Applicants were convicted of criminal defamation after the magazine edited by them carried an article alleging that an Austrian MP had lied in a public speech when he stated that he knew a case where the Association of Austrian

²⁰ Application No. 3374/67 (1969) XII Ybk 246.

²¹ European Commission on Human Rights Decisions and Reports, vol 26 at 171.

Manufacturers had incited an enterprise to dismiss employees for the purpose of political propaganda. It was suggested that in reality the MP did not know of such an enterprise. At a press conference, the MP had been asked by numerous journalists to disclose the name of the employer in question, but he refused to do so.

The MP instituted a private prosecution under section 111 of the Penal Code, under which it is a criminal offence to state before others that a person has contemptible features or attitudes, or to accuse him of dishonest behaviour or to degrade him in the public opinion. A person will not be punished if it is shown that the allegation made is true. According to section 112 the burden of proof is on the defendant party. The position under Austrian criminal law in this respect accordingly mirrors the common law presumption of falsity in a civil defamation action.

The applicants alleged that their convictions violated Articles 6(1) (fair trial), 6(2) (presumption of innocence) and 10 of the Convention. The applicants submitted that in criminal proceedings the shift of the burden of proof on the accused is inadmissible, because it is almost impossible to prove the negative, and to require them to do so violates the principles of a fair trial and the presumption of innocence. They also argued that a restriction of freedom of expression was not admissible for the protection of somebody's reputation if a statement made about him is not (objectively) untrue.

16. The Commission dismissed the Applicants' claim on the basis that it was ill-founded. It said that under Austrian law it was a criminal offence to damage another's reputation by statements in the press unless one can prove that these statements are true. Therefore, all the elements of the offence, except for the truth of the statement, have to be proven in the normal way by the prosecution. There was, therefore, no question of a shifting of the burden of proof, except as regards the truth of the matter. The Commission said:

"This in no way means that the accused has to prove his innocence because he can only be considered as innocent if he has not committed the offence. The offence as conceived in the applicable provisions of the Penal Code, however, can even be committed by a true statement. What exculpates is not the *objective truth* of a defamatory statement, but *ability to prove its truth*. In this way the law intends to compel the author of such statements to make sure in advance that what is being said can also be proven as true, i.e. it imposes a particular standard of care on everybody who makes defamatory statements in the press. Similar regulations also exist in many other Convention States. The reputation of the victim is protected in this way not only against untrue statements but against any allegations the truth of which cannot be proven by their author and in respect of which it would be unfair to impose a negative proof on the victim. The Commission considers that, in view of the object of this legislation, it is not inappropriate to make use of the legal technique of a defence, commonly referred to as the 'proof of truth', to cover the exculpating element. There is therefore no appearance of a violation of Article 6(2) of the Convention in the present case"²²

Regarding the Article 10 complaint, the applicants had submitted that it was

22 Emphasis added

not "necessary" in a democratic society to limit the expression of opinion in the press to statements which can be proven as true, in particular if critical comments are being made on the veracity of political declarations the factual basis of which has not been laid open. The Commission observed in response to this that the obligation for the press to publish only what can be proved as true was not of general application, and the special standard of care was only applicable where allegations of an objectively defamatory character were made against a particular person, be it a politician or another citizen. It concluded:

"The protection of the reputation of that person is as such a legitimate ground justifying a restriction of the freedom of expression and the Commission also considers that the scope of protection as it is defined in the Austrian laws does not in the present case go beyond what may reasonably be considered as 'necessary' in the sense of Article 10(2)."

17. In an important passage, the Commission drew a distinction between criticism on the one hand, and allegations of fact on the other:

"In view of the fundamental importance which this freedom has in the field of political discussion it is of the utmost importance that these restrictive regulations should only be applied where it is really necessary in the particular case. They should not be used to curb legitimate criticism in the press of the behaviour and statements of a politician since it is the very function of the press in a democratic society to participate in the political process by checking on the development of the debate of public issues carried on by political office-holders. A politician must be prepared to accept even harsh criticism of his public activities and statements, and such criticism may not be understood as defamatory unless it throws a considerable degree of doubt on his personal character and good reputation. This threshold is overstepped if, as in the present case, an allegation is made against a certain politician that he is trying to manipulate public opinion by deliberately making false assertions and withholding the relevant information in order to prevent the verification of these assertions.

However the applicants did not limit their criticism of the private prosecutor to an expression of their opinion that the private prosecutor had invented an untrue story and that his subsequent behaviour was only a strategy to cover up the untruthfulness of his original statement. *The applicant's article indeed went beyond the expression of such a suspicion in that it presented the personal conclusion which the applicants had drawn from the incomplete information available to them in such a way as if it were an established matter of fact. In other words they presented their opinion in the form of objective information.* It was only because they chose this form of presentation that the proof of truth which they were required to discharge included the proof of the private prosecutor's bad faith which they were eventually unable to establish".²³

18. The significance of this case is, first, that it draws a distinction between criticism of official conduct and factual allegations or "objective information". Second, it upholds the Austrian position under which truth is a defence (and therefore the prosecution is not required to show falsity). This is all the more significant in the light of the fact that this was in the context of a

²³ Emphasis added.

criminal prosecution, not a civil suit. If the burden of proving truth may legitimately be placed on the defendant in criminal proceedings, *a fortiori* one would expect such a burden to be legitimate in civil proceedings. It seems therefore, that the presumption of falsity in existing Irish law of civil defamation would not be in breach of the Convention. In this respect, our recommendation for the reversal of the presumption of falsity goes further towards freedom of expression than is required by the Convention guarantee.

19. The importance of the distinction between criticism of a public figure's conduct and factual allegations was stressed again in a recent decision of the court, *Oberschlick v Austria*.²⁴ In that case, an Austrian politician had suggested that family allowances for Austrian women should be increased by 50% in order to obviate their seeking abortions for financial reasons, while those paid to immigrant mothers should be reduced to 50% of their current levels. He had justified his statement by saying that immigrant families were placed in a discriminatory position in other European countries as well. Thereupon the applicant and others laid a criminal information against the politician, the text of which referred to crimes of incitement to hatred and activities contrary to the *National Socialism Prohibition Act 1945* and was published by the applicant on the same day in a periodical for which he worked as a journalist. The politician thereupon instituted a private prosecution for defamation and the applicant was in due course convicted and fined and the relevant issue of the periodical ordered to be seized. The Vienna Court of Appeal dismissed an appeal by the applicant, finding that he had insinuated, without a sufficient basis in the facts, that the politician held national socialist attitudes. The application alleged *inter alia* that his conviction constituted a violation of Article 10. The claim was admitted by the Commission and upheld by the court.

In the course of its judgment, the court reiterated that the limits of acceptable criticism were wider with regard to a politician acting in his public capacity than in relation to a private individual. In the case of the particular publication, the court found that the applicant had been convicted because he had not been able to prove the truth of the allegations. In the view of the court, however, the publication consisted of a true statement of facts (the politician's proposal) followed by the opinion of the author concerning that proposal. That opinion, in the view of the court, constituted a "value judgment", in respect of which the requirement of proving its truth was impossible of fulfilment and thus infringed freedom of opinion. They were also of the view that, having regard to the importance of the issue at stake, the applicant could not be said to have exceeded the limits of freedom of expression by choosing that particular form of publication.

20. Two cases concern the issue of group defamation. The first is *Church of Scientology v Sweden*,²⁵ where a local Swedish newspaper had published statements made by a professor of theology in the course of a lecture, including the following passage:

"Scientology is the most untruthful movement there is. It is the cholera of spiritual life. That is how dangerous it is."

The Church instituted proceedings for damages against the publisher of the newspaper. The Supreme Court held on appeal that the Church was not qualified to bring an action since the protection of a group could not be

²⁴ *The Times*, 20th August 1991.

²⁵ Appl 8282/78.

obtained through the civil proceedings in question. The Applicants complained that the inability of the applicant Church to institute civil proceedings for damages in the Swedish courts violated Article 6(1) of the Convention, which provides that in the determination of his civil rights everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Commission noted that the Court had, in the *Konig* case, laid emphasis on the concept of 'civil rights' in this Article, saying:

"Whether or not a right must be regarded as civil ... must be determined by reference to the substantive content and effects of the right ... under the domestic law of the State concerned".

The right whose vindication was sought in the present case concerned the protection of the reputation of a group, which was not recognised by the Swedish Supreme Court. The Commission said:

"Although the Commission has held on several occasions that the right of an individual to protect his reputation can be regarded as a 'civil right' within the meaning of Article 6(1) ... it must attach importance to the characterisation of the right of the group under Swedish law".

It concluded that since the group right claimed was not recognised under Swedish law, it was not a right within the meaning of Article 6(1) and the complaint was ill-founded.

21. The *Scientology* case does not appear to conflict with the second case on group defamation, *X v Federal Republic of Germany*.²⁶ Here the applicant had displayed pamphlets on a notice board describing the killing of six million Jews as a mere invention, an unacceptable lie and a Zionist swindle. A neighbour of Jewish origin whose grandfather had died in the concentration camp of Auschwitz felt defamed by these pamphlets and brought a civil action against the applicant by which he sought the discontinuance of the latter's behaviour. The Regional Court of Mainz found that the pamphlets were defamatory of all Jews persecuted and their surviving relatives. As the plaintiff could understand the pamphlets as saying that the fate of his grandfather was a swindle or lie, he was entitled to bring a defamation action. It had been proved by numerous documents beyond any doubt that millions of Jews had in fact died at the hands of the Nazis. The Koblenz Court of Appeal considered that the plaintiff had no *locus standi* because the pamphlets were not addressed to him personally or as a member of the insultable group of Jews. On appeal to the Federal Court of Justice, it was observed that no one who denies the historical fact of the assassination of Jews can invoke his freedom of expression under Article 5(1) of the Basic Law, because this freedom does not include a right to make wrong statements. The applicant's argument that the pamphlet at issue merely criticised exaggerated estimations of the number of assassinated Jews was rejected. It was found that the pamphlets described the fact of the assassination of the Jews as a lie, and that documentary evidence established that it was not a lie. Furthermore, the Federal Court's case law established that each person belonging to the group of Jews may feel defamed by an attack against the group, irrespective of whether he has personally suffered from persecution during the relevant period. The applicant's constitutional complaint was rejected as inadmissible by a panel of the Federal

26 Appl 828/78, 21 D & R 10944, appl 9235/81, 29 D & R 194.

Constitutional Court. Following the exhaustion of domestic remedies, the applicant invoked his rights under a number of articles of the Convention, including Article 10.

22. The Commission accepted the view of the Federal Court of Justice that the prohibition was limited to assertions denying the assassination of Jews as such, and that it did not cover criticism directed against an allegedly exaggerated estimation of the number of Jews killed. Thus the restriction at issue was a defamatory falsehood about a group. The Commission noted that the restriction was based on the applicable legal provisions as interpreted by the German case law, which was based on the principle that Jews are insultable as a group. The Commission considered that the restriction in question was not only for a legitimate aim but was also "necessary" in a democratic society, saying:

"Such a society rests on the principles of tolerance and broadmindedness which the pamphlets in question clearly failed to observe".

It said that the protection of these principles may be especially indicated *vis à vis* groups which have historically suffered from discrimination. It dismissed the applicant's complaint as ill-founded.

23. It may be noted that in this case the applicant before the Commission was not the member of the group relying on the right of reputation, but rather the person who had insulted the group. Nonetheless the case indicates that a group may under Convention law be defamed and that restrictions on such insults are permissible. Presumably if the German courts had non-suited the member of the group, he could have relied on the group's right to reputation before the Commission. At first sight this appears to conflict with the *Scientology* case. The outcome in this case may be explained on two possible grounds. The first is that restrictions for the purpose of protecting group reputation are permissible if the group is one which has historically suffered from discrimination. Secondly, and more probably, restrictions for the purpose of protecting group reputation are permissible in national law if the State wishes to introduce such restrictions. However, if, as in the *Scientology* case, the State has not done so, (and a group cannot maintain a defamation action under domestic law) the group or a member thereof cannot rely on Article 6 of the Convention. Thus it would appear that the Convention leaves it to individual States to choose whether they will impose restrictions on free expression for the purpose of protecting groups.

Implications of the Convention for the Irish Law of Defamation

24. The Convention appears to impose a number of requirements in the context of defamation law. First, restrictions on freedom of speech must be prescribed by law. Since our reforms envisage the enactment of new legislation on defamation, this requirement will have been adhered to. Second, restrictions must be accessible and formulated with clarity and precision. We have endeavoured to comply with this requirement in formulating our proposals. Third, restrictions must be necessary in a democratic society for the protection of the interest in question, here reputation. This means that the restriction must be proportionate to the end pursued. We have endeavoured to ensure that our proposals secure what is necessary for the protection of reputation and no more. In some respects, our proposals go somewhat further in according freedom of expression than the Convention would appear to require. For example, our proposals on the defence of comment would afford protection for a wide range of opinion,

irrespective of the manner of criticism or the identity of the speaker, which appears to go further than the case of *Germany*, and appears to comply with *Lingens and Leitgens v Austria*. In recommending the reversal of the presumption of falsity we appear to have gone further than required by Convention law, as interpreted in *Lingens and Leitgens v Austria*. The cases on group defamation appear to leave us free to allow restrictions for the purpose of protecting group defamation, should we choose to do so.

25. Nonetheless, the above discussion illustrates that it is somewhat difficult to know what proposals formulated by us would be deemed to be in conformity with the Convention. To take, for example, the issue of strict liability in the present law, one commentator has argued that the present position of strict liability with respect to the issue of truth may fall foul of the proportionality required by the Convention and that only a fault standard, because it takes account of the competing values of free speech and good name, would be proportionate.²⁷ However, in view of the somewhat strict attitude to factual allegations taken by the Commission in *Lingens and Leitgens v Austria*, this is questionable. Another writer speculates as to whether the absence of a public benefit requirement in the defence of justification, or a lack of right of reply, would be in breach of the "necessary" requirement. To some extent we have been obliged to leap in the dark as far as the Convention is concerned, as the equivalent of many of the reform proposals formulated by us have not been considered by the Strasbourg organs as yet. The best that we can do is to formulate proposals endeavouring to ensure that restrictions on free expression are no more than are strictly necessary to protect reputation.

²⁷ McDonald, *op cit.* p298.