

INTRODUCTION

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 of, 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 The Commission decided to undertake in the first place an examination of Civil Defamation, the most extensive of these categories Last March, the Commission published a Consultation Paper on the Civil Law of Defamation and, in July, a Consultation Paper on Contempt of Court containing the results of their examinations together with provisional proposals for reforms in the law and it is hoped to present final proposals to the Attorney General on both subjects in the near future

This Paper contains the results of our examination of the second subject comprised in the Attorney General's request, i.e. Criminal Defamation or, to give it its more precise legal description, the Crime of Libel (Unlike the civil wrong of defamation, which can be committed in either written or permanent form (libel) or spoken form (slander), criminal defamation can only take a written form)

The crime of libel is a common law misdemeanour It may come as a surprise to those who associate the term "libel" with a form of defamation to know that the crime in fact encompasses four sub-crimes These are the offences of seditious libel, blasphemous libel, obscene libel as well as defamatory libel Given the wide range of material within it, it may be seen that the crime

represents the bulk of common law criminal rules regarding speech

The crime is an interesting one because it is at once of high and trivial importance. It is of high importance because Ireland has a Constitutional guarantee of free speech, and the common law rules represent stringent restrictions upon the individual's right of expression. They affect what may be said about the organs and officials of State, the administration of justice about religion and religious institutions, about individuals whether public or private, and they circumscribe what may be read or viewed on grounds of taste and morality. In this sense therefore the crime merits serious consideration and the rules which pre-date the 1937 Constitution must be viewed with circumspection. On the other hand, the crime is a trivial one because in modern society it has assumed a very minor role. The offence in any form is rarely prosecuted in this jurisdiction and were it not for the provisions of the *Defamation Act 1961*, which clearly envisage the continued existence of each form of the crime, one might be tempted to conclude that the crime was well nigh obsolete.

A number of Constitutional principles will be seen to be important factors in the discussion of the crime. A continually emerging theme is the right of free speech guaranteed under Article 40.6.1.1 of the Constitution. Another is the constitutional qualification in the same article prohibiting the publication of "blasphemous, seditious or indecent" matter. Of importance in the context of defamatory libel is the right to a good name guaranteed under Article 40.2. Considerations of religious equality assume a role in the crime of blasphemous libel by virtue of Article 44. Another principle to which we will advert will be the principle of equality before the law under Article 40.1. Finally we shall also have recourse to the definition of the offence of treason as proscribed by Article 39.

The offence is therefore a multi-faceted one which attracts a number of delicate considerations. Nonetheless the fact remains that it is little prosecuted. Accordingly we have attempted to maintain a common sense approach bearing this fact constantly in mind. The lack of prosecution has another effect, which is of course the absence of authority. We shall be quoting much English law to establish the common law principles. This course is open to the usual qualifications.

We permit ourselves a short note on terminology. We have observed that the crime encompasses much more than the crime of defamatory libel. We shall see that even to view the crime and tort of defamation as the intersection of the criminal and tortious systems in this context is inaccurate for the crime and the tort differ in a number of respects. We note at the outset that we consistently refer to the overall crime as the "crime of libel".

or "criminal libel" and the sub-crimes by their individual names, seditious libel, blasphemous libel, obscene libel and defamatory libel. Others have used the term "criminal libel" to depict defamatory libel, but we have avoided this practice as we feel it is misleading.

We commence our examination of this crime with a summary of its historical development. We emphasize that this is not purely an academic exercise. The rules governing the different sub-crimes are frequently complex and sometimes difficult to justify. The picture becomes at once clear when one sees the origin of a particular rule, whether due to judicial reaction or political pressure, and this in turn points the way to reform. More importantly, the context in which a crime develops may of itself provide reasons for consideration of its abolition.

We then go on to consider the present law governing each of the branches of the crime of libel. There follow four corresponding chapters in which we draw some comparisons with other jurisdictions, consider the constitutional implications, examine the defects of the present law and present our tentative recommendations for reform.

We emphasise that the proposals for reform contained in this Consultation Paper are provisional in their nature. We invite written submissions in relation to any of these proposals and the material contained in this Consultation Paper. Any such submissions received by us will be assessed with great care before we present our final proposals to the Attorney General.

We would be grateful if submissions on the Consultation Paper were sent to us at the Commission's Offices not later than Wed. 25 September, 1991.

CHAPTER 1: HISTORICAL DEVELOPMENT OF THE CRIME OF LIBEL

Earliest Period

¹ The earliest form of libel known to English law was an offence of a criminal nature known as *scandalum magnatum* (slander of magnates). This offence was created by a statute in 1275 in the reign of Edward 1, and provided as follows-

"[None] be so hardy to cite or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people or the great men of the realm, and he that doth so shall be taken and kept in prison until he had brought him into court which was the first author of the tale"¹

The mischief the statute was sought to prevent was therefore causing a loss of faith in the government or the monarch. Thus the earliest form of libel was a seditious libel, and since it was punishable by imprisonment, it can be classified as a criminal offence.

However, if a person was the victim of some other form of defamation, he was obliged to go to the Ecclesiastical Courts, for, under medieval law, no remedy was offered in respect of the other forms of defamation.²

Development of Civil Action

² Towards the beginning of the 16th century the common law courts

¹ (31 dw 1) Stat Westm prim c 34
² Holdsworth *History of the English Law* 335

began to develop a civil action for slander. This jurisdiction was gradually taken over from the Ecclesiastical Courts, whose jurisdiction began to wane after its peak towards the end of the 15th century. Slander, it must be said, had not yet taken on its present-day meaning of spoken words or other transient forms of communication. At this time the action was applicable to both written and spoken defamation. The modern distinction between libel and slander was not introduced until after the Restoration.³

In the common law courts, because the action was the action on the case, the gist of the action was damage to the victim of the slander. Damage was limited to its narrow proprietary sense⁴. At this time, a number of other rules were developed, such as the requirement of publication to a third party, the rule that truth is a complete defence to the action and the rule that the action does not survive the death of the victim.

However, the action proved so popular that the Courts deemed it necessary to restrict the number of actions, and they did so by means of a number of principles. One of these was the rule of *mitior sensus*, under which words alleged to be defamatory *per se* would be held non-defamatory if it were at all possible to find an innocent meaning. This rule would have been unobjectionable if it had been restricted to genuinely doubtful cases, but its actual use shows the twisting of words and strict interpretation more in the nature of construction of documents and pleadings, often with absurd results. Holdsworth cites a case in which it was held actionable to say that a man had robbed a church *and* stolen lead from it, but that no action would have lain if the words said that the man had robbed a church *for* he had stolen the lead from it - because there could in law be no larceny of the lead which was fixed to the freehold⁵. Another example is the case of *Holt v Astgrigg*⁶, where the words were-"Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head, the one part lay on the one shoulder and the other on the other". One would have thought that this was a clear accusation of killing, yet it was moved in arrest of judgement that the words were not actionable, because it was not averred that the cook was killed, but argumentative¹.

A second restriction on the action was the rule requiring special damage to be shown unless the statement fell into one of the following categories, statements imputing a crime, statements imputing incompetence in a trade or

3 On which see at p⁷ below

4 This prompted Sir E. Pollock to say "The law went wrong in the beginning by making the damage and not the insult the cause of the action

5 Holdsworth *History of the English Law* p360 citing *Bensonner Morley* (1608) Cro Jac 153

6 (1608) Cro Jac 184

profession, or statements imputing certain diseases⁷ This emphasis on temporal damage is thought to stem from the fact that defamation unaccompanied by temporal damage was actionable in the Ecclesiastical Courts only

A further set of rules to restrict actions in the common law courts were the rules on repetition It was laid down by Coke in *The Earl of Northampton's Case*⁸ that if A published that he heard B say that C was a traitor he would not be liable if he proved he actually heard B say this A would be liable only if he did not identify the original author It was not until the 19th century that the view emerged that repetition of a libel would render the speaker liable, even if he identified the original source of the statement A feature of the common law on defamation thus developed prior to the merging of jurisdictions was the complexity and volume of cases used as precedents, which was extremely inhibiting to development This volume led to the grouping of cases under headings drawing extremely fine distinctions, leading Holdsworth to say

A study of these cases makes it quite obvious that so many and such fine distinctions were drawn by judges as to the actionable quality of words, that it was a mere lottery whether or no any particular words would be held to be defamatory, and although protests were made in the late 17th and the 18th centuries against this vicious system of citing cases to prove that this or that set of words were or were not defamatory, it was not till modern times that it was eliminated by the application to words or writings, which were the subjects of actions for defamation, of the rule that the meaning of all words and documents is a question of fact to be deduced from the words or documents themselves⁹

3 The action, surrounded by this morass of rules and cases, was unsatisfactory It was partly for this reason that the courts were subsequently to develop different rules for written defamation The old body of rules continued to apply to spoken defamation, which was eventually affected to some degree by the developments in relation to the tort of libel However, the distinction between the two forms of communication and the two distinct sets of rules continues to be a feature in the modern law of defamation

Contribution of the Court of Star Chamber

4 Meanwhile other developments had taken place in the criminal sphere

⁷ These would later form the categories of slander actionable per se to which the *Slander of Women Act 1891* added a fourth category

⁸ (1613) 12 Co Rep 134

⁹ Holdsworth *History of the English Law* at p359

in response to the increased importance of the written word. In 1476, Caxton set up the first printing press at Westminster and in 1488, the Star Chamber was set up in order to monitor and suppress criticism of Church and State which were at that time closely interwoven. The primary libels with which it was concerned were therefore libels of a seditious or blasphemous nature.

However, the Star Chamber also wished to suppress duelling, which was the fashionable means of vindicating attacks upon honour or reputation, and to this end it also punished defamatory libels i.e. libels which impugned the integrity of a private individual. In 1606 the Star Chamber held in the celebrated case of *De Libellis Famosis*¹⁰ that it was an offence to defame the deceased Archbishop of Canterbury.

The nature of the tasks of the Star Chamber and common law courts were therefore altogether different, while the Star Chamber was attempting to discourage matter which either threatened state security or might cause a breach of the peace, the common law courts were concerned with rectification of damage done to the reputation of an individual. Small wonder, therefore, that the tort and crime of libel have but a single point of intersection, namely defamatory libel, and this by reason only of the fact that this form of libel would injure reputation as well as tending to cause a breach of the peace. It may also be noted that the classification of the crime of libel into four sub-categories did not crystallise until the 19th century, until then, the distinction was rather between libels of a *political* and libels of a *personal* nature.

The rules in the Star Chamber developed differently from those in the common law courts. For example, it was sufficient if the libel were published to the victim only, neither did it matter whether the victim was alive or dead. Of extreme importance is the rule that truth was not a defence, indeed the contrary principle was expressed in the well-known phrase—"The greater the truth, the greater the libel." The often-cited example given to explain this is provided by Hudson: for, as the woman said, she would never grieve to have been told of her red nose if she had not one indeed.¹¹ A true libel was therefore a greater one because of its greater potential to provoke a breach of the peace. This merely reinforces the obvious fact that the developing criminal offence of libel had little to do with reputation and much more to do with maintenance of the public peace.

Interaction of the Two Jurisdictions

5 The Court of Star Chamber was abolished in 1641. After the Restoration, its criminal jurisdiction in respect of libel was inherited by the

10 (1606) 5 Co. Rep. 125a

11 Hudson *Treatise on the Court of Star Chamber* in Hargrave *Collectanea Juridica* (1791) vol. 2, p. 103.

Court of Kings Bench. The result was that the pre-existing civil law of defamation and the inherited criminal jurisdiction in libel were administered by one and the same court. It was inevitable that the two sets of rules would interact.

Indeed, defamation was one of a number of wrongs or offences in this position, namely in respect of which the Star Chamber and the common law courts had respectively developed a set of rules, both of which influenced the subsequent common law. The criminal aspect of defamation was largely influenced by the Star Chamber rules, and the civil aspect by the common law rules. The interaction of the two sets was marked not only by the retention of the separate crime and tort, but also by the growth of the distinction between libel and slander.

6. The crucial point for the development of the libel/slander distinction came when it arose for decision whether written defamation should be actionable without proof of special damage. The existing form of civil defamation required such proof, while the crime did not. The answer, as history has shown, was that the tort of written defamation (libel) was held actionable *per se*. Holdsworth attributes this step in part to the fact that the existing civil law and the action on the case had resulted in a highly unsatisfactory body of law from which the Court wished to free itself, and in part to the pressing need to suppress duelling effectively. In order to achieve the latter aim, it was necessary to make the action more accessible, and the removal of the need to show damage was the first step in this direction.

The conclusion that libel was actionable *per se* was not reached at once. Its development may be traced through *King v Lake*¹², *Austin v Culpepper*¹³, *Harman v Delaney*¹⁴, *Villars v Monsley*¹⁵ and was finally settled in *Thorley v Lord Kerry*¹⁶. The result was a success. First, it released the tort of libel from the network of rules and distinctions which had choked its rational growth. Second, the feature of actionability *per se* threw a new emphasis on the insult aspect of the tort. It therefore achieved a clean break with the pre-existing civil law, albeit at the expense of creating an arbitrary distinction between the two forms of communication, and one which would later be exacerbated by the development of more sophisticated forms of communication.

The rule of *mitior sensus* was also held inapplicable to the tort of libel, while

12. Hardres 470.

13. SC. 2 Show 313.

14. (1731) Fitz Gibbon at 254.

15. (1769) 2 Wils 403.

16. 4 Taunt 355.

the rule that truth was a complete defence was retained for all forms of tortious defamation. By contrast the rule that truth was no defence to a criminal prosecution persisted until its rigour was mitigated by Lord Campbell's Act in 1843, where it was introduced as a defence with the additional requirement of showing that the matter was for the 'public benefit'. The cross fertilisation of the two sets of rules was not complete, however: for example, spoken words defamatory of a private person were held not to be a crime,¹⁷ whereas seditious or blasphemous words or words likely to cause a breach of the peace were indictable.

Continuing Development of the Crime of Libel

7 We have noted the absorption of the crime of libel from the Star Chamber to the common law courts and some of the effects of the interaction of the criminal and civil rules. We must now return to the development of the various types of criminal libel. Inherited from the Star Chamber were the seditious, defamatory, and blasphemous forms of libel. In 1727, the category of obscene libel was recognized for the first time. At the beginning of the century, Holt CJ had been of the view that obscene matter was an issue for the ecclesiastical courts.¹⁸ Obscene libel was first recognized as a common law offence in the decision in *Curl's Case*.¹⁹ However, the offence of obscene libel does not appear to have been prosecuted with any enthusiasm until the 19th century, when prosecutions became more frequent due, indirectly, to the changed climate in society, and resulting directly from the efforts of the Society for the Prevention of Vice, founded in 1802. The year 1857 saw the first major piece of legislation on obscenity, and obscene libel appears to have been proceeded against under its provisions rather than through the medium of obscene libel. The hey-day of the offence of obscene libel may therefore be said to be the first half of the 19th century.

The pertinent categories of libel until the 19th century were the "political" and the "personal". Coke drew a distinction between the two forms in *De Libellis Famosis*,²⁰ considering a libel against a public person to be much more serious than that of a private person, because "it concerns not only the breach of the peace but the scandal of Government". Spencer states

'When libel prosecutions were common there was a well known distinction between prosecutions for defamatory libel instituted by or on behalf of private persons in order to protect their personal reputations, and prosecutions for defamatory, seditious and blasphemous libel begun by the state for political reasons. The first type of case was known as private or personal libel, the second as political or public

17 *R v Penny* (1687) 1 Ld Raym 153 91 ER 999

18 *R v Read* (1708) Fortescue 98

19 (1727) 2 Stra 788 93 ER 899

20 (1606) 5 Co Rep 125a

libel

As under this classification that we proceed with our discussion

Political Libels

(i) Seditious libels

8 Holdsworth observes that the heads of political libel included the publication or utterance of words which were seditious, obscene or blasphemous, or the utterance of words that would lead to a breach of the peace.²¹ Of these, seditious libels appear to have been the most important. The offence of sedition or seditious libel is clearly interwoven with prevailing theories of ruler and ruled, and such theories, it has been said,²² fall into two broad categories. The first says that the ruler is superior to his subjects and inherently wise and just. It would therefore be unthinkable to criticise his actions or person. The second view is that the ruler represents the will of the people and is the instrument through which they express their wishes on means of government. Criticism and guidance from the people would therefore not only be permissible but is necessary to maintain a healthy relationship between the two parties. It is clear that English history has moved from the extremes of the first theory gradually into the second. However, during the 17th and early 18th centuries, the former view would have been the dominant one, and accordingly government critics would have been prosecuted with zeal.

In keeping with these sentiments, the common law courts willingly accepted the rules imposed by the Star Chamber, that truth was no defence, that publication to a third party was not necessary, that the death of the victim was not a bar to prosecution, and that the author and publisher were guilty in equal degrees. Furthermore seditious words uttered orally were indictable.²⁴ Any person who questioned the legality or policy of government committed the offence of sedition. Indeed the judges used the *Licensing Acts*, until their expiration in 1694, to implement the policy that the publication of *any* matter without government authority was illegal.

During the troubled times between the Jacobite Rising of 1745 and the passage of the Reform Act 1832, there was a large number of prosecutions

21 *The Press and the Reform of Criminal Libel* JR Spencer *Reshaping the Criminal Law* (edited Glazebrook) at 266. See also Spencer [1977] Crim LR 384.

22 Holdsworth *History of the English Law* 337.

23 See Holdsworth *ibid* at 338 outlining the views of Stephen in this regard at HCL II 299-300.

24 Stephen HCL II 307 (1629) Cro Car 117 *R v Harrison* (1687) 3 Keble 841 *R v Frost* (1793) 22 St Tr 517.

for criminal libel

In political prosecutions, the Government as Spencer aptly states, contrived to stack the cards against the accused²⁵

Many of these cases were not brought on indictment, but instead on the Attorney General's *ex officio* information for which no leave of the court was required. This rendered the defendant's case much more onerous because there was no possibility of hearing the prosecution's case before it was opened in court and because there was no hope of having the case dismissed at an early stage on a finding by a judge that there was no *prima facie* case, or by a grand jury that there was no 'true libel'. Additionally, it was usual to summon a special jury to hear the case which, being composed of wealthy persons was more likely to be out of sympathy with critics of the Government.

The eagerness of the political establishment to suppress dissent manifested itself in the interacting roles of judge and jury, which in turn influenced the mental elements of the crime. When the crime was under the jurisdiction of the Star Chamber, it was the practice to attribute to the defendant the worst of intentions, alleging that he acted "maliciously", "seditiously", and "falsely". Whether this was rhetoric or whether it indicated a requirement of intention was of little importance when the Court was arbiter of both fact and law, as was the Star Chamber. However when the spheres of fact and law were placed in the separate hands of judge and jury in the Common Law Courts, the issue of intention became more relevant. For if it were a requirement that the matter bearing a seditious meaning was published with intent this would be a question of fact for the jury. By contrast, if the crime were constituted merely by publishing seditious matter, the only question of fact for the jury would be whether there was publication, the judge deciding whether the meaning of the words was in law a seditious libel. Clearly there is quite a difference between a jury deciding whether there has been publication and its deciding whether there has been publication with seditious intent. In the latter case, the jury would have much more influence in the outcome of the case. It seems that the dominant view was to limit the jury's function to merely answering the question of whether there was publication.

Thus we find Holdsworth stating

25 One such prosecution resulted in the conviction for libel of Johnson J. judge of the Irish Court of Common Pleas (1805) 6 East 583 102 ER 1412 and 7 East 65 103 ER 26. For consideration of some of these cases see Spencer *Criminal Libel: A Skeleton in the Cupboard* [1977] Crim L. Rev. 383.

26 *Ibid.* at 384.

'Down to the beginning of the eighteenth century, therefore, the essence of a libel was the intentional publication of a document, bearing the seditious or defamatory meaning alleged by the prosecution, and that it was for the court to say, as a matter of law, whether what was published was seditious, defamatory, or otherwise malicious, and so a libel. This state of the law harmonised admirably with the current views as to the relations of rulers to their subjects. But, when those views changed it gradually came to be wholly out of touch with current public opinion. The law as to what amounted to a seditious libel having been formed in the period when the ruler was regarded as the superior of his subjects, assorted badly with the new view that he was their agent or servant. Therefore the desire for greater freedom of speech than the existing law allowed, took the technical form of the contention that the seditious, defamatory or otherwise malicious intention with which a libel was published, was the essence of the offence and so a matter of fact for the jury.'²⁷

The role of the jury was altered by the *1792 Libel Act* in England, known as Fox's Libel Act, and the *1793 Libel Act* in Ireland. Entitled "An Act to remove doubts respecting the functions of juries in cases of libel", it provided that at a trial on indictment for libel, the jury could give a general verdict upon the whole matter put in issue, and should not be required to find the defendant guilty merely on proof of publication.

If the fresh input of juries altered the nature of libel trials, it did not initially stem the flood of political libel prosecutions. Indeed the category seems to have been expanded to cover not only criticism of the home government but also criticisms of foreign rulers with whom the British Government was seeking favour.²⁸

¹⁰ After the *Great Reform Act* of 1832, a more liberal political climate prevailed and prosecutions for political libel lost prominence. This fact was reflected in the Report of the Select Committee of the House of Lords on Defamation (1843) which confined its attention to the law affecting private cases. Its recommendations had little to do with seditious and blasphemous libels or defamatory libels of public officials, and its views were reflected in the *1843 Libel Act*.²⁹

Since that date, prosecutions for political libels have fallen into disuse, and

²⁷ Holdsworth *History of the English Law* at 345.

²⁸ See for example (1803) 28 St Tr 530 where a French critic of Napoleon living in England was prosecuted for an attack upon that ruler.

²⁹ On which see below at pp24 et seq.

the machinery of *ex officio* criminal informations and special juries has been dismantled. The law of political libel has fallen from its position of prominence into gradual disuse, although it has never been expressly overruled or discredited.

(u) *Blasphemous Libels*

11 We may now take up the thread of the history of blasphemous libels from the time this jurisdiction was taken over by the common law courts from the Court of Star Chamber and the Ecclesiastical courts. The first indictment for blasphemy appears to have been *Taylor's case*,³⁰ in which Sir Matthew Hale is reported as saying,

Contumelious reproaches of God or of the religion established are punishable here. The Christian religion is a part of the law itself "

and

Christianity is parcel of the laws of England.³¹

The doctrine laid down in *Taylor's case* was affirmed in the decision in *R v Woolston*,³² which concerned writings attacking the miracles of Christ, for the purpose, according to the author, of showing that they were allegorical representations of religious truths. The defendant was fined, and sent to prison for a year, to be released upon his finding sureties for good behaviour throughout life, which he never found. Raymond LCJ stated

We do not meddle with any differences in opinion. We interpose only when the very root of Christianity itself is struck at, as it plainly is by this allegorical scheme',

30 1 Ventris 293 3 Keble 607 see Kenny *Evolution of the Law of Blasphemy* (1922) 1 CLJ at 129

31 Kenny suggests that the maxim 'Christianity is parcel of the laws of England' was actually based on a statement in the current legal textbook by Sir Henry Finch which itself was an incorrect translation of a statement by Prynne, an expert lawyer who became Chief Justice of the Common Pleas in 1449. Kenny argues that the statement originally said that the canon law should be included in the common law only to the extent of practice, the words 'ancient Scriptures' being used to denote the older authorities which would evidence that practice and its extent. However, the words were incorrectly translated to mean 'the Bible', altering the meaning of the statement entirely and giving it the meaning expressed by Hale. However, it seems unlikely that the statement of Hale was influenced solely by Sir Henry Finch since it was in harmony with prevailing theories of Church and State. Hale's view must have been influenced more by the views on the intermingling of Church and State which surrounded him, rather than a mistranslation of an individual author.

32 Fitzgibbon 64 2 Strange 832 1 Barnardiston 162 266

and that

Christianity in general is parcel of the common law of England ,

although the court said it

desired it might be taken notice of, that they laid their stresses upon the word general and did not intend to include disputes between learned men upon particular controverted points

In both of the cases mentioned, the language used could be considered scurrilous and offensive, and this fact can of course be used to say, as it was in *Bowman*, that the older cases punished offensive speech and not questioning of doctrine *per se*. However, the judges in the cases did not lay emphasis on the strength of the language employed but rather based their prohibition on the fact of attacking Christianity, as Kenny puts it "a prohibition not merely of the manner but of the matter"³³

England

12 There were numerous prosecutions for blasphemous libel in England at the end of the eighteenth and beginning of the nineteenth centuries, including the celebrated prosecution of Williams, publisher of Paine's *Age of Reason*, where the prosecution for the Crown was conducted by Thomas Erskine the leading advocate of the day. It seems that in this period *Woolston's* case was relied on to prohibit all denials of Christianity³⁴. In response, Lord Macauley stated in Parliament that it was "monstrous" to see prosecutions for blasphemy under the present law and that every person should be entitled to discuss the "evidences of religion". He added, however, that no person should be in a position to enforce such sounds and sights on unwilling ears. When he became a legislator in India, Lord Macauley included in his Code a provision making it an offence to utter words within the hearing of another or make any gesture in the sight of another with the deliberate intention of wounding the religious feelings of that other.

In 1841 we find the Commissioners on Criminal Law stating in their report that the law "distinctly forbids all denial of the Christian religion", but qualifying it with the statement that "the course has been to withhold the application of the penal law unless insulting language is used"³⁵. An exception to this proviso appears to have been the case of *Briggs v Hartley*³⁶, where a

33 Kenny *Evolution of the Law of Blasphemy* (1922) CLJ at 128

34 *Ibid* at 134-5

35 Sixth report of Her Majesty's Commissioners on Criminal Law (1841) Parliamentary Reports 1841 x

36 19 LJR Ch 416

bequest of money for the best essay on natural theology as a philosophical system of universal religion was held invalid on the ground that it was inconsistent with Christianity

Nonetheless the nineteenth century evidenced a shift in attitude so that blasphemy was constituted only where there was scurrilous language, and the perception arose that indications in previous cases that all denials of Christianity were automatically blasphemous were merely *obiter dicta*. As early as 1812, Starkie was urging that temperate discussion of Christianity should be tolerated and that the law should be reserved for "the malice of mankind", not its "honest errors". We will see portions of Starkie's writings quoted in judgments in a later chapter.

13 The continuing trend of tolerance of temperate discussion in religious matters is evidenced by the ruling of Lord Denman in *R v Hetherington*,³⁷ although the accused was in fact convicted and sentenced to four months' imprisonment. The trial of *Pooley*³⁸ in 1857 saw Coleridge J adopting the milder views of Starkie.

The next major turning point was the trial of *Ramsay and Foote*, the publishers of a weekly paper containing offensive caricatures of religion. Lord Coleridge LCJ expressly held that the fundamentals of religion could be attacked "if the decencies of controversy are observed".³⁹ This view was followed in all subsequent prosecutions and was authoritatively approved in *Bowman v Secular Society Ltd* by the House of Lords in 1917.⁴⁰ The prosecution in *R v Gott* in 1922 was the last prosecution for blasphemous libel in England prior to *Whitehouse v Lemon*⁴¹, which we will discuss in our Present Law chapter.

Ireland⁴

14 It appears that the earliest reported case of a prosecution in the Irish common law courts was the trial in 1703 of Thomas Emlyn, some 30 years after *Taylor's* case was decided in England.⁴³ Emlyn was Unitarian Minister who had written a book entitled *A Humble Enquiry into the Scripture Account of Jesus Christ* and was sentenced to one year's imprisonment with a fine of

37 4 St. Tr. (NJ) 590

38 (1857) 8 St. Tr. NS 1089

39 (1883) 15 Cox CC 231

40 [1917] AC 406

41 [1979] AC 406

42 The following section is based primarily upon material in an article written by Paul O'Higgins (1960) 23 MLR 151 entitled *Blasphemy in Irish Law*

43 For references to the trial of Thomas Emlyn see O'Higgins *Bibliography of Irish Trials* at 3134 and 432

£1,000, and ordered to find security for good behaviour for life

Speaking of this case, over a century later, Sir Edward Sugden said

I am not called upon to give any opinion whether that prosecution was right or wrong, but it proves this, which is of great importance, that as the law was then administered, it was blasphemy to deny the Divinity of Christ, and Mr Emlyn was accordingly convicted of blasphemy in the Queen's Bench, on that ground, and suffered a long imprisonment, and a fine of considerable amount. I know this as a matter of fact in this cause. Mr Emlyn had not spoken with irreverence of Christ, his was a candid inquiry and he could not be convicted on that ground, but his defence was inadmissible by law, and he was convicted."⁴⁴

15 The next stepping stone in Irish law for the offence of blasphemy appears to have been in 1852, the case of Brother John⁴⁵ John Syngean Bridgman, a Franciscan friar, was charged with "unlawfully, wickedly, and blasphemously" setting fire to a Protestant Bible and publishing "of and concerning said New Testament, as aforesaid, these profane and blasphemous words, that is to say, that it (meaning the New Testament) is not the word of God, but the word of the Devil, and the Devil's Book-Luther's Bible, or your heretic Bible - to the great dishonour of Almighty God, and in contempt of the Protestant religion." He was found guilty. However the importance of the case lies in the charge to the jury by Baron Lefroy

' you are to try whether the traverser is at liberty by his conduct to insult Christianity itself. It is not the version of the Scriptures which will warrant the commission of such an offence. It is not because fallible man cannot agree upon the translation of a portion of the Scriptures, that they are to be treated with this want of reverence, that because it is not a particular translation, it shall be treated with such vilification. Is it to be held that, when the law of the land sanctions a certain version, and calls it the authorised version, it is to be said that any man, be his opinions what they may, shall pour contempt upon it, and thus be guilty of a violation of the law? Is he to be at liberty to throw that book into the fire, and say that he vilify that book which the law has sanctioned? *It has been said to you that this act must be done with intent, and on that the law is clear, every man is presumed to understand the consequences of his own acts. If a man can throw a book into the fire, whether it be the Douay Bible or the authorised version, and if you believe that he did not intend any contempt, then you should acquit him.*

⁴⁴ Att Gen v Drummond (1842) 1 Dr and War 353 at 384

⁴⁵ For references see O Higgins *Bibliography of Irish Trials* at 3 124

In 1885 a Redemptorist Father by the name of Reverend Petcherine burned a Bible by mistake among a bundle of other books⁴⁶ He was found not guilty on a charge on indictment of blasphemously burning the Bible Baron Green approved the above statements by Baron Lefroy to the effect that intention to burn the Bible was necessary

16 From this sparse authority it would seem that by the time the *Bowman* case came before the House of Lords in England, the offence of blasphemous libel could be committed by any attack or denial of Christian doctrine, and that no emphasis was laid on the manner in which the attack was made

While it has been suggested that *Bowman v Secular Society Limited* was not part of Irish law prior to the enactment of the Constitution of the Irish Free State, not being a decision on an appeal from Ireland, the better view would appear to be that all decisions of the House of Lords formed part of the law of Ireland carried over by that Constitution and subsequently by the Constitution of Ireland, unless, of course, the principle laid down was inconsistent with the Constitution Apart from that consideration, if a case had arisen between *Bowman* in 1917 and 1937, it seems likely that an Irish court would have found the views in *Bowman* persuasive It is undeniably the case that, in determining the parameters of the offence of blasphemy mandated by the Constitution - a difficult task in the absence of authority - the characteristics of the common law offence of blasphemy, as it was generally understood at that time, are of considerable relevance We will examine this issue when we come to state the present law of blasphemous libel

Private Libels

17 In modern times the victim of a private libel will usually resort to a civil action in order to obtain damages which at law represent vindication of the plaintiff's reputation It is highly unusual for a private individual to initiate criminal proceedings in respect of defamatory libel in Ireland, and in England there have been only a handful of cases in recent years At one time, prosecutions in respect of private libels were common and were indeed preferred to the civil action⁴⁷ In the following discussion, we shall see why this was so and why the position has changed

When the King's Bench inherited the jurisdiction of criminal libel from the Star Chamber, it recognized libel prosecutions at the suit of private citizens in order to provide an alternative remedy to the practice of duelling The

⁴⁶ *Ibid* at 4 492

⁴⁷ Some of the *causes celebres* are discussed by Spencer in the two publications referred to at footnote 21 above

primary influence of the common law on this type of criminal libel was the holding in 1697 in *Penn v Case*⁴⁸ that spoken words defamatory of a private person did not constitute a crime, which was limited to written defamatory statements. This leads to one notable difference between the tort and the crime of defamation, namely that oral defamation is a tort (slander) while oral defamation is not a crime. In 1884, *Labouchere's case*⁴⁹ severely limited the availability of criminal informations in libel cases, holding that the court should in general exercise its discretion against the granting of an information at the suit of a private individual. Following this decision, the normal procedure was by way of indictment.

18. Given that the crime consists of written defamation only, it is not surprising that the press has played a large role in shaping the law of criminal defamation. In the seventeenth century, private prosecutions against newspapers appear to have been rare. Newspapers were few, their circulation limited, and their expression strictly curtailed by censorship. It was the eighteenth century that saw a boom in private prosecutions. Spencer attributes this to a number of factors.⁵⁰ Defamatory attacks at the time tended to be extremely scurrilous, tending to make the angered victim more likely to prosecute than to sue. Also, the aristocracy tended to be the victims of defamatory attacks, and many of these were opposed to newspapers and advocated their suppression on principle. There is also the fact that, as a wealthy class, the aristocracy would not have been attracted by the lure of money. Thirdly, a criminal court could make a libeller find securities for future good behaviour, whereas the common law court could not order an injunction. Perhaps one of the main attractions, however, was the rule that truth was not a defence in a criminal prosecution for libel. If a person had something to hide, he was well-advised to bring a criminal prosecution rather than a civil action. Indeed, in 1848, we find a Parliamentary exchange stating that a prosecution by indictment for libel is practically admission of the truth of the libel.⁵¹

Spencer estimates that by the 1830's, although criminal prosecutions were still popular, they were becoming less frequent and civil actions more popular.⁵² The attitude of journalists and editors was also changing, and instead of accepting criminal liability as part of the risk of the trade, they were voicing objections to details of the law. Their complaints included the following:

48 (1697) 1 Ld Raym 153

49 (1880) 14 Cox 419

50 See Spencer, *The Press and the reform of Criminal Libel*, in *Reshaping the Criminal Law* (edited by Glazebrook) at 267.

51 HL SC 1843 p27 Q. In point of fact as the law now stands is not the prosecution by indictment almost constructive evidence of the truth of the libel? A (Lord Brougham) It is almost supposed to admit that.

52 *Supra* footnote 50.

(1) *Costs* The fact that in an unsuccessful civil action the defendant would recover costs, whereas he would bear his own costs in a criminal prosecution even if he were acquitted

(2) *Vicarious Liability* The rule that a master was liable for the acts of his servants which had even been held to lead to a conviction of a bookseller although he had expressly forbidden an assistant to sell the pamphlet in question in his absence⁵³

(3) *The rule that truth was not a defence* As Spencer points out, this rule which originated from Coke was an absurdity and was based on fallacious reasoning because it assumed that the exposure of villains whose activities menace society is less important than preventing the risk of unlawful violence by the villain if he is annoyed at being found out⁵⁴ It was particularly at odds with the emerging view of the purpose of defamatory libel as being the vindication of the reputation of the injured party

Spencer paints a vivid picture of the injustices it created

For example the editor of *The Welchman* received six months' imprisonment for publishing an account of a riot at Carmarthen, suggesting the mayor had handled it incompetently, he was not even permitted to prove that there had been a riot, let alone that the mayor had been incompetent Another newspaper editor was convicted of libel when he exposed the fact that a man who had obtained a teaching post at a school had been convicted of forgery in France and sent to work on the roads with a ball and chain on his ankle, even though the French court furnished a certificate of his conviction and sentence The rule was a constant worry even to those who were not actually fined or imprisoned because of it In 1841, *The Times* exposed a monumental commercial fraud, and in recognition of this public service the City of London erected a memorial to the occasion Boyle the swindler sued the editor of *The Times*, who was thus able to plead justification But the editor and his solicitor lived in fear and trembling throughout lest Boyle should decide to prosecute, and that the editor might therefore go to prison In 1829, Lord Tenterden CJ made matters worse, if possible, by ruling that the truth of the libel was not even admissible as evidence in mitigation of sentence Looked at from any angle, the rule was utterly indefensible though as with most indefensible rules, there were plenty of contemporary lawyers to defend it As far as the press was concerned its only redeeming feature was that it was so bad that sometimes it was good some people who might otherwise have prosecuted for libel sued instead, because a prosecution was often interpreted as a tacit admission of the truth of the accusation⁵⁵

53 Johnson (1797) quoted by Lord Denman Parl Deb vol 66 p408

54 *Supra* footnote 51 at 272

Because of these complaints, a number of Bills were introduced to alleviate the position of the press, including Bills by Henry Brougham and Daniel O'Connell. No success was met until Lord Campbell managed to set up the Select Committee of the House of Lords. Following the Report of this body on the law of defamation, Lord Campbell with the help of Starkie drafted a bill which became the *Libel Act 1843*. This addressed a number of the complaints voiced. Section 8 gave the successful defendant costs, section 7 mitigated the vicarious liability rule, and section 6 introduced truth as a defence, albeit with an additional requirement that the matter be shown to be published for the public benefit. The provisions will be considered in detail below, but the Act may be noted for the present as remedying a number of the primary defects in the law of criminal libel, and marking a major turning point in the history of private prosecutions.

19 After 1843 the press continued to complain about matters of detail in the law of criminal libel, such as the position in relation to reports of public meetings, the obscurity of the vicarious liability provision in the 1843 Act, and the fact that a prosecutor could leave a prosecution hanging in mid-air. However, perhaps a more fundamental change could now be seen in the attitude of the journalists and editors themselves as to their role and its corollaries, which included a questioning of the very principle of criminal liability,

'This new attitude to criminal libel reflected a change in the status of the press. Whereas in earlier years, running a newspaper was a 'fringe' activity, with overtones of the pillory and public disgrace, it was now quite respectable. The press took itself correspondingly more seriously. Obviously, this affected the extent of the changes it was prepared to ask for. Less obviously, it also affected how it sought to bring those changes about. Whereas formerly, the press interest lobbied others who promoted changes in the general law, it was now represented in Parliament by a powerful group of MP's who were newspaper proprietors. The press interest now promoted the changes it wanted by itself. And, like other powerful interest groups in later years, it eventually took to seeking, not alterations in the general law, but exemptions from it in favour of itself. This had a powerful effect on the future history of criminal libel.'⁵⁵

In 1865 a group of Irish lawyers in Parliament unsuccessfully attempted to introduce a Bill to restrict private libel prosecutions by requiring the consent of the Attorney-General, and to confer a privilege in respect of reports of public meetings. It was re-introduced in succeeding years but opposition to it was strong. In 1878, a Select Committee was appointed with the Attorney-General as Chairman. Its recommendations were implemented in a bill,

55 Spencer *supra* footnote 50 at 275

which was later to become the *1881 Newspaper and Libel Registration Act*. The Act represented a compromise between advocates of the press and their opponents. It enacted two significant provisions, the first conferring limited privilege on reports by newspapers of public meetings, the second requiring the consent of the Director of Public Prosecutions, in England, and the Attorney General, in Ireland, for prosecution of a newspaper. Opponents of the press succeeded in having commenced a scheme of registration so that the proprietorship of newspaper would be ascertainable.

20 Unexpectedly, the 1881 Act saw an increase, rather than a decrease, of prosecutions for criminal libel. It may be that this had little to do with the law, and more to do with trends in journalism. A number of new newspapers were set up, among them the magazine *Truth* founded by Henry Labouchere, which were devoted to uncovering the scandals of late Victorian England. They produced the type of material likely to encourage prosecution. The presence of Henry Hawkins as judge at the Old Bailey contributed to a judicial atmosphere hostile to newspapers, while the accession of Sir Augustus Stevenson to the office of the DPP in 1884 facilitated the obtaining of permission to commence prosecution.

It was at this point that Lord Coleridge stepped in, holding in one of the leading cases (*R v Labouchere*⁵⁶) that the judicial discretion to grant a criminal information in private prosecutions should be severely curtailed. As an opponent of the practice of bringing criminal prosecutions for libel, he continued to make such prosecutions difficult, and in *Wood v Cox*,⁵⁷ he deprived the plaintiff of his costs and expressed his disgust at the giving of his fiat by the DPP. At the time, the House of Lords was debating a bill on civil libel. Lord Coleridge introduced an amendment, which ultimately became the provision that no prosecution could be commenced against a newspaper without the leave of a judge in chambers, although it appears the original proposed amendment would have given this discretion additionally to the Attorney-General.

Spencer records that the 1890's saw a number of financier cases, involving allegations of fraud, but that after these criminal libel prosecutions against newspapers appear to have died out. However, they continued against individuals in relatively large numbers until 1939. Since the Second World War, the offence of criminal libel has taken a back seat to civil proceedings. One of the major factors in causing the decline in press libel prosecutions was the requirement of the judge's consent. Also, damage awards in civil cases began to increase from about 1880 onwards, thereby providing a bait to take the civil route.

56 (1884) 12 QBD 320
57 (1888) 4 TLR 651

21 We have now examined the development of the two forms of political libel, and private libels. It is time to turn our attention to the later developed crime of obscene libel.

Obscene Libels

22 When the control of literature was given to the Court of Star Chamber, the censorship exercised was aimed at religious and political comments. Matters of sexual explicitness or indecency do not appear to have been considered a problem of importance. Throughout the Elizabethan era, censorship was increased by the granting of a charter to the Stationers' Company, which rooted out undesirable books, by the licensing of books by designated censors, such as the Archbishop of Canterbury, and by the institution of the office of Master of Revels and the requirement that plays be sent for advance scrutiny. Censorship continued to be aimed at the political and the religious. The abolition of the Star Chamber was soon followed by the re-introduction of licensing in 1643, and the passing of the *Licensing Act 1662*. This Act was again confined to religious and political factors.

23 The first case in which indecency divorced from a political or religious context appears to have been central is that of *R v Sedley*⁵⁸ in 1663. Sir Charles Sedley and some aristocratic companions are said to have outraged the crowd by appearing drunk and naked on the balcony of a London tavern and performing gestures of an obscene and offensive character. Sedley was fined and gaoled for a week for a breach of the peace. An isolated incident, it is nonetheless noteworthy for its identification of the factor of obscenity as one meriting punishment by the criminal law, although its immediate trappings were of course the habitual "breach of the peace" tendency. The court described itself as "custos morus" (guardian of morals), clearly representing a move from the time when it would refuse to deal with "spiritual" matters because these were the jurisdiction of the Ecclesiastical courts. Nonetheless, as we shall see, it was a supposed lack of jurisdiction over spiritual matters which made the court dismiss the prosecution in a case some 45 years later.

24 The later part of the seventeenth century saw a shift in attitude towards obscenity, and witnessed the formation of a number of societies for the censorship of immorality. Official censorship was extended to include immorality. It was not until 1708, however, that an opportunity arose for the courts to deal with an obscene text, James Read's *Fifteen Plagues of a Maidenhead*. The Court of Queen's Bench dismissed the indictment stating

[the] crime that shakes religion, as profaneness on the stage, &c is indictable, but writing an obscene book, as that entitled, *The Fifteen*

58 1 Keble 620 83 FR 1146 1 Sid 168 82 ER 1036

Plagues of a Maidenhead is not indictable, but punishable only in the Spiritual Court ⁵⁹

Powell J expressed the view that the absence of a person who had been libelled made it impossible to call this a libel

"This is for printing bawdy stuff but reflects on no person, and a libel must be against some particular person or persons, or against the Government. It is stuff not fit to be mentioned publicly, if there should be no remedy in the Spiritual Court, it does not follow there must be a remedy here. There is no law to punish it, I wish there were, but we cannot make law, it indeed tends to the corruption of good manners, but that is not sufficient for us to punish"

If the concept of libel is reference to an individual, it is of course stretching the meaning of the word "libel" to call obscene publications "obscene libels". In contrast, seditious words could be called libel because, even if a particular person is not attacked, there is at least an identifiable collective entity (the Government, the judiciary). However, blasphemous libel also stretches the concept of libel because it is difficult to say that an individual in the ordinary sense is attacked. The rationale of that offence was the supposed impact of such words on society, rather than the hurt or harm caused to any person spoken of.

25 It seems that *Read's case* did not preclude occasional prosecutions in the lower courts in respect of obscene matter, but it did stall such prosecutions until the decision in *Curll's case* in 1727.⁶⁰ This case marks the beginning of the history of obscene libel in the criminal law. The book was entitled *Venus in her Cloister, or the Nun in her Smock*, and concerned lesbian relationships in a convent. It is unlikely that the religious content encouraged the outcome, indeed, it might have hindered it. One of the judges, Sir John Fortescue, would have accepted the book because it exposed "the Romish priests, the father confessors and Popish religion". The Court rejected the decision in *Read's case*, in part relying on *Sedley*.

The conceptual difficulties encountered in *Read's case* in relation to obscene matter and the term "libel" posed no difficulties to the court in *Curll's case*. This leaves those unacquainted with the history of criminal libel with the puzzle that the offence of libel encompasses not only attacks on persons, members of Government or the Government itself, but also matter that attacks religion and matters that are considered obscene or indecent. The

59 *R v Read* 11 Mod Rep 142 88 ER 953

60 *R v Curll* 2 Str 789 92 ER 777

result is that in the criminal law we can only view the word libel as devoid of any meaning other than the neutral one written speech and that the categories of criminal libel represent the common law basket of criminal offences consisting of speech, as distinct from speech incidental or related to action

26 Despite *Curl's* case, the offence of obscene libel appears to have been little prosecuted throughout the eighteenth century. For example, John Cleland's *Fanny Hill* was not prosecuted when it first appeared in England in 1748.

The beginning of the nineteenth century saw an upsurge in the number of prosecutions. The Society for the Suppression of Vice had been founded in 1802, and was both active and successful in bringing prosecutions for obscene libel. Of the 159 prosecutions it brought, 154 resulted in convictions. Throughout this period it appears that there was no working definition of obscenity. Obscenity was recognized on an instinctive basis.

27 In 1846, the first customs prohibition on the importation of obscene or indecent matter was enacted, and in 1857 the Lord Chief Justice, Lord Campbell, introduced a Bill which was to become the *Obscene Publications Act* of that year. It was in respect of matter seized under that legislation that the decision in *R v Hicklin* came about in 1868, where a test of obscenity was formulated by Cockburn LCJ, namely, whether the matter has a tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall⁶¹. This frequently cited test became the accepted definition of obscenity both under the legislative provisions and in respect of the offence of obscene libel, and not only travelled into other common law jurisdictions but survived into present day law.

28 In England, the 1857 Act governed the law on obscene matter until it was replaced in 1959 by the *Obscene Publications Act* of that year. In Ireland, a censorship scheme was implemented through the various Censorship of Publications and Censorship of Films Acts. Although obscenity is nowhere defined in such legislation, the corrupt and deprave test is used as a part of the definition of indecency in the Censorship of Publications Acts.

Legislation on Libel

29 As we have seen the nineteenth century witnessed a large measure of political pressure in respect of newspaper libel which left its imprint in the form of three important pieces of legislation: the *Libel Act 1843*, the

61 *R v Hicklin* (1868) 1 R 3QB 360.

Newspaper Libel and Registration Act 1881, and the *Libel Law (Amendment) Act 1888*. It may be noted that some of the provisions concern defamatory libel alone while others are more general. In some cases their application is to all forms of criminal libel while in others it appears to extend to both forms of libel, civil and criminal.

30 We shall now examine these provisions in some detail and record their passage into modern Irish law via the *Defamation Act 1961*. Interestingly, the osmosis was not complete. Some provisions which formerly applied to criminal proceedings are now applicable solely to civil proceedings.

Lord Campbell's Act 1843

31 Mention has already been made of the Report of the Select Committee of the House of Lords on Defamation in 1843, and the Libel Act of that year which followed upon it. The more significant provisions of that Act are as follows:

Section 1 provided that in any action for defamation it should be lawful for the defendant to give in evidence in mitigation of damages that he made or offered an apology to the plaintiff before the commencement of the action, or as soon afterwards as he had an opportunity of doing so.

This section was always reserved to civil proceedings and continues to be so in section 17 of the *Defamation Act 1961*.

Section 2 provided that in any action for libel contained in any newspaper or other periodical, the defendant would be at liberty to pay into court a sum of money by way of amends provided (1) that he pleaded that the libel was inserted without actual malice and without gross negligence, and (2) that before the action or at the earliest opportunity afterwards he inserted in the newspaper or periodical a full apology.

This section is also of relevance to civil proceedings only, and therefore of passing interest to this Paper. However, it may be noted that no equivalent has been re-enacted. Order 22 RSC provides that the defendant in a libel action may make a payment into court only if he admits liability. This takes a different tack from the provision under consideration, because the latter made pleading a lack of certain types of culpability a pre-requisite to using the lodgement procedure. Another important difference is that Order 22 makes no distinction between media and other defendants.

Section 3 made it an offence to publish or threaten to publish or propose to abstain from publishing, a libel with intent to extort money

This section is not re enacted in the *Defamation Act 1961*

Section 4 provided that the penalty for maliciously publishing a defamatory libel knowing it to be false was to be imprisonment for a maximum of 2 years, and such fine as the Court awarded

Section 5 provided that the penalty for maliciously publishing a defamatory libel (*simpliciter*) was to be imprisonment for a maximum of one year, or liability to a fine, or both

The combined effect of these two sections was to create a two-tiered system of penalties in respect of defamatory libel, depending on knowledge of falsity or absence thereof. This feature has been carried through to the *Defamation Act 1961*, although the penalties are different

Section 6 is of crucial significance. It provided that, on the trial of any indictment or information for a defamatory libel, the truth of the matters charged would amount to a defence provided the matter was published for the public benefit. This was a major inroad into the common law rule that truth was no defence to a charge of criminal libel. However, the requirement that the matter be for the public benefit as well as being true prevented the defence being identical to the defence of truth in relation to civil proceedings for defamatory libel

This provision is carried through into the *Defamation Act 1961*

Section 7 is another crucial provision. At common law, a master was vicariously liable for the publication of a libel by his servant or agent. This section provided that on the trial on indictment or information for the publication of a libel, when evidence is given which establishes a presumption of publication against the defendant by the act of another person within his authority, the defendant would be competent to prove that such publication was made without his authority, consent, or knowledge, and the publication did not arise from a want of due care or caution on his part

This provision is also carried through into the *Defamation Act 1961*. Since it refers to libel without qualification it appears to apply to all forms of

criminal libel

The Newspaper Libel and Registration Act 1881

32 *Section 2* conferred a privilege on certain limited newspaper reports, reading as follows

'Any report published in any newspaper of the proceedings of a **public meeting** shall be privileged if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was **fair and accurate**, and published without malice, and if the publication of the matter complained of was for the public benefit provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a **reasonable letter or statement of explanation or contradiction** by or on behalf of such plaintiff or prosecutor"⁶²

This important provision signifies the birth of the statutory defence of privilege in respect of newspaper reports. From the use of the words "plaintiff or prosecutor", it seems clear that it was supposed to apply both in civil proceedings and criminal prosecutions

Section 3 provided that no criminal prosecution could be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel contained therein without the written *fiat* or allowance of the Director of Public Prosecutions in England and the Attorney General in Ireland

This was applicable to all forms of criminal libel

Section 4 allowed a court of summary jurisdiction to dismiss the case if there was a strong presumption that the jury at the trial would acquit the person charged, after hearing the charge and evidence for the defence, including evidence that the matter was true and for public benefit or that the report was fair and accurate and published without malice. Again this provision was limited to defendants who were persons responsible for the publication of a newspaper. Newspaper was defined in section 1 to include periodicals published at intervals not exceeding 26 days

62 Emphasis added

Section 5 allowed a court of summary jurisdiction, which was of the opinion that the libel was of a trivial character, to ask the defendant whether he consented to the case being dealt with summarily. If the person so consented, the court could summarily convict him and impose a fine not exceeding £50. Again the section applied only to defendants who were responsible for the publication of newspapers.

This section appeared to apply to all forms of criminal libel.

The Law of Libel Amendment Act 1888

33 *Section 2* repealed section 2 of the 1881 Act, which had conferred privilege on fair and accurate reports of public meetings. It was replaced and developed by sections 3 and 4 of the 1888 Act.

Section 3 granted a privilege in respect of fair and accurate reports in newspapers of proceedings publicly heard before a court exercising judicial authority, if published contemporaneously with such proceedings. The section also stated that "nothing in this section shall authorise the publication of any blasphemous or indecent matter".

Section 4 granted a privilege in respect of fair and accurate reports in newspapers of the proceedings of a public meeting or any one of a list of meetings set out in the section, subject to the following conditions—(a) that it was not made maliciously, (b) that it did not contain blasphemous or indecent matter, (c) that the defendant publish, if requested, a reasonable letter by way of contradiction or explanation of the report, and (d) that the publication was for public benefit.

These privileges were an expanded and refined version of the first privilege set out in the 1881 Act. It may be noted that, as sections 3 and 4 of the 1888 Act merely stated that such reports "shall" be privileged, without reference to the type of proceedings involved, we may assume that the defence would have applied in criminal proceedings as well as those of a civil nature. Also, section 4 refers to the dismissal of a criminal case after considering the evidence of fair and accurate report.

Section 8 provided that leave to prosecute was to be obtained from a judge in chambers.

It may also be noted that the 1888 Act did not apply to obscene libels.

The Defamation Act 1961

34 The *Law of Libel Amendment Act 1888* was the last piece of legislation in England directly to affect the offence of criminal libel. Although a major piece of legislation was passed in England in 1952, namely, the *Defamation Act* of that year, its ambit covered civil proceedings only. By contrast, in Ireland, the *Defamation Act 1961* deals specifically with criminal libel in Part II. Part II preserves a number of provisions stemming from the 19th century legislation dealt with and contains no original material. This preservation was necessary because the First Schedule to the 1961 Act repeals the previous enactments, First Schedule, Part I repealing the 1792 Libel Act, and the First Schedule, Part II repealing the Acts of 1843, 1881 and 1888. Certain of the 19th century provisions were carried through substantially to the 1961 Act, but are made to apply to civil proceedings. It is therefore of considerable importance to set out and examine precisely which provisions continue to apply to criminal proceedings and which do not.

35 Section 5(1) of the 1961 Act continues the rules that a jury is competent to give a general verdict on a trial on indictment for libel. Section 6 carries through the defence of truth for the public benefit⁶³. Section 7 continues the rule that a defendant may escape liability by showing that publication was made without his authority, consent or knowledge, and without any want of due care or caution on his part. Sections 11 and 12 maintain the distinction between maliciously published defamatory libels and such libels published with knowledge of their falsity. Section 9 maintains the section giving power to a court of summary jurisdiction to dismiss a case after hearing the evidence and concluding that there is a probability that the jury will acquit. The words "a court of summary jurisdiction" are replaced by "a Justice of the District Court". Section 10 continues to allow for summary disposition of the case if the Court concludes the case is of a trivial nature and the defendant consents to waive trial by jury. Again the phrase "Justice of the District Court" has been employed. Section 8 maintains the rule that leave must be obtained to commence prosecution against a newspaper editor, proprietor or publisher. The phrase "Judge in chambers" has been replaced by the words "Judge of the High Court sitting in camera".

The 1961 Act specifically sets out the penalties in respect of each offence. The maximum penalty for maliciously publishing a defamatory libel is currently a fine of £200 or imprisonment for one year, or both. The maximum fine for maliciously publishing a defamatory libel with knowledge of its falsity is a fine of £500 or imprisonment for 2 years, or both. Section 13 contains search and seizure provisions on foot of a court order in respect of blasphemous matter, and appears to be modelled on section 1 of the *Criminal Libel Act 1819*.

63 Carried through from the 1793 Act

36 A number of provisions were not carried through. Section 3 of the 1843 Act provided penalties for publishing, threatening to publish or abstain from publishing a libel with intent to extort money or secure an appointment or office. There is no provision to this effect in the 1961 Act. More importantly, the "fair and accurate" defences have been omitted from Part II of the 1961 Act. Section 3 of the 1888 Act dealt with newspaper reports of judicial proceedings, while section 4 dealt with reports of public meetings and the proceedings of a number of other bodies. In that Act they appeared to apply to criminal as well as civil proceedings. Although the 1961 Act carried these defences through, and indeed elaborates upon them, in respect of civil proceedings, they do not apply to criminal proceedings, and the repeal of the earlier Acts means that the 1888 privileges are no longer available in criminal proceedings either. This appears to be a rather serious omission from Part II of the Defamation Act. That this was not intended is implied by the statement of the Parliamentary Secretary to the Minister for Justice when introducing the Bill,

"The Bill is a composite measure. It proposes not alone to amend the law of defamation but also to consolidate the existing statutory law. The principal consolidation is in Part II. It is proposed in Part II to continue subject to slight modifications called for by the passage of time, the existing statutory enactments."⁶⁴

The omission of two important privileges could hardly be called a "slight modification". Furthermore section 9 of the 1961 Act, which deals with dismissal of a case, continues to refer to evidence of fair and accurate reports as a basis for dismissal. This is inconsistent if the defence of fair and accurate report is no longer a privilege conferred in criminal proceedings.

37 *The Defamation Act 1961* is the sole existing Irish piece of legislation on the offences of defamatory, seditious, blasphemous and obscene libel. The fleshing out of the offences accordingly rests with the common law, and in the next chapter we will deal with the features of these offences as so developed.

It is important to note, however, that there has been legislation in two of these areas, namely obscenity and sedition. It will be relevant to any consideration of the offence of criminal libel to see if its use has been superseded by other methods of dealing with the same matter. We will therefore be examining these areas of related legislation in a later chapter.

⁶⁴ *Dail Debates* vol 188 col 1642-3

CHAPTER 2: THE PRESENT LAW OF DEFAMATORY LIBEL

38 The common law crime of defamatory libel is now supplemented by the provisions of the *Defamation Act 1961*. Central to any discussion of the crime are the Constitutional guarantees of free speech in Article 40.6.1.1 and of the right to a good name in Article 40.2. We have been unable to trace more than one Irish prosecution this century, this being the recent *Fleming* case in 1989, although there were a number of cases just before the turn of the century.¹

1 Commencement of Prosecution

39 Leave to commence a prosecution in respect of a defamatory libel contained in a newspaper must be obtained from a High Court judge sitting *in camera* by virtue of section 8 of the *Defamation Act 1961*. Where the defamatory libel is elsewhere, no leave need be obtained.

It may be noted that in the 1977 House of Lords decision in *Gleaves v Deakin*², all the Law Lords thought that leave to prosecute should be in the hands of a prosecuting authority. Viscount Dilhorne would have given the power to the Attorney General or DPP, Lords Edmund-Davies and Diplock to the Attorney General, and Lord Scarman to an unspecified "prosecuting authority".

40 An interesting point is that it has been stated that, in deciding whether

1 *Reg (Smith) v McHugh* (1899) 33 ILTR 178. *Re O Mahony* (1897) 32 ILTR 71. *Re Hastings* (1899) 33 ILTR 130.

2 [1980] AC 477.

leave should be given to prosecute, a factor *not* to be taken into account is the adequacy or otherwise of civil proceedings in a particular case. In *Goldsmith v Pressdram*³ Wien J said

What is not appropriate, in my judgement, is the question whether damages might or might not afford an adequate remedy to a complainant. I consider that question is irrelevant. Once one arrives at a conclusion that the criminal law ought to be invoked, then it is not a private case between individuals, the state has an interest and the state has a part in it.

In *Gleaves v Deakin*, Viscount Dilhorne said

I cannot regard it as the law that examining justices, be they lay or stipendiary, are required to consider, if a charge of criminal libel comes before them, whether or not the civil remedies for libel should suffice for the person libelled.

2 Features of the Offence

41 Although the crime and tort of defamatory libel cover broadly the same matter, there is a danger in assuming that they are identical. One must be careful to observe which rules and defences apply to the crime and not the tort and vice versa.

(a) Definition

42 In *Thorley v Lord Kerry*,⁴ Mansfield CJ described the nature of defamatory words as words which

contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt and ridicule, for all words of that description an indictment lies.

In more recent cases involving criminal libel, this definition has been cited with approval.⁵ However, it may be that the courts would accept more modern definitions of defamatory words from the cases on the tort of defamation, such as Lord Atkin's test in *Sim v Stretch*⁶

3 [1977] QB 83

4 (1812) 4 Taunt 355

5 *R v Wicks* (1936) 25 Cr App Rep 168 *Goldsmith v Pressdram Ltd* [1977] QB 83
Gleaves v Deakin [1980] AC 477

6 [1936] 2 All ER 1237

"Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

or the test of Walsh J in *Quigley v Creanon Ltd*⁷

"Words are defamatory if they impute conduct which would tend to lower that person in the eyes of a considerable and respectable class of the community, though not in the eyes of the community as a whole. The test is whether it will lower him in the eyes of the average right-thinking man."

A modern definition of defamatory words is the subject of some discussion in our Consultation Paper on the Civil Law of Defamation⁸

(b) *Form of Communication*

43 Slander is not a crime. The crime of defamatory libel encompasses written matter. It does not include broadcasts by means of wireless telegraphy. Section 15 of the *Defamation Act 1961* treats such broadcasts as publication in permanent form, and therefore as libels, but is applicable to *civil proceedings only*.

(c) *From Breach of the Peace to Gravity of Libel*

44 We have already seen that the breach of the peace element in the crime of defamatory libel arose from the nature of the aims of the Star Chamber, the birthplace of the crime of libel, namely, the preservation of state security and the maintenance of public peace. It is therefore natural that many of the cases make reference to a tendency to breach the peace as an essential ingredient of the offence of defamatory libel. In *R v Labouchere*,⁹ for example, where application was made for leave to file a criminal information in respect of a libel upon a foreign national, Lord Coleridge CJ said,

"The non-residence of the applicant in England is a very cogent argument against the interference of the Court. It makes it as a general rule very unlikely that there should be any intention to provoke a breach of the peace on the part of him who publishes the defamatory matter, and also generally speaking very unlikely that in fact any breach of the peace will follow."

7 [1971] IR 269 272

8 March 1991, pp199 207

9 (1884) 12 QBD 320

In *R v Holbrook*,¹⁰ Lush J stated,

Libel on an individual is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke rage, and thus endanger the public peace. In this respect libel stands on the same footing as assault or any other injury to the person'

On the other hand, it seems that a number of convictions occurred where there was in fact little likelihood of a breach of the peace,¹¹ and it is probably this fact that it was sometimes the belief in the nineteenth century that the link between criminal libel and breach of the peace was a fiction.¹² In the later 19th century due to the increasing popularity of the libel prosecutions, Lord Coleridge CJ sought to discourage such actions by requiring a risk of a breach of the peace.¹³ It became a widely held view that breach of the peace was a necessary element. It is of interest to note that the draft Code produced by the Criminal Code Commissioners in 1879 which was intended to be declaratory of the existing law, defined defamatory libel in section 227 as 'matter published without legal justification or excuse, designed to insult the person to whom it is published, or calculated to injure the reputation of any person by exposing him to hatred, contempt or ridicule'. The marginal note explained the word "designed" as follows, "This is the existing law, the criminality of the libel depending on its tendency to produce a breach of the peace". In the last Irish case on this point, *R v Rea*,¹⁴ Lefroy CJ stated that as a general rule an information or indictment cannot be sustained for defamatory words namely, unless they amount to a breach of the peace, or were spoken with intent to provoke a breach of the peace'. However, the tide was to turn in 1936 in *R v Wicks*.¹⁵

45 The breach of the peace element was one of the main issues in *R v Wicks*¹⁶ the leading case in relation to this issue. The alleged libel was contained in a letter from Mr Wicks to a Mr Chapman, who had been arrested and charged with forgery and other criminal offences at the instance of Sun Life Assurance Company of Canada. The defamatory statements concerned a Mr Gurney, solicitor for the above company. There was bad feeling between the two parties and Mr Wicks had been involved in litigation with Mr Gurney for some time previously. His letter offered Mr Chapman evidence which might assist him in his forthcoming trial. Mr Chapman did

10 (1878) 4 QBD 42

11 See Spencer 1979 CLJ 60 at 68

12 See Henry Brougham 1816 Parliamentary Debates vol 34 ser 1 p387 and Lord Campbell House of Lords Select Committee (1843) vol 20 p 177

13 See for example *l'abouchere's case supra*

14 (1865) 17 ICLR 584

15 (1936) 25 Cr App R 168

16 For a detailed study of Mr Wicks case and its surrounding facts see Spencer *The Smuggling of Mr Wicks* 1979 CLJ 60

not accept the offer of help, but pleaded guilty and handed the letter over to Sun Life

Mr Wicks was prosecuted on two counts of defamatory libel (1) publication of a defamatory libel knowing it to be false, contrary to section 4 of the Libel Act 1843 and (2) publication of a defamatory libel contrary to section 5 of the same Act, under which knowledge of falsity is not required. At the trial, Mr Wicks' counsel argued first, that there was no evidence that the libel tended to create a breach of the peace, and second, that the letter was privileged. He did not attempt to justify. The Recorder, however, summed up in favour of the prosecution on both counts. The jury convicted and Mr Wicks was sentenced to 12 months imprisonment. Counsel for the prosecution had raised a number of matters believed to be pertinent to sentence: a number of unsuccessful libel actions brought by Mr Wicks, remarks by the Bankruptcy Registrar to the effect that he was a dangerous and unscrupulous man, the fact that Mr Wicks had not given evidence in his defence, and for having first threatened and then desisted from pleading justification. The Recorder said the libel was one of the grossest he had ever seen.

On appeal to the Court of Criminal Appeal, four points were argued: that a criminal libel must tend to breach the peace, that the letter was privileged, that there was no evidence that Mr Wicks knew the libel to be false, and that the sentence was unnecessarily severe. The appeal was dismissed, and leave to appeal to the House of Lords was refused. In the appellate court, Du Parcq J., speaking for the Court, stated as follows,

"It is true that a criminal prosecution for libel ought not to be instituted, and, if instituted, will probably be regarded with disfavour by Judge and jury, when the libel complained of is of so trivial a character as to be unlikely either to disturb the peace of the community or seriously to affect the reputation of the person defamed. There is, however, in our judgement, no ground for the suggestion made at the bar that it is incumbent upon the prosecution to prove that the libel in question would have been unusually likely to provoke the wrath of the person defamed, or that the person defamed was unusually likely to resent an imputation upon his character.

The actual holding in *Wicks* is questionable on a number of grounds. The facts might well have been found to ground a situation of qualified privilege¹⁷. Secondly, the method of deducing that the defendant had knowledge of falsity for the purposes of section 4 of the 1843 Act is highly questionable¹⁸. Finally,

17 See below at p45

18 See below at pp49-50

the matters taken into account in passing sentence were also questionable. At the time, it was settled that a sentence might not be increased because of improper techniques used by the defence. It is even less desirable that a sentence be increased due to the use of proper techniques, such as a refusal to give evidence or a lack of attempt to plead justification. Furthermore, no mention should have been made of libels in respect of which Wicks had neither been tried or charged.

For present purposes, however, the holding in respect of the breach of the peace element is important. The principle that this was not an essential ingredient of the offence was upheld in *Goldsmith v Pressdram*¹⁹. Wien J quoted from the judgment of Du Parcq J in *Wicks* with approval, and said

'First, before a discretion can be exercised in favour of an applicant who wishes to institute criminal proceedings in respect of a libel, which he contends is criminal, there must be a clear *prima facie* case. What I mean by that is that there must be a case to go before a criminal court that is so clear at first sight that it is beyond argument that there is a case to answer. Secondly, the libel must be a *serious one, so serious that it is proper for the criminal law to be invoked*. It may be a relevant factor that it is unusually likely for the libel to provoke a breach of the peace, *although that it not a necessary ingredient at all*. Thirdly, the question of the public interest must be taken into account, so that the judge has to ask himself the question "does the public interest require the institution of criminal proceedings?" (Emphasis added)

The highlighted portions of the judgment show that, in considering whether the public interest requires prosecution, a new emphasis was placed on the gravity of the libel. The libel must be so serious as to warrant public prosecution. In deciding whether this is so, a tendency to breach the peace is a factor, but not a necessary one. Contrasting the decision with *Labouchere* referred to above, the focus has therefore changed. The main enquiry is the seriousness of the libel, the breach of the peace element is now a sufficient but not necessary ingredient.

46 The breach of the peace decision in *Wicks* was also approved by the House of Lords in *Gleaves v Deakin*²⁰ in 1979. The narrow point on appeal was whether at committal proceedings the appellants could call evidence of the prosecutor's general bad reputation. The House of Lords held that like the defence of justification, evidence of bad reputation had to await trial, but four of the five Law Lords went on to consider the offence in a more general manner.

19 (1977) 2 AllER 557 [1977] QB 83

20 [1980] AC 477

Viscount Dilhorne said

"It was thought at one time that the distinction between a libel for which civil proceedings might be brought and a criminal libel which might be the subject of a prosecution lay in the criminal libel having a tendency to disturb or provoke a breach of the peace "

Citing *Labouchere* in support of this older view and considering the comments of Wien J quoted above, he continued

"A criminal libel must be serious libel. If the libel is of such a character as to be likely to disturb the peace of the community or to provoke a breach of the peace, then it is not to be regarded as trivial. But to hold as du Parcq J did, in my view rightly, that the existence of such a tendency suffices to show that the libel is a serious one, is a very different thing from saying that proof of its existence is necessary to establish guilt of the offence "

Lord Edmund Davies said

"How defamatory do the published words have to be to constitute a *prima facie* case of criminal libel? It was long considered that criminal proceedings should not be instituted unless the words were clearly of a kind calculated to provoke a breach of the peace. I need not delay your Lordships by exploration of this stage in the evolution of criminal libel since it has already been admirably conducted by Wien J in *Goldsmith v Pressdram*. Suffice it to say that a tendency to provoke a breach of the peace as an essential ingredient of the criminal offence here charged has long been forcefully criticised and in my judgement risking a breach of the peace is no longer a *sine qua non* of this type of criminal libel. If the existence of such a risk clearly emerges, so much stronger the case for the prosecution "

Lord Edmund Davies also went on to cite from Du Parcq's judgment in *Wicks* with approval. The test advocated by this Law Lord was whether

'the specified extracts from the defendants' book were sufficiently serious to justify, in the public interest, the institution of criminal proceedings "

Lord Scarman observed that "to warrant prosecution, the libel must be sufficiently serious to require the intervention of the Crown in the public interest. He said that this requirement had grown out of the common law principle that a criminal libel had a tendency to breach the peace, and made

the interesting point that Blackstone's definition of libels assumed an inherent tendency to breach the peace, under which view proof of the libel alone would suffice²¹ Referring to Du Parcq J's judgment in *Wicks*, Lord Scarman said

It is plain from the passage in the judgment where these words appear that the learned judge was emphasising that it is the gravity of the libel which matters. The libel must be more than of a trivial character: it must be such as to provoke anger or cause resentment. In my judgement, the references in the case law to reputation, outrage, cruelty or tendency to disturb the peace are no more than illustrations of the various factors which either alone or in combination contribute to the gravity of the libel. The essential feature of a criminal libel remains - as in the past - the publication of a grave, not trivial, libel'

Lord Diplock thought that the offence contained "serious anomalies" which were difficult to reconcile with Article 10 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He appeared to be of the view that a tendency to provoke a breach of the peace had vanished both as an element and as a rationale for the crime, two distinct ideas

'The original justification for the emergence of the common law offence of defamatory libel in a more primitive age was the prevention of disorder. The reason for creating the offence was to provide the victim with the means of securing the punishment of his defamer by peaceful process of the law instead of resorting to personal violence to obtain revenge. But risk of provoking breaches of the peace has ceased to be an essential element in the criminal offence of defamatory libel, and the civil action for damages for libel and an injunction provides protection for the reputation of the private citizen without the necessity for any interference by public authority with the alleged defamer's right to freedom of expression "

47 The question of when leave should be granted has been considered in two modern Irish cases. In *Application of Gallagher*²² the principles applied by Wien J in *Goldsmith v Pressdram* were expressly approved of and were summarised as follows

(1) Firstly the applicant must establish a clear *prima facie* case in

21 In a criminal prosecution the tendency which all libels have to create animosities and to disturb the public peace is the whole that the law considers. Blackstone Commentaries 13ed(1796) vol 4 p 150 quoted by Wien J in *Goldsmith v Pressdram Ltd supra*

22 Unreported. Finlay P judgment delivered 3rd July 1978

the sense that it is a case which is so clear at first sight that there is beyond argument a case to answer if the matter goes before a criminal court

- (2) The libel must be a serious one, so serious that it is proper for the criminal law to be invoked
- (3) Although it may be a relevant factor that the libel is unusually likely to provoke a breach of the peace that is not a necessary ingredient
- (4) The question of the public interest must be taken into account on the basis that the Judge should ask himself the question does the public interest *require* the institution of public proceedings'

Finlay P said that in his view the only qualification which was necessary in Ireland was that the court would also have to have regard to the constitutional guarantees of personal rights

48 More recently, the law in the matter was considered by Gannon J in *Hilliard v Penfield Enterprises Ltd and Others*²³ In that case an article in a magazine published and edited by the defendants contained serious allegations about the husband of the applicant, a clergyman who had been killed in horrific circumstances shortly before the publication appeared The applicant applied under section 8 of the 1961 Act for leave to commence a criminal prosecution and by agreement of the parties, the learned judge gave his decision in open court

Having described the article in question as

"so scurrilous and contrived in its presentation of dissociated persons and events as to arouse feelings of revulsion towards the author as well as vilifying the subject',

Gannon J went on to consider the applicable legal principles Having referred to the English authorities and to *Gallagher*, he said it was clear that section 8 of the 1961 Act imposed an onus on the applicant to show that it was in the public interest that there should be a prosecution Having observed that sections 6 and 9 of the 1961 Act imposed a contrary onus on defendants to show that the publication was in the public interest, he went on to say

the test common to both prosecution and defence, I think, must be

23 (1990) 1 IR 138

the likely effect on a significant section of law abiding citizens. I think the likelihood of provoking a breach of the peace would be significant if it should appear affirmative but if negative would be of marginal significance. It must be borne in mind that the mischief is the damage to the good name and repute of the vilified party in the esteem of other right minded persons and not the damage to his self esteem. The latter is more likely to provoke a breach of the peace in the physical sense, but the former could also provoke a physical reaction in the case of the libel of some classes of highly esteemed public personages.

A special factor in *Hulhard*, was, of course, the fact that the person allegedly defamed was dead. We shall return shortly to the question as to whether a criminal prosecution for libel may be instituted in such a case. At this point, however, it may be said that, following the decisions in *R v Wicks*, *Goldsmith v Pressdram* and *Gleaves v Deakin*, as applied in Ireland in *Gallagher and Hulhard*, a tendency to provoke a breach of the public peace is no longer a necessary ingredient of the crime of libel in either Ireland or England. The important factor is whether the libel is of so serious a character that the public interest requires the institution of criminal proceedings. A tendency to breach the public peace may point towards the gravity of the libel, but is not the sole factor to be taken into account.

(d) *Publication*

49 In criminal proceedings in respect of the crime of defamatory libel it is not necessary to show publication to a party other than the victim himself²⁴. This stands in contrast to the position in relation to civil proceedings, where publication to a third party is not only necessary, but must have been intentional or reasonably foreseeable.

The lack of a requirement of publication to a third party stems from the historical fact that the offence of defamatory libel was created in order to suppress duelling, and publication to the victim would be the most likely way of encouraging a breach of the peace. Consequently, it may be that where there is publication to the victim alone, there must additionally be a tendency to provoke a breach of the peace.

This view appears to be supported by the decision in *R v Adams*²⁵ where a man was held guilty of defamatory libel specifically on the basis that the letter sent only to the victim tended to cause a breach of the peace on her

24 *Clutterbuck v Chaffers* (1816) 1 Starkie 471
25 (1888) 22 QBD 66

part²⁶ On the other hand, Kenny observes that the count in that case did not contain the allegation that the words tended to breach the peace²⁷ However, it seems plain that the tendency to cause a breach of the peace was perceived to be the basis of the defamation, Lord Coleridge CJ stating

"It appears to me that there is a very short and plain ground upon which this conviction can be sustained It is a conviction upon an indictment the third count of which charges that the letter there set out is a defamatory libel tending to defame and bring into contempt the character of the person to whom it was sent I am of opinion that the letter is of such a character as that it tended to provoke a breach of the peace "

Doubt is now cast upon this issue by the decisions in *Wicks* and *Gleaves v Deakin*²⁸, both of which cases held that a tendency to provoke a breach of the peace was no longer a constituent part of the crime of libel The breach of the peace element in the context of publication was not, however, specifically adverted to and it accordingly remains uncertain whether a tendency to provoke a breach of the peace must be shown in cases where there is publication to the victim alone, although it is clear that in other cases a tendency to breach the peace is not necessary The more likely view is that publication to the victim without this tendency is sufficient

(e) *Identity of the Victim*

(1) *Libel of the Dead*

50 Older cases support the view that a criminal prosecution may be brought in respect of a libel upon a dead person In *De Libellis Famosis*,²⁹ Coke said

"Although the private man or magistrate be dead at the time of the making of the libel, yet it is punishable, for in the one case it stirs up others of the same family, blood, or society, to revenge, or to break the peace, and in the other the libeller traduces and slanders the state and government, which dies not "

It was held in *R v Topham*³⁰ that to support an indictment for libel on a

26 The letter contained a proposal that the recipient have sexual intercourse with the sender for a fee

27 Kenny *Outlines of Criminal Law* 19ed at 234 n 1

28 *Supra* footnotes 5 and 2 respectively

29 *De Libellis Famosis* (1606) 5 Co Rep 125a 77 ER 250

30 (1791) 4 Term Rep 126 100 ER 931

dead person, the libel must have been done with intent to bring contempt upon the family *or* to stir up the hatred of others against relations and thus induce them into breaking the peace in defending their good name

Some doubt was cast upon these older decisions by the decision in *R v Ensor*⁵¹, where Stephen J referred to the passage above made by Coke and said,

"In the history of the Star Chamber it is said.- In all ages libels have been most severely punished in this court, but most especially they began to be frequent about 42 and 43 Elizabeth. (1600, when Sir Edward Coke was her Attorney General)

"In this passage therefore he was probably giving his impression of the Star Chamber practice, which no one would now regard as of any authority. There are, I think, many instances in which Lord Coke's views of the criminal law are doubtful and go far beyond the authorities he refers to. In this passage he refers to none "

Stephen J went on to consider the 'only real' authority, *R v Topham*, and said,

"The judgment seems to me to show that a mere vilifying of the deceased is not enough. There must be a vilifying of the dead with a view to injure his posterity. The dead have no rights and can suffer no wrongs. The living alone can be the subject of legal protection, and the law of libel is intended to protect them, not against every writing which gives them pain, but against writings holding them up individually to hatred, contempt or ridicule. This, no doubt, may be done in every variety of way. It is possible, under the mask of attacking a dead man, to attack a living one.... I wish to add that I regard the silence of the authorities and the general practice of the profession as a more weighty authority on this point than the isolated statements of Lord Coke and the few unsatisfactory cases referred to in *R v Topham*. I am reluctant in the highest degree to extend the criminal law. To speak broadly, to libel the dead is not an offence known to our law."

51. These authorities, particularly the observations of Stephen J in *Ensor*, were referred to in *Hillhard*, the facts of which have already been set out. In refusing the application under section 8, Gannon J said that

"it seems to me the defamation of the widow and daughter of the deceased, assuming it to be proved as intentional and malicious, does

31 (1987) 3 All ER 366

not have the gravity in law to require prosecution for a criminal offence.

It would seem accordingly that the law in Ireland is that a libel on the dead may be the subject of criminal prosecution where the statement reflects upon living persons to a degree sufficient to warrant the institution of a criminal prosecution. If it reached the necessary degree of seriousness, however, it would seem from *Gallagher and Hulhard* that a tendency to breach the peace would not be a necessary requirement for such leave.

(ii) Corporate Libel

52 A company or corporation may be the victim of a criminal libel. It may also be indicted on a charge of criminal libel.³² In the *Triplex* case it had been contended *inter alia* that a corporation could not be indicted for libel and the court responded:

In our view, these contentions fail, and no distinction can be drawn between the case of the Company and that of the defendant Liveman. As to the first, it is not in doubt that a limited company is responsible, in a civil action for a libel published by one of its officers, and that it is capable of malice: see *Citizens Life Assurance Co v Brown* [1904] AC 423. It follows that it is possible to prove against a limited company all the constituent elements of the crime of publishing a defamatory libel.

(iii) Group Libel

53 Civil proceedings for libel may be maintained in respect of defamation of a group if the words or circumstances sufficiently refer to the plaintiff as an individual. However, the general rule is that there is no civil action for libelling a class of persons since its members are usually too numerous to make such an action practicable. The position in relation to criminal proceedings is unsettled: there being authority both for and against the proposition that an indictment lies where the object of the publication was to excite hatred against a class of persons.³⁴ Kenny is of the view that criminal proceedings may be carried on by a definite class of persons, since technically the prosecution is not by the persons injured, but by the Crown. Russell is also of this view, stating:

32 *R v Jenour* (1741) 7 Mod 400 87 ER 1318

33 *Triplex Safety Glass Co Ltd v Lancagay Safety Glass (1934) Ltd* [1939] 2KB 395 408

34 *R v Osborn* (1732) 2 Barn KB 166 94 ER 425 *R v Williams* (1832) 5 B & Ald 595 106 ER 1308 *R v Orme and Nutt* (1699) 1 Ld Raym 486 91 ER 1224 *R v Gathercole* (1838) 2 Levin 237

"An indictment lies for general imputations on a body of men, though no individuals be pointed out because such writings have a tendency to inflame and disorder society and are therefore within the cognisance of the law"³⁵

(f) *Mens Rea*

54 Unlike the area of blasphemous libel, the crime of defamatory libel does not have the benefit of a recent decision turning specifically on the *mens rea* of the crime³⁶ The English Law Commission in its Working paper on Criminal Libel accepted that the authorities were inconclusive, some suggesting that the offence is one of strict liability while others seem to require an intent to defame It attributed this uncertainty to the fact that the words which had been the subject of prosecutions had all been plainly defamatory, so that the author must have been aware of the defamatory meaning The Commission concluded that it was an open question whether a defendant would be liable where he had clearly intended to publish but had not intended to defame Smith and Hogan suggest that the more likely view is that the defendant must have intended to publish matter bearing a defamatory meaning, rather than have intended to publish such matter with a defamatory intent Russell is also of this view, stating

"The criminal intention of the defendant will be a matter of inference from the nature of the publication Where a libellous publication appears unexplained by any evidence the jury should judge from the overt act, and where the publication contains a charge defamatory in its nature should from thence infer that the intention was malicious The intention may be collected from the libel unless the mode of publication or other circumstances explain it, and the publisher must be presumed to intend what the publication is likely to produce"³⁷

This is certainly the modern position in relation to the crime of blasphemous libel, namely that intention to publish matter bearing a blasphemous meaning is sufficient However, it is not self-evident that the *mens rea* in relation to blasphemous and defamatory libel is identical Words referring to a person have an unfortunate potential to take on defamatory meanings, it may turn out that a reference to a fictitious person is understood to refer to a real person, or an innocent statement may suddenly become loaded with innuendo when facts unknown to the speaker emerge A person might innocently announce to the office that he or she saw Mr X at lunch in a restaurant,

³⁵ *Russell on Crime* 12 ed at 778

³⁶ *Whitehouse v Lemon* [1979] AC 617 discussed in our chapter on the Present Law of Blasphemous Libel

³⁷ *Russell on Crime* 12 ed at 784

unaware that Mr X had called in sick that day. There is always a danger that the speaker only has one piece of the jigsaw puzzle, while the listeners have the others, and the resulting picture may be defamatory. Words carrying blasphemous meanings have this tendency to a lesser degree. The essence of the harmful statement is insult to a religion, expressed in immoderate terms. It is much more difficult to conceive of circumstances in which the speaker was unaware that he or she was insulting and causing outrage to a religion, than it is to imagine a speaker who is unaware of the defamatory nature of his words. We may conclude that if an Irish court were to consider the issue of *mens rea* in the case of defamatory libel, it would not necessarily be influenced by the holding in *Lemon* on the *mens rea* of blasphemous libel.

55 A question arises as to the meaning of the word "maliciously" in sections 11 and 12 of the *Defamation Act 1961*. Section 11 sets out the penalties for "maliciously publishing a defamatory libel", while section 12 contains the penalties for "maliciously publishing a defamatory libel knowing it to be false". Malice might be thought to refer to the defendant's attitude to the falsity or truth of the statement - as in American authorities - but this construction is ruled out by the wording of section 12 which uses "maliciously" and "knowing it to be false" in such a manner as to show that they are not synonymous. What then does malice mean? Deliberate publication? Intention to defame? Does it merely reflect a presumption in law that defamatory statements are published maliciously? After all, in civil proceedings, where the intent of the defamer is irrelevant, the statement of claim reads "that the plaintiff falsely and maliciously published". In this context it is accepted that the use of the word "maliciously" is mere surplusage, as distinguished from the mental element of malice which may defeat the defences of fair comment and qualified privilege.

It seems that the latter view of the term "maliciously" in sections 11 and 12 of the 1961 Act is the correct one. Lord Russell of Killowen CJ said in respect of their predecessors (sections 4 and 5 of the Libel Act 1843),

'The word 'maliciously' was introduced in order to show that, although the accused might be *prima facie* guilty of publishing a defamatory libel, yet if he could rebut the presumption of malice attached to such publication he would meet the charge. *in the absence of evidence of the motive for publication, the law attaches to the fact of publication the inference that the publication was malicious*'¹⁸

56 The English Law Commission state that there is one principle in relation to intent that is common to both civil and criminal proceedings for libel - namely that the intention of the defamer as regards the defamatory

38 *R v. Munslow* [1895] 1 QB 758 761

nature of the words is not relevant. Words reasonably understood to be defamatory will be so even if the defamer did not intend them to be understood in a defamatory way. At first sight this seems to clash with one of the possible views of *mens rea*. It seems paradoxical to require an intent to defame and yet say that the intent of the defamer in relation to the defamatory nature of the words is irrelevant. However, there are two separate questions: first, what the defamer meant to achieve in publishing the matter and second, what the defamer's understanding of the words published was. Thus A might want to malign B, but chooses a fairly harmless set of words; here there is an intent to defame but no defamatory words. Conversely A might have had no intention to malign B but inadvertently said something which would generally be considered to be defamatory. For example, A might be a newspaper reporting court proceedings and mistakenly name B as a defendant in a murder case. In this situation, there is no intent to defame but there are defamatory words. The point made by the English Law Commission is simply that when it comes to construing words, one does not seek the advice of the person who chose the words. This has very little bearing on the issue of *mens rea*, but is worthy of mention lest it cause confusion.

3 Defences

57 Russell states that the defences to an indictment for defamatory libel are as follows:

- (1) that the words were not published by the defendant,
- (2) that the words do not refer to the person of whom they are alleged to be published,
- (3) that the words are not defamatory,
- (4) that the words were absolutely privileged,
- (5) that the words were published on an occasion of qualified privilege,
- (6) that the words consisted of fair comment
- (7) that the words were true and for the public benefit

Defences (1) to (6) may be set up under a plea of not guilty. Defence (7) must be set up by special plea.

(a) *Justification*

58 At common law truth was not a defence in criminal proceedings for libel. In *De Libellis Famosis*³⁹ Coke said:

It is not material whether the libel be true, or whether the party against whom it is made, be of good or ill-fame, for in a settled state

39. *Supra* footnote 29.

of Government the party grieved ought to complain for every injury done him in an ordinary course of law and not by any means to revenge himself either by the odious course of libelling, or otherwise he who kills a man with his sword in fight is a great offender but he is a greater offender who poisons another for which cause the offence is the more dangerous because the offender cannot easily be known and of such nature is libelling it is secret and robs a man of his good name which ought to be more precious to him than his life⁴⁰

It was this common law rule that led to the saying 'The greater the truth the greater the libel' because it is clear that if the truth of the matter is not a defence true matter could often and indeed more often did lead to a breach of the peace and hence to a libel, because the person would be more sensitive about a matter which was true

59 Section 6 of the *Defamation Act 1961* allows the defendant to plead in his defence that the matter was true and was published for the public benefit. The requirement of showing that it was published for the public benefit renders the defence more difficult to comply with than the defence in civil proceedings. As Kenny observes, the existence of this proviso makes it possible to repress the publication of statements which, "though quite true, are objectionable, whether on grounds of decency or as being disclosures of state secrets, or as being painful and needless intrusion into the privacy of domestic life"⁴¹

The defendant must specifically plead the defence of justification and must give written particulars of (1) the truth of the matters alleged and (2) the facts which indicate the public benefit for which it was published. The prosecution may, but is not obliged to, reply generally denying the matters specified in the plea of justification. Under the section the court may take into account an unsuccessful plea of justification "in aggravation or mitigation of sentence

Section 6 also provides that, if no defence of justification is raised, on no account shall the truth of the matters alleged be entered into. As in civil proceedings there is a presumption of falsity and the burden of showing truth is actively thrust on the defendant

40 See also *Wants* case (1601) Moore 628 72 ER 802 where it was stated 'Et fuit tenu auxi par le Court que un libeller est punishable comment que le matter del libel soit vray' (And was held also by the court that a libeller is punishable even if the matter be true) and *Lake Hatton* (1619) Hobart 252 80 ER 398

41 Kenny supra footnote 27 at 234 5

(b) *Privilege*

(i) *Absolute Privilege*

60 Absolute privilege confers complete protection on a number of categories of statement by reason of the occasion of their utterance or publication. In respect of the tort of defamation, these are said to be

- (1) Statements in either House of the Oireachtas, by virtue of Articles 15 13 and 15 13 of the Constitution,
- (2) Statements made in the course of judicial proceedings,
- (3) Statements between officers of the State and in the course of official duties,
- (4) Statements between solicitor and client,
- (5) Statements by most parties in the course of proceedings of Parliamentary Committees, by virtue of the 1976 *Committees (Houses of the Oireachtas) Privilege and Procedure Act*
- (6) Statements made in the course of proceedings before a quasi-judicial body

The wording of the Constitutional immunity in respect of Parliamentary utterances appears to apply to the crime of libel also, since Article 15 12 provides that

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

and Article 15 13 provides that

'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'

The immunity conferred by the 1976 Act on statements at proceedings of Parliamentary Committees also appears to cover criminal proceedings

61 The remaining instances of absolute privilege exist by virtue of the common law and appear to apply to criminal proceedings. Support for the view that statements in judicial proceedings or statements between solicitor and client are absolutely privileged in criminal proceedings is found in *R v Wicks*,⁴⁷ where these privileges appear to have been assumed as applicable in the appropriate case by Du Parcq J. Russell is of the view that all of the instances of absolute privilege mentioned are applicable in criminal

42 *Supra* footnote 5 at p174

proceedings

(ii) *Qualified Privilege*

At Common Law

62 The defence of qualified privilege at common law applies to a wide range of situations, broadly summarised as cases where there is a duty or interest on the part of the speaker and the recipient in the subject-matter of the communication. This form of privilege may be defeated by irrelevance, or excess of communication i.e. publication solely or additionally to persons without an interest or duty in receiving the communication. It is also defeated by proof of malice, defined in *Horrocks v Lowe*⁴³ as a dominant improper motive, usually but not exclusively a lack of belief in the truth of the statement.

It appears that this common law defence also applies in criminal proceedings. In *R v Rule*,⁴⁴ it was held that qualified privilege was a defence to a criminal charge of defamatory libel, the qualified privilege in question being constituted by a written communication from a constituent to his MP asking for assistance to lodge a complaint to the appropriate MP concerning the conduct of a public official in that constituency.⁴⁵ In *R v Wicks*,⁴⁶ Du Parc J assumed that the defence of qualified privilege would apply in criminal proceedings if the facts were appropriate, but found that the common interest in the case before him was too slim to ground such privilege. This decision on the particular facts is questionable. A letter offering evidence to someone accused of a crime could well be considered to be published on an occasion of qualified privilege. As Spencer observes,

"It looks as if the court found the common interest insufficient because of the tone of the letter rather than because of the relationship of the parties."⁴⁷

The particular finding of absence of qualified privilege on the facts of this case is debatable and does no service to the development of this form of privilege in criminal cases.

43 [1975] AC 135

44 [1937] 2 KB 375

45 See also *Hebditch v McIlwaine* [1899] 2 QB 54

46 Supra footnote 5

47 Spencer *The Snuffing of Mr Wicks* [1979] CLJ 60 at 71

By Statute

63 The Defamation Act 1961 provides two statutory defences normally classified as instances of qualified privilege to newspapers in civil proceedings only. Since they are confined to the media they will be dealt with below.

(c) Fair Comment on a Matter of Public Interest

64 In civil proceedings for libel there is a defence open to the defendant in order to comply with which he must show

- (a) that the matter consisted of comment
- (b) that the comment was based on facts
- (c) that these facts were true
- (d) that the subject matter was one of public interest and
- (e) that the comment is one that an honest person could have made even if he held strong, exaggerated or prejudiced views

The rigour of requirement (c) has been somewhat ameliorated by section 23 of the Defamation Act 1961. Like the defence of qualified privilege, this defence can also be defeated by a showing of malice.

It is clear that section 23 of the Defamation Act does not apply to criminal proceedings. However, it is not even settled that the common law defence of fair comment applies to criminal proceedings at all, although the more likely view is that it does. A number of nineteenth century authorities support the view that this is so.⁴⁸ *Halsbury* suggests that the defence would be available if properly pleaded.⁴⁹

(d) Vicarious Liability

65 The common law rule that a master was liable for all publications of his servant or agent was mitigated by section 7 of the Libel Act 1843, which is reproduced in section 7 of the Irish Defamation Act 1961. It provides that when a defendant pleads not guilty to the publication of a libel (therefore of whatever type) evidence which establishes a presumption of publication against him by the act of another person under his authority may be rebutted by evidence that such publication was made without his authority, consent or knowledge, and that the said publication did not arise from want of due care or caution on his part.

48 *R v Newman* (1853) 1 F1 and B1 558 569 118 ER 544 551. *R v Carden* (1879) 5 QBD 1 8 and 14.

49 *Halsbury*, 4ed vol 28 para 285.

It has been held that where a newspaper proprietor gives his authority to an editor to publish what is suitable and the editor publishes a defamatory statement the proprietor may avail of the statutory defence

(e) Distributors

66 It is a defence in civil proceedings for libel that the defendant was a distributor and that he was not aware that the publication contained a libel nor negligent in failing to detect it or to be averted to the fact that the publication might contain a libel. It is unclear whether this defence would apply in criminal proceedings. In one case it was held that a newspaper boy was not guilty of libel where he sold a newspaper containing a defamatory statement of which he was not aware⁵¹. This is slim authority, and such authority as exists appears to be for the view that a lack of negligence in this respect would provide a defence and arises in cases, not concerning libel, but respecting contempt of court⁵².

It seems clear however that any such defence certainly does not apply to printers. There is no such defence for printers under the civil law. In *Re Read and Huggonson*⁵³ Lord Hardwicke said of the trade of "printing papers and pamphlets"

But though it is true, this is a trade, yet they must take care to use it with prudence and caution, for if they print anything that is libellous, it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous⁵⁴.

4 Special Provisions for Newspapers

67 It will be recalled that the 1881 Newspaper Registration and Libel Act and the 1888 Libel Amendment Act were passed as a result of political pressure exerted by newspaper proprietors in parliament. Some of these provisions have been re-enacted in the Irish Defamation Act as follows

Leave to Prosecute

68 Under section 8 of the 1888 Act, an order of a judge in chambers was required to initiate a prosecution against a newspaper defendant. This is

50 *R v Holbrook* (1878) 4 QBD 42 50 1 *per* Lush J approved in *Whitehouse v Lemon* [1979] AC 617 *per* Lord Edmund Davies at 650

51 An unreported decision of Wills J referred to by Smith J in *R v Allison* (1888) 16 Cox C C 559 at 563

52 *Maloney v Bartley* (1812) 3 Camp 210 170 ER 1357 *Macleod v St Aubyn* [1899] AC 549

53 (1742) 2 Atk 469 at 472

substantially reproduced in section 8 of the *Defamation Act 1961* which provides that-

'No criminal prosecution shall be commenced against any proprietor, publisher, editor or any person responsible for the publication of a newspaper for any libel published therein without the order of a Judge of the High Court sitting in camera being first had and obtained, and every application for such order shall be made on notice to the person accused, who shall have an opportunity of being heard against the application "

It was held in one English case on section 8 of the 1888 Act that no appeal lies against a judge's decision to allow or refuse leave to prosecute⁵⁴

In *Goldsmith v Pressdram*, Wien J laid down guidelines for the exercise of this judicial discretion⁵⁵ (1) there must be a clear prima facie case, (2) the libel must be so serious as to warrant the intervention of the criminal law, in consideration of this factor a tendency to provoke a breach of the peace is relevant, but is not the sole determinant factor, and (3) the public interest must require the institution of criminal proceedings. The adequacy of possible civil remedies is irrelevant to the exercise of this discretion. These guidelines have been applied in Ireland in *Application of Gallagher and Hillard v Penfield Enterprises Ltd and others*.⁵⁶

Inquiry by the District Court

69 Section 9 of the 1961 Act also applies only to newspapers. It allows a District Justice, upon the hearing of a charge against a proprietor, publisher, editor or other person responsible for the publication of a newspaper for libel, to examine evidence as to the publication being for the public benefit or the matters being true or any other matter which may be given in defence, and to dismiss the case if he is of opinion that there is " a strong or probable presumption that the jury on the trial would acquit the person charged ". The section also allows the Justice to receive evidence of the report's being fair and accurate and published without malice, a point which will be returned to later.

There is also provision for a summary conviction for libel in section 10 of the 1961 Act. It is interesting that the English equivalent, section 5 of the 1881

54 *Ex Parte Purlbrook* [1892] 1 QB 86

55 His precise words are quoted above at pp35-36

56 *Supra* footnotes 22 and 23 respectively

Act, has been repealed in that jurisdiction by the *Criminal Law Act 1977*, sections 17 and 65, and section 13. Section 10 of our Act empowers a District Justice to try the case summarily if he is of the opinion that the libel is of a trivial character and the defendant consents to the matter being dealt with summarily. Again this applies only to charges against proprietors, publishers, editors or other persons responsible for the publication of a newspaper.

Privileges

70 Section 3 of the *Law of Libel Amendment Act 1888* accorded to newspapers a privilege for fair and accurate reports of proceedings publicly heard before any court exercising judicial authority, provided such report was published contemporaneously with such proceedings. This provision is still in force in England. However, our 1961 Act repealed the 1888 Act in entirety, and did not re-enact this particular privilege in the context of criminal prosecutions. Section 18 of the 1961 Act clearly uses identical wording, but it applies only to civil proceedings.

Section 4 of the 1888 Act provided a qualified privilege in respect of fair and accurate reports in newspapers of public meetings and of certain bodies and persons. In England this section was repealed and replaced by section 18(3) of the *Defamation Act 1952*, which contains wider provisions. However, being limited to civil proceedings, this leaves English newspapers in the same position as Irish newspapers in this context. Section 24 of our *Defamation Act 1961* does the same thing, namely enacts a wider list of proceedings but only in the context of civil proceedings. Again this development widens the gulf between the protections afforded to a defendant in civil proceedings and a criminal prosecution for libel.

5. Penalties

71 The penalties for defamatory libel are set out in the *Defamation Act 1961*. The penalty for maliciously publishing a defamatory libel knowing it to be false under section 12 is a fine not exceeding £500, or imprisonment for a term not exceeding 2 years, or both. Under section 11, the penalty for maliciously publishing a defamation libel simpliciter is a maximum fine of £200, or a maximum term of imprisonment of one year, or both.

72 One would have thought that the prosecution would be required to show that the accused actually knew that the material was false in order to establish the offence referred to in section 12. However, the decision in *R v Wicks*⁵⁷ is disturbing in this respect. Arguably the presumptions of a libel

57 *Supra* footnote 5

trial were incorrectly used to make a finding of fact for the English equivalent of section 4. First, the prosecution did not prove falsity. Instead, the presumption of falsity was used in ease of the prosecution. As Spencer observes,

" Presuming the libel to be false in this context is handing the prosecutor on a plate one of the essential elements of the offence, relieving him of all necessity to prove it for himself. The presumption turns 'knowing it to be false' into 'believing it to be false', although the Libel Act clearly says the former, and the latter is more severe on a defendant"⁵⁸

73 Secondly, the prosecution did not prove that the accused believed the matter to be false. The court ruled that this belief could be inferred from his statement in the letter stating that his opinion of Gurney was based on first-hand knowledge of this man. The upshot was that the court seems to have shifted the burden in section 4 on to the defendant to disprove that he had knowledge of falsity, by turning the presumption that the libel *is* false into a presumption that the defendant *knows* it is false.

6. Comparison between Defamation in Civil Proceedings and the Crime of Libel

74 (1) Libel may be a crime as well as a tort. Slander is not a crime.

(2) Publication to a person other than the victim is essential to ground the tort of libel. Publication to the victim alone is sufficient under the criminal law. This difference stems from the divergent aims of the early law: the crime was created to prevent breaches of the peace, the tort to make reparation for injury to reputation.

(3) Libel of the dead may be a crime but not a tort.

(4) Mental Elements:

- (i) In relation to the tort of libel, publication must have been intentional or reasonably foreseeable. In relation to the crime of libel, publication must have been intentional.
- (ii) In relation to the tort of libel, intention to defame on the part of the defendant is not necessary. The position in relation to the crime of libel is not settled, but it may be that intention to defame is necessary.
- (iii) In relation to the tort of libel, knowledge of falsity is

58 Spencer *supra* footnote 12

irrelevant to liability, although it may inflate damages. In relation to the crime of libel, knowledge of falsity is not an essential element. However, to merit the more severe punishment under section 12 of the *Defamation Act 1961*, there must have been knowledge of falsity. Knowledge of falsity therefore does not affect guilt, but it will increase sentence.

- (iv) In relation to the tort of libel and the crime of libel, the defendant's understanding of the words published is irrelevant. The defamatory nature of the words is assessed objectively.

(5) In civil proceedings, the defendant is vicariously liable in respect of defamatory libels published by his servants or agents. In criminal proceedings, the defendant who is vicariously liable for the acts of his servants may establish a defence if he shows that the publication was made without his authority, consent, knowledge, and that it did not arise from any want of due care or caution on his part.

(6) Truth is a complete defence in civil proceedings. There is also a statutory modification in section 22 of the 1961 Act so that the defendant may, in certain circumstances, be relieved of showing the truth of every fact. Truth is not a complete defence in criminal proceedings. It must additionally be shown that the publication was for the public benefit under section 6 of the 1961 Act. The relaxation of the rule in relation to proof of truth contained in section 22 of the same Act does not apply to criminal libel.

(7) The statutory privileges contained in sections 18 and 24 of the 1961 Act, in respect of reports of the proceedings of judicial and numerous other bodies, apply to civil proceedings but not to criminal proceedings.

(8) The defence of fair comment on a matter of public interest is available in civil proceedings. Less clear is whether it applies in criminal proceedings, although the more likely view is that it does.

CHAPTER 3: THE PRESENT LAW OF SEDITIOUS LIBEL

(1) *The common law offence and Irish legislation - a problem of identification*

75 To our knowledge the last reported case of seditious libel in this jurisdiction was in 1901¹. Of particular interest to any discussion of the crime of seditious libel is the Constitutional guarantee in Article 40.6.1.1 of the citizen's "rightful liberty of expression, including criticism of Government policy", which is followed by the statement that "The publication or utterance of seditious matter is an offence which shall be punishable in accordance with law". Surprisingly the *Defamation Act 1961* does not refer to seditious libel.

76 A question which arises in this context is whether a particular provision of the *Offences against the State Act 1939* constitutes seditious libel, or is merely similar to it. This is section 10(1) of the Act, which provides,

"It shall not be lawful to set up in type, print, publish, send through the post, distribute, sell, or offer for sale any document-

- (a) which is or contains or includes an incriminating document, or
- (b) which is or contains or includes a treasonable document, or
- (c) which is or contains or includes a seditious document."

During the course of the passage of the Defamation Bill through the Dail,

1 *P. McHugh* [1901] IR 569, 74 ILR 197.

some confusion was evident on this point.

The word "libel" is not mentioned in the 1939 Act. Also the offence in section 10(1) covers more ground than the offence of seditious libel. We shall assume that the offence in section 10(1) is not the offence of seditious libel, but merely covers similar ground. However, the absence of penalty in respect of seditious libel in the *Defamation Act 1961* leaves this open to some doubt.

(2) *Ingredients of the common law offence*

77. The law of sedition includes the uttering of seditious words, the publication of seditious libels, and conspiracies to do an act for the furtherance of a seditious intention. We will be confining our comments to the crime of publishing written seditious material.

(a) *Seditious Matter*

78. A seditious libel consists of the written publication of words with seditious intention. One of the accepted definitions of "seditious intention" is that of Stephen, from his *Digest of the Criminal Law*, which was accepted in Irish law as the correct definition by O'Brien LCJ in *The Queen v McHugh*:²

"A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.

An intention to show that His Majesty has been misled or mistaken in his measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite His Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to secure their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention."

In this context, seditious intention appears to refer to the nature of the matter

² *Supra* footnote 1.

rather than the defendant's state of mind, for, as we shall see, a seditious intention as *mens rea* is probably not required

79 In the *McHugh* case, the libel consisted of the publication of words implying that the jurors in a particular case had been used as corrupt tools of a Government to give a false verdict, and that this was typical of the system as a whole. It was held to be a seditious libel as tending to bring into contempt the administration of justice. The Lord Chief Justice considered the argument that the attack on the judge in the case was a personal libel, but found that he was attacked in his capacity as a judge, approving the view of Odgers that

'to assert that a judge has been bribed, or that in any particular case he had endeavoured to serve his own interests or those of his friends, or his party, or had wished to curry favour at Court, or was influenced by fear of the Government, or of any great man, or by any other motive than a simple desire to arrive at the truth, and to mete out justice impartially, is seditious "

80 An interesting test was put forward by Madden J in *R v McHugh*, where he saw the dividing line between seditious and non-seditious speech in the context of statements concerning the administration of justice as the difference between statements for the purpose of "purifying" and statements for the purpose of "vilifying" the system

"Probably none of the attempts which have been made to define a seditious intention, or rather to enumerate various kinds of intention which the law regards as seditious, are completely satisfactory or exhaustive. But it is clear that an intention to bring the administration of justice into hatred or contempt amounts to such an intention. The intention is, in each instance, something different from the defamatory writing. The character of the writing may be strong, and in some cases irresistible, evidence of the existence of an intention to bring the administration of justice into contempt. In other cases a jury might fairly believe that a charge was brought, against persons engaged in the conduct of a trial, for the purpose, not of vilifying, but of purifying, the administration of justice."

81 A publication may be found to constitute a seditious libel even where it is not described as such by the prosecution. In *R v McHugh*, O'Brien LCJ said 'if the substance of what is a seditious libel is stated, this is enough', or as Gibson J put it, "The thing is there though the word is not"

82 Even if the offence in section 10(1) of the *Offences against the State*

Act 1939 is not the crime of seditious libel, but a related statutory offence, it is possible that a court would draw guidance on the meaning of the term 'seditious' from the definition of "seditious document" in section 2 of the same Act. A seditious document includes-

- "(a) a document consisting of or containing matter calculated or tending to undermine the public order or the authority of the State, and
- (b) a document which alleges, implies, or suggests or is calculated to suggest that the government functioning under the Constitution is not the lawful government of the State or that there is in existence in the State any body or organisation not functioning under the Constitution which is entitled to be recognized as being the government of the country, and
- (c) a document which alleges, implies, or suggests or is calculated to suggest that the military forces maintained under the Constitution are not the lawful military forces of the State, or that there is in existence in the State a body or organisation not established and maintained by virtue of the Constitution which is entitled to be recognised as a military force, and
- (d) a document in which words, abbreviations, or symbols referable to a military body are used in referring to an unlawful organisation"

This definition reflects the immediate historical context of the legislation. Nonetheless if we take the above definition and the Stephen's definition as representative of the Irish definition of seditious matter, the essence of seditious matter appears to be matter which undermines the authority of the organs of Government. We may note at this point that no advocacy of overthrow by violence appears to be required.

(b) *Intention to disturb authority by advocating violence*

83 It was held in the recent Canadian case of *R v Boucher*,³ that a further requirement of the offence is an intention to cause public disturbance or disorder against the institutions of government by violence. "Not only must there be proof of incitement to violence in this connection, but it must be violence or defiance for the purpose of disturbing constituted authority." The English Law Commission noted that this aspect of the offence appeared to have been approved in the older English cases of *Collins*⁴ and *Aldred*⁵. It concluded that it was unlikely that a modern court would make the offence

3 [1951] 2 DLR 369 382 4

4 (1839) 9 C&P 456 at 461 *per* Littledale J (cited with approval in *Boucher*). See also *Burns* (1886) 16 Cox CC 355 367

5 (1909) 22 Cox CC 1 4 *per* Coleridge J

wider than the publication of matter designed to secure the overthrow of authority by violence

We do not think that this is the position in Ireland. Neither of the two definitions offered by us has included any reference to violence. Furthermore, the Constitution defines *treason* to include "inciting to levy war against the State, or attempting by force of arms or other violent means to overthrow the organs of government established by this Constitution, or inciting to make or take part or be concerned in any such attempt" (Article 39). Clearly one of the primary ways of "inciting" is by means of written publication. If the written publication of matter inciting to violent overthrow of constitutionally grounded organs of government is treason under our Constitution, it would seem that sedition is something else. That it is matter criticising and tending to undermine the authority of the organs of State is in harmony with the definitions of Stephen and of the Offences against the State Act 1939.

In conclusion, we suggest that the advocacy of violence is not a part of the definition of seditious matter in Irish law.

(c) *Mens Rea*

84 As with defamatory libel, it is not clear what mental element is required.⁶ Is it an intention to publish seditious matter with a seditious intention, or an intention to publish matter bearing a seditious meaning only?

We have already seen in our historical section that the *mens rea* element in relation to seditious libel was closely interwoven with the role of judge and jury, and the prevailing views of government criticism. When the Star Chamber was arbiter of both fact and law, the *mens rea* favoured appears to have been intention to publish with a seditious intent. When juries became involved in libel trials, after this jurisdiction was handed over to the common law courts, the preferred *mens rea* appears to have been merely intention to publish. The judge decided whether the matter published constituted a libel, and therefore held the key position in the proceedings. After the 1792 Libel Act in England and the equivalent 1793 Act in Ireland, juries were empowered to give a general verdict on the whole issue, in other words decide whether there had been a libel.

What was the mental element after this point? Stephen appears to have favoured an objective test in his *Digest*⁷, stating in relation to a seditious intention, "every person must be deemed to intend the consequences which

6 See Smith and Hogan *oed* p834

7 Stephen's *Digest* 4ed Article 94

would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.' The imposition of an objective test was also favoured in the Scottish case of *Grant*⁸. In that case, however Lord Cockburn thought that there had been a confusion between the meaning of the libel and the intention of the author, and that while the former should be evidence of the latter, the two concepts should not be deemed synonymous. Smith and Hogan observe that such a confusion has without doubt occurred in other areas of the criminal law, and that Lord Cockburn's preference for intention or recklessness as the test is more in harmony with general principles of the criminal law. By contrast, in *Burns* Cave J took the intention/recklessness test one step further, and directed the jury that intention was necessary and even recklessness would not suffice. This judge based this view of the necessary mental element on the view expressed by Stephen in his *History of the Criminal Law*, which is a view at odds with his own view in the Digest referred to above.

We may conclude that the *mens rea* of seditious libel is unsettled in modern law.

(3) Defences

Truth

85 The defence under section 6 of the *Defamation Act 1961* that the matter was true and published for the public benefit does not apply to seditious libel. This would seem to be apparent from the wording of the section, but in any event its predecessor, section 6 of the 1843 *Libel Act*, was expressly held not to apply to seditious libels in three Irish cases: *The Queen v Duffy*,⁹ *Ex parte O'Brien*¹⁰, and *The Queen v McHugh*¹¹. In the first of these cases, Blackburn CJ stated

' on reference to the terms of the statute itself, it requires very little consideration to see that the privilege to plead the truth of the facts charged is given, where it is for the public benefit that the effects should be published, that is, it makes the individual liable to have the truth stated where it was for the public benefit, but the public benefit is the only object the statute has in view in such case, and no one can contend that libels of a blasphemous, or treasonable, or seditious nature, can come within this statute, for such never can be of public benefit.'

8 (1848) 7 St Tr NS 507

9 9 Ir LR 329

10 12 LR Ir 29

11 [1901] 2 IR 569

Privilege

86 In *The Queen v McHugh* it was held that the statutory privilege of reporting public meetings conferred by the 1888 Act did not apply to seditious libel, since it was conditional upon the matter being for public benefit, and seditious matter could not be for public benefit. In any event, the extensive privilege for reports which is contained in our *Defamation Act 1961* does not apply to any criminal proceedings for libel.

CHAPTER 4: THE PRESENT LAW OF BLASPHEMOUS LIBEL

87 The modern Irish law of blasphemous libel is dominated by the Constitutional prohibition on the publication of blasphemous matter in Article 40.6.1. The common law is the major source prohibiting such publications by law. The only other provision with respect to publication of blasphemous matter is contained in section 7 (2) of the *Censorship of Films Act 1923*. The common law of blasphemous libel is supplemented by the provisions in respect of penalty and seizure in the *Defamation Act 1961*.

88 In the English case law there are two major decisions in relation to blasphemous libel in the context of modern law. The first is *Bowman v Secular Society Ltd*¹, which put to rest in that jurisdiction most doubts surrounding the nature of the matter which can constitute blasphemous libel. The second is *Whitehouse v Lemon and Gay News*², which definitively settled the *mens rea* of the offence. Both are decisions of the House of Lords, the first in 1917 and the second in 1979. Furthermore, the configuration of facts in *Lemon* was presented to the European Commission by way of challenge to the common law on blasphemous libel under the European Convention on Human Rights and Fundamental Freedoms³. In the absence of Irish authority this century, we will set out the English law and consider later whether it is applicable in Ireland, a matter which is open to some doubt.

1 *Commencement of Proceedings*

89 Any member of the public may institute proceedings for blasphemous

1 [1917] AC 406

2 [1979] 1 All ER 898

3 (1983) 5 EHRR 123

libel where the defendant is other than a newspaper editor, publisher or proprietor. Where the defendant falls within the latter category, section 8 of the *Defamation Act 1961* requires the consent of a High Court judge to be first obtained.

2. *The Nature of Blasphemous Matter*

90 If it is an offence of publishing blasphemous matter, we must know what constitutes blasphemous matter. Unfortunately neither the *Defamation Act 1961* nor the discussion that accompanied the Bill are useful in this regard.

What is the nature of blasphemous matter? More particularly, is it, or indeed was it ever, blasphemous simply to express disbelief in Christianity, or was blasphemous matter constituted only by such disbelief couched in scurrilous or offensive language so as to anger believers and provoke them to a breach of the peace? This is a question which has provoked some controversy. We shall see that in *Bowman v Secular Society Ltd*,⁴ some of the Law Lords were of the view that the mere expression of disbelief in Christianity alone had never been an offence, and that the absence of a conviction for questioning of Christian doctrines expressed in temperate language showed this to be so.

91 Nonetheless there is also much support for the view that originally any denial of Christianity constituted blasphemy. This is supported by Kenny,⁵ who stated

"[The] severer view seemed to be established, if not by any actual decision, yet certainly by a chain of unchallenged *obiter dicta* continuing throughout more than a century down into the reign of Queen Victoria. As Stephen says (History CL II,475), in the convictions for blasphemy throughout that period the Bench usually laid down 'the plain principle that the public importance of the Christian religion is so great that no one is to be allowed to deny its truth'."⁶

In our opening chapter we adopted the latter view, stating that the *actus reus* of the offence of blasphemy grew out of any challenge to the doctrines of Christianity into attacks that are couched in offensive language, and that this shift occurred in the mid-nineteenth century, due in part to the influence of the writings of Starkie.⁶ We will now proceed to examine the case law setting

4 *Supra* footnote 1

5 Kenny *The Evolution of the Law of Blasphemy* (1922) CLJ at 128

6 We were assisted in our discussion by the analysis of Kenny *Evolution of the Law of Blasphemy* (1922) CLJ 127

out the more modern view of the *actus reus* of blasphemy, including Starkie's justification therefor, commencing with the ruling in *R v Hetherington*⁷ and finishing with the authoritative decision of the House of Lords in *Bowman v Secular Societies*⁸

92 The case of *R v Hetherington*⁹ is generally accepted as the linchpin of the modern English law of blasphemy. The passage which was to be often cited in later cases was that of Lord Denman CJ where he said

'[E]ven discussion upon [doctrines of Christianity] may be by no means a matter of criminal prosecution, but, if they be carried out in a sober and temperate and decent style, even those discussions may be tolerated and may take place without criminality attaching to them. But if the tone and spirit is that of offence and insult and ridicule, in that case the jury will hardly feel it possible to say that such opinions so expressed do not deserve the character which is affixed to them in this indictment.'

In *Ramsey v Foote*¹⁰, Lord Coleridge CJ outlined the change in attitude from earlier times

"Now, according to the old law, or the dicta of the judges in old times, these passages would undoubtedly be blasphemous libels, because they asperse the truth of Christianity. But, as I said in the former trial, and now repeat, I think that these old cases can no longer be taken to be a statement of the law at the present day. It is no longer true in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land. Therefore to maintain that merely because the truth of Christianity is denied without more, that, therefore, a person may be indicted for blasphemous libel is, I venture to think, absolutely untrue. It is a view of the law which cannot be historically justified."

He proceeded to quote a passage from *Starkie on Libel*,¹¹ describing it as a correct statement of the law, which passage contained the following fine exposition of the reasons for tolerance of free speech-

'Yet it cannot be doubted that any man has a right, not merely to

7 (1841) 4 St Tr NS 503

8 *Supra* footnote 1

9 *Supra* footnote

10 (1883) 15 Cox CC 231

11 4 ed 599 (Emphasis added)

judge for himself on such subjects, but also, legally speaking, to publish his opinion for the benefit of others. When learned and acute men enter upon those discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken so far from producing mischief, must in general tend to the advancement of truth, and establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless, but, be this as it may, the law interferes not with his blunders, so long as they are honest ones, justly considering that society is more than compensated for the partial and limited mischief which may arise from the mistaken endeavour of honest ignorance, by the splendid advantages which result to religion and truth from the exertions of free and unfettered minds. The law visits not the honest errors, but the malice of mankind. *A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or wilful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals, a state of apathy and indifference to the interests of society - is the broad boundary between right and wrong.*"

In his direction to the jury, Lord Coleridge CJ said

If the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemous libel."

The italicised passage from Starkie had also been quoted with approval by Lord Coleridge CJ in a case decided 14 days previously, *R v Bradlaugh*¹². In that case, Lord Coleridge based his exposition of the existing law of blasphemous libel on an analogy with seditious libel, showing incidentally how views on political as well as religious criticism had altered by the late nineteenth century.

"I am aware that a more severe and strict view of the law has been put forth by persons entitled to respect that any attacks upon the fundamental principles of the Christian religion, and any discussion hostile to the inspiration or perfect purity of the Hebrew Scriptures is, however respectfully conducted, against the law of the land and is subject-matter for prosecution. As at present advised, I do not assent to that view of the law. It is founded, as it seems to me, upon misunderstood expressions

12 (1883) 15 Cox CC 217

in the judgments of great judges in former times I fail to see the consequences from the premises, because you may attack anything that is part of the law of the land in respectful terms, without committing a crime or a misdemeanour, otherwise no alteration in any part of the law of the land could ever be advocated by anybody, primogeniture is part of the law of the land, the laws of marriage are part of the law of the land and deliberate and respectful discussion upon the first principles of government, upon the principles of the law of inheritance, upon the principles which should govern the union of the sexes, on that principle, so far as I can see, would be an indictable libel. The consequence appears to me so extreme and untenable as to show that the premises must be wrong."

93 If any doubts persisted as to the *actus reus* of the offence of blasphemous libel, they were put to rest in a case which came before the House of Lords in 1917. The case was *Bowman v Secular Society Ltd*,¹³ it involved a bequest to a company formed for the purpose of promoting the view that "human conduct should be based upon natural knowledge, and not upon super-natural belief" and devoted to the secularisation of education and society in general. One of the issues was whether this purpose was unlawful, as constituting the offence of blasphemous libel.

Lord Dunedin was of the view that this offence would only be constituted by publications couched in scurrilous language'

Lord Parker stated

'In my opinion to constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace

It will be remembered from our historical section that the case of *Briggs v Hartley*¹⁴ represented some obstacle to the court, it having held that a trust to provide a prize for the best essay on natural theology treated as a science was void as inconsistent with Christianity. Lord Parker was of the view the case was wrongly decided because "there is nothing contrary to the policy of the law in an attack on or a denial of the truth of Christianity or any of its fundamental doctrines, provided such attack or denial is unaccompanied by such an element of vilification, ridicule, or irreverence as is necessary for the common law offence of blasphemy."

13 Supra footnote 1

14 19 LJ (Ch) 416

Lord Sumner undertook an extensive review of the authorities, in the course of which he stated

The gist of the offence of a blasphemy is a supposed tendency in fact to shake the fabric of society generally. Its tendency to provoke an immediate breach of the peace is not the essential, but only an occasional feature. After all to insult a Jew's religion is not less likely to provoke a fight than to insult an Episcopalian's, and, on the other hand, the publication of a dull volume of blasphemies may well provoke nothing worse than throwing it into the fire.

It is noteworthy that Lord Sumner did not accept that attitudes towards dissenting religious opinion had changed, but considered that the authorities indicated that temperate language had always been acceptable.

"It is common ground that there is no instance recorded of a conviction for a blasphemous libel, from which the fact, or, at any rate, the supposition of the fact, of contumely and ribaldry has been absent, but this was suggested to be of no real significance for these reasons. Such prosecutions, it was said, often seem to be persecutions, and are therefore unpopular, and so only the gross cases have been proceeded against. This explains the immunity of the numerous agnostic or atheistic writings so much relied on by Secularists. All it really shows is that no one cares to prosecute such things till they become indecent, not that, decently put, they are not against the law. Personally I doubt all this. Orthodox zeal has never been lacking in this country and as anti-Christian writings are all the more insidious and effective for being couched in decorous terms, I think the fact that their authors are not prosecuted, while ribald blasphemers are, really shows that lawyers in general hold such writings to be lawful because decent, not that they are tolerable for their decency though unlawful in themselves."

Later, he added

"Our Courts of law, in the exercise of their own jurisdiction, do not, and never did that I can find, punish irreligious words as offences against God. They dealt with such words for their manner, their violence, or ribaldry, or, more fully stated, for their tendency to endanger the peace then and there, to deprave public morality generally, to shake the fabric of society, and to be a cause of civil strife. The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault."

In any event Lord Sumner accepted that the modern *actus reus* of the offence

was as follows

It seems to need no citation of authorities to show that a temperate and respectful denial, even of the existence of God, is not an offence against our law, however great an offence it may be against the Almighty Himself

Lord Buckmaster was also of the view that it had always been the law that temperate discussion of Christianity was permissible, stating that "with one possible exception every reported case on the matter is a case where the offence alleged was associated with, and I think constituted by violent, offensive, or indecent words" He went on to say

'In my opinion, therefore, the common law of England does not render criminal the mere propagation of doctrines hostile to the Christian faith The crime consists in the manner in which the doctrines are advocated

94 What then is blasphemous matter? Lord Buckmaster said it was constituted by violent and offensive words, Lord Dunedin that it must be couched in scurrilous language, while Lord Sumner said that 'respectful denial 'did not constitute the offence' The fullest definition was provided by Lord Parker, who described it as words "containing such an element of vilification, ridicule, or irreverence, as would be likely to exasperate the feelings of others and so lead to a breach of the peace"

It is unfortunate that Lord Sumner expressed his definition in negative terms, for the breach of the peace issue contained in Lord Parker's definition leaves a question mark in the air Must it be shown that the words tended to cause an immediate breach of the peace, or were the words so used merely in a descriptive way? We saw that Lord Sumner identified the rationale of the offence of blasphemous libel as being its inherent "tendency in fact to shake the fabric of society generally" This tendency, he said, varied according to the period, and nowadays a discussion of the doctrines of Christianity would hardly contain this potential Notably his view of this aspect of the breach of the peace element did not make it a requirement, but was rather an observation on the type of speech at issue and the reasons for the creation of the offence As to breach of the peace in a narrower sense, he said "its tendency to provoke an immediate breach of the peace is not the essential, but only an occasional, feature" Lord Parker's view of the breach of the peace aspect of the offence was somewhat narrower likely to exasperate the feelings of others and so lead to a breach of the peace Lord Sumner's failure to define the offence in positive terms made it more likely that the Parker

definition would be adopted¹⁵

3. *The Mental Element*

95 The mental element in the offence of blasphemous libel assumed a priority only late in the day. As Lord Edmund Davies pointed out in *Lemon*¹⁶

'During the long years when the actus reus of blasphemy was constituted by the mere denial (however decently expressed) of the basic tenets of Christianity or, later, the couching of that denial in scurrilous language, there was no necessity to explore the intention of the accused, for his words were regarded as revealing in themselves what that intention was'

It will be seen that the *mens rea* of the offence of blasphemous libel prior to 1979 was precisely the issue before the House of Lords in *Lemon*, and that unanimity on this question was not forthcoming. The majority were of the view that a specific intention to blaspheme was not an element of the offence, while the minority felt that the matter was open for decision. This can to some extent be attributed to the ambiguity in two of the leading cases on blasphemous libel as follows

96 In *R v Bradlaugh*¹⁷, Lord Coleridge quoted from Starkie to the effect that intention to insult and mislead was an element of the offence, but proceeded to direct the jury to answer the question whether the words "were not calculated and intended to insult the feelings and the deepest religious convictions of the great majority of the persons amongst whom we live"

In *R v Ramsay and Foote*¹⁸, Lord Coleridge again referred to Starkie but directed the jury as follows

"If these libels - now before you - are in your opinion permissible attacks upon religious belief, then find the defendants not guilty. But if they are such as do not come within the most liberal view of the law as I have laid it down to you, then your duty is to find the defendants guilty"

15 See for example *R v Gott* (1922) 16 Cr App R 87 and Kenny *Evolution of the Law of Blasphemy* (1922) CLJ at 140 both of which adopted that definition

16 *Supra* footnote 2

17 (1883) 15 Cox CC 217

18 (1883) 48 LT 733 15 Cox CC 231

At least for some period in its development, the crime of blasphemous libel was one of strict liability. The absence of the element of intention to produce shock and outrage among believers has been attributed at least in part to matters of procedure prior to the 20th century.

" At a period when an accused could not give evidence in his own defence and his intention to produce a particular result by his acts, where this was an ingredient of the offence, was ascertained by applying the presumption that a man intends the natural consequences of his acts, the distinction was often blurred between the *tendency* of the published words to produce a particular effect upon those to whom they were published and the *intention* of the publisher to produce that effect."¹⁹

However, whether cases such as *Bradlaugh* and *Ramsay* altered this position was unclear prior to *Lemon*. It may be noted that the view of Kenny, writing in 1922, was that an intention to blaspheme was necessary:

'In civil actions to recover damages for a libel, no such intention is necessary, a man who, by mistaking it for a different and innocent letter, unintentionally posts a libellous one which also he has written, must suffer for his mistake (9 B&C 382). But in criminal proceedings, guilt can only arise where the offensive matter was published with full knowledge of its contents and with readiness to offend. 'Wilful intention', as Professor Starkie said, 'is the criterion and test of guilt'. A foreigner imperfectly acquainted with English may well have failed to appreciate the coarseness or contemptuousness of the phrases he has used."

97 However, more than fifty years later, the House of Lords would hold that intention to publish alone was required. This occurred in *Lemon*²⁰, where a private prosecution was instituted against the defendants. They were charged with the offence of blasphemous libel, the particulars of the offence alleging that they had published an obscene poem and illustration vilifying Christ in His life and crucifixion. The trial judge directed the jury that it was sufficient if the publication bore the meaning alleged, and that it was not necessary to establish any intention beyond the intention to publish matter which in the opinion of the jury was blasphemous. The jury convicted. The Court of Appeal dismissed the appeals, and the House of Lords granted leave to appeal. The discussion of the crime of blasphemous libel by the House of Lords in 1977 provides us with a modern judicial exposition of this form of criminal libel.

19 *Per* Lord Diplock in *Lemon* [1979] 1 ALL ER 898 at 902

20 *Supra* footnote 2

In the English Central Criminal Court, the applicants had argued that the offence of blasphemous libel had fallen into desuetude by reason of the lack of prosecutions in respect of that offence since 1922. The trial judge ruled that he could not quash the indictment on this ground. The applicants then abandoned this line of attack in the House of Lords.

The issue on appeal was not whether the words were blasphemous. The sole question for determination was whether the *mens rea* of the offence was satisfied by proof only of material which in the opinion of the jury was likely to shock and arouse resentment among believing Christians, or whether the prosecution was required to go further and prove that the accused in fact intended to produce that reaction or was reckless in this regard. We will find two main points of disagreement. The first is simply whether the *mens rea* of the offence was settled prior to the instant case. Four of the Law Lords were of the view that the point was open for decision and that a policy move should now be made. Viscount Dilhorne alone thought the *mens rea* was definitively settled. The second point is what that *mens rea* in fact is or should be. Three of the Law Lords held it to be an intention to publish matter which bears a blasphemous meaning. The two dissenting opinions were of the view that intention to blaspheme was a necessary ingredient of the offence.

The Majority Opinions

98 We observed above that Viscount Dilhorne alone was of the view that the earlier authorities had settled the mental element in this crime, and that this mental element was merely an intention to publish matter which was held by a jury to bear a blasphemous meaning. In this respect he differs not only from the minority judgements but also from the majority, in short, he felt that a mere intention to publish *was*, not *should be*, the *mens rea* of the offence.

He was also of the view that the procedural developments referred to by Lord Diplock bore no relevance to the question on appeal, namely whether *mens rea* was an element of the offence. Rather these developments affected offences in which a specific intention was already present. Referring to *R v Bradlaugh*²¹, he noted that while Starkie was quoted by Lord Coleridge CJ to the effect that wilful intention to insult and mislead was the criterion of guilt, a crucial point of note was that the direction merely told the jury to consider whether the matter was blasphemous and whether the accused had published, omitting any reference to intention. This also occurred in *R v Ramsay and Foote*²², where the direction to the jury again omitted reference to intention.

21 *Supra* footnote 17

22 *Supra* footnote 18

Viscount Dilhorne referred to a number of cases after *Bradlaugh and Ramsey*, including *R v Aldred*²³ and *R v Gott*²⁴. In the former case, which concerned seditious libel, Coleridge J said to the jury

"The test is not either the truth of the language or the innocence of the motive with which he published it, but the test is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of state? whatever his motives, whatever his intention, there would be evidence on which a jury might, on which I think a jury ought, and on which a jury would decide that he was guilty of a seditious publication."

In *R v Gott*, Avory J in his summing up quoted the above passage, and omitted any reference to blasphemous intent.

Viscount Dilhorne concluded

"In the light of the authorities to which I have referred and for the reasons I have stated, I am unable to reach the conclusion that the ingredients of the offence of publishing a blasphemous libel have changed since 1792. Indeed, it would, I think, be surprising if they had. If it be accepted, as I think it must, that that which it is sought to prevent is the publication of blasphemous libels, the harm is done by their intentional publication, whether or not the publisher intended to blaspheme."

99 In a short speech, Lord Russell stated that the authorities were inconclusive-

"The authorities embrace an abundance of apparently contradictory or ambivalent comments. There is no authority in your Lordships' House on the point. The question is open for decision."

-and was in favour of proof of the lesser form of intention

"I do not, with all respect to the speech of my noble and learned friend, Lord Diplock, consider that the question is whether this is an offence of strict liability. It is necessary that the editor or publisher should be aware of that which he publishes. Why then, should this House, faced with a deliberate publication of that which a jury with every justification has held to be a blasphemous libel, consider that it should be for the prosecution to prove, presumably beyond reasonable doubt, that the accused recognised and intended it to be such or regarded it as

23 (1900) 22 Cox CC 1

24 Reported in *The Freethinker* January 8 1922

immaterial whether it was? I see no ground for that. It does not to my mind make sense, and I consider that sense should retain a function in our criminal law. The reason why the law considers that the publication of a blasphemous libel is an offence is that the law considers that such publication should not take place. And if it takes place, and the publication is deliberate, I see no justification for holding that there is no offence when the publisher is incapable for some reason particular to himself of agreeing with a jury on the true nature of the publication."

100 Lord Scarman was also of the view that the *mens rea* of the offence was a matter open for decision, stating "The history of the law is obscure and confused. The point is, therefore, open for your Lordships' decision as a matter of principle." It is noteworthy that he did consider the procedural situation to affect the substantive law, and in this regard he is in agreement with the minority. He was inclined to favour the view that the *mens rea* historically was no more than an intention to publish words found to be blasphemous, but he found force also in the view put forward by Lord Edmund-Davies. We may therefore conclude that Lord Scarman did not consider the law to be definitively settled.

The issue was, he said, "one of legal policy in the society of today." In this respect, he was influenced by the view that the trend of the law in relation to public order offences was towards the view that "people, who know what they are doing, will be criminally liable if the words they choose to publish are such as to cause grave offence to the religious feelings of some of their fellow-citizens or are such as to tend to deprave and corrupt persons who are likely to read them." In support of this trend, he referred to the Obscene Publications Act 1959 and the Public Order Act 1936 as amended by the Race Relations Act 1970, in which attention is focused on the nature of the conduct rather than the intention behind it.²⁵

Lord Scarman was further of the opinion that this was in keeping with Articles 9 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantee religious freedom and freedom of expression.

"It would be intolerable if by allowing an author or publisher to plead the excellence of his motives and the right of free speech he could

25 The English Law Commission has made some interesting criticisms of this argument. In support of his contention Lord Scarman referred to the *Obscene Publications Act 1959* but we have observed that criticisms of the way in which that Act has worked led to comprehensive new proposals for legislation by the Williams Committee. He also cited section 5A of the *Public Order Act 1936* but this was inserted by the *Race Relations Act 1976* because of the practical necessity for dealing effectively with an urgent social problem. See Working Paper No 79 at p78.

evade the penalties of the law even though his words were blasphemous in the sense of constituting an outrage upon the religious feelings of his fellow citizens. This is no way forward for a successful plural society. Accordingly, the test of obscenity by concentrating attention on the words complained of is, in my judgment, equally valuable as a test of blasphemy. The character of the words published matter, but not the motive of the author or publisher."

Another point of note is Lord Scarman's rationale for the offence. At the outset of his judgment, he stated his faith in the utility of the offence:

"I do not subscribe to the view that the common law offence of blasphemous libel serves no useful purpose in the modern law. On the contrary, I think there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences designed to safeguard the internal tranquility of the kingdom. In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt. I will not lend my voice to a view of the law relating to blasphemous libel which would render it a dead letter, or diminish its efficacy to protect religious feelings from outrage and insult."

Given such a strong defence of the continued existence of the offence, the proposed rationale must be read with interest. We find this later in the speech, after the statement that the offence of blasphemous libel was in harmony with the European Convention:

"Article 9 provides that every one has the right to freedom of religion, and the right to manifest his religion in worship, teaching, practice and observance. *By necessary implication* the article imposes a duty on all of us to refrain from insulting or outraging the religious feelings of others." (Emphasis added)

We may extract from this a general principle, namely, that if there is a right to exercise religion by teaching, practice and observance, there is a related right to be protected from religious insult. It is regrettable that Lord Scarman did not expand on this deduction. It is arguable that it is not self-evident that protection from religious insult flows from a right to practise religion. We will see below that the European Commission also assumed without argument that the right of freedom from insult flowed from the right to practise religion.

Lord Scarman concluded firmly that there was no requirement of an intention to blaspheme. "The character of the words published matters, but not the motive of the author or publisher."

101 As we have seen, the decision in *Bowman* had already settled that the matter had to be published in insulting or scurrilous language. We noted that some doubt was left surrounding the breach of the peace issue, since Lords Parker and Sumner differed on this point. In *Lemon*, the issue was the *mens rea* rather than the *actus reus* of the offence. However, the *actus reus* of the offence was dealt with by Lord Scarman. He expressly approved the following definition of Stephens, set out at article 214 of the *Digest of Criminal Law*

"Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves."

Earlier in his speech, Lord Scarman appears to have put to rest any question that a tendency to provoke an immediate breach of the peace is a requirement of the offence, stating as follows

"I would only add that it is a jejune exercise to speculate whether an outraged Christian would feel provoked by the words and illustration in this case to commit a breach of the peace. I hope, and happen to believe, that most, true to their Christian principles, would not allow themselves to be so provoked. The true test is whether the words are calculated to outrage and insult the Christian's religious feelings, and in the modern law the phrase 'a tendency to cause a breach of the peace' is really a reference to that test. The use of the phrase is no more than a minor contribution to the discussion of the subject. It does remind us that we are in the field where the law seeks to safeguard public order and tranquility."

The Minority Opinions

102 Lord Diplock, dissenting, expressed his agreement with the exhaustive historical survey undertaken by Lord Edmund-Davies, but felt bound to observe that by the beginning of the twentieth century the mental element of the crime of blasphemous libel was not settled. He thought that it was clear that the *actus reus* of the offence had undergone a substantive change between the 17th and end of nineteenth centuries, and this was due in part to changes

in procedure ²⁶

He thought that the abolition in 1843 of the doctrine of vicarious liability²⁷ and the influence of Starkie opened the way to development of the mental element of the offence Lord Diplock referred to the passage from Starkie cited in *Ramsay v Foote* to the effect that a "malicious and mischievous intention" was required²⁸, and commented

"The language in which this statement is expressed is perhaps more that of the advocate of law reform than that of the draftsman of a criminal code Nevertheless the statement clearly requires intent on the part of the accused himself to produce the described effect on those to whom the blasphemous matter is published and so removes blasphemous libel from the special category of offences in which *mens rea* as to one of the elements of the *actus reus* is *not* a necessary constituent of the offence "

Lord Diplock stated that this view of the law continued to be adopted by judges in summing up for criminal prosecutions, and although Avory J in *R v Gott*, the last reported case, was less specific, he did refer to words being "calculated and *intended* to insult the feelings and the deepest religious convictions "

Lord Diplock concluded on the basis of this skeletal review of the authorities that the question was now a policy one before the House of Lords and was open for decision

"I accept that, on the state of the authorities, it is still open to this House to approve the stricter view of the law preferred by Stephen to the milder view adopted by Lord Coleridge CJ in his summing-up in *Reg Ramsay and Foote* 15 Cox CC 231, but there are, as it seems to me, compelling reasons why we should not The paucity of subsequent prosecutions for blasphemous libel makes one unable to point to any judicial developments in the legal concept of the *mens rea* required in this particular offence, but this does not necessarily mean that the law of blasphemous libel, now the offence has been revived after a lapse of 50 years, should be treated as having been immune from those significant changes in the general concept of *mens rea* in criminal law that have occurred in the last 100 years All of these in my opinion point to the propriety of your Lordships adopting the milder view that the offence today is no longer one of strict liability, but is one requiring

26 See quotation from judgment above at p68

27 Strictly speaking it was mitigated not abolished

28 See italicised passage at p66 above

proof of what was called in *Director of Public Prosecutions v Beard* [1920] AC 479 a 'specific intention', namely, to shock and arouse resentment among those who believe in or respect the Christian faith'

Lord Diplock went on to consider the procedural changes which he believed should bear on the decision to require a specific intent. The first of these consisted of the passing of the *Criminal Evidence Act 1898*. This enabled the accused to testify as a witness in his own defence, in contrast to the previous position where intention could only be inferred from the act and its circumstances, combined with the presumption that a person intends the natural consequences of his own acts.

The second procedural change was a legislative provision on this presumption. Originally the presumption was an inference that the jury was bound to draw unless the accused overcame the burden of showing facts that the law regarded as sufficient to rebut it. There were two views as to what these facts were. The objective school said that the presumption could only be rebutted by proof that he was insane or suffered from some abnormality of mind. The subjective school said the burden merely cast upon the accused the burden of proving that he had not intended the natural consequences of his act, which burden was altered to the lesser one of inducing a doubt in the jury's mind as to his intention. However in *DPP v Smith*²⁹, the House of Lords had held the objective school to be correct. In section 8 of the *Criminal Justice Act 1967* Parliament had reversed this decision, so that the jury would decide whether the accused did intend or foresee the result of his actions by reference to all the evidence.

Lord Diplock accepted that these developments did not directly render intention to blaspheme an element of the crime of blasphemous libel. However, they did at least make the subjective test applicable if intention was an ingredient of the offence. The remaining step was therefore to deduct that intention was an element of the offence. To this effect he stated

'My Lords, if your Lordships were to hold that Lord Coleridge CJ and those judges who preceded and followed him in directing juries that the accused's intention to shock and arouse resentment among believing Christians was a necessary element in the offence of blasphemous libel were wrong in doing so, this would effectively preclude that particular offence from the benefit of Parliament's general substitution of the subjective for the objective test in applying the presumption that a man intends the natural consequences of his acts, and blasphemous libel would revert to the exceptional category of crimes of strict liability from which, upon what is, to say the least, a plausible analysis of the

29 [1961] AC 290

contemporaneous authorities, it appeared to have escaped nearly a century ago. This would, in my view, be a retrograde step which could not be justified by any considerations of public policy. The usual justification for creating by statute a criminal offence of strict liability, in which the prosecution need not prove *mens rea* as to one of the elements of the *actus reus*, is the threat that the *actus reus* of the offence poses to public health, public safety, public morals or public order. The very fact that there have been no prosecutions for blasphemous libel for more than 50 years is sufficient to dispose of any suggestion that in modern times a judicial decision to include this common law offence in this exceptional class of offences of strict liability could be justified upon grounds of public morals or public order.

Lord Diplock concluded with the interesting point that in the instant case, the requirement of an intention to blaspheme might well have made no difference to the outcome. Nonetheless, he said, "Mr Lemon was entitled to his opportunity of sowing the seeds of doubt in the jury's mind." It may well be that the sense of outrage in cases of blasphemous libel and the fear that the defendant will be acquitted has hampered the development of a requirement of specific intention, and it may also be that such fears are misplaced.

103 Lord Edmund Davies, also dissenting, was in agreement with the view that the presumption discussed by Lord Diplock was a concept "which goes far to explain the frequent absence of a clear direction regarding the necessity of proving a subjective intention." He said

"My noble and learned friend Lord Diplock has rightly observed that section 8 of the Criminal Justice Act is concerned simply with how intention is to be proved when intention is of relevance, and says nothing about when intention is to be proved. Such indeed was the view I expressed in *Reg v Majewski* [1977] AC 443 and I adhere to it. But the section is nevertheless of significance in relation to the present proceedings in its manifestation of conformity with the increasing tendency in our law to move away from strict liability in relation both to statutory offences and to common law crimes. There are those who dislike this tendency. But to treat as irrelevant the state of mind of a person charged with blasphemy would be to take a backward step in the evolution of a humane code.

He supported the theory of the three-stage development of the crime, based on an examination of *R v Hetherington*, the mitigation of the doctrine of vicarious responsibility in the 1843 Act as seen in *R v Holbrook*, the influence of *Starkie*, *R v Bradlaugh*, and *R v Ramsay and Foote*. He described the

direction of Avory J in *R v Gott* as "equivocal as to the necessity for intention "

A summary of the three-stage theory (which we ourselves have adopted in this paper) was admirably expressed in the following passage

'In the earliest stage it was clearly a crime of strict liability and consisted merely of any attack upon the Christian Church and its tenets. In the second stage the original harshness of the law was ameliorated, and the attack was not punishable unless expressed in intemperate or scurrilous language. In the third stage, opinions were mixed. Some judges held that the subjective intention of author or publisher was irrelevant, others that it was of the greatest materiality. The stricter view was explicable on several grounds. (1) By reason of the presumption of intention as to the probable consequences of one's actions, which, though increasingly unpopular, was not finally eliminated until section 8 of the *Criminal Justice Act 1967* was enacted. (2) By reason of the fact that, as until Fox's *Libel Act 1792* it was for the judge (and not the jury) to decide whether a publication was blasphemous, he was relieved of any necessity for directing the jury as to intention. (3) By reason of the doctrine of vicarious responsibility, earlier discussed, which subsisted in an unqualified form until Lord Campbell's *Libel Act 1843*. (4) By reason of the fact that, until the *Criminal Evidence Act 1898*, persons accused of blasphemy were incompetent to give evidence on their own behalf. The preponderance of authority was nevertheless increasingly and markedly in favour of the view that intention to blaspheme must be established if conviction was to ensue "

Believing that the House was faced with a choice on the issue of *mens rea*, Lord Edmund-Davies was in favour of the requirement of specific intention, believing (as we have noted above) that any other decision would be a "retrograde step"

4. *Blasphemy in the Irish context*

Actus Reus and Mens Rea

104 There is no Irish authority on the question of what constitutes the *actus reus* of the offence in Irish law. As we have seen, the more generally accepted view would be that *Bowman*, as a decision of the House of Lords prior to 1921, formed part of the law of Ireland in existence at the date of the enactment of the Constitution of the Irish Free State and survived its enactment to the extent that it was not inconsistent with any of its provisions. We are not aware of any provision in that Constitution which would be in potential conflict with *Bowman* and, accordingly, on this analysis it was part of our law at that time the Constitution of Ireland was enacted in 1937. The

question then arises as to the effect on the pre-existing law of blasphemy of the Constitution.

105. Article 40.6.1.i provides that the publication of blasphemous matter is an offence which shall be punishable in accordance with law.

The religious content of the Constitution in general has been altered since 1937. A referendum in 1972 abolished the original Article 44.1.ii. which had provided:

"The State recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of citizens."

However, the Preamble continues to state, "In the Name of the Most Holy Trinity, from whom is all authority and to Whom, as our **final end**, all actions, both of men and States must be referred, We the people of Eire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial..." Moreover, Article 44 1 still provides that:-

"The State acknowledges that the homage of public worship is due to Almighty God. It shall hold his name in reverence, and shall respect and honour religion".

106. Writing of the Constitutional provisions in 1960, in a context prior to the 1972 referendum, Paul O'Higgins wrote:

"Did these provisions as a whole alter the pre-existing common law as to blasphemy? It may be noted that while the phrase 'Christianity is part of the Law of England' has been discarded as a guide to the problem of what constitutes blasphemy under English law, the Irish Constitution in many respects, it may be argued, gives new meaning to the phrase 'Christianity is part of the law of Ireland'. The debates in the Dail at the time when the Constitution was under discussion give little indication of the intention of the Irish parliament, then consisting only of one chamber, on this matter. It is, however, well known that Mr. Eamon de Valera, lately the Taoiseach or Prime Minister of the Republic, himself prepared the first draft of the present Constitution. What was his intention in including these provisions? An inquiry was directed to Mr. de Valera as to what was the source of the proviso to article 40.6.1.i, and whether in the light of the other provisions of the Constitution referred to above a new offence of blasphemy had been created or the old conception of blasphemy modified. The reply elicited

was that no new offence had been created by article 40.6.1.1, that the offence of blasphemy is one at common law and that it is impossible to attribute article 40.6.1.1 to any particular source.³⁰

Mr O'Higgins proceeded to examine the statutory and case law on blasphemy. He concluded that there was considerable doubt surrounding the meaning of the term 'blasphemous' in the Constitution and that

the Constitution is open to a retrogressive interpretation which would discard the progress which has been made in the legal toleration of sincere religious dissent and rational disbelief – the high water-mark of which is to be seen in *Bowman's* case. Not only may the Constitution be interpreted in a way unfavourable to the non-believer but even to members of religions other than those which are recognised by the Constitution.³¹

107 Notwithstanding the deletion of some provisions in Article 44, the Constitution retains a distinctly Christian flavour and there are judicial dicta to the effect that the State established by the Constitution is Christian and democratic in its nature.³² However, Article 44 prohibits religious discrimination of any kind, so that all religions are guaranteed equality of treatment. Bearing in mind that the Constitution guarantees freedom of conscience and profession of religion (Article 44.2) as well as freedom of speech, it seems most unlikely that the offence of blasphemy envisaged in the Constitution would extend to a denial of the truth of the doctrines of Christianity, as distinct from an insulting and outrageous attack upon such doctrines.

Whether the offence is limited to insults to Christianity is another question. The common law certainly imposed that restriction. However, a court today would have to consider whether an offence so defined would be consistent with the Constitutional guarantee of religious freedom. In this context, the remarks of Lord Scarman in *Lemon*, which we have already quoted, are again worth noting.

I do not subscribe to the view that the common law offence of blasphemous libel serves no useful purpose in the modern law. On the contrary I think that there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence

30 Paul O'Higgins *Blasphemy in Irish Law* (1960) 23 MLR 150-153.

31 *Ibid.* at 166.

32 *Ryan v Attorney General* [1965] IR 294 per Kenny J at p313; *Quinn's Supermarket v Attorney General* (1972) IR 1 per Walsh J at p23; *Norris v Attorney General* (1984) IR 30 per O'Higgins CJ at p65.

belongs to a group of criminal offences designed to safeguard the internal tranquility of the kingdom. In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt. I will not lend my voice to a view of the law relating to blasphemous libel which would render it a dead letter or diminish its efficacy to protect religious feelings from outrage and insult. My criticism of the common law offence of blasphemy is not that it exists but that it is not sufficiently comprehensive. It is shackled by the chains of history"

If, however, the constitutional provision is to be construed by reference to the probable intention of the framers of the Constitution, then, having regard to the terms of the preamble and to the fact that the provision originally appeared in an article which in effect confined recognition of religion to the Christian churches in existence in Ireland at the date of its enactment and to the Jewish religion, it would seem likely that it was intended to be confined to religious beliefs in the Judaeo-Christian tradition. (In addition to specified branches of Christianity, recognition was extended to "the Jewish congregations and the other religious denominations existing in Ireland at the date of the coming into operation of the Constitution", but we assume that religions such as Islam, Hinduism or Buddhism were not represented by any organised communities in Ireland at that time). It is true that, as Walsh J pointed out in *Quinn s Supermarket v Attorney General*,³³ the acknowledgement of the deity contained in article 44.1 is couched in terms which do not confine the benefit of that acknowledgement to members of the Christian faith. However, bearing in mind that the common law in existence at the date of the Constitution was preserved to the extent that it was consistent with the Constitution, it might be difficult to contend that the law of blasphemy was intended to protect any religions other than those in the Judaeo-Christian tradition. Even if it was held to extend to all monotheistic religions, such as Islam, it must be highly doubtful whether it was intended to apply to polytheistic creeds such as Hinduism or to religions which deny the existence of personal deities.

We do not overlook the fact that there are authoritative judicial observations to the effect that the Constitution is not necessarily to be interpreted according to ideas prevalent or accepted at the time of its enactment. In order to ensure that it remains a living document, the courts must take into account the changing views of society on various matters.³⁴ As we have already mentioned, however, the view that the Constitution has a distinctively Christian flavour does not depend solely on the probable intentions of those who framed it or the views of the people at the time it was enacted, it is

33 [1972] IR 1 at p23

34 See for example the observations of Walsh J in *McGee v Attorney General*, [1974] IR 284 at p319

also supported by judicial dicta in a number of cases

As to the *mens rea* of the offence, the position in Ireland is unsettled. A court might hold that the offence was one of strict liability as did the court in *Lemon*, or might require an intention to blaspheme

5. Publication

108 There is a distinction between blasphemous libel and blasphemy *simpliciter*. It seems that the crime of blasphemy may be committed, and could always be committed, by oral utterances, gestures, and pictures as well as by means of the written word. For example, the burning of the Bible, or the publication of a caricature may constitute the publication of blasphemous matter. In *Lemon*, Lord Scarman stated

"Everyone who publishes any blasphemous document is guilty of the [offence] of publishing a blasphemous libel. Everyone who speaks blasphemous words is guilty of the [offence] of blasphemy."

Technically our paper deals only with blasphemous libel. Section 15 of the *Defamation Act 1961*, which deems broadcasts by wireless telegraphy to be libels, does not apply to criminal libels. Accordingly publication in this context appears to include written publication only.

6. Element of Attack

109 If an Irish court were to draw guidance from the English case law, it would appear that the critical nature of the publication is not conclusive. Rather the determinant factor is the tone of the language. A fundamental attack could be expressed in temperate terms and would not constitute blasphemous libel. Conversely, a flippant comment could cause outrage by its insulting tenor. Lord Scarman stated in *Lemon*

"It was said that to constitute a blasphemous libel the words must contain an *attack* on religion and must tend to provoke a breach of the peace, and that the accused must so intend. The plausibility of the first point derives from the undoubted fact that, as a matter of history, most of the reported cases are of attacks on the doctrines, practice or beliefs of the Christian religion. Since *Hetherington's* case it has been clear, however, that the attack is irrelevant, what does matter is the manner in which the feelings of the general body of the community have been treated. If the words are an outrage on such feelings, the opinion or argument they are used to advance or destroy is of no moment.

7. *Breach of the Peace*

110 In England, there appear to be two views of the issues of breach of the peace. The narrow view sees a tendency to breach the peace as an element of the offence, in the sense that the words would be seen as blasphemous if they would be likely to provoke a person into angry reaction. For example, the trial judge in *Lemon* referred to the tendency to breach the peace as a tendency "to provoke or arouse angry feelings, something which is a possibility, not a probability". The broader view defines breach of the peace as a disturbance of society and order in a deeper and fundamental way, furthermore, this view would see this tendency as inherent in blasphemous words, rather than an additional criterion to be satisfied. The latter view and its place in modern society was expressed in a celebrated passage in the judgement of Lord Sumner in *Bowman v Secular Society Ltd.*

"The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which 150 years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before. In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous. Whether it is possible that in the future irreligious attacks, designed to undermine fundamental institutions of our society, may come to be criminal in themselves, as constituting a public danger, is a matter that does not arise. The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other, nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times, and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion, as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience."

111 In 1949, Lord Denning pronounced the offence a dead letter because the offence no longer contained the potential to shake the fabric of society. Nonetheless the offence re-surfaced in 1979 in the *Lemon* case. Since the *mens rea*, not the *actus reus*, was under consideration, breach of the peace was not in issue. However, Lord Scarman made two references to it, both

of which are quoted above³⁵ It is clear that he believed this aspect of the offence had been eliminated However, there is no authoritative statement as to the conflict of views on this issue following *Bowman* The better view is probably that this element, whether seen as a constitutive part of blasphemous words or a requirement of the offence in the narrower sense of provoking an angry reaction has disappeared from the offence

The position in Ireland is unclear, but the more likely view is that both the tendency to and requirement of breach of the peace are not necessary

The elimination of the breach of the peace issue in either of its senses raises important questions If the basis for the offence is no longer its threat to the established order, nor its tendency to provoke an angry response, the justification for this restriction of speech must be re-examined We have already referred to Lord Scarman's deduction from the guarantee of freedom of religion under the Convention of a right to be protected from insults on one's beliefs In our chapter on the reform of blasphemous libel we shall suggest a number of additional purposes of the offence

DEFENCES

8. *Vicarious Liability*

112 Section 7 of the *Defamation Act 1961*, which mitigates the common law rule that a master is liable for a libel published by his servant, applies to blasphemous libels

9 *Privileges*

(i) *Statutory*

113 We have already seen that the two statutory privileges conferred by the *Defamation Act 1961* on reports of judicial proceedings (section 18) and reports of proceedings of a number of other bodies (section 24 and Schedule II) apply only to civil proceedings There are accordingly no statutory privileges in respect of blasphemous libel In any event, sections 18 and 24 do not permit the publication of blasphemous matter, section 18 states that nothing in the section shall authorise the publication of blasphemous matter, and section 24 states that the privilege is conditional upon the statements being for the public benefit, a condition which would presumably not be satisfied in relation to blasphemous matter

35 In the discussion of his judgment at p74

(ii) Common Law

114 At common law there are two types of privilege. Qualified privilege attaches to statements made between persons where there is reciprocity or duty or interest. Quite apart from the question of the applicability thereof to criminal proceedings it is unlikely that this would be of any relevance to blasphemous matter.

Absolute privilege exists in civil proceedings in relation to statements between solicitor and client, statements between officers of State in the performance of official duties, and statements in the course of judicial proceedings. The idea behind the first two categories is to facilitate the performance of duties and would offer no rationale for protecting blasphemous matter. It would not significantly impede the daily performance of duties to avoid insulting another's religion. It is obviously more difficult to avoid defamatory and potentially defamatory words. As to the third category mentioned, it is an interesting question as to whether statements made in the course of judicial proceedings would be privileged. Presumably the repetition of the charge at a trial would not render the judge guilty of blasphemy nor would the publication of the charge sheet render the police officer guilty of the crime himself. Any other situation would render the crime of blasphemy impossible to try.

(iii) Constitutional

115 Article 15.12 provides that

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

Article 15.13 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 authority other than the House itself.

These provisions would appear to admit of no exception and therefore blasphemous matter uttered in the Oireachtas would not seem to be punishable at law.

10 Penalties

116 The publication or utterance of blasphemous matter is an offence which shall be punishable in accordance with law Article 40.6.1.1

Section 13 of the *Defamation Act 1961* covers the penalties and procedure in respect of blasphemous matter. The penalty for a conviction on indictment for blasphemous libel is a maximum fine of £500 or imprisonment for a maximum term of 2 years, or both, or penal servitude for a maximum term of 7 years, under section 13 (1). Under section 13(2) the court may make an order for seizure and detention of all copies of the libel in the possession of the person or another person named in evidence on oath. In pursuance of such an order, a member of the Garda Síochána may enter if necessary by force and search buildings for copies of the libel. Provision for returning such copies in the event of a successful appeal of conviction is made in section 13(3).

The Lemon Case in the European Commission³⁶

117 The publisher and editor of *Gay News Ltd* made an application to the European Commission of Human Rights on the basis that their convictions amounted to an unjustified interference with their freedom of expression as guaranteed under Article 10 of the Convention, and an unjustified interference with their freedom of thought and religion as guaranteed under Article 9. In addition to the contention that the restrictions imposed on them were not necessary in a democratic society, the applicants submitted that their convictions had been based on legal principles which did not exist or had not been defined with sufficient clarity at the time of the offence, and that the offence was therefore not 'prescribed by law' as required by paragraph (2) of Articles 9 and 10, and also in violation of Article 7 of the Convention. Article 7 states that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

118 The Commission held the applications inadmissible. With respect to the contention that position of strict liability was not laid down with certainty prior to the trial, the Commission quoted from the judgment of the European Court in *Sunday Times v UK*³⁷,

'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

³⁶ (1983) 5 ECHR 123

³⁷ (1979) 2 ECHR 245

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. Those consequences need not be foreseeable with absolute certainty. Experience shows this to be unattainable. Again whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

Referring to a number of cases in which interpretation of criminal law was under scrutiny, the Commission observed. What is among other things, prohibited is the application of the penal law *in malam partem* in relation to facts which the text of the law cannot reasonably extend to. In an important passage, it continued

"In particular in the area of the criminal law it is excluded, by virtue of Article 7(1) of the Convention, that any acts not previously punishable should be held by the courts to entail criminal liability, or that existing offences should be extended to cover facts which previously clearly did not constitute a criminal offence. This implies that constituent elements of an offence such as, e.g. the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case law of the courts. On the other hand it is not objectionable that the existing elements of the offence are clarified and adapted to new circumstances which can be reasonably brought under the original concept of the offence."

There is clearly a balance to be struck between maintaining the flexibility to meet unforeseen situations and giving the offence sufficient certainty to allow the potential wrongdoer to know what constitutes the offence. The Commission deemed the balance in this case to be in favour of the view that the settling of the *mens rea* of the offence by the House of Lords had not prejudiced the applicant.

"Despite the admission by the Court of Appeal and the majority of the House of Lords that a point of principle was involved in the determination of this question which required clarification, it is equally clear that the application of a test of strict liability and the exclusion of evidence as to the publisher's and editor's intention to blaspheme did not amount to the creation of new law in the sense that earlier case law clearly denying such strict liability and admitting evidence as to the blasphemous intentions was overruled. By stating that the *mens*

rea in this offence did only relate to the intention to publish, the courts therefore did not overstep the limits of what can still be regarded as an acceptable clarification of the law. The Commission further considers that the law was also accessible to the applicants and that its interpretation in this way was reasonably foreseeable for them with the assistance of appropriate legal advice.

Central to the decision that the clarification of the *mens rea* element by the House of Lords in the *Lemon* case constituted clarification only and not retrospective law-making was the fact that no authorities required overruling, that the view of *mens rea* adopted by the majority was consistent (if not exclusively consistent) with the authorities, and that the interpretation of the authorities as occurred was foreseeable by the applicant if instructed with appropriate legal advice.

119 The second major ground of attack pursued by the applicants was that the restriction on their freedom of speech did not pursue a *legitimate* purpose covered by Article 10(2) of the Convention, and that such restriction was not *necessary in a democratic society*. Since the case had been brought by way of private prosecution, the Commission considered that any justifying ground for the restriction must be sought in the protection of the rights of the private prosecutor. It accepted that the purpose of the law of blasphemous libel at common law, as gleaned from the judgments of the English courts, was 'to protect the right of citizens not to be offended in their religious feelings by publications'. Accordingly the restriction was legitimate. The Commission moved on to consider whether it was necessary in a democratic society. In an important passage, the Court set out its view that the existence of the offence of blasphemy does not require justification and that the real question under the Convention is whether the ingredients of that offence as formulated by the courts of a particular country satisfy the Convention requirement of proportionality to the aim pursued. One may note, however, the assumed self-evidence of the need for an offence of blasphemy and the weight attached to the rationale, namely, protection of religious feelings.

It remains to be seen whether the restriction imposed on the applicants for this purpose can also be considered as necessary within a democratic society. In this respect, the Commission first observes that the existence of an offence of blasphemy does not as such raise any doubts as to its necessity. *If it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offence triable at the request of the offended person.*

It is in principle left to the legislation of the State concerned how it wishes to define the offence, provided that the principle of

proportionality which is inherent in the exception clause of Article 10(2) is being respected. The Commission considers that the offence of blasphemous libel as laid down in the common law of England in fact satisfies these criteria. In particular it does not seem disproportionate to the aim pursued that the offence is one of strict liability incurred irrespective of the intention to blaspheme and irrespective of the intended audience and of the possible avoidability of the publication by a certain member of the public' (Emphasis added)

120 The Commission went on to reject the contention that the restriction represented by the crime of blasphemous libel constituted an interference with the applicants' freedom of thought and religion. Finally, the Commission rejected the argument that the applicants had been discriminated against in the exercise of their freedom of expression, holding that there was no indication that they were singled out for restriction on account of their homosexual views or on account of beliefs not shared by confessing Christians. Nothing suggested that the poem would not have been restricted in the same way if it had been published by persons without homosexual tendencies and therefore the essence of the restriction was its blasphemous character and not the identity of the person who published it.

121 In our view there are two essential points of note to be made concerning this decision. The first is the statement that the rationale of the offence as discerned from the judgments of the English courts is the protection of 'the right of citizens not to be offended in their religious feelings by publications'. Leaving aside the question of whether there is such a right, we may note the contrast between the present-day rationale offered of the offence and the older views, summed up by Lord Sumner in the *Bowman* case as the prevention of publications which would shake the very fabric of society by attacking religion. There is clearly a shift from the public to the personal, the tendency to corrupt public order may be contrasted with the hurt caused to the feelings of individual citizens.

The second important point of note is the attitude of the European Commission towards the offence of blasphemy itself. Before deciding whether the restriction was proportionate, it should have decided whether the restriction was necessary. In effect, the Commission side-stepped this crucial question by stating

"If it is accepted that the religious feelings of the citizen may deserve protection then it can also be considered as necessary that such attacks shall constitute a criminal offence.

No one would question this statement. However the prior question it neglected was "whether" it is accepted that religious feelings deserve such protection at the expense of freedom of speech. In general, speech causing hurt feelings does not constitute an offence at common law. It may be that religious feelings are in a special category. It may be that the well-being of society depends upon its religious members being free from religious insult. However, the Commission did the offence little service by failing to support the rationale it offered by analysis.

CHAPTER 5: THE PRESENT LAW OF OBSCENE LIBEL

¹²² Unlike blasphemy and sedition, obscenity is not prohibited by the Constitution, although indecency is. We have been able to trace only two Irish prosecutions in respect of the common law offence this century. However the offence of obscene libel undoubtedly continues in existence by virtue of the provisions of the Defamation Act 1961 which prescribes the penalties for the offence.

One of the Irish cases is the recent *Fleming* case¹, where a prosecution was brought in respect of obscene graffiti scribbled in public places around Ireland by the defendant. There were two charges of defamatory libel and one charge of publishing an obscene libel of the victim and her husband. The defendant pleaded guilty. It may well be that, although the charge was for obscene libel, the case was in reality one of defamatory libel of an obscene nature. Many defamatory statements reflecting on the sexuality or sexual habits of the victim may well be obscene, and it is the obscenity which lowers the victim's reputation and renders the statement defamatory. Since the libel here was aimed at individuals it more closely resembled a defamatory libel than the traditional type of obscene libel, which consists of the publication of obscene matter not affecting individuals in a normal defamatory context. The other Irish case is *Attorney General v Simpson*,² involving a more typical set of facts, and which will be discussed in detail below.

1 Reported in the Irish Times 23 November 1989

2 93 II IR 33

(1) Obscene matter

(a) The 'corrupt and deprave test

123 Obscenity in the English language means that which is repugnant to the senses, offensive, foul, repulsive or loathsome. Pornography is by contrast used to refer to sexual lewdness or erotic behaviour. Obscenity therefore, may or may not be pornographic, and vice versa. It is in the law only that the word 'obscurity' of itself has sexual connotations.

124 It appears that the suppression of obscene material in England is now achieved through use of the legislative provisions of the *Obscene Publications Act 1959* as amended by the *Obscene Publications Act 1964*. When the Williams Committee on Obscenity issued its report in 1979³, it made the *Obscene Publications Act 1959* the core of its review. Since this legislation incorporates the test of obscenity laid down at common law, we will make reference to recent English decisions in proceedings brought under legislative provisions to the extent that such decisions reflect a modern approach to the definition of obscene matter.

125 The publication of an obscene libel divorced from a political or religious context was first held to be a common law misdemeanour in *Curll's* case⁴. Some precedent therefor was found in *Sedley's* case⁵, but the court had to overrule *Read's*⁶ case. The offence was little prosecuted throughout the 18th century. It was not until the 19th century, in particular due to the formation of the Society for the Prevention of Vice in 1802, that prosecutions for obscene libels were undertaken with vigour.

Until the later half of the 19th century it appears that no test of obscenity was formulated and that recognition of obscenity was done on an *ad hoc* basis. In 1868, a test was formulated which was to survive, particularly in legislative form, until the present day. This was the statement in *Hicklin*⁷ by Cockburn CJ:

I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall"

3 Report of the Committee on Obscenity and Film Censorship (HMSO) Cmnd 7772
4 (1727) 2 Stra 788
5 1 Keble 620 83 ER 1146 1 Sid 168 82 ER 1030
6 11 Mod Rep 142 88 ER 953
7 (1868) 1 R 3 QB 360

Hicklin arose out of a prosecution under the 1857 Obscene Publications Act. The test became the standard test in proceedings for the offence of obscene libel and for forfeiture under that Act.

126. Let us pause for a moment to consider the basis of the crime. In its barest meaning of repulsiveness and loathsomeness, obscenity is a subjective concept. For obviously that which disgusts one person leaves a second indifferent and is enjoyed by a third. At this level, whether something is obscene is a matter of taste and opinion. The literal meaning of obscenity is inherently a subjective concept. The "corrupt and deprave" test shifts the centre of gravity away from taste (is this offensive or repulsive?) and on to morality (does this corrupt?). Instead of asking whether the matter is distasteful, one has to enter the speculative realm of deciding whether the viewing of such matter has negative effects in the minds of some members of society. Whether certain matter is commendable or corrupting, or indeed whether certain states of mind are good or bad, is essentially a moral question. In the case of *Lady Chatterley's Lover* in 1961⁸, the judge used the dictionary to supply the meaning of "corrupt" as "to render unsound or rotten, to destroy the moral purity or chastity of, to pervert or ruin a good quality, to debase, to defile". In *R v Calder & Boyars*⁹, the trial judge said: "The essence of the matter is moral corruption." If excessive judicial intervention in matters of morality is a matter of concern today, it was less so in the nineteenth century. Furthermore it may well have been easier to identify a unified morality than it is today, and was certainly easier than identifying a unified "taste" in publications. The necessarily subjective basis of the crime of obscene libel and the moral questions it raises will be returned to later.

It may also be noted that the test as defined by Lord Cockburn introduced a causal notion into the concept of obscenity. The matter must be shown to contain a tendency to have a deleterious effect upon other individuals. Therefore in theory, at least, the real test of obscene matter was whether it could potentially corrupt the morals of an individual, as opposed to whether it offended prevailing standards of what is acceptable. It seems, however, that the latter interpretation is what was used in practice. This is perhaps explained on the basis that if one is of the view that something is morally wrong, one may automatically assume that the viewing or reading of such matter tends to corrupt, without requiring a strict causal link. In other words a perception that something depraves or corrupts appears to have been preferred to proof that something actually has that effect. Proof that something actually depraves or corrupts would be a complex matter; it would presumably require (a) expert psychological evidence that the viewing of certain matter leads to a favouring of, or indifference to that matter, which

8 [1961] Crim LR 177.

9 [1969] 1 QB 151.

is a factual matter, and (2) proof that favouring or indifference to that matter is morally corrupt, which is a moral issue

127 Evidence that the "corrupt and deprave" test was loosely employed by judges without undue deference to the causal aspect of that test is to be found in the following statement by Kenny to the effect that precedent in this area is of little value

In the vague field of moral tenets which vary between individuals and constantly shift with changes in social organization and advances in scientific knowledge the past history of decided cases shows such variation in the views adopted by the courts that the doctrine of judicial precedent cannot be expected to be very satisfactory for the solution of a modern case¹⁰

If matter depraved and corrupted one would not expect this tendency to lessen or increase with the passage of time. One may therefore suspect that the test employed is not the tendency to deprave or corrupt, but whether the matter would be opposed by the prevalent morality, which would by contrast be expected to change with time¹¹

In another way, the "corrupt and deprave" test has proved rather ambiguous since matter may well be obscene without tending to corrupt or deprave, and indeed it has been argued that the more obscene the publication the more it revolts and therefore the less the tendency to deprave or corrupt¹². Such arguments merely emphasise that the definitions of obscenity inside and outside the law have little to do with each other

128 Lord Cockburn's "corrupt and deprave" test was examined by an Irish District Justice in some detail in 1959. The decision in *Attorney General v Simpson*¹³ arose out of a prosecution charging the accused with showing 'for gain an indecent and profane performance'. This is an interesting charge in itself since at common law the offence was publication of obscene matter *simpliciter* and it was in legislation only that the 'for gain' aspect was introduced. The performance giving rise to the charge was of a Tennessee

10 Kenny *Outlines of the Criminal Law* 19th edition at 236

11 In the *Andersen* case however the conviction was quashed because the judge left the jury with the impression that obscene meant repulsive, filthy or loathsome in other words the primary meaning of obscenity. A strict emphasis on the tendency to corrupt and deprave test was insisted on in that case. Whether this evidences a new stress on this causal aspect of the test is debatable but Smith and Hogan are of the view that the statutory test of corrupt and deprave is stricter than at common law 6th ed 720

12 *Culder v Bovey Ltd* *supra* footnote 9. *Anderson* [1972] 1 QB 304

13 93 ILTR 33

Williams play, *The Rose Tattoo*, at the Pike Theatre, Herbert Lane, Dublin. The judgment was given at the preliminary investigation stage in the District Court and is notable for this feature alone.

129 The first point of note is that the strict boundaries of terminology were blurred. The accused was charged on three counts of showing for gain an 'indecent and profane' performance. District Justice O Flinn said that strictly speaking the charges were more in the nature of indecent exhibition than obscenity, but proceeded to quote from Russell the following passages which equated the two offences:

The offence described as obscene libel, which in former editions of this work was placed in collocation with blasphemous, seditious and defamatory libel, seems more properly to belong to the law of public mischief. In general all open lewdness, grossly scandalous, and whatever openly outrages decency or is offensive and disgusting, or is injurious to public morals by tending to corrupt the mind and destroy the love of decency, morality and good order, is a misdemeanour indictable at common law. The acts which fall within the general definition may be classified as (i) obscene publications, (ii) obscene or indecent exhibitions, and (iii) indecent exposure of the human body."

"Indecent Exhibitions- Exhibitions of an obscene, indecent or grossly offensive and disgusting character which do not fall within the definition of obscene libel are, nevertheless, regarded as indictable misdemeanours, such as the performance of an obscene and indecent play"¹⁴

The District Justice therefore granted Counsel's request that the words "and obscene" be placed after the word "indecent" in two of the counts, stating "it might well be held that profanity and indecency and obscenity are related offences." Whatever about the relation between obscenity and indecency, profanity only occasionally intersects with these two concepts and such intersection is not a logical necessity. The District Justice equated the concepts of obscenity and indecency again when he referred to the Constitutional guarantee of free speech and its prohibition on indecency, concluding:

"There we have a clear statement of the concern with the elimination of indecency or obscenity in our various means of communication in order to protect the public interest and foster the general good, the elimination, I should say, of things which violate the natural law and

14 Russell on Crime 8th ed 1731 and 1758

are responsible for serious harm to the community"

The District Justice went on to say that in the absence of Irish authority the appropriate law was the English common law and the decisions concerning obscenity under the *Obscene Publications Act 1857*. He accepted *Hicklin* as the case laying down the central test of obscenity but said the law as evidenced in a number of English cases in 1954 was, to say the least, extremely vague and from some of the decisions it was difficult to believe they were both operating within the same judicial system.

The District Justice thought the central issue before him was whether an intention to publish obscene matter was necessary. However, he did consider the nature of blasphemous matter in some detail. Referring to *R v Secker and Warburg*¹⁵, the District Justice expressly approved some statements of Stable J in that case as to the nature of obscene matter. Unfortunately it is not clear to which passages of the judgment of Stable J he was referring but he quoted the following:

The jury are not judges of taste, it is not whether they like the book or whether it is a good thing if books like it were never written. The jury are trying a criminal charge on the evidence, the charge is that the tendency is to corrupt and deprave, not that the tendency is to shock or disgust. That is not a criminal offence.

Is the act of sexual passion sheer filth? It may be an error of taste to write about it. Filthy books ought to be stamped out and suppressed. They are not literature, they are not drama, they have no message, they have got no inspiration, they have got no thought, they have got nothing. They are just filth and they ought to be stamped out. A book is not obscene merely because it is in bad taste or it is an undesirable book.¹⁶

The District Justice went on to discuss a number of American materials. He referred to a number of United States Supreme Court decisions, *Butler v State of Michigan*¹⁷, *Alberts v California*¹⁸ and *Roth v US*¹⁹, where Brennan J stated that the proper standard for defining obscenity was 'whether to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to the prurient interest'. This test was

15 [1954] 2 All ER 683

16 O Flynn DJ followed these passages immediately with the statement 'I do not consider that more apt words could with suitable paraphrase be applied as the best possible test to the evidence adduced in this investigation'

17 (1956) 352 US 380

18 (1956) 354 US 476

19 *Ibid*

re-iterated by the same judge in *Kingsley Book Inc v Brown*²⁰. The District Justice noted that the words were the same as in the American Law Institute's *Model Penal Code*, Tentative Draft No. 6. The Code defined 'prurient interest' as "a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candour in description or representation in such matters". The Code also stated: "As an independent goal of penal legislation, repression of sexual thoughts and desires is hard to support. Thoughts and desires not manifested in overt anti-social behaviour are generally regarded as the exclusive concern of the individual and his spiritual advisers." The Code also said: "We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art, and because regulation of thought or desire, unconnected with overt misbehaviour, raise the most acute constitutional as well as practical difficulties. We likewise reject the common definition of obscene as that which tends to corrupt or debase. If this means anything different from tendency to arouse lustful thought and desire, it suggests that change of character or actual behaviour follows from contact with obscenity. Evidence of such consequence is lacking."

The District Justice went on to deal with the *mens rea* in the American cases, but as to the *actus reus* of the offence in the American materials he merely concluded that 'prurient interest' does not mean material having a tendency to excite lustful thoughts. However he did not express a view either way on the correctness of the American views examined and the tests he actually employed tend to contradict the American opinions.

130) What test was used by the District Justice in *Simpson*? Unfortunately he expressed quite a number, which were not necessarily compatible with each other and which were certainly incompatible with the American materials he had cited. After considering the evidence, he stated that his duty was to decide whether there was a *prima facie* case, and used the unlikely test "Is the play a filthy play? That is the question." Then he summarised what the play in his view portrayed and said: "Does the play as described in the evidence tend to corrupt and deprave? Does it lead to certain lascivious thoughts and lustful desires which will affect character and action? Is the play a cloak for something sinister, and to repeat the words of Mr Justice Stable, 'is it camouflage to render the crudity, the sex of the book sufficiently wrapped up to pass the critical standards of the Director of Public

20 (1957) 354 US 436

Prosecutions?"²¹ Later, he said the question was whether the accused "was exploiting a filthy business and showing a complete disregard of the primary requirements of decency?", a test which he immediately followed with the question "Did the accused, Alan Simpson, intend to deprave and corrupt other persons?"

131. As this is the only case dealing with the nature of obscene matter for the purposes of the common law offence of obscene libel in Ireland this century, these indications of the nature of obscene matter are far from satisfactory. The interesting developments in the American courts were discussed but apparently not approved. Although the American Law Institute specifically stated that the "appeal to prurient interest" test was a departure from (i) the common law "corrupt and deprave" test, and (ii) the test of whether the matter tended to arouse sexual impulses and desires, the District Justice expressly retained the "corrupt and deprave" test and approved of Stable J's test of whether the matter tended to lead to certain lascivious thoughts and lustful desires. Moreover by using the word "filthy", he seemed to imply that depiction of sexually explicit matter was inherently disgusting. Neither is the test, "was the play a filthy one?" particularly useful. Apart from the non-judicial nature of the term "filthy", it does not give any guidance as to the content of that term. There was no analysis, either approving or disapproving, of the American view that a tendency to corrupt or deprave, or a tendency to lead to sexual thoughts and desires, was not a legitimate basis of the offence. Furthermore, there was no advertence to the fact that the "corrupt and deprave" test and the "tendency to encourage sexual thoughts and desire" test are not synonymous, unless one assumes that the existence of sexual thoughts and desires in a person's mind indicates that the person's mind is in a state of corruption. For "tendency to corrupt and deprave" could also mean the encouragement of the *commission* of harmful acts, and could further distinguish between harmful in the sense of moral harm and of harmful in the sense of criminal harm. No such explanation was forthcoming. Finally the equation of indecency and obscenity with profanity is probably misconceived. Although profane matter may sometimes be obscene or indecent, it is not necessarily so.

132. In fairness to the District Justice, it must be said that the decision was given in an atmosphere of severe disapproval, not only of depiction of sexually explicit matter but of anything which hinted at sexual matters. The actual

21 This is particularly surprising in the light of the fact that he quoted Brennan J stating "However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind throughout the ages; it is one of the vital problems of human interest and concern".

decision in the case was that the matter was not obscene. From a modern viewpoint, it is difficult to see, on the basis of the evidence given, how the matter could possibly have been perceived to be obscene.²² Indeed it is a noteworthy feature of the case that the District Justice did not have a copy of the play before him and instead had to rely on the evidence of witnesses. In this context the outcome of the case was in fact satisfactory. However, as a guideline for future cases it is sadly lacking in content. It maintains the 'corrupt and deprave' test, it equates corruption and depravity with harbouring sexual thoughts and impulses, it associates obscenity firmly with sexuality, and associates publications dealing with sexuality with filth.

(b) **The Potential Audience: 'Those into whose hands this sort of publication is likely to fall'**

133 Whom does the jury have to consider when deciding on the issue of corruption?

'Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged fourteen? Or do we go even further back than that and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is of course not. A mass of literature, great literature, from many angles, is wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offence for making those works available to the general public.'²³

134 It is not clear, however that this view expressed by Stable J in the *Martin Secker* case is representative of the orthodox English judicial view. According to the original definition, obscene matter must 'tend to corrupt those whose minds are open to immoral influences and into whose hands a publication of this sort may fall'. This is essentially a paternalistic definition, assuming that some groups in society are entitled to make moral decisions for others. To borrow from the internal logic of the law of obscenity we may presume that if there are people who are more susceptible to 'immoral influences', they are presumably not separated by those who are not so susceptible by age alone.

22 For example one of the witnesses complained of the following passage: 'I am hoping to meet some sensible old lady. Maybe a lady a little bit older than me. I don't care if she is a little bit plump or not much of a stylish dresser. The most important thing in a lady is understanding, good sense, and I want her to have a well furnished house and a profitable little business of some kind.' The District Justice commented: 'I do not consider it reasonable for anyone to infer the motive of fornication from these words if the English language is an intelligible means of expression and yet Detective Sergeant Kenny goes on to say in the next sentence of his evidence: "I think his designs were not as honourable as the fact that he desired to marry her".'

23 Per Stable J in *Martin Secker and Warburg* [195] 2 All E.R. 683 at 686.

In *Calder & Boyars*²⁴, Salmon LJ said, in answer to the question 'Who are the persons likely to read the book'

'Clearly this cannot mean all persons, nor can it mean any one person, for there are individuals who may be corrupted by almost anything. On the other hand, it is difficult to construe 'persons' as meaning the majority of persons or the average reader. This court is of the opinion that the jury should have been directed to consider whether the effect of the book was to tend to deprave and corrupt a significant proportion of those persons likely to read it. What is significant is a matter entirely for the jury to decide.

Furthermore, two Law Lords stated in 1972 that the article is not obscene only if the number of readers likely to be corrupted is so small as to be negligible.²⁵

'In each case 'said Lord Wilberforce in *DPP v Jordan*²⁶, "it has to be decided who these readers are and so evidence is usually given as to the type of shop or place where the material is, and as to the type of customer who goes there. When the class of likely reader has been ascertained, it is for the jury to say whether the tendency of the material is such as to deprave or corrupt them.

135 However, Irish law may be more in keeping with the view expressed in the *Martin Secker* case. District Justice O Flinn addressed this issue in *Attorney General v Simpson*²⁷. He quoted from the judgement of Brennan J in *Kingsley Book Inc v Brown* as follows:

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v Hicklin* (1866) LR 3 QB 360. Some American courts adopted this standard, but later decisions have rejected it and substituted this test, 'whether to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to the prurient interest'. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so must be rejected as unconstitutionally restrictive of the freedoms of speech and press. Both trial courts below sufficiently followed the proper standard. In *Roth* the trial Judge instructed the

24 *Supra* footnote 9

25 Lords Pearson and Cross *DPP v Whyte* [1987] 3 All ER 416

26 (1956) 40 Cr App Rep 152

27 *Supra* footnote 2

jury as follows "The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community the young, the immature, or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved " The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those it is likely to reach In other words, you determine its impact upon the average person in the community The books, pictures and circular must be judged as a whole, in their context, and you are not to consider detached or separate portions in reaching a conclusion You judge the circular, pictures and publications which have been put in evidence by present-day standards of the community You may ask yourselves does it offend the common conscience of the community by present-day standards "

The District Justice did not return to this issue However, a passage earlier in his judgment suggests that the persons to be considered are the average or aggregate views of the community

The word jury, which I have used in defining a *prima facie* case, does not connote twelve self-righteous bigots, or twelve hypocrites, or twelve humbugs, or twelve hysterics, or twelve amorists, or twelve debauched rousers, or twelve dedicated thespians, or twelve lubricists, or twelve ritualistic liberals who have made up a martyrdom of authors or playwrights who have suffered from enforcement of the laws of obscenity [He proceeded to quote from *Kingsley Books, Inc v Brown*] " A jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity, which by its definition, calls for an appraisal of material according to the average person's application of contemporary criminal standards, and, of course, as with jury questions generally, a trial judge must initially determine that there is a jury question, i.e. that reasonable men may differ whether the material is obscene "

It should, of course, be borne in mind that the careful and learned judgment of the District Justice was never considered at any higher judicial level and that this may weaken its status as an authority

(c) Obscenity Not Requiring Sexual Connotations

136 In modern times, English law may have come a full circle in that the test of depraving and corrupting may lead to matter without sexual content being obscene, thus bringing the subject matter of the offence back to its

original meaning (although ironically, Cockburn CJ did not intend the words "deprave and corrupt" to be understood other than in a sexual context) This has occurred in the case law on obscenity under English legislation, as opposed to the common law crime of obscene libel, where the test is identical In *Calder (John) Publications Ltd v Powell*²⁸, a book was held obscene on the ground that it "highlighted, as it were, the favourable effects of drug-taking, and, so far from condemning it, advocated it, and that there was a real danger that those into whose hands the book came might be tempted at any rate to experiment with drugs and get the favourable sensations highlighted by the book" In *Skarving*, the subject matter of the prosecution was a pamphlet entitled "*Attention Coke Lovers - Freebasing, the Greatest Thing Since Sex*", which was concerned with the merits of various methods of ingesting cocaine

The problem with extending the ambit of matter which "tends to deprave or corrupt" to include matters of a non-sexual nature is one of where to draw the line As Smith and Hogan observe,²⁹

[If] taking drugs is depravity, why not drinking, or, if evidence of its harmful effects accumulates, smoking? Whether the conduct to which the article tends amounts to depravity would seem to depend on how violently the judge (in deciding whether there was evidence of obscenity) and the jury (in deciding whether the article was obscene) disapproved of the conduct in question "

It is important to note that by depravity is meant a purely mental state, not resulting in external action of any kind In *DPP v Whyte*³⁰, Lord Wilberforce said

"At least since *Reg v Hicklin* and, as older indictments show, from earlier times, influence on the mind is not merely within the law but is its primary object "

Lord Pearson stated

"But, in my opinion, the words 'deprave and corrupt' in the statutory definition refer to the effect of pornographic articles on the mind, including the emotions, and it is not essential that any physical sexual activity (or any 'overt sexual activity', if that phrase has a different meaning) should result "

28 [1965] 1 QB 509
29 Smith and Hogan 6ed 721
30 [1987] 3 All ER 416

Lord Cross said

"Depravity' and 'corruption' are conditions of the mind though evidence of behaviour may be necessary to establish their presence "

(d) Admissibility of Expert Evidence

137 There is some controversy as to the nature of expert evidence which may be admitted in obscenity cases. Prior to *Skirving*³¹, which we will discuss shortly, there was only one case in which expert evidence had been held admissible. This was *DPP v A&BC Chewing Gum Ltd.*³², where the evidence was introduced to explain the likely effect of violent picture cards on children. This was held admissible on the basis that the likely effect on a child was a matter outside the ordinary juror's range of opinion, that is to say, that the average juror would not be able to estimate the possible damage on the audience in question, which consisted of a special class (children), as distinct from being unable to gauge the effect of violent pictures. In two subsequent cases, Lord Wilberforce accepted *obiter* that it might be possible to hold admissible certain expert evidence, again on the basis that the particular audience would be outside the range of the ordinary juror³³. The rule and its exception was stated by Lord Wilberforce in a later case as follows³⁴.

"When the class of likely reader has been ascertained, it is for the jury to say whether the tendency of the material is such as to deprave or corrupt them, and for this purpose, in general, no evidence, psychological, sociological or medical may be admitted. The jury consider the material for themselves and reach their conclusion as to its effect. They cannot be told by psychologists or anyone else what the effect of the material on normal minds may be. The reason for this has sometimes been said to lie in the supposed common law rule excluding direct evidence as to the ultimate issue to be decided, but I think that it (or this may be true of the rule itself) rests on a less technical basis, namely on the principle that since the decision has been given to the jury as representing the ordinary man, it follows that, at any rate as to matters affecting the ordinary man, the jury, as such, must make it. To this general rule there may be an exception in a case where the likely readers are a special class, such that a jury cannot be expected to understand the likely impact of the material on its members without assistance. In such a case evidence from persons qualified by study or experience of that class may be admissible."

31 [1985] QB 819

32 [1968] 1 QB 159

33 See *DPP v Jordan* (1956) 40 Cr App Rep 152 and *Gold Star Publications v DPP* [1981] 2 All ER 257

34 *DPP v Jordan* [1976] 3 All ER at 778 9

It was before generally agreed that expert evidence was admissible only if the material in question was available to a special class of recipient of which the jury did not have first-hand knowledge³⁵

13. A case which has attracted some criticism is *Skiving*³⁶ in which it was held that expert evidence on the medical effects of cocaine was admissible as outside the experience of the average juror. Arguably this was incorrect because in the previous cases the lack of experience related to a particular audience, not, as here, the particular activities depicted or described in the subject-matter. One writer has argued that, on principle it was incorrect because it contained the risk of misleading the jury into thinking that the effects of cocaine were on trial, whereas what was on trial was whether a book describing the effects of cocaine corrupted the minds of its readers.³⁷ This argument was in fact raised in the case itself and Lord Lane CJ disposed of it as follows,

Such expert evidence,[counsel] submits, causes the members of the jury to pay insufficient or no regard to whether the book itself tends to deprave and corrupt and to pay exclusive or excessive regard to whether the drugs tend to deprave and corrupt. If the jury does conclude that the drugs tend to deprave and corrupt then there is a real danger that they will convict without considering or considering properly the tendency or otherwise of the book to do so. The answer to that submission is that it has been acknowledged on all hands, and we would like to emphasise, that the direction to the jury by Judge Lewisohn was impeccable. No jury listening to that direction could fail to address his mind correctly to the questions which had to be decided in this case.¹

He continued, in the following important passage

The evidence called by the prosecution in the shape of the experts was not aimed at establishing that the book had the necessary tendency, as has already been made plain from the passages in the summing up which we have read. It was to give a scientific assessment of the characteristics of cocaine and their likely effect, both physical and mental, on the user or abuser of the drug, furthermore, to explain the different effects of the various methods of ingesting the substance, that is to say freebasing, snorting or injecting. That did not involve the question of expert witnesses usurping the function of the jury at all. Professor Edwards was not giving evidence of whether the pamphlet had

35 See also *R v Calder and Boyars Ltd* and *R v Anderson*

36 [1985] 2 All ER 705

37 Stone *Obscene Publications: The Problems Persist* [1986] Crim LR 139

a tendency to deprave or corrupt its likely readers: he was telling the jury (and this was a matter which they could not have expected to know of their own knowledge) what the effects of cocaine and taking it in the various ways was."

Therefore the expert evidence told the jury what the physical effects of the activity advocated were, not whether the physical effects of the activity should be deemed corrupt. Arguably this is a valid distinction on which it is not pedantic to insist. It so happens that most people are familiar with the negative physical effects of ingesting cocaine. But suppose the drug had been a new one, never heard of before, and one which is beneficial to health? Would it not seem bizarre to ask the jury to decide whether a pamphlet advocating the use of the drug corrupted and deprived, which in turn was entwined with the question of whether the taking of the drug corrupted and deprived, when the jury had no knowledge whatsoever of the drug or its physical effects? Surely there are sequential steps to be taken. First, the jury must have an idea what the activity depicted involves. Second, it must decide whether the activity corrupts and depraves. Third, it must decide whether the viewing of such activity corrupts and depraves. In this light it may be seen that while the knowledge supplied about the first enquiry is purely factual, the answers to the second and third questions are judgmental. Arguably, the decision in *Skirving* was correct in allowing expert evidence in to establish the factual first enquiry. We would therefore disagree with Mr Stone who expressed the view that on principle the decision was wrong because the jury "needed no help from expert witnesses as to the effect of taking cocaine, or as to what the moral attitude should be". We believe that he makes the incorrect assumption that the court equated the physical effects of taking cocaine with the separate moral questions of whether taking cocaine or reading a book advocating the taking of cocaine is corrupting. We are of the view that the court correctly saw that to judge on the effect of a book, one must be able to judge on the activity, and that to judge on the activity, one must know what the activity involves.

Neither will the expert evidence on the physical effects of such activity pre-determine the answer to the judgmental questions. For example, if a prosecution were to be brought in respect of matter which advocated tobacco smoking, expert evidence would show that the physical effects of the activity were extremely negative, yet it would be most difficult to conceive of a jury thinking that tobacco smoking is an immoral activity, or finding that the advocacy of tobacco smoking is obscene because it depraves and corrupts peoples' minds.

We will return later to the point of the extent of interlocking between the two judgmental questions, namely:

- (a) if an activity is considered corrupting, when, if ever, does the viewing of such matter corrupt? and
- (b) why does the viewing of such matter itself corrupt?

(2) Mens Rea

139 In *R v Hicklin*³⁸, the requisite *mens rea* was held to be knowingly to publish matter with a tendency to corrupt and deprave. It was irrelevant that the accused had motives other than an intention to publish obscene matter. Cockburn CJ put it thus

"May you commit an offence against the law in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is, emphatically, no."

Subsequent cases have upheld this reasoning. In *Barraclough*³⁹, the court held that it was unnecessary that the indictment contain an allegation of intent on the ground that intent was implicit in the publication of obscene matter. In *De Montalk*⁴⁰ an appeal failed where the appellant argued that there had been insufficient direction on intent. Crown counsel submitted that intention was to be inferred from the act of publication, and the court dismissed the appeal approving *Barraclough*. In *R v Calder & Boyers*,⁴¹ which concerned the publication of the book *Last Exit to Brooklyn*, Salmon LJ said the following in respect of intent and obscene matter

"Counsel for the appellants conceded, as he had to, that the intent with which the book was written was irrelevant. However pure or noble the intent may have been, if, in fact, the book taken as a whole tended to deprave and corrupt a significant proportion of those likely to read it, it was obscene within the meaning of that word in the Act of 1959"

However, in that case, although the defendant conceded that intent was irrelevant, he argued that the tendency of the matter was not towards corruption and depraving because of the way in which it was presented. In the words of Salmon LJ,

the description was compassionate and condemnatory. The only effect that it would produce in any but a minute lunatic fringe of readers would be horror, revulsion and pity, it was admittedly and intentionally disgusting, shocking and outrageous, it made the reader share in the

38 *Supra* footnote 7
 39 [1906] 1 KB 201
 40 (1932) 23 Cr App Rep 182
 41 [1969] 1 QB 151

horror it described and thereby so disgusted, shocked and outraged him, that, being aware of the truth, he would do what he could to eradicate those evils and the conditions of modern society which so callously allowed them to exist "

Since the appellants therefore had strong arguments to show that the matter did not have an obscene tendency, the summing up of the trial judge was flawed in failing to mention these matters

Therefore, we may conclude that although a defendant may not escape liability by showing that he did not intend the matter to be obscene which is found by a jury to be so, he may do so by showing that matter which would undoubtedly be obscene at first sight was not so by reason of the way in which he presented it i e in a condemnatory fashion. If we take "a lack of intent to be obscene" to include an intent to condemn the matter depicted, then the only difference between a lack of intent to be obscene and a lack of tendency to be obscene is that in the second case the defendant effectively got his message across in the book, film, picture or other publication, whereas in the first he did not. This is a rather fine distinction. However, it is in line with the general view that persons are responsible for their words and that they cannot be heard to say that they are being penalised for a bad choice of words

In summary, in English law, it is not necessary for the prosecution to show that the defendant intended the matter to be obscene. If the defendant has published matter which is found by a jury to bear an obscene meaning, he will be guilty of the offence. It is no defence to show a lack of intent to be obscene. However, if the presentation of the matter conveys a condemnation of the matter, this may negate any supposed tendency to corrupt and deprave

140 Irish law does appear, however, to require a mental element beyond intent to publish. If the *Rose Tattoo*⁴² case is unsatisfactory as to the definition of obscene matter, it is laudable in this respect, although the means of arriving at the conclusion that intent was necessary are not entirely satisfactory. District Justice O Flinn began by quoting St Augustine and the maxim "*ream linguam non facit nisi mens rea*" which became "*et actus reus non facit nisi mens sit rea*". He said

"In this famous principle of natural justice, and our law, a distinction is made between a man's deed (*acta*) and his mental process (*mens*). It became the test of guilt—the emergence of the subjective standard-

42 *Supra* footnote 2

derived from the Ecclesiastical Courts"

From this general background the District Justice deduced a requirement of intention in the instant case

"In my view, the principle of the subjective standard is strictly applicable to the charges before me."

He found "additional support" in the old form of drafting which alleged intent to corrupt public morals. He then said that this form of drafting ceased to be necessary when in the cases of *Barraclough* and *Montalk* the court laid down that intent must be proved whether it is pleaded or omitted from the charge. This must surely be erroneous. To deduce intent from the old practice of drafting overlooks the fact that procedures were quite different in earlier times and that words were used more loosely, and many offences which do not require intent featured phrases such as "wickedly and maliciously" and other colourful phrases. Indeed, as Holdsworth has commented

"...round full-mouthed abuse... was thought natural and proper', and, as we can see from the indictments for other offences, and even from the declarations in civil actions, it was customary, wherever an accusation of any sort of wrong was made, to exhibit the defendant's conduct in the worst possible light. Naturally the use of these common forms tended to give rise to the view that the crime was, not so much the intentional publication of matter bearing the seditious or defamatory meaning alleged by the prosecution, as its publication with a seditious or malicious intent"⁴³

Moreover, the District Justice's interpretation of *Barraclough* and *Montalk* is at odds with orthodox interpretation

141. Moving from 1906 back to 1865, the District Justice proceeded to examine *Hicklin's* case, perceiving three possible interpretations

- "(a) if it excludes intention it was wrongly decided,
- (b) it was rightly decided and Cockburn CJ's statement is *obiter*, and
- (c) there is nothing incompatible between the Cockburn judgment and the requirement of intention "

43 Holdsworth *History of English Law* p341 2 The phrase within the single quotation marks is from Stephen *History of the Common Law*, ii 354

He then cited *R v Reuter* as implicit authority for the view that the element of intent is required. Finally he quoted a passage from *R v Secker and Warburg* where Stable J said it was to be considered whether "in this the author was pursuing an honest purpose and an honest trend of thought". District Justice O Flinn concluded "Either this is a misdirection or the third view of *Hicklin's* case represents the true state of the law"

He left the issue of intention temporarily and looked at the American authorities, most of which concerned the nature of obscene matter, but in the course of which he quoted Chief Justice Warren to the effect that

"The conduct of the defendant is the central issue not the obscenity of a book or picture"

and

"The personal element in those cases is seen most strongly in the requirements of *scienter*. Under the Californian law the prohibited activity must be done 'wilfully and lewdly'. The federal statute limits the crime to acts done 'knowingly'. In his charge to the jury the District Judge stated that the matter must be calculated to debauch or corrupt."

and

"It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature."

The District Justice said:

"I propose, with all respect, to apply all these words of the eminent jurist, Chief Justice Warren, both to the law and to the evidence in the present investigation",

and later

"From these American decisions it is, *inter alia*, abundantly clear that the third view of *Hicklin's* case as adopted by Mr Justice Stable in *Secker and Warburg's* case and I venture to suggest by Goddard LCJ in *Reuter's* case, is the correct view, namely, that there is nothing incompatible between Cockburn's judgment and the requirement of intention"

The more likely view is that preponderance of English authority including and following *Hicklin* perceived the offence of obscene libel as one of strict liability. To this extent the District Justice's interpretation of the English

authorities may be criticised. However, he expressly adopted the American statements to the effect that *mens rea* was necessary. Therefore even if the deductions from authority are erroneous, the decision will still stand as laying down that *mens rea* is necessary. This, of course, is subject to the qualification already mentioned, that the decision has never been reviewed at any higher level. It may therefore be concluded that an intention to 'debauch or corrupt' is an ingredient of the offence of obscene libel in Irish law.

(3) Defences

142 There is no defence at common law that the matter in its entirety has educational, scientific, literary or other merit.

By contrast, the English *Obscene Publications Act 1959* provides in section 4 a defence known in shorthand as the defence of "public good" providing that a person shall not be convicted if it is proved that the publication of the article is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern. Section 4(2) allows expert evidence to be admitted to establish or negative the above.

143 It is no defence at common law to show that the defendant had not examined the article and had no reasonable cause to suspect that it was such that his publication of it would make him liable to conviction.

By contrast, the above matters, provided both conditions are satisfied, constitute a defence under section 2(5) of the English 1959 Act.

However, section 7 of our *Defamation Act 1961* uses the word "libel" without qualification and therefore seems to apply to this case of libel. It therefore provides a defence if the defendant can rebut a presumption of publication by showing that the publication was made without his authority, consent or knowledge and that the publication did not arise from want of due care or caution on his part.

(4) Procedural

144 At first sight, section 9 of the *Defamation Act 1961* applies to obscene libel since it too refers to "libel" without qualification, and provides that a Justice of the District Court may receive, *inter alia*, evidence as to the publication being for public benefit, and dismiss the case if he feels there is a strong presumption that the jury would acquit. However, this is presumably a reference to the defence of justification in which public benefit must be shown, and since there is no fully-fledged defence at common law of "public

benefit" nor of justification in respect of obscene libel, we presume that this section does not apply to it

We assume that section 10 of the Act, which allows for summary conviction for libel applies equally to obscene libel since the word "libel" is again used without qualification

Similarly, it would appear that section 8 requires the consent of a High Court judge sitting *in camera* to allow the institution of criminal proceedings against the proprietor, editor or publisher of a newspaper in respect of an obscene libel contained therein

(5) Penalty

145 Section 13 of the 1961 Act contains the penalty for obscene libel, which is identical to that for blasphemous libel, namely a fine not exceeding £500 or imprisonment for a term not exceeding two years, or to both, or to penal servitude for a term not exceeding 7 years

CHAPTER 6: DISCUSSION AND REFORM OF DEFAMATORY LIBEL

A. *Comparison with other Countries*

England

146 The English Law Commission has considered the crime of defamatory libel in a Working Paper¹ and Report², both entitled *Criminal Libel*. Having considered the arguments for and against the retention of the offence in some form, the Commission recommended the abolition of the offence and its replacement by a narrower statutory offence, which would consist of the communication to a third party of information seriously defamatory of another knowing or believing that the information was both seriously defamatory and false. All elements of the offence would have to be proved by the prosecution including the falsity and seriously defamatory nature of the information. "Seriously defamatory" was defined as matter which would be "likely seriously to damage his reputation in the estimation of reasonable people generally". The defences of absolute and qualified privilege would be identical to those obtaining in civil proceedings. Finally, the consent of the Attorney-General would have to be obtained before a prosecution in respect of the proposed offence could be instituted, irrespective of the identity of the defendant.

Canada

147 The English law of defamatory libel at common law was incorporated into the English Draft Criminal Code, which was adopted almost entirely and placed in the first *Canadian Criminal Code* of 1892. It repealed the previous criminal libel statute. The ingredients of the offence now in the existing *Criminal Code* have not changed substantially since 1892.

1 No 84 1982
2 No 149 1985

Part VI of the *Code* contains the provisions on defamatory libel and creates three offences as follows.

Publishing a defamatory libel knowing it to be false	s.264
Publishing a defamatory libel	s.265
Extortion by defamatory libel	s.266

It will be remembered that the 1843 Act contained a provision on extortion by libel which was not re-enacted in the Irish *Defamation Act 1961*

148. Section 262(1) of the *Canadian Criminal Code* defines defamatory libel as "matter published without lawful justification or excuse, that is likely to injure the reputation of a person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person or concerning whom it is published". We may therefore note that the definition has retained the "insult" element of the offence which constituted the offence in the early English common law, but probably no longer, since the tendency to provoke breaches of the peace may be said to have disappeared and this rationale for this type of libel. Sub-section (2) provides that a defamatory libel may be expressed either directly or by insinuation, (a) in words legibly marked upon any substance, or (b) by any object signifying a defamatory libel otherwise than by words. This would implicitly exclude oral communication. However, many provincial defamation statutes deem defamatory broadcasts to be libels.

It may be noted that section 262(2) above makes provision for defamatory meaning by innuendo. Section 513(2) of the *Code* provides that a count for publishing a defamatory libel can specify the sense of the libel by assertion to show how the libel was written in that sense. This differs from the common law position under which the person defamed had to insert in an introductory averment the circumstances which give rise to the innuendo in addition to pleading the innuendo itself. An example of the *Code* procedure in action on this point is found in *R v Molleur (Nol)*³ where the charge contained a libel by innuendo that the words "protector of childless widows" meant seducer of childless widows, and the Crown proved at trial the extrinsic circumstances which caused persons to understand words in that sense. Lemieux J in the Court of King's Bench, Quebec, said:

"In every case under the statute it is sufficient to specify in the indictment the sense of the alleged defamatory and libellous words, without any affirmative preliminary indicating why and how the matter was written in such sense."

3 (1965) 12 CCC 8 (Que KB)

Section 263 defines publication to include exhibition in public, causing the libel to be read or seen, or showing it or delivering it, with intent that it should be read or seen by the person whom it defames or any other person. Therefore the common law rule that publication to the victim alone is sufficient has been retained.

Due to the common law rule that publication occurs every time and every place the libel is communicated, an exemption is contained in section 434(2) of the *Code*, so that a person charged with publishing a libel in a newspaper is to be tried either in the province where he resides or in the province where the newspaper is printed.

Mens Rea

149 The *Code* does not appear to require intention to defame, referring ambiguously to matter "designed" to expose a person to hatred, ridicule or contempt. In *R v Straighi*,⁴ the accused published an article which satirized a local magistrate by awarding him a "Pontius Pilate Certificate of Justice Award". Morrow J held that intention to insult the judge was not required, because the word intent did not appear in the definition of the offence, stating

"If it had been the decision of Parliament to use the word 'intent' it would have done so as has been done in many other sections, instead of the word 'intent' the section uses the word 'designed', this word simply means 'to put together' or 'purpose'".⁵

The *Criminal Code* provides defences for innocent disseminators depending on whether they sell newspapers or other items. A person who sells a newspaper containing a libel is deemed not to have published it unless he knows the libel is contained in it or knows that libels are habitually contained in it-section 267(3). A person who sells a book, magazine, pamphlet or other thing which is not a newspaper but contains a libel is deemed not to have published the libel if at the time of sale he does not know the libel was contained in it-section 268(1). These provisions represent a substantial departure from the common law position.

Sections 267 deals with vicarious liability and newspaper proprietors. A newspaper proprietor is deemed guilty of publishing a libel unless he proves the libel was inserted into the newspaper without his knowledge and without negligence on his part. This is the position in Ireland under section 7 of our *Defamation Act 1961*. The *Code* goes on to say that the giving of general

4 (1969) 6 CRNS 150 (BC Co Ct)

5 *Ibid* at 153

authority to manage the newspaper to a person as editor or otherwise by the newspaper proprietor is deemed not to be negligence, unless it is proved that (a) he intended the general authority to include the authority to insert a libel, or (b) he continued to confer general authority after he knew that a libel had been inserted in his newspaper. These represent more detailed provisions on vicarious liability than the Irish provision.

Defences

150. The *Code* incorporates as a defence a number of occasions of absolute privilege - section 7(3)⁶, sections 269(a) and (b) and 270(a) and (b). These include statements made in proceedings of a court exercising judicial authority, in inquiries made under the authority of a statute⁷ in a petition to Parliament or a Legislature, and in a paper published by order or under the authority of Parliament or a Legislature.

The *Code* incorporates the defence of qualified privilege, which the original drafters believed to be declaratory of the common law. In fact the conditions and instances of the defence are defined in such a way as to make the defence considerably wider than at common law, particularly because the occasion does not require reciprocity of duty and interest. Instead a unilateral duty or interest is sufficient. The occasions are:

- | | |
|--|--------|
| - On invitation or challenge | 276(a) |
| - To refute defamatory matter | 276(b) |
| - To answer inquiries ⁸ | 277 |
| - To give information to a person ⁹ | 278 |
| - To seek remedy or redress | 279 |

The defence of qualified privilege in the *Code* is conditional upon four matters:

- (1) the matter must be relevant,
- (2) the publication must be in good faith,
- (3) the defamer must believe the matter is true,¹⁰
- (4) the matter must not exceed what is reasonably sufficient for the occasion.

6 Defences at common law.

7 This category includes statements made in the course of an inquiry made by order of Her Majesty, or under the authority of a public department, or a department of the government of a province.

8 Which includes commercial credit reporting agencies.

9 Here the person who receives the information must have an interest in knowing the truth of the matter, or be believed by the publisher on reasonable grounds to have such an interest.

10 In one instance (section 278 seen above) the belief must be based on reasonable grounds.

The *Code* also protect four types of reports – reports of parliamentary proceedings, public court proceedings, papers published by order or under authority of parliament and public meetings

Section 275 provides that no person shall be deemed to publish a defamatory libel where he proves on the balance of probabilities that the publication is for public benefit and the defamatory matter is true. This is equivalent to section 6 of our *Defamation Act 1961*, the balance of probabilities merely referring to the proof required of the defendant to complete the defence

Section 273 provides a defence foreign to both Irish and English law, namely where the defendant publishes matter that, on reasonable grounds, he believed to be true and which was relevant to a subject of public interest, the public discussion of which is for the public benefit. The defence failed in the *Georgia Straight*¹¹ case, but succeeded in *Lord v Ryan*¹². In that case, an article alleged that the provincial government had rented machines from a company which was linked to the Mafia. The decision indicates that the reporter who wrote the article had reasonable grounds to believe in the truth of his allegations, and that the defamatory matter was published in the public interest

Section 274 incorporates the defence of fair comment on a matter of public interest, so that a person is protected if he publishes comments (a) on the public conduct of a person who takes part in public affairs, or (b) on a published book or other literary production, any composition or work of art or performance or other communication made to the public on the subject, if the comments are confined to criticism

151 Of interest also are the *Code* provisions on costs incurred by a defamatory libel prosecution. Section 656 provides that a person in whose favour judgment is given in such proceedings is entitled to a court order against the opposite party awarding him or her reasonable costs. Under section 657 if the costs are not paid forthwith, the party in whose favour judgment is given may enter judgment for the amount of the costs by filing the order in the superior court of the province where the trial was held and the judgment is enforceable against the opposite party as if it were a judgment rendered there against him in civil proceedings. The person who initiates prosecution is liable to pay these costs even if the case is subsequently conducted by the Crown

152 The Law Reform Commission of Canada produced a Report devoted

11 *Supra* footnote 4

12 (1976) 19 C de D 265

to the crime of defamatory libel in 1984. In its chapter on the defects of the present law it mentioned many of the defects outlined by us earlier in relation to our law. Of particular interest to us because of our constitutional guarantee of free speech and because Ireland is a party to the European Convention on Human Rights and Fundamental Freedoms, was the consideration of the crime of libel by that Commission in light of the guarantee of 'thought, belief, opinion and expression' in the *Canadian Charter of Rights and Freedoms*. This is subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Law Reform Commission of Canada noted that section 11(d) of the *Charter* provides that any person charged with an offence has the right to be presumed innocent until proved guilty according to law, in a fair and public hearing by an independent and impartial tribunal, subject to reasonable limits. It thought that this might render unconstitutional some reverse onus provisions in the Code on relating to the offence of defamatory libel, such as the defence for newspaper proprietors and the defence of justification. Also subsection 15(1) of the *Charter* which provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination might render unconstitutional the different provisions applying different laws to newspaper proprietors, newspaper sellers, sellers of other defamatory matter, and their employers. The Commission concluded that a constitutional challenge to the present Code offence might well succeed.

These arguments might similarly be applicable in this jurisdiction. The special position of newspapers in certain matters may be unconstitutionally discriminatory, and the burdens in proceedings for defamatory libel may well be in breach of general principles of criminal liability and concepts of a fair trial.

Australia

Queensland, Western Australia, Tasmania

153. In these jurisdictions, where the *Criminal Code* is operative, defamatory libel is a crime which is in essence the unlawful publication of defamatory matter concerning another. The penalties are a maximum prison sentence of 1 year and a fine of \$600, or where there is knowledge of falsity, prison with hard labour for 2 years and a fine of \$11,000. The various Code defences are applicable.¹³

13. The Criminal Code (Qld) s370. The Criminal Code (WA) s350. Defamation Act 1957 (Tas) s8.

Australian Capital Territory

154. The *Defamation Act (New South Wales) 1901* applies. The two essential provisions are as follows:

11. Whosoever maliciously publishes any defamatory libel, knowing the same to be false, shall be liable to imprisonment for any term not exceeding two years, and to pay such fine as the Court may award.

12. Whosoever maliciously publishes any defamatory libel shall be liable to fine or imprisonment or both, as the Court may award, such imprisonment not to exceed the term of one year.

These are the same as the provisions in our *Defamation Act 1961* which provide the penalties for the greater and lesser offences of maliciously publishing a defamatory libel with and without knowledge of falsity respectively.

New South Wales

155. The law of defamation was reviewed by the New South Wales Law Reform Commission in 1971.¹⁴ It was in favour of retaining the offence in respect of serious cases, and recommended the creation of a new statutory offence covering both written and spoken defamation.

Provisions on criminal libel are now contained in Part V of the *Defamation Act 1974*(NSW). Section 49 abolished the common law misdemeanour of defamatory libel (criminal libel defined to exclude seditious, blasphemous and obscene libels). The offence is now contained in section 50 (1). It is committed where a person, without lawful excuse, publishes matter defamatory of another living person (a) with intent to cause serious harm to any person (whether the person defamed or not) and (b) where it is probable that the publication of the defamatory matter shall cause serious harm to any person (whether the person defamed or not) with knowledge of that probability. The penalty is imprisonment for a term not exceeding three years or a fine of such amount as the Court may impose, or both.

This definition does not incorporate the defendant's state of mind on the issue of falsity. It must be shown that the defendant knew that the matter would probably cause serious harm. However, it would seem open to convict a defendant if he knew the matter would probably cause serious harm but honestly and reasonably believed (for example) that the matter was true. It may be noted that the definition restricts the common law position as regards who may be defamed; only defamation of the living is punishable. One may

¹⁴ Report on Defamation, LRC 11, (1971).

also note that the serious harm caused need not be caused to the victim of the defamation, but rather to any person but consequential on the publication. Section 51 provides that a lawful excuse in the preceding section is where if that other person brought proceedings against the accused for damage for defamation the accused would be entitled to succeed in those proceedings. The effect of this is to incorporate all the defences of the civil law of defamation into the crime contained in section 50(1).

Sub-section (3) of section 51 provides that at trial it is not necessary for the prosecution to negate any thing which would amount to lawful excuse unless an issue respecting that thing is raised by evidence at the trial.

South Australia, Victoria, Northern Territory

156 The position is similar to Ireland. The common law continues to apply and is supplemented by legislative provisions modelled on the English 19th century legislative provisions.

The year 1977 saw the Report of the Criminal Law and Penal Reform Committee of South Australia. It considered the retention of the offence unnecessary in view of two factors: (a) the fall in the number of criminal prosecutions, and (b) the adequacy of the civil action in defamation to restrain tendencies to endanger the public peace. The Committee described criminal libel to include seditious and defamatory libels as well as libels affecting the administration of justice, a somewhat unusual classification. Out of this mixed bag of offences it recommended the retention only of libels in relation to affairs of State and the administration of justice.

In 1979, the Australian Law Reform Commission published its *Report on Unfair Publication*, which dealt with the issue of privacy as well as defamation. It recommended the retention of criminal libel, provided it was restricted. It modelled its proposed offence on that of the New South Wales 1974 provision, with one important difference: the mental element was to be that the defendant either (1) knew the matter to be false, or (2) was recklessly indifferent to truth or falsity.

New Zealand

157 Part IX of the *Crimes Act 1961* provides for "crimes against reputation". Section 211 deals with the offence of criminal libel while section 216 deals with criminal slander. In Irish law there is no crime of slander.

A criminal libel is matter published, without lawful justification or excuse, either designed to insult any person or likely to injure his reputation by

bringing him into hatred, ridicule, or contempt or by injuring him in his profession, office, business, trade, or occupation. Person is defined in section 2 of the Act to include a public body, society, or company, or any group of persons. The offence may therefore be constituted where there is insult alone.

Publication of a libel is (a) the exhibition thereof in public or (b) causing it to be read or seen, or showing or delivering it or causing it to be shown or delivered, with a view to its being read or seen by any person other than the person defamed.

Section 212 contains a provision which resembles a limited version of the defence of qualified privilege in the *Canadian Code*. It states that it is not a crime to publish defamatory matter on the *invitation or challenge* of the person defamed thereby, or if it is necessary to *refute* some allegation made by the last mentioned person concerning the alleged offender. This is conditional upon the author (i) believing the statement to be true, (ii) that the matter is relevant, and (iii) that the publication does not in manner and extent exceed what is reasonably sufficient for the occasion.

Section 214 contains provisions on justification and includes the requirement of proving truth and public benefit. However, a significant difference is that the accused may fulfil the defence by showing that he believed on reasonable grounds that the matter was true and that it was for public benefit. Sub-section (5) provides that on conviction following a plea of justification, the court in pronouncing sentence may consider whether his guilt is aggravated or mitigated by the plea.

All prosecutions require the consent of a Supreme Court judge.

The offence of criminal slander is committed where a person utters words of defamatory character (a) within the hearing of more than twelve persons at a meeting to which the public are invited or have access, or within the hearing of more than twelve persons in any place to which the public have or are permitted to have access, or (b) in the course of a broadcast by means of radio or television.

It has been held that the *mens rea* is not an element of the offence, merely a likelihood of injury to reputation.¹⁵

In 1977 the New Zealand Committee on Defamation recommended the

¹⁵ *Har.A.* [1951] VI R 454

abolition of the offence of criminal libel. It considered the civil action to be adequate and thought that the functions of libel in the criminal law were catered for by other statutory provisions.

The 1989 *Crimes Bill* (New Zealand) makes no provision for the offence of defamatory libel.

United States

158 Since *New York Times v Sullivan*¹⁶ and *Garrison v Louisiana*¹⁷, the offence of criminal libel is subject to the Constitutional standards of the First Amendment. The breach of the peace element has been ruled obsolete¹⁸. The law is built on a public figure/private figure distinction, discussed at length in our Consultation Paper on the Civil Law of Defamation¹⁹.

The American Law Institute's *Model Penal Code* (1962) makes no provision for the offence of criminal libel.

Belgium

159 The criminal offence of defamation is punishable under Articles 443 and 448 of the *Penal Code* and has three elements, (1) a specific imputation of fact defamatory to the honour of another, (2) an intention to injure, and (3) publication. Article 98 of the Belgian Constitution requires that press offences be tried by jury. It seems that due to the adverse publicity of such trials the judicial authorities have abstained from prosecutions against the press. In practice, the civil action is more prominent in Belgium, and is brought under Articles 1382 and 1383 of the *Civil Code*.

In all of the above jurisdictions, the primary means of litigating reputation is through the civil remedy for defamation. The criminal law is rarely, if ever, invoked. In the countries with which we will now deal, by contrast, the criminal law is the main method of suppressing and punishing defamatory publications. Sometimes the party is attached in the criminal proceedings and may obtain compensation in tort following on a finding of guilt. Because the criminal law is the live branch of the law of defamation in these countries, the defences are more akin to those in the civil law of defamation in common law jurisdictions.

16 (1964) 376 US 254

17 (1964) 379 US 64

18 *Garrison* *ibid*

19 Law Reform Commission *Consultation Paper on the Civil Law of Defamation* March 1991

Denmark

160 The criminal offence of defamation is set out in the relevant parts of section 267 of the Danish *Penal Code* as follows

"(1) Any person who violates the personal honour of another by offensive words or acts or by making or spreading accusation of an act likely to disparage him in the esteem of his fellow countrymen shall be liable to a fine or simple detention

(3) In fixing the penalty it shall be considered an aggravating circumstance if the insult was made in a printed document or in any other way likely to give it a wide circulation, or in such places or at such times as greatly to aggravate the offensive character of the insult '

We may note that the test of defamatory matter is whether the words or acts were "offensive" The matter may be addressed to the victim himself, in which case the rationale is violation of honour, or addressed to another, in which case the basis is disparagement in the esteem of fellow-countrymen In this respect it is of similar content to the common law offence It appears that no content is required

Section 269 provides a defence in three situations (a) where its truth is established, (b) where the author of the allegation acted in good faith, and was under an obligation to speak, (c) if the author acted in protection of obvious public interest or personal interest of himself or of others Like the common law offence, therefore, falsity does not have to be shown by the prosecution However, truth is a complete offence, unlike in Ireland Situation (b) is similar to that form of qualified privilege where there is a duty to speak However it is wider because it requires only a unilateral obligation whereas the common law defence requires reciprocity of duty or interest Situation (c) resembles in part the common law defence of qualified privilege where the author is motivated by personal interest, but again it is wider because the interest is unilateral However, that part of (c) which refers to the author speaking in "justified protection of obvious public interest" has no parallel at common law

Section 269(2) provides that sentence may be remitted where there is evidence of circumstances which afforded grounds for regarding the allegation as true Therefore if the defendant fails to establish the complete truth, he will nonetheless have his sentence remitted if he can establish evidence to support his allegations It does not appear that the evidence be substantial, or that his conclusions were reasonable Clearly there is no parallel for this defence at common law

Section 267(a) is designed to ensure that the protection of the law of defamation is not less for public figures than private individuals. However, it does not appear to be raised in practice. The view in legal literature appears to be that the protection of such figures is less in fact because of the necessity for wide ranging debate and assessment of their actions.

Federal Republic of Germany

161 The German *Penal Code* contains a number of provisions for the protection of personal reputation. The offences are as follows, insult, being an expression of contempt (section 185), defamation, being an untrue statement of fact damaging to the reputation of another (section 186) and aggravated defamation, which is deliberate and intentional defamation knowing the statement to be untrue (section 187). The distinction between the two forms of defamation is similar to that contained in the Irish *Defamation Act 1961*. Insult is covered but unlike the common law is treated as a separate offence, and not under the rubric of defamation, essential to which is falsehood.

France

162 The main provisions in French law limiting freedom of expression are contained in the *Law of the Press 29 July 1881*. Article 29(1) provides for the offence of defamation. A defamation consists of an allegation or imputation of fact which attacks the honour and esteem of another. Publication directly or indirectly is punishable even if done by "forme dubitative" or if it affects a person not expressly named where identity is discernible from the terms of the publication. Article 29(2) provides for the offence of insult or *injure*, which consists of words which are expression of contempt or invective which do not consist of an allegation of fact.

It is a defence to both offences to show that the matter was not defamatory or insulting, or that they did not exceed the limits of legitimate criticism. However it is a defence to defamation only to show truth within limits set out in Article 35 of the law, and good faith. Other than contesting the insulting character of the words, a person prosecuted for insult may only avail himself of the defence that the words were spoken in response to provocation.

Different sanctions apply depending on the identity of the victim, the categories consisting of

- (a) individuals, (article 32),
- (b) court, tribunals, army, public administrative bodies, or corporate bodies (article 30),
- (c) one or several Ministers, one or several members of either House, a public official or other person entrusted with a public function, a juror or a witness in respect of his testimony (article 31)

Greece

163 Article 362 of the *Penal Code* makes it an offence to state or disseminate a fact which is detrimental to another's honour or reputation unless the defendant can prove its truth. The offence is aggravated if the fact is untrue and stated with knowledge of its falsity by virtue of Article 363.

A defamatory opinion is also punishable as a criminal offence, unless made for justifiable reasons and without intent to defame by virtue of Article 367. A justifiable reason includes the public interest, which allows for a wide range of opinions.

Article 168 of the *Code* makes it an offence to damage the reputation of the President or defame him in public or in his presence. Proof of truth is not a defence and harsher sanctions may be imposed.

Article 181 makes it an offence to insult a public, municipal or communal authority or leaders of political parties. In practice this offence is narrowly construed.

Netherlands

164 Libel is defined in Article 261.2 of the *Penal Code* as follows:

1. He who intentionally injures someone's personal honour or good reputation by imputing a certain fact with the clear intention of making public such imputation, will be punished for 'slander' with imprisonment for not more than six months or a fine of the third category.

2. If done through print or picture, distributed, exhibited publicly or displayed, or if done through print, the contents of which are read publicly, the author shall be punished for 'libel' with imprisonment for not more than one year or a fine of the third category.'

Article 261.3 of the *Code* provides a defence if the author acted in necessary defence or could reasonably and in good faith have assumed that the imputed facts were correct and that the public interest required the imputation.

A lesser offence is 'simple defamation', which is an intentional defamation other than libel or slander. This presumably refers to opinions since libel involves the intentional publication of facts. It is a defence to show that the defendant purported to give an opinion on management of public interests and that he did so with no intent to injure in any other respect or more grievously than is clear from the report. Article 266.2.

Sweden

165. The primary restrictions on freedom of speech are contained in the *Freedom of the Press Act 1949* which has constitutional status. Any criminal offence limiting this freedom must be proscribed in this Act and in the *Penal Code*. There are two offences in the Act concerning reputation, namely, defamation and insult: Chapter 7, article 4.9 and 4.11. Similar provisions have been incorporated into the *Penal Code* of 1965: chapter 5, sections 1 and 3.

Defamation consists of accusing another of being a criminal or reprehensible because of his way of life, or the publication of other information which would expose the person to the contempt of others. However no crime is committed if it was justifiable in the circumstances to provide the information and the speaker proves it was true or that he had reasonable grounds for making it.

The crime of insult is the act of intentionally insulting another by offensive invective or accusation or other insulting behaviour. This is less serious and the penalty is usually limited to a fine.

Norway

166. The law of defamation is set out in the *Penal Code* of 1902 and there are two offences: libel (section 247) and aggravated libel (section 248). Libel is the unlawful violation of another's feelings of personal honour committed in print. Aggravated libel is the same committed with malice. Truth is normally a defence. Prosecutions are very rare and are brought only where the accusation involves high-ranking public officials.

Conclusions

167. From this brief survey of a number of jurisdictions, it may be seen that the essence of the crime of libel is similar to Irish law, although matters of communication and the definitions vary. The countries in which the crime is more frequently availed of than the civil action have developed wider defences for defendants. In those jurisdictions where the law is based on the common law, there have been calls for reform of the crime of libel by a number of reform bodies, and the general trend is to restrict or abolish the various types of criminal libel.

B. Defects of the Present Law

1. The Crime is Wider than the Tort

168. "If it is inadvisable to make such conduct tortious, it is intolerable that it should be criminal".¹⁹

We consider it an anomalous and objectionable position that the offence of defamatory libel is wider in a number of respects than the tort of defamatory libel. The following are the elements which render the crime wider:

(a) Proof of Truth. In civil proceedings, proof of truth is a complete defence. In criminal proceedings, proof of truth is a complete defence only if it is additionally shown that the matter is for the public benefit, by virtue of section 6 of the *Defamation Act 1961*. It is objectionable on principle that a person would be punished under the law of defamation for the publication of a true statement. Furthermore, the criterion of public benefit is too vague to be defensible as a test in criminal proceedings.

It is interesting to note that in the course of the Bill through the Dail, this point was noted in passing but no serious discussion of the merits of the defence was undertaken.

Another objection to the difference between the crime and tort of defamatory libel concerning the defence of truth is that section 22 of the *Defamation Act 1961*, which mitigates the rigour of the common law rule requiring strict proof of the truth of every defamatory imputation including those which do not cause further material injury once the other allegations have been proved true, is not applicable in criminal proceedings. Therefore a defendant might be subjected to criminal sanctions although he shows the truth of the more serious of the allegations. It is objectionable that the defence of justification be easier to fulfil in civil proceedings than in criminal proceedings.

(b) Other Statutory Defences. There are a number of other statutory defences which are made applicable by the *Defamation Act 1961* to civil but not criminal proceedings. These are contained in section 21 of the Act, which provides a complete defence to unintentional defamers who have exercised all reasonable care, provided they comply with the procedure set out, and section 24,²⁰ which confers privilege on the reports of the proceedings of a long list of bodies and events. Furthermore, section 23, which mitigates the common

¹⁹ JR Spencer, *Criminal Libel - A Skeleton in the Cupboard*, [1977] Crim L Rev at 413.

²⁰ Read in conjunction with Schedule II.

law rule in relation to proof of truth of the supporting facts necessary to ground the defence of fair comment, does not apply in criminal proceedings.

(c) *Publication*. It is sufficient for the crime if publication is to the victim alone, whereas in civil proceedings there must be proof by the plaintiff of publication to a person other than himself. The rationale for the criminal position was that publication to the victim was as much, if not more, likely to lead to a breach of the peace, the evil which the offence was designed to prevent. That tendency is now gone and the breach of the peace as an element appears to be obsolete. If the offence is to be retained, it must surely be on the basis that it seeks to prevent a narrow category of deliberate character assassination, which is an important shift from being an offence against public order to an offence against the person. The type of injury envisaged is caused by publication to a third party, not to the victim. This is another example of a particular in which the crime is wider than the tort, and one which should be replaced if the offence is retained.

2. Seriousness

169. The House of Lords in *Gleaves v Deakin*²¹ approved the view that the libel must be "serious" to warrant criminal prosecution. However, the concept of gravity, which places a desirable restriction on the class of case which may be proceeded against, is nebulously incorporated into the offence. It is not clear whether seriousness refers to the defendant's motive, the nature of the accusation, the position of the defendant, or something else, or perhaps all of these factors together. While we applaud the fact that a restriction is being placed on the type of words which may be the subject matter of a prosecution, we believe the utility of the restriction is marred by its vagueness.

3. The Presumption of Falsity

170. In civil and criminal proceedings for libel, the statement once shown to be defamatory is presumed false. The issue of falsity does not arise unless the defendant raises the defence of justification. There is no burden on the plaintiff or prosecution to show the matter is false. Rather the onus is on the defendant to displace the presumption of falsity.

This presumption has been criticised in the context of civil proceedings, and we have examined the arguments for and against a reversal of the presumption in that context in our *Consultation Paper on the Civil Law of Defamation*.²² However, we believe that the issue is more clear-cut in the context of criminal proceedings. The injury caused by defamation stems from the fact that the publication is not only defamatory but also false, and it is anomalous that the

21 [1980] AC 477.

22 LRC. *Consultation Paper on the Civil Law of Defamation*, March 1991, pp321-6.

prosecution be exempted from having to show an essential part of the offence committed

(4) The Mental Element

171 We observed in our section on the present law of defamatory libel that the mental element in the offence of defamatory libel was unsettled. It may consist of an intent to defame another, or it may be merely an intent to publish matter which is found by a jury to bear a defamatory meaning.

At a preliminary level, it is undesirable that an offence be surrounded by doubt as to the mental element. Although if in a case which might arise a decision one way or the other may not amount to retrospective legislation where it is compatible with the authorities²³, it is plainly preferable that the important ingredients of the offence be settled. We therefore consider the uncertainty surrounding the *mens rea* in the offence of defamatory libel to be a defect in the present law.

Let us assume firstly that the required *mens rea* is an intention to publish *simpliciter*. This renders the defendant liable where he had no knowledge that the matter could bear a defamatory meaning of an individual and had innocent motives in publishing. This arises primarily in two situations, namely, where words innocent on their face become defamatory by reason of facts known to the recipients and not known to the publisher, and where words not intended to refer to anybody which are understood to refer to a specific individual. However, there are many other situations where a defendant intends to publish and is arguably not culpable in a manner necessary to ground criminal liability. For example, the defendant might be negligent about his facts, or might advert to a possibility of untruth but feel that the matter is one of high importance to the public and publish with the information of the public in mind, and without any intention to injure the individual. A simple intention to publish as a mental element is incompatible with general principles of criminal liability. It imposes liability irrespective of the culpability of the defendant as regard the actual injury caused.

Let us assume secondly that the requisite *mens rea* is an intention to defame. This view is an improvement on the first type of intention. It links the mental element to the injury caused, as opposed to the act which caused the injury. However, we believe that it is still defective. The injury of defamation is composite, comprising defamatory effect and falsity. The phrase 'intent to defame' fails to specify what the defendant's state of mind is on each of these issues. It also fails to define intent. Is it limited to knowledge? Does it

²³ So said the European Court in the *Lemon* case as to the House of Lords ruling on the *mens rea* of blasphemous libel.

include recklessness? If so, would such recklessness be objective or subjective? The simplistic approach of this mental elements renders it defective as a test of mental culpability in the crime of defamatory libel

5 Distributors' Negligence

172 As we have observed, the crime is probably one of strict liability and so it is not necessary for the prosecution, nor is it a defence, to show that the defendant was not aware of the defamatory nature of the publication or of its falsity. The position of distributors is somewhat different. In civil proceedings it is a defence for distributors to show that they were not negligent in failing to detect or be alerted to a libel contained in matter sold by them and it seems that this applies in criminal proceedings also. The onus is on the defence to show a lack of negligence and a failure to displace this burden will result in criminal liability.

It could be argued that negligence is not a desirable criterion of criminal responsibility in this context and that this would be so even if the burden were on the prosecution to show that the defendant was negligent. It could be said to be unreasonable to impose criminal liability on distributors who are in business of selling large quantities of material and who may have no real opportunity of knowing in detail the contents of such material.

6 Vicarious Liability

173 The general principle of the common law was that a person was criminally liable for the publications of defamatory matter by his servants or agents. The rigour of this rule was somewhat mitigated by a statutory provision now enacted in section 7 of the *Defamation Act 1961*, to the effect, that the defendant may rebut the presumption of publication by showing that the matter was published without his authority, consent or knowledge and that such lack of knowledge was not due to a want of caution on his part. In short, it is a defence to show that he had no knowledge of the libel and that such lack of knowledge was not due to his own negligence. This puts him in essentially the same position as a distributor in that he must show a lack of negligence to avoid criminal liability. This runs contrary to the general principle of criminal law that a master is not liable for all criminal acts of his servant performed in the course of the servant's employment.²⁴

24 For the general rule see *Huggins* (1730) 2 Stra 883. Another common law exception to the general rule that there is no vicarious liability in respect of criminal acts is in the criminal law of public nuisance. Smith and Hogan are also of the view that the offence of contempt of court by the publication of inaccurate reports of judicial proceedings is one in which liability would be attributed to the master probably because it is an offence of strict liability. Also where the courts are dealing with statutory offences governed by strict liability they will usually take the step of imposing vicarious liability although the concepts are not synonymous. This usually occurs where the master has delegated the performance of duties cast on him by the act to his servant and where the acts done

7. Form of Communication

174. Slander is not a crime although it is a tort (provided special damage can be shown, or it falls into a category of slander actionable *per se*). In this respect the crime is narrower than the tort. If the offence is to be retained, this appears to be a distinction which is indefensible in the light of modern forms of communication. We have criticised the maintenance of the distinction between libel and slander elsewhere²⁵, but the arbitrary results of this distinction are heightened in the criminal law because section 15 of the *Defamation Act*, which made broadcasts by means of wireless telegraphy libels, does not apply to criminal proceedings. Therefore a criminal prosecution could be brought in respect of defamatory matter published in a newspaper but not in respect of identical matter broadcast on the radio or television. Loath though we are to extend the ambit of this crime, we believe that if the offence is to be retained in restricted form, the narrowness of the category should be determined by other factors than the form of communication. We therefore consider the inapplicability of the crime of libel to broadcasts as an illogicality in the present law.

8. Special Protection of Newspapers

175. Three provisions in the 1961 Act place some restrictions and confer some protection on newspapers in respect of libels contained therein, namely sections 8,9 and 10. Section 8 prevents the commencement of prosecution without leave of a High Court judge, section 9 allows a Justice of the District Court to dismiss a case if after hearing evidence of certain defences he is of the opinion that the jury would probably acquit, and section 10 provides that if the libel is of a trivial character, the District Court Justice shall ask the accused if he consents to summary trial, which, if he does consent, is punishable by a fine not exceeding £50.

These provisions were introduced as a result of political pressure from newspaper proprietors in the late 19th century and have been carried through into the Act. There seems no reason in principle why these provisions should not apply to all defendants. The absence of similar protections for other defendants is discriminatory, and may well constitute inequality of treatment before the law contrary to Article 40.1. of the Constitution.

With reference to the commencement of prosecution by leave of a High Court judge, this has been criticised by all of the Law Lords in *Gleaves v Deakin*²⁶, where the favoured view was that leave to prosecute should only be granted by the Attorney - General. It was felt that the public interest should be considered by a prosecuting authority prior to commencement of

physically were in law the acts of the master; see Smith and Hogan, 6ed, at 164-5.

25 See *Consultation Paper on the Civil Law of Defamation*, March 1991, pp196-9.

26 *Supra* footnote 21.

prosecution

In a system which confers prosecutorial discretion upon the Attorney General and Director of Public Prosecutions, it is an anomaly that leave to commence prosecution should in this instance be conferred upon a judge. Indeed it is an anomaly only explained by its immediate history, as we have seen.²⁷ The anomaly was adverted to in the course of the Dail Debates²⁸ and it was made clear that the section was being retained simply because that part of the Act was intended in essence as a consolidating measure.

9. Proof of Previous Convictions

176 If a prosecution for libel were brought in respect of a statement that Mr X committed a criminal offence, in a situation where Mr X had previously been convicted of that criminal offence, it is unclear whether the defendant would be able to admit evidence of that conviction in order to justify. In our *Consultation Paper on the Civil Law of Defamation* we examined the same problem where the libel action is a civil one, and noted that section 13 of the *Civil Evidence Act 1968* in England deems the admissibility of evidence of the previous conviction "conclusive evidence" that the crime was committed. We recommended a provision clarifying the position in relation to the admissibility of such evidence.

We suspect that a criminal court would not be prepared to re-open a criminal case by deciding afresh in a libel case whether an individual had committed the crime. However, the uncertainty on this point is a flaw in the present law. Theoretically, it forces the speaker to be careful to say that Mr X "was convicted of the offence, as opposed to 'was guilty of the offence, a distinction which is not always grasped by non-legal speakers.

177 We note that the Criminal Law Revision Committee in England recommended a provision stating that convictions of persons other than the accused should be admissible in criminal proceedings as evidence of the fact that the person convicted was guilty of the offence.²⁹ However, they rejected the suggestion that a provision corresponding to section 13 was necessary for cases of criminal libel. They said that "in the unlikely event of an attempt by a person convicted of an offence to reopen the question of his guilt by means of criminal proceedings against somebody for referring to his having committed the offence it can hardly be supposed that a justice would see fit

27 See above p20

28 Although initially there was some confusion as to whether the 1888 Act which enacted this provision had repealed a provision in the 1881 Act conferring such discretion on the Attorney General which it of course did repeal.

29 Eleventh Report *Evidence (General)* (1972) Cmnd 4991 paras 217-219

to issue a summons or that a judge would give leave to prefer a voluntary bill of indictment

However, in *Gleaves v Deakin*³⁰, a number of years later, this is precisely what happened. Several of the statements at issue in this criminal libel trial were based on previous convictions of the prosecutor. Certificates of the fact of his previous convictions were not admissible to prove the prosecutor's guilt and the defendants were required to re-prove the guilt of the prosecutor by calling a number of prosecution witnesses who had given evidence in those trials to testify again as to the conduct of the prosecutor which had led to the convictions.

The lesson to be learnt is that a law reform body should not ignore a defect in the law on the supposition that the matter will be satisfactorily dealt with in the next case which arises. The price to be paid for such assumptions is the possibility of an unjust conviction. As one commentator says

'The journalists eventually succeeded, and the sequel was that Gleaves himself was thereafter prosecuted and gaoled, this time for social security fraud, but this happy ending hardly vindicates the present state of the law. Preparing the defence consumed four months of the journalists' lives and ate up vast sums of money. And one need only look at some earlier *causes celebres* to see that, before a less sympathetic judge, and with less resources behind them, the journalists could easily have been convicted.'³¹

We therefore continue to maintain that the uncertainty of the law regarding the admissibility in a criminal libel trial of the previous conviction of the prosecutor for the conduct which is referred to in the libel is objectionable.

Conclusion

178 We are of the view that the defects in the law regarding the offence of defamatory libel render the offence in its present condition highly unacceptable. We are strongly opposed to the retention of the offence of defamatory libel in its present form. It runs contrary to many modern principles of criminal liability and fair trial, and threatens freedom of speech to a high degree, in theory if not in practice, so long as it continues to exist in its present state.

30 *Supra* footnote 21

31 Spencer *Criminal Libel* *The Law Commission's Working Paper* [1983] Crim L. Rev 524

C Retention or Abolition?

179 From the above discussion it is apparent that if the crime of defamatory libel is to have a continued existence, it will have to undergo substantial amendments. However, at this stage in our discussion we must consider whether the crime of defamatory libel should be retained at all. We have seen in our comparative study that three reform bodies in common law jurisdictions have recommended the abolition of the offence, namely the Criminal Law and Penal Reform Committee of South Australia (1977 Report) and the Committee on Defamation of New Zealand (1977 Report), and the Law Reform Commission of Canada (1984 Report), while the American Law Institute as far back as 1962 omitted criminal libel from its Draft *Model Penal Code*. The other reform bodies we examined advocated the retention of the crime in a narrow category of case.

Of dominant note throughout the following discussion must necessarily be the fact that prosecutions in respect of criminal libel have become virtually unheard of in Ireland. Apart from the decisions discussed earlier³² we have been unable to locate any other case of defamatory libel this century. By contrast, civil actions for defamation are extremely popular.

We have already stated our commitment to the view that if the offence is retained it should not remain in its present form. Discussion of the retention or abolition of the offence must pre-suppose that such amendments will be implemented. It would obscure the issues and involve laborious repetition if the opponent of its retention were to point to the existing defects in the law. We therefore assume for the purposes of the following discussion that the offence is a modified one, in which there is a *full mens rea*, there is personal and *no vicarious liability*, the burden of proof is on the *prosecution to establish all elements of the offence*, and there is *no liability if the matter is true*. We commence by summarising the main arguments in favour of and against the abolition of the offence. We will then examine the individual reform bodies' response to this point since each places emphasis on different arguments.

Arguments in favour of Abolition of Defamatory Libel

180 (a) The imposition of criminal liability in respect of speech constitutes a retrograde step to a stage in the law where the value of free speech was not recognized as it is today and where the individual liberty of freedom of expression was undeveloped.

32 See *supra* pp38-39-90

- (b) The imposition of any criminal liability in respect of words is incompatible with the Irish Constitutional guarantee of freedom of speech
- (c) The imposition of criminal liability in respect of words which neither incite to crime nor constitute an immediate threat of physical violence is incompatible with the Irish Constitutional guarantee of freedom of speech
- (d) The retention of the offence is absurd when it is considered that it is in practice virtually obsolete
- (e) The enactment of a new offence even in the most restricted terms would encourage self-censorship among writers or journalists. Although no one would justify speech which is published with knowledge of its defamatory character and of its falsity, writers will be deterred from publishing matter which does not fall within that category because the spectre of criminal liability is a strong deterrent
- (f) The civil law affords adequate remedy to the person defamed and adequate deterrent to the defamer. Damages may be substantial, and in appropriate cases, a permanent injunction may be awarded. Breach of the injunction is a contempt of court for which the penalty is a fine or imprisonment
- (g) Any offence which is provided for in acceptably narrow terms in terms of freedom of speech and criminal procedure would be capable of proof in so few cases that it is not worth creating the offence
- (h) Even if the cases which may be prosecuted were limited to serious and deliberate defamation, it would constitute an unjustified burden on an already over-burdened criminal system, involving time and money which would be better spent elsewhere.

*Arguments in favour of the retention of the offence*³³

181. (a) The removal or absence of criminal sanctions in respect of a particular type of conduct signifies that it is acceptable conduct. The law should not send out such a message in respect of matter which is published with knowledge of its defamatory and false character, which can only be designed to injure the victim.

(b) The absence of prosecution in recent times does not mean that the offence should be entirely wiped out: it should be retained for the occasional very severe case.

(c) The imposition of criminal liability is not incompatible with principles of free speech when it is considered that the speech aimed at cannot be of a type which is justifiable on freedom of speech grounds

This point is well put by Spencer:

"That such cases are rare is surely no objection to the creation of an appropriate offence. These cases are extraordinary, it is true, but they are also extraordinarily bad, and *pace The Times*, it is hard to think of any equally harmful behaviour which is not at present a crime. There is no reason why it should not be a crime, unless making it into one unreasonably hampers people in freely communicating with one another, or unreasonably interferes with newspapers in their job of disseminating news and views. And how, in heaven's name, does an offence of *deliberately* publishing what is *known to be false* with the *intention* of defaming another *so as to do him serious harm*, or an offence of sending poison pen letters, unreasonably impinge on the proper ambit of free speech?"³⁴

Following from the fact that the imposition of criminal liability in the narrow category of case envisaged cannot be said to impinge on principles of free speech, the retention of the narrow offence on the statute books can at worst be a waste of paper and at best a means of capturing the occasional serious

33 We have disregarded the argument that the lack of civil legal aid in respect of libel actions justifies the retention of criminal libel because criminal proceedings are instituted without reference to the means of the person defamed. We believe this argument merely points to the need of civil legal aid in this area. It should not be used as an argument to impose criminal liability on speech. The logical extension of such an argument would be to extend the criminal law to all cases of defamation currently possible in civil cases (i.e. basically retention of the current law of criminal libel), which would be to introduce one evil as a result of another. Furthermore, it would be a dishonest way of dealing with the inadequately funded civil legal aid system. To impose criminal sanction on defendants because the system is under-funded is an alarming proposition.

34 [1983] Crim. L. Rev. at 528

case

(d) The imposition of criminal liability is not incompatible with principles of free speech when it is considered that the civil law countries deal primarily with defamation by means of the criminal arm of the law. The use of criminal liability is incompatible with principles of free speech only when the offence is too wide and captures speech which may be justifiable on moral, theoretical, practical or other grounds. The subject matter of the retained offence would have to be matter which cannot be justified on any grounds³⁵

(e) The injury caused by defamatory statements can be more damaging and more permanent than many other injuries which are accepted as criminal offences. Although the following cases are admittedly English and only one of this type has arisen in Ireland in recent times, we will quote from Spencer on the type of case that arises

'In *Penketh*³⁶, a widow with a young child heard a broadcast in which a charitable appeal was made for a pen friend for D. She wrote to D, who bombarded her with letters, until she decided to end the correspondence. So he got his own back by writing to the son's headmaster stating that he was the natural father of her child. On pleading guilty to criminal libel he was put on probation on condition that he stopped libelling her and left her alone. He did not, and eventually went to prison for breach of the probation order. In *Fell*³⁷, D, who was upset that his relationship with a married woman had ended, sprayed offensive libels about her in public places all over the town of Lytham St Annes, the woman was so upset that she attempted to commit suicide. In *Leigh*³⁸, D, who was accused of fraud, sought to discredit the police sergeant in charge of the investigation by printing 5,000 handbills and a number of posters accusing him of being persistently drunk, and engaging five men to distribute them. Earlier this century were the parallel cases of *Annie Tugwell*³⁹ and *Edith Emily Swann*⁴⁰. These ingenious ladies framed people they irrationally disliked

35 Moral grounds e.g. It is wrong to punish the statement of true facts. Theoretical grounds e.g. It is wrong to punish a person for criticising a government official because part of his freedom of expression involves the right to criticise those who govern him. Practical grounds e.g. It is a bad idea to punish people for publishing negligent statements because it will deter them from not only speech which is negligent but also speech that is not negligent. It may be that this 'overkill' principle influenced the United States Supreme Court in choosing a recklessness standard in the *New York Times* case (1982) 146 JPN 56.

36 The Times February 14 1976

37 The Times March 9 1971

38 The Times July 16 August 2 1910

40 Travers Humphries *Criminal Days* pp 124 et seq

by composing a series of poison-pen letters, posting them to themselves and to others, and then accusing the victims of their hatred of having sent them. In both cases the victim was prosecuted, and in one of the cases she was convicted and imprisoned, before the accusations were found to be false. And going back still further, there was *Greenhouse*⁴¹, who coveted his superior's job, and in the hope of relieving him of it, sought to get him the sack by putting about the story that he had been indecently assaulting little girls.⁴²

The recent example of such a case in Ireland is the *Fleming*⁴³ case, where the defendant who believed the victims, a married couple, were in collusion with the Agricultural Credit Corporation which had seized his land, wrote obscene graffiti about them in public places all around the country, giving their telephone number as one to be called to arrange sexual intercourse with the persons living at their address. The victims were a married couple with three children and received calls from 1984 to 1988, in one period the number of calls being recorded at 156 per month between the hours of 2-3 am.

(f) The nature of the conduct where reputation is injured intentionally and with knowledge of falsity is no less blameworthy than other conduct which is accepted as criminal, such as deliberate assault or damage to property.

(g) The civil remedies are not always sufficient to vindicate the plaintiff's reputation. This is the case where the defendant is impecunious. It is also the case where the plaintiff does not have the resources to bring an action.

(h) The civil remedies are not always sufficient to deter defamers. This is the case where the defendant has ample resources to meet an award of damages. To some extent, this argument is inter-related with the unsettled issue of punitive damages in civil proceedings, and to what, if any, categories of defendant or conduct such awards are limited. It is also the case where the defendant is impecunious. Spencer states

'An award of damages is no deterrent to someone who has no money, and an injunction only says 'We'll lock you up *if you do it again*', whereas in the worst of these cases, the defendant has usually achieved his object by doing it once. What is needed against the deliberate character assassin is neither damages, nor an injunction, but punishment for what he has done-as a deterrent both for him and for others like him- or a hospital

41 The Times May 12 1887

42 Spencer [1978] Crim LR at 527

43 See Irish Times 23 November 1989

order or suchlike if he turns out to be mad rather than bad"⁴⁴

(i) Public as well as private damage can be caused by untrue defamatory statements the person may be hampered in performing functions or services of public importance, and confidence may be lost in him, a matter of particular public importance where the person is democratically elected, whether at a national local, formal or informal level

(j) Although the offence is little used, it is impossible to know its deterrent effect in practice, or of the effect of removing restrictions on defamatory speech with the attendant publicity of such a move

The Reform Bodies on Abolition or Retention

Canada

182 The analysis of the Law Reform Commission of Canada was particularly enlightening. They commenced from the premise that the criminal law should be used to deal only with conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose. It used the shorthand test "Are we satisfied that the criminal law can make a significant contribution in dealing with the problem?"

In this context it posed seven questions as follows,

- 1 How often is the crime prosecuted?
- 2 How valid today is the original rationale for the crime?
- 3 How have other jurisdictions considered reforming the crime of defamation?
- 4 How would abolition of the crime affect society?
- 5 How adequate is the civil remedy?
- 6 How effective is the crime as a deterrent?
- 7 How useful would a restricted crime of defamation be?

We may summarise their findings as follows,

- 1 The crime was rarely prosecuted in Canada and they found only 4 reported decisions since 1969 on the offence of defamatory libel. They attributed this to the perception that an offence such as assault is perceived as a public wrong, whereas defamatory libel is considered a private wrong. This was borne out by the large number of civil actions in defamation.

44 [1983] Crim LR at 528

2 The original rationale for the offence was to prevent attacks against state officials and to prevent duelling, neither of which are applicable today. Furthermore attacks on state organs are catered for under seditious libel.⁴⁵

It is not necessary to consider question 3

4 Abolition of the crime might lead to the inference that an attack on reputation would no longer be labelled by society as a public wrong, and society would be perceived as condoning defamation. However, the Commission did not agree with this argument, stating "abolition of the crime does not inevitably lead to the conclusion that the activity is condoned by society. After all, a defamatory publication would still constitute a private wrong remedied by a civil suit."

5 The civil remedy appeared to be a more suitable remedy for defamation because it provided a method of compensating the victim. The question was therefore whether such compensation were adequate. They believed that the size of damage awards were certainly sufficient to compensate. They refuted the argument that the remedy of damages was inadequate where the defendant was impecunious because to say this "amounts to saying that there should be one law for the rich, who can afford to pay damages, and another for the poor, who cannot afford to do so and therefore should be sent to prison." They rejected the argument that the remedy of damages is inadequate where the defendant is the owner of a newspaper sheltering behind the corporate shield, stating that "such abuses are not widespread" and "this rationale for retaining the crime is rather like using a sledgehammer to crack a nut."

6 The Commission was of the view that it was "doubtful" that there was any merit in the argument that the crime deters where the tort does not for a number of reasons

"The fact that defamations are rarely prosecuted supports the argument that the crime deters only if it prevents the publication of defamations. If this were so, one would expect that civil actions for defamations would be equally uncommon, which is not the case. If it is assumed that the severity of the punishment acts as a deterrent, then the deterrent effect of the present crime of defamation is doubtful. First, punishment does not appear to be severe, since a jail sentence is not often imposed. Secondly, there would appear to be the perceived certainty of a civil action, not criminal prosecution, given that the victims normally resort to the civil remedy."

However, the Commission conceded that a restricted offence might act as a deterrent where the present form had failed. One of the reasons the present

45 The Commission considered the modern ambit of the crime to be attacks on reputation and invasions of privacy.

form failed to deter was because prosecutors 'realize that it is in many ways anachronistic and incredibly complex" and are reluctant to prosecute. A simpler and well defined offence might remove this reluctance.

7 The Canadian Commission considered at length the proposals for the new offence put forward by the English Law Commission. It said that the crime would

'be inevitably complex, given the need to define with certainty the elements of the offence, appropriate defences, and necessary procedural matters. Serious attention would have to be given to potential constitutional problems. For example, a requirement that the accused prove on the balance of probabilities that he did not know or believe the defamation to be false runs contrary to the general principle that the prosecution prove all elements of the offence beyond a reasonable doubt."

183 We will see below that the English Law Commission recommended a *mens rea* of *knowledge or belief* that the matter was untrue. This raised difficulties of proof, which in turn led them in their Working Paper to suggest placing a burden on the accused as stated above. However in their final Report they abandoned this burden-shifting provision and placed the burden squarely on the prosecution to show knowledge or belief of falsity. The Canadian Commission were referring to the English Commission's Working Paper, the Report not yet having been published. It may be that they would have been more favourably disposed to the proposal as it emerged ultimately in the English Commission's Report. But, in this context, it should be noted that the Canadian Commission also observed

"Not that these problems could not be overcome. However, the bottom line is whether a restricted crime would be useful in combatting the problem of deliberate and serious defamations in our society."

It considered that this was not the case and recommended that the crime be abolished without replacement.

New Zealand

184 The 1977 *Report of the New Zealand Committee on Defamation* dealt with the crime of defamatory libel in four pages. It observed that there were only seven reported decisions, the most recent of which was heard in 1951. On the basis of this and other enquiries made, the Committee considered that the law of criminal libel had fallen into a state of desuetude.

It approved the arguments put forward by the Council for Civil Liberties

- (a) Conduct ought not be criminal unless it is the cause of significant harm to society or to the individual citizen
- (b) The criminal law should not be invoked for trivial problems
- (c) The limited resources available for control of crime are better directed to serious crimes against the person, property, or maintenance of peace
- (d) Criminal libel does not fit into the traditional categories of seriously anti-social behaviour
- (e) The crime of libel inhibits free speech and public criticism

The Committee recommended the abolition of the crime of defamatory libel, stating

"Criminal libel is rarely used in New Zealand. Its functions in the criminal law are now either catered for by other statutory provisions or are outside the scope of other criminal offences and it is a harsh provision from the point of view of the defendant. The most compelling reason for its abolition, in our view, is that the civil action available for defamation provides adequate protection for defamatory statements and renders the criminal action superfluous."

We consider all of these arguments argue for the reform of the present position but do not necessarily argue for the entire abolition of the offence. They argue from two distinct premises first, that the crime captures trivial material and secondly, that defamatory libel is never a serious matter. By eliminating trivial matters from the scope of the offence we deal with the first premise. The second is essentially a matter of opinion and priority. If a serious attack on reputation is made, it is not clear that this interest is so clearly less meriting of protection than person, property or public peace that it should be ignored by the criminal law.

It will be recalled that the *1989 Crimes Bill* (New Zealand) contains no provision for the offence of defamatory libel.

Australian Law Reform Commission

185 The Australian Law Reform Commission dealt with the offence of criminal libel in five pages in its *Report on Unfair Publication* in 1979. It noted the recent prosecution history of the offence as follows. The most recent prosecution in Victoria was in 1951. The most recent trial in New South Wales was in 1928, and only four applications for leave to prosecute in that jurisdiction had been made this century, the most recent in 1966. The last conviction in Australian Capital Territory was in 1960. However, in Western Australia, six men stood separate trial in 1977 on charges of criminal defamation. The charges arose out of statutory declarations in which serious

allegations were made against members of the Western Australian Police Drug Squad. Four were acquitted and two convicted. The case revived interest in the offence in that jurisdiction and public opinion appeared to be divided as to whether the offence should be retained or abolished.

Some saw criminal defamation as the only method of preventing irresponsible and malicious attacks by individuals not worth suing for damages. They argued the need for a powerful weapon to protect public officers from scurrilous attacks and to prevent erosion of public confidence in their integrity. Irresponsible attacks were in fact an injury to the public, appropriately treated as such by imprisonment. Criminal defamation may be capable of abuse but history showed that the police, and prosecution authorities, would use the weapon sparingly and responsibly, prosecuting only in 'bad cases'. The opposing view criticised the use of criminal defamation in the particular cases but went further, arguing that it was quite insufficient to have assurances that prosecutions would only be brought in 'bad cases'. The law was not so limited and anyone might commence a prosecution. Furthermore criminal defamation might be used as a weapon of government to inhibit complaint and stamp out dissent.⁴⁶

The ALRC accepted the arguments of those in favour of abolition and that the use of the criminal law to punish free speech and attacks on government was "one of the less attractive features of the English common law". Nonetheless it opted in favour of retaining a narrow offence in respect of cases where the civil remedies would not be sufficient, such as cases "where the publisher is bankrupt or has no means at all".

We may note with interest that the ALRC decided to retain the offence in narrow form despite the infrequency of prosecution.

England

186 The English Law Commission set out the arguments for and against the retention of the offence of defamatory libel as follows and made its decision on the basis of these points:

Abolition-

- 1 The existence of even the most restricted offence would deter writers or journalists from publishing legitimate material because of the threat of criminal liability.

46 ALRC *Unfair Publication* at p 104

- 2 The civil remedies of damages and injunction in the appropriate case are sufficient
- 3 Any offence which is drawn up in terms of acceptable narrowness would be capable of proof in so few cases that it is not worth making provision for them
- 4 The time and money spent in prosecuting defamatory libel would be a waste of resources which are badly needed to combat other crimes

Retention

- 1 The injury caused by defamatory statements can be as serious and perhaps more so, than other types of injury e.g. a schoolteacher accused of sexually assaulting schoolchildren
- 2 Since the new offence would require intent to harm and knowledge of falsity, this state of mind is as culpable and morally blameworthy as that of the perpetrator of any other offence
- 3 Attacks upon individuals may damage the public interest, especially where the victim is a person in a position of public responsibility
- 4 For various pecuniary reasons, the civil remedy is not always sufficient to deter defamatory attacks-if the defendant is not deterred by the risk of costs, if the plaintiff does not have the means to bring an action
- 5 The offence may act as a deterrent although it is little prosecuted
- 6 The offence can be restricted to ensure prosecution in cases of clear public interest only

After consideration of these arguments the English Commission concluded that

there are instances where defamatory publications may cause very serious damage to a person's life which it is in the public interest to prevent or, where the matter has already been published, to punish. Provided that the terms of any new offence are not such as to inhibit genuine freedom of speech and conform to the general principles of the criminal law, we consider that, not only can there be no objection in principle, but that such an offence is needed.

It recommended a new offence the details of which we shall examine below.⁴⁷

Conclusions

187. Of the reform bodies considered, two (New Zealand and Canada) recommended the abolition of the offence while two recommended its retention in a restricted category of cases (Australia and England). Of the two that recommended its retention, differing conclusions were reached on the *mens rea* of the new offence as we shall see below, which means that one offence was narrower than the other. The decision to retain a narrow category or to abolish entirely appears to be a finely balanced one. It cannot be attributed to the relative rates of prosecution of the offence, because in all the jurisdictions considered the offence was rarely prosecuted. It is interesting, however, that the two bodies in favour of retention had both witnessed prosecutions in comparatively recent years. Perhaps this led them to believe that the offence was useful in the occasional case in which it arose. It may also have reminded them that the type of case which may arise can be serious and that facts that would fall within the new offence are not purely figments of imagination.

Having considered all the arguments, *our tentative conclusion is in favour of retaining the offence, but in a more restricted form.* The *Fleming* case demonstrates that its abolition would deprive the criminal law of a valuable weapon. The fact that it need only be invoked in a restricted category of cases is no reason for abolishing the offence.

In our next section we set out our conclusions on the new offence which would replace the existing offence if the view that it should be retained in a narrower form is favoured.

We have already indicated our view that, if the existing offence is to be retained, it should be in a somewhat more confined form. This might be achieved by, for example, making it a crime triable on indictment only, thus ensuring that only serious cases would be prosecuted. On balance, however,

⁴⁷ The Commission's approach, which was substantially the same as the opinions published in its Working Paper, was attacked in strong terms in *The Times*, 25 November 1982, *The Guardian* 25 November 1982, and by Geoffrey Robertson in an article entitled *The Law Commission on Criminal Libel*, in [1983] Public Law 208, stating " [The Law Commission's] paper is academic in all the worst senses: it is incomprehensible to most lay readers, it displays little knowledge of the world outside the law reports, and its proposals are impracticable and would, if implemented, raise more problems for freedom of expression than the discredited law they are designed to replace...The Law Commission provisionally eschews the neat, simple and overwhelmingly sensible solution of abandoning the whole idea of criminal libel. It has worked hard to come up with a new criminal offence of telling a lie" For a defence of the Working Paper, see JR Spencer, [1983] Crim L. Rev 524

it seems more desirable to retain the option of summary disposal of cases where appropriate. At the same time, there should be provision that in all cases prosecutions may be instituted only with the consent of the Director of Public Prosecutions. This would take the place of the existing somewhat anomalous procedure under which prosecutions against newspaper proprietors, publishers or editors may only be instituted with the leave of a judge of the High Court given in chambers.

At the same time, it would be necessary to revise the penalties prescribed by the 1961 Act. The opportunity should also be taken to delete the anomalous and discriminatory provisions of the 1961 Act which permit the District Justice either to dismiss the charges or to dispose of them summarily where the libel appears in a newspaper.

We have considered whether the offence should be confined in its operation by providing that it only arises in cases where the alleged libel is of a serious character. We are inclined to the view, however, that this is adequately provided for by stipulating that the consent of the DPP should be obtained to any prosecution.

We accordingly provisionally recommend that

- (1) *prosecutions in respect of defamatory libel should be instituted only with the consent of the Director of Public Prosecutions,*
- (2) *the offence should be triable either summarily or on indictment at the option of the DPP,*
- (3) *sections 8, 9 and 10 of the Defamation Act 1961 should be repealed*

D. The New Offence

The Burden on the Prosecution

A. The Actus Reus

188 1. Definition of "defamatory"

We recommend for the purpose of consistency that the same definition of "defamatory" be adopted as that recommended in our Consultation Paper on the Civil Law of Defamation

2 Burden of showing Falsity

We recommend that the prosecution be required to show that the matter was actually false as well as defamatory

3 The Mens Rea

This is the most complex aspect of the new offence. *We recommend at the outset that the burden be on the prosecution to show the requisite mens rea*. What the requisite mental element is to consist of is a point on which there must be a decision. It is one of the crucial matters which will determine the strictness or leniency of the offence.

In our section on the present law, we criticised the two possible mental elements under existing law, the intent to publish alone, and the intent to defame. The injury constituted by defamation is complex because it stems from two sources: (a) the fact that the matter is defamatory, and (b) the fact that the matter is false. We believe that the *mens rea* should be defined to refer specifically to the defendant's state of mind with regard to both of these issues. Accordingly we will look first at the defendant's state of mind as regards the defamatory nature of the matter, then at his state of mind as regards the falsity of the matter.

(1) The defendant's state of mind regarding the defamatory nature of the matter

189 We have already stated the view that the word 'defamatory' should be specifically defined. *We recommend that the prosecution show that the defendant knew the matter was defamatory*. This will exclude liability in all cases except where the defendant addressed his mind to the content of the matter, realised it was defamatory and published nonetheless.

We may contrast our position with the view of the English Law Commission which defined the mental element in this context to be "knowledge or belief" that the matter was seriously defamatory. Its intention was to exclude cases of unintentional defamation, such as cases where (a) innocent words become defamatory because of facts known to recipients but not to the publisher, (b) defamatory words not intended to refer to anyone are understood to refer to an individual by reason of facts known to the recipients and not to the publisher. We believe that, at best, there is no need for the word "belief" in the mental element, and at worst, it might widen the offence. Therefore we would confine the mental element in this context to knowledge that the matter was defamatory⁴⁸. Our definition will exclude the cases referred to above and more besides, from the possibility of prosecution.

⁴⁸ We examine below the question whether recklessness would also suffice.

We may also contrast our view with that of the Australian Law Reform Commission which adopted the requirement that the defendant published 'with intent to cause serious harm to a person (whether the person defamed or not) or with knowledge of the probability that the publication of the defamatory matter will cause serious harm to a person (whether the person defamed or not)'. We believe that the phrase 'intent to harm' should be avoided as containing ambiguity. We also believe that our definition of 'knowledge of the seriously defamatory character' of the publication is simpler than 'knowledge of the probability that the publication will cause serious harm'.

(2) The defendant's state of mind regarding falsity

190 This is the more difficult aspect of the mental element. There are a number of viable possibilities, ranging from the strictest requirement of proof to the most lenient: (1) actual knowledge of falsity, (2) reckless disregard of falsity, (3) belief that the matter was false, (4) negligence.

No one has been in favour of a negligence standard, and we are firmly of the view that such a test would be incompatible with general principles of criminal liability.

(1) Recklessness

191 On the issue of falsity, the ALRC said that "no one should be convicted unless he knows the statement to be true or is recklessly indifferent to the question of truth or falsity". It adopted this test as the mental element on the issue of falsity, stating that the accused would be entitled to acquittal if the prosecutor failed to show that he knew of the falsity or was indifferent to it. Therefore the burden was firmly on the prosecutor to establish knowledge of falsity.

The English Law Commission rejected recklessness as a test. It examined two types of recklessness. The first was recklessness as defined in their *Report on the Mental Element in Crime*, namely if the defendant realised the statement might be untrue, and, on the assumption that any judgement by him of the degree of that risk was correct, it was unreasonable for him to take that risk of it being untrue. The second type of recklessness was as defined in *Caldwell*⁴⁹ and *Lawrence*⁵⁰, so that the defendant would be reckless if

- (1) the circumstances were such as would have drawn the attention of any ordinary prudent individual to the possibility that the

49 [1982] AC 341

50 [1982] AC 510

- (ii) defamatory statement was untrue
the risk of the defamatory statement being untrue was not so slight that an ordinary prudent individual would feel justified in treating it as negligible
- (iii) the defendant either failed to give any thought to the possibility of the risk of the defamatory statement being untrue or having recognised that there was a risk went on to take it

The two types of recklessness are usually described as the 'subjective' and 'objective' tests respectively. The Commission felt that either test of recklessness was unsuitable to defamatory libel for two reasons.

The first reason was that, in cases such as criminal damage, if the risk of damage was substantial the harm done could never justify the taking of the risk. However, in the case of statements, even if there is a substantial risk of falsity, there might be nonetheless a good reason for publishing it, such as reasons of public interest. Using the examples of rape and criminal damage, the Commission said-

Put at its shortest, then, the harm done by rape or criminal damage can never justify a man taking any unjustifiable or substantial risk, but the requirements of free speech may justify such a risk when making a defamatory statement.

The second reason was that either test of recklessness would involve the jury considering the nature of the risks taken by the defendant, including such questions as how likely it was that the statement was untrue, and whether there was public benefit in the publication. Such questions involved judgments rather than findings of fact, and were unsuitable for jury decision in a criminal trial.

(ii) Belief in the falsity of the statement

192 The Commission favoured this mental element as the criterion additional to knowledge of falsity. It saw no objection to the imposition of criminal liability where the defendant had deliberately published a seriously defamatory libel believing it to be false (bearing in mind that the prosecution has already shown that it is in fact false.)

However, although the Commission favoured this test conceptually, it foresaw a number of practical problems to which it would lead. It observed that there is a difference between having direct knowledge of a fact and having a belief about a fact formed on the basis of information received from another

In the first category, the defendant will have played a part in the facts so that if the prosecution satisfies the jury that the information is in fact false, the jury will usually accept that the defendant knew it was untrue. e.g. the defendant alleges a committee chairman accepted a bribe from him; once shown that there was no bribe accepted from the defendant, it is obvious that the defendant must have known this. In the second category, the allegation by the defendant will concern some activity in which the defendant played no part and therefore had no direct knowledge e.g. the chairman of a committee has regularly accepted bribes from third parties. Proof that this is in fact untrue alone does not provide evidence that the defendant believed the allegations to be false. He might well have received convincing reports from credible witnesses that it occurred. On the other hand, it might seem probable that he invented the story, but he might have exercised his right to silence and avoided any admission as to the means of his knowledge of the facts. This will particularly be the case for journalists, because as a matter of ethics journalists are reluctant to name sources. The absence of evidence would lead to a stalemate. The result would be that if the prosecution were required to prove belief in the ordinary way, the only cases where a defendant could be successfully prosecuted would be those in the first category, i.e. where the defendant must have known that the facts stated were false. The English Law Commission therefore went on to consider special procedural provisions in relation to the proof of belief.

It commenced by examining such procedural provisions in other offences. The main analogy was with an offence which we have already examined: receiving stolen property. Section 22(1) of the English Theft Act 1968 provides that a person handles stolen goods if he dishonestly receives the goods *knowing or believing* them to be stolen. Proof that the goods were in fact stolen is not evidence that he knew or believed them to be so. The practical difficulties of proving belief therefore arise in this situation also. Accordingly, principles have been developed, which in effect force the defendant to give evidence as to the state of his knowledge or belief.⁵¹

The Commission considered that in order to render workable the requirement that the prosecution show that the defendant believed the information to be false, special procedural provisions as to proof of such belief would be necessary. It considered the following possibilities:

51 One such principle is to allow the jury to draw an inference as to the knowledge of the defendant that goods were stolen from the facts unless evidence is given by the defendant to rebut that inference. This principle is the basis of section 27(3) of the 1968 Act which allows evidence of previous convictions and evidence of other possession of stolen goods to be admitted. Another principle is that if the defendant has in his possession property which was shown to have been stolen a short time before he obtained possession, the jury can be directed that they may infer that the defendant knew that the goods were stolen if he has offered no explanation to account for his possession of the property, or if they are satisfied that any explanation given was untrue.

- (i) A provision to the effect that the court might infer the state of mind if the defendant failed to give evidence in relation to it.
- (ii) A requirement that before the hearing, the defendant give notice to the prosecution of his grounds for not knowing or believing the statement to be false.
- (iii) An inference of knowledge of falsity derived from failure by the defendant to explain his means of knowledge.
- (iv) Imposition upon the defendant of a burden of proof, which on proof of the other elements of the offence, including its falsity, would require evidence to be adduced that he did not know or believe that it was false. The burden could be either evidential or persuasive. If it were evidential, the prosecution could rebut the issue raised by evidence sufficient to prove beyond reasonable doubt that the defendant did know or believe the statement to be false. If the burden were persuasive, the defendant would be convicted unless he satisfied the court it was more probable than not that he did not know or believe the statement to be false.

The Working Paper concluded that only option (i) would be satisfactory, and that a full persuasive burden would be necessary. It concluded that the choice lay between taking this option or allowing the offence to be effective only in the narrow range of cases where the defendant had personal knowledge or had participated in the relevant events.

193. The response to the Working Paper included a large body of opinion in favour of recklessness instead of belief in this context. However the Commission in its Report continued to maintain that it was an inappropriate concept in the area of defamation. Other suggestions included the use of the concept of malice, but the Commission rejected this on the basis that it might cause confusion. Many commentators found unacceptable the reversal of the burden of proof regarding knowledge or belief in falsity. The Commission adhered to its view that "belief" was the most appropriate mental criterion on the issue of falsity. However, it re-examined the problems of proof of such belief. This time it rejected the burden-shifting provision, stating:

"To justify such a burden exceptional reasons must exist, and arguably do exist in those offences where such a burden is currently imposed. Having regard to the views expressed on our consultation paper and the general antipathy towards placing a burden on the defence in such a context, we do not think it possible to assert that the importance of an offence of criminal defamation for the general purposes of the criminal law as a whole is such that these exceptional reasons can rightly be said to exist in the present case."

Accordingly the Commission recommended that, as regards the issue of falsity, the appropriate mental element should be knowledge or belief of falsity, and declined to recommend any provisions to assist the securing of evidence of such knowledge or belief. It accepted that in practice this omission meant that the value of the offence was restricted to cases where it could be shown that the defendant knew or believed the information at issue to be false by virtue of his own personal participation in or observation of events, or where he made an admission of falsity.

Conclusions

194 We have already said that, if the offence of defamatory libel is to be retained, it should be narrowly confined. It should be restricted to the clear case of a person deliberately setting out to injure an individual, as in the recent *Fleming* case. We are firmly opposed to the criterion of belief in the falsity of the matter as recommended by the English Law Commission. This is consistent with the views expressed in our Report on the *Receiving of Stolen Property*. We note the point made by the English Law Commission regarding the possible unsuitability of the concept of recklessness to speech⁵², but we continue to maintain that the concept of belief is too vague to be a defensible criterion of criminal liability.

If we were to choose between belief and recklessness, we would therefore opt for the latter. Publication with knowledge or reckless disregard for falsity is the criterion favoured by the United States Supreme Court, and the Australian Law Reform Commission. We see logic in the view that if the offence is retained for a narrow category of cases, there is little reason in principle to distinguish between the person who has knowledge of falsity and the person who acts in reckless disregard of falsity. Our provisional view is that there is, in this context, nothing fundamental to distinguish criminal defamation from other crimes, such as receiving stolen property and malicious damage, in which, after an analysis of the appropriate constituents of *mens rea*, we concluded that the test should be either knowledge or recklessness.

195 *We accordingly provisionally recommend that, in relation to the issue of falsity, the burden on the prosecution be to show that the defendant actually knew that the matter was false or was recklessly indifferent as to whether it was true or false.*

52 The English Law Commission pointed out that in cases such as malicious damage or rape if the defendant had perceived a risk that the act would be harmful there can be justification for his having taken the risk. By contrast a publisher might advert to the risk that matter was false but believe that it was necessary to inform the public of the information. Particularly where the matter was one of high public or national interest it could be said there was some justification for taking the risk. Since recklessness concerns the taking of risk the English Commission concluded that the concept of recklessness was not appropriate in the context of speech.

4. Publication to Third Party

196. Since we believe that the rationale which led to the rule that publication to the victim alone was sufficient is now obsolete (tendency to breach the peace), we recommend that the prosecution be required to show publication to a person other than the victim. We believe this accords more neatly with the modern purpose of the offence and do not feel that it is likely to cause problems in the case where the defendant sets out to injure the victim, because he will do so by publishing to others.

5. Defences

197. If our discussion appears to abolish more defences than it provides, this is because our redefined offence of defamatory libel will cut away so much speech from the ambit of the criminal law that a number of defences are rendered unnecessary. Since the prosecution will have shown that the matter was false and defamatory, that the defendant knew it was false and that he also knew it was defamatory, the range of speech left to defend will be narrowly confined and so, unlike the position in civil proceedings, there will be little necessity for a wide range of defences.

(1) Justification

198. Since the prosecution has to show falsity beyond all reasonable doubt there is no need for a defence of justification.

(2) Privilege

(a) Absolute

199. Absolute privilege in respect of statements made in the Oireachtas is automatically applicable in criminal proceedings by virtue of Article 15.13 of the Constitution.

The remaining instances of privilege are (i) statements made in the course of judicial proceedings, (ii) statements made in the course of quasi-judicial proceedings, (iii) statements made before parliamentary committees, (iv) statements made by officers of state to each other in the course of their duties, and (v) statements between solicitor and client. We have invited views in our Consultation Paper on the Civil Law of Defamation as to whether absolute privilege should be retained as a defence in the cases just mentioned. It could be argued that protection should not be afforded to statements made either with knowledge of their falsity and defamatory nature or recklessly as to whether they were false or defamatory. But the same might be said of statements made maliciously which are absolutely privileged in civil law. *We invite views as to whether the defence of absolute privilege should remain in some at least of these instances, ie. judicial proceedings, parliamentary committees and statements by officers of state.*

(b) Qualified

(i) At Common Law

200. The common law instances of qualified privilege arise on occasions where the person communicating and the person receiving the information both have either an interest or duty in the information. The defence is conditional upon the absence of "malice", as defined in relation to that defence. Although the term has been variously defined, it is clear that *knowledge* that the statement was defamatory and untrue would amount to malice in this context. While it may not be so clear-cut, we think that the same would apply if the words were published with reckless indifference as to whether they were false and defamatory. It would seem, accordingly, that if the defence of qualified privilege were applied in its present form, ie. with a rule that malice defeats the defence, it would never be successful. The prosecution by discharging the burden of showing the mental element would simultaneously have killed off any real possibility of raising the defence. Therefore we decline to recommend that the common law defence of qualified privilege, as it now exists, be applied in criminal proceedings and we feel it would be a worthless exercise.

We note that the English Law Commission recommended the retention of qualified privilege. This was primarily due to the differently defined mental element in the new offence. Because it included a belief that the matter was false, in some cases the prosecution might show the requisite mental element, but this would not of itself be equivalent to malice which would defeat the defence of qualified privilege. The Commission felt that it should not be possible to make the crime any wider than the tort, and so recommended the applicability of the defence of qualified privilege to the crime of defamatory libel. Our proposed mental element is, however, different and, as we have just pointed out, while it may not be free from doubt, we think it would be difficult to envisage a defendant who had published defamatory matter with a reckless indifference as to its truth or falsehood and its defamatory nature successfully relying on an absence of malice.

We feel it necessary, however, to go on to consider the question as to whether the occasions encompassed by the common law instances of qualified privilege should confer a privilege on the defendant even if he acts on malice so that the defence is no longer conditional on the absence of malice. In other words, once the prosecution shows that the defendant (I) knew the matter was defamatory or was recklessly indifferent as to whether it was or not and (II) knew it was false or was recklessly indifferent as to whether it was or not, it should it be a defence for the defendant to show that he had an interest or duty in passing that information on to some one who had a duty to interest to receive it? It would be, in our view, unacceptable that a person could have a duty or interest to convey or receive information which he knows to be false

or that such a duty or interest could arise where he is recklessly indifferent as to its truth or falsity. We therefore provisionally recommend no defence of qualified privilege similar to that existing in civil proceedings by virtue of the common law as it would appear to be incompatible with the mental element in the offence we propose.

(ii) *By Statute*

201 We have seen that the statutory instances of qualified privilege contained in section 24 (read in conjunction with Schedule II) of the *Defamation Act 1961* apply exclusively to civil proceedings. So long as criminal libel remains in its present form this is a serious defect in the law. However the question before us now is whether such protections would be necessary if the offence were retained in the modified form proposed by us.

The statutory protections extend to reports of proceedings of a list of bodies, whose activities are of public interest. Since the person who reports has no direct knowledge of the matters discussed and merely transmits the information, we believe that it would be impossible for the prosecution to prove that a reporter not only knew, or was recklessly indifferent as to whether the matter was defamatory but also knew, or was recklessly indifferent as to whether, it was false. If such a thing were possible, there would seem to be no good reason for allowing the reporter to escape liability, bearing in mind that the prosecution will have shown that he either knew or was recklessly indifferent as to whether the matter was defamatory and false. Accordingly, it would seem that a defence of report or a defence identical to that in section 21 of the 1961 Act would be unnecessary.

3. Fair Comment

202 Earlier we criticised the uncertainty whether the defence of fair comment applied in criminal proceedings and the fact that section 23 of the *Defamation Act 1961*, which attempts to mitigate the rigour of one of the requirements of that defence, does not apply to criminal proceedings. Again these criticisms would appear to apply only in the context of the present law. However if one looks at the mental element in the proposed new offence, one can see that it envisages factual matter only. This is because it states that the prosecution must show that the defendant "knew the matter to be false". Opinion and comment cannot be false. Only factual matter is capable of truth or falsity. We do not envisage any criminal liability in respect of opinion or comment.

We therefore recommend no defence of fair comment or comment, or any equivalent of section 23.

We note that the English Law Commission also refused to recommend the defence of fair comment, but on the narrower ground that malice defeats the defence of fair comment and that once the prosecution will have discharged his burden under the new offence it will be clear that malice sufficient to destroy a defence of fair comment will be destroyed. It is surprising that the Commission adopted this view in relation to fair comment and not qualified privilege when the malice element is the same for both. In any event, we have not adopted this approach because a defence of fair comment, or even comment simpliciter, without defeat by malice is conceivable. Indeed in our *Consultation Paper on the Civil Law of Defamation*, we recommended the abolition of the malice element in this defence. Therefore we have not argued against the necessity for this defence in criminal proceedings from this premise because it assumes, we believe incorrectly, that the defence of fair comment cannot exist without the rule that it is defeated by malice.

Miscellaneous

1 Form of Communication

203 It would be indefensible if a defendant who caused serious injury to a victim by publishing matter which he knew to be defamatory and false (or was recklessly indifferent as to whether it was defamatory and false) could escape liability simply because he broadcast the matter, whereas he would have been liable if he had written it in a newspaper. This is the absurd result of the rule that written communication only comes within the ambit of defamatory libel. It is a distinction which was probably never justified, and which in the context of modern forms of communication has certainly outlived any logic that it ever embodied. *We therefore recommend that publication be defined as 'communication to a person other than the victim by any means whatsoever'*

Lest worries be raised as to whether this means that a prosecution could now be brought in respect of informal oral communications between neighbours, friends, and so on, it must be borne in mind that the DPP will have to be convinced that the matter is sufficiently serious to warrant criminal prosecution, and that the form of communication in its context will play a large role in his consideration of the gravity of the case.

If this aspect of the offence is widened, the more appropriate title for the offence would be "Defamation". *We so recommend*

2. Distributors and Printers

204 The difficult position of distributors and printers will be somewhat ameliorated because it is unlikely that it will be possible to show that they had (1) knowledge of defamatory character and (2) knowledge of falsity

Indeed, in most cases they will be unaware of the existence of the libel itself. It is true that proof of recklessness would not be so difficult: it might be that the circumstances of the publication were such as to make it obvious that the printer or distributor was aware of its defamatory character and recklessly indifferent as to whether it was true or false. However, in such a case there seems no reason why the printer and distributor should not be liable. *We accordingly provisionally recommend that there should be no special defence available to distributors and printers.* We have borne in mind that in our *Consultation Paper on the Civil Law of Defamation* we have provisionally recommended immunity for printers and distributors for actions in defamation. However, different considerations clearly apply in the criminal area. A plaintiff in civil actions frequently joins the printer and distributor simply because they are a mark for damages and, in modern circumstances, they may find it extremely difficult to avail of the somewhat limited defences afforded by the law as it stands. By contrast, in cases of criminal defamation, the DPP can be expected to exercise prosecutorial discretion in relation to bona fide printers and distributors.

3. Vicarious Liability

205 What is the effect of the new mental element on the doctrine of vicarious liability as modified by the Defamation Act 1961? The new mental element might perhaps be interpreted automatically to oust the doctrine, since proof of actual knowledge of, or recklessness as to, falsity and character are required. However, it might also be interpreted to run alongside vicarious liability, so that a master would continue to be liable for the publication of seriously defamatory matter by his servant in circumstances where he was negligent in failing to detect and prevent the libel being published, whereas an independent person would be liable only if knowledge of, or recklessness as to, the character and falsity of the publication was shown. This would clearly be inconsistent and bizarre. *We therefore recommend, for the purpose of clarity, that the application of vicarious liability, however limited, to this crime should be abolished.*

4. Proof of Previous Convictions

206 We have noted that there is some uncertainty as to whether proof of previous convictions may be admitted in criminal proceedings for libel where the subject matter of the libel is that a person committed a crime, in a situation where that person was in fact previously convicted of that crime. Further, it is not clear what weight is given to that evidence should it be held admissible.

For purposes of clarity, *we recommend that in a prosecution for defamatory libel in which all or part of the subject-matter of the libel is an allegation that a person committed a criminal offence, evidence of a previous conviction for that offence shall be admissible and shall be conclusive evidence that the crime was*

committed by that person This recommendation is consistent with a similar recommendation in our *Consultation Paper on the Civil Law of Defamation*

5. Penalties

207 We have already indicated our view that the offence should be prosecutable summarily at the option of the DPP It would also appear that the penalties provided in the 1961 Act would, in any event, require revision *We accordingly provisionally recommend that, where the offence is disposed of summarily, the accused should be liable to imprisonment for a term not exceeding twelve months or a fine not exceeding £2,000 or both and, where it is disposed of on indictment, to imprisonment for a term not exceeding five years or a fine not exceeding £10,000 or both The offence should be triable summarily at the option of the DPP*

As we have pointed out in earlier Reports, a provision of the last mentioned nature does not affect the jurisdiction of the District Justice to conclude that, having regard to the circumstances of the particular case, the offence charged is not a minor one in which case it can only proceed, if at all, on indictment, thus preserving the constitutional right of the accused to a trial by jury in such circumstances

Identity of Parties

1. Defamation of the Dead

208 It would appear that, under present law, criminal liability in respect of defamation of the dead arises only where the contents of the libel can be said to bring living persons, such as the family of the deceased, into hatred ridicule or contempt and that the defamation of the living is sufficiently serious to require prosecution for a criminal offence

We pointed out in our *Consultation Paper on the Civil Law of Defamation* that the absence of any remedy in the civil law for defamation of the dead had given rise to some concern and suggested that there should be a new cause of action in respect of such publications This proved to be one of our more controversial provisional recommendations although there was some support for the proposal, it evoked strong criticism from the media and others We are at present reassessing our provisional recommendation in the light of these comments and it would, accordingly, be inappropriate to advance even a provisional recommendation at this stage as to what the position should be in relation to criminal defamation It is undoubtedly the case that a deliberate lie about a deceased person may cause much distress to surviving relatives or indeed an organisation connected with the deceased We remain doubtful as to whether there is any free speech justification for the deliberate lie concerning the dead any more than there is for the deliberate lie

concerning the living. However, it may well be that the unnecessary trauma caused to the relatives by deliberately defamatory material might be better dealt with in the context of the evolving law of privacy.

We invite views as to whether the definition of defamatory matter should include statements concerning a living or deceased person and as to whether there should be a time limit in respect of such proceedings. In the case of civil defamation, we had provisionally recommended that there should be a time limit of three years from the date of death.

2. Defamation of a Group

209 It appears that the rule concerning defamation of a group is more lenient in criminal proceedings than in civil proceedings. *We recommend that the definition of defamatory matter include 'statements made concerning a group of living or deceased persons provided the individuals are sufficiently identified for the matter to be understood to refer specifically to them'*

For example, to take a variation on the facts of the recent *Fleming*⁵³ case, if the defendant had written in public places that all of the family members concerned were available for sexual intercourse and mentioned the family name as well as the phone number, it would be absurd to refuse prosecution simply because there was a group reference rather than an individual one.

Corporate Libel

We recommend that no criminal liability should attach in respect of libel upon a company. We believe that the damage caused in this instance may be rectified in civil proceedings.

⁵³ Reported in the Irish Times 23 November 1989

CHAPTER 7: DISCUSSION AND REFORM OF SEDITIOUS LIBEL

A. Comparative

Canada

210. Section 60 (2) of the *Canadian Criminal Code* provides that a seditious libel is a libel that expresses a seditious intention. Sub-section (4) provides, that

"Without limiting the generality of the meaning 'seditious intention', every one shall be presumed to have a seditious intention who (a) teaches or advocates, or (b) publishes or circulates any writing that advocates the use, without the authority of law, of force as a means of accomplishing a governmental change in Canada."

Section 61 provides that no person shall be deemed to have a seditious intention by reason only that he intends in good faith, "(a) to show that Her Majesty has been misled or mistaken in her measures, (b) to point out errors or defects in (i) the government or constitution of Canada or a province, (ii) the Parliament of Canada or the legislature of a province, or (iii) the administration of justice in Canada; (c) to produce, by lawful means, the alteration of any matter of government in Canada; or (d) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada".

These provisions in essence codify Stephen's definition of seditious matter which we have discussed in our present law chapter. However the element relating to the use of force is additional.

Section 62 provides that every one who speaks seditious words, publishes a seditious libel or is party to a seditious conspiracy is guilty of an indictable offence and is liable to imprisonment for fourteen years

211 The Law Reform Commission of Canada examined these provisions in its 1986 Working Paper entitled *Crimes Against the State*. It criticised the lack of clarity on the issue of *mens rea* as follows¹

The seditious offences in sections 60,61 and 62 provide yet another example of uncertainty in the Code. For example, the three offences of speaking seditious words, publishing a seditious libel and being a party to a seditious conspiracy, each require that there be a 'seditious intention', but this phrase is not defined. Subsection 60(4) tells us what will be presumed to be a seditious intention and section 61 tells us what will not be treated as a seditious intention, and yet nowhere in the Code is there a conclusive definition of what is in fact a seditious intention. Instead we have to turn to the common law to find its meaning, but the common law definition is also vague and uncertain.

It criticised the substance of the offence in the following terms

"The offence of sedition provides another example of an outdated and unprincipled law. The original aim of the crime of sedition was to forbid criticism and derision of political authority, and as Fitzjames Stephen pointed out, the offence was a natural concomitant of the once prevalent view that the governors of the State were wise and superior beings exercising a divine mandate and beyond the reproach of the common people. With the coming of age of parliamentary democracy in the nineteenth century, government could no longer be conceived as the infallible master of the people but as their servant, and subjects were seen to have a perfect right to criticize and even dismiss their government. Indeed it is essential to the health of a parliamentary democracy such as Canada that citizens have the right to criticize, debate and discuss political, economic and social matters in the freest possible manner. This has already been recognized by our courts and now the *Canadian Charter of Rights and Freedoms* provides additional guarantees of political freedom of expression. Is it not odd then that our *Criminal Code* still contains the offence of sedition which has as its very object the suppression of such freedom?"

The Commission considered that the seditious offences contained probable sources of conflict with the *Charter* guarantees. The content of the offence probably included much that came within the citizen's rightful and legitimate

1 L.R.C. Canada *Crimes against the State* p32

range of expression. The existence of the offences threatened the participation of the citizen in the democratic process. Furthermore, the offences were so vague and uncertain that they could kill legitimate expression.

The Commission recommended a "mini-code" of crimes against the State and excluded sedition from its provisions. It did so for two reasons. First, the matter which would probably come within the offence would be better covered in other offences, such as counselling or inciting treason, violent overthrow of government or breaches of public order. Secondly, the offence interfered with legitimate free expression. The criminal law might be used to suppress unpopular political opinions. It recommended the repeal of the provisions on seditious libel.

New Zealand

212. The *Crimes Act 1961* contained provisions on seditious offences in sections 80-85. The *Crimes Bill 1989* has dropped these provisions. The explanatory note to the Bill merely notes the omission but does not comment further on it.

England

213. The English Law Commission produced a Working Paper in 1977 on *Treason, Sedition and Allied Offences*. It noted that the previous 15 years there had only been one instance of proceedings brought for sedition and that in that case there were other offences of which the defendants were convicted. It was of the view that the courts would probably not adopt any definition wider than that enunciated in the Canadian case of *R v Boucher*², so that the offence was constituted where there was intention to incite to violence, or to public disorder or disturbance, with the intention of disturbing duly constituted authority. For a defendant to fall within the offence, he would also be guilty of incitement to commit offences against the person or property or urging others to riot or to assemble unlawfully. The Commission concluded that "it is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is 'political'". It recommended the abolition of the offence of sedition.

B An Examination of Related Irish Legislation

214. There appear to be no reported cases of seditious libel since the foundation of this State but this in itself does not necessarily mean that it has no function. Seditious libel is not an offence which one would expect to occur very often in a relatively settled society. It is a crime the primary function of which is to lie dormant for long periods and come alive only in

2 [1951] 2 D.I.R. 369

troubled times. However it is not necessary to have duplicated forms of machinery to deal with such activity when it occurs. We will now look to see if in other areas of Irish law there are other methods of dealing with essentially the same activity.

215 The most important piece of related legislation is the *Offences Against the State Act 1939*³. Not only does it consider related offences against the State, it also contains provisions which actually refer to seditious matter. Section 10(1) provides that it shall not be lawful to set up in type, print, publish, send through the post, distribute, sell or offer for sale any document (b) which is or includes a treasonable document, or (c) which is or includes a seditious document. A seditious document is defined in full in section 2 of the Act⁴.

Section 10(2) provides that it shall not be lawful to send or contribute to any newspaper or other periodical, or for the proprietor of such publication, to publish any material which is or purports to be sent or contributed, by or on behalf of an unlawful organisation, which is of such a nature that the printing of it would be a contravention of the foregoing sub-section.

The penalties for these offences are set out in Section 10(3).

Section 10(5) renders lawful such publication if it is published by permission of the Government, or as part of a fair report of the Oireachtas or Court proceedings.

Section 11(1) allows the Minister for Justice, where he is of the opinion that a particular issue of a newspaper or periodical ordinarily printed outside the State is seditious or contains matter in contravention of the Act, (1) to authorise the Garda Síochána to seize and destroy all copies thereof, (2) to prohibit the importation of any copy of any issue published within a specified period.

Section 12(1) provides that it shall not be lawful for any person to have a treasonable seditious or incriminating document in his possession, or in lands or premises owned or occupied by him or under his control.

3 We assume for the purposes of this discussion that the offence contained in section 10(1) of the 1939 Act is related legislation and not legislation on seditious libel itself. We set out the merits of this approach in our present law chapter.

4 For full text of definition see above at pp57-58.

Section 12(2) provides that it shall be a defence of such offence to show (1) that the person is an officer of the State and had possession of the document in the course of his duties, (2) that he did not know the document was in his possession or (3) that he did not know the nature or contents of the document

Section 10(1) covers the same ground as seditious libel and more, while section 10(2) is even more specific. Section 12(1) is probably wider than the offence of seditious libel since it makes it an offence to have seditious material in one's possession. The Act is more comprehensive than the common law in that it provides defences.

216 There are provisions specifically prohibiting national television from broadcasting seditious matter. Radio Telefis Eireann is governed by regulations set out in the Broadcasting Acts. Section 18(1) of the *Broadcast Authority Act 1960*, as amended by section 3 of the *Broadcasting Authority Amendment Act 1970*, provides that the Authority is prohibited from broadcasting anything which may reasonably be regarded as being likely to promote, or incite to, crime or as tending to undermine the authority of the State. This may fairly be said to cover the same ground as seditious libel.

Section 31 of the 1960 Act, as amended by section 16 of the 1976 Act, provides that where the Minister is of the opinion that the broadcasting of particular matter or matter of a particular class would be likely to incite to crime or would tend to undermine the authority of the State, he may by order direct the Authority to refrain from broadcasting such matter, under section 31(1) however, the order must be laid before each House of the Oireachtas as soon after its making as is possible and it may be annulled by resolution of either House within 21 days of the order being laid before it⁵.

It may be concluded that the essence of seditious libel is punishable in accordance with separate and more detailed provisions in Irish legislation.

C Conclusions

217 We accept that in the area of sedition the absence of prosecution does not of itself indicate that the necessity for the offence is removed. However, we have a number of objections to the common law offence. Its ambit is unsettled and if it refers, as we have suggested, not to advocacy of violence but to matter which undermines the authority of the State, it is dangerously close to incompatibility with Article 40.6.1.1, which specifically refers to

See *State (Lynch) v Cooney* [1982] IR 337 in which the Supreme Court upheld the constitutionality of the subsection.

rightful liberty of expression, including criticism of Government policy" As an offence it has an unsavoury history of suppression of government criticism and has been used as a political muzzle

Furthermore the matter which is the subject of the offence is now punishable in accordance with provisions of Irish legislation Although this legislation leaves some definitional problems, and perhaps other difficulties which we have not addressed, it is preferable to the common law offence and must necessarily be read in the context of the Constitutional envisagement of treasonable and seditious matter

We are of the view that the common law offence is incompatible with the Constitutional guarantees of free speech and would require re-definition to become legitimate This is unnecessary in the light of the existing provisions of Irish law dealing with seditious matter

We provisionally recommend the abolition without replacement of the common law offence of seditious libel

CHAPTER 8: DISCUSSION AND REFORM OF BLASPHEMOUS LIBEL

A. Defects of the Present Law

1. Uncertainty

218. It is absurd that an offence exists in Irish law in respect of which the *Defamation Act 1961* provides both penalties and unusual provisions of search and seizure, and one the subject matter of which is Constitutionally mandated, but which is totally uncertain as to both its *actus reus* and its *mens rea*. It may well be unconstitutional to punish a person in respect of a crime which the State has failed to define, not only in matters of detail, but in broad outline.

2. Actus Reus

219. (a) If the views expressed in *Bowman*¹ and *Lemon*² were never received into Irish law, the *actus reus* has continued to be that which it was from the earliest times until the nineteenth century, namely any questioning of Christian doctrine. As an offence which originated in a period of religious intolerance and was governed by different conceptions of the role of the Church in State matters, this offence would be totally incompatible with modern conditions. It might also be unconstitutional in two respects: (i) as being an unconstitutional restriction upon freedom of speech, and (ii) as being in breach of constitutional guarantees of religious equality.

(b) If the *actus reus* of the offence can be deemed to be that which it is in England, namely, an offensive and insulting attack upon a Christian religion,

1 [1917] AC 406.

2 [1979] 1 All ER 989.

it is open to Constitutional objection on the ground that it discriminates against non-Christian religions contrary to Article 44

(c) If the *actus reus* of the offence is neither of the above, but merely what the jury deems it to be on a particular day, the offence is seriously lacking in objective basis. Furthermore it would render legal advice as to what is permissible to publish virtually impossible.

(d) If an immediate tendency to breach the peace is still an ingredient of the offence, this may be criticised as a requirement out of keeping with modern times.

3 *Mens Rea*

220 As we have seen, a majority of the Law Lords in *Lemon* were of the opinion that it was sufficient, for the purpose of establishing *mens rea*, for the prosecution to prove an intention to publish material which was in fact blasphemous and that it was not necessary for them to prove further that the defendants intended to blaspheme. They denied, however, that it followed from this that the offence was one of strict liability. The minority were of the view that if the prosecution did not have to establish that the defendants intended to blaspheme, the offence was in truth an offence of strict liability. We would respectfully incline to the view of the minority on this matter. It might also be that, if the question came before the Irish courts today, the view of the minority on the principal issue would also be preferred, i.e. that proof of an intention to blaspheme was an essential ingredient. On the other hand, we cannot rule out the possibility that an Irish court would take the same view as the majority in *Lemon*. If that were to happen, then blasphemy would continue in the law as an offence of strict liability, taking the broader view, as we do, as to what constitutes such an offence. Strict liability, however, is generally reserved for offences created by statute where the legislature, rightly or wrongly, takes the view that the public interest in preventing the conduct in question (and, in some cases relative mildness of the penalties) should override the general common law requirements as to *mens rea*. The absence of prosecutions in respect of blasphemous libel leads us to conclude that there are no policy reasons for treating it as an offence coming into that category.

4 *Publication*

221 Technically, since oral publication is blasphemy and not blasphemous libel, the offence excludes matter broadcast by wireless telegraphy³. Therefore an insulting attack upon a Christian religion on television would not be within the offence although the same words in a newspaper or pamphlet would be

³ The *Defamation Act 1961* section 15 deems such publications to be in permanent form and therefore libellous but does not apply to criminal proceedings.

This appears to be arbitrary discrimination.

5. *Vicarious Liability*

222. If a servant publishes matter which falls within the definition of blasphemous libel, his master will be liable unless he can show lack of knowledge and that such lack of knowledge was not due to his negligence. We have argued in relation to defamatory libel that this position is incompatible with modern principles of criminal liability. Not only is the onus placed upon the defendant to displace a presumption that an ingredient of the offence is established, the criterion which applies is that of negligence.

6. *Commencement of Proceedings*

223. Leave of a High Court judge must be obtained before prosecuting a newspaper defendant but no other defendant, and this discrimination appears unjustifiable. Furthermore, the fact that the consent of a judge is required is an anomaly in a legal system which confers prosecutorial discretion upon the Attorney General and Director of Public Prosecutions.

B. An Examination of the Purpose of the Offence

224. The original basis for punishing matter which denied the doctrines of Christianity was closely linked with prevailing conceptions of Church and State, first, and religious freedom, second. Since Church and State went hand in hand, an attack on one was a questioning of the other. Also, the value of freedom of speech in both the religious and political arenas was not yet recognized. The conditions which gave rise to the offence have been altered and modern society generally favours a presumption in favour of freedom of expression. Choice of religion and the right to criticise in a religious context are also tolerated. What then is, or can be, the purpose of this offence?

225. On one view, it may be argued that the law should protect religion and religious beliefs and practice from all attack. This raises the difficult question of what is meant by religion in this context a subject to which we will return at a later point. We have already noted that a series of judicial decisions in England have made it clear that Christianity alone is protected by the law of blasphemy in that jurisdiction. We have also seen that, in the absence of any authority, it cannot be said with certainty that the offence of blasphemy mandated by the Constitution is confined to insults to Christianity. We have, however, pointed out that the more plausible view would be that the offence is in fact confined to religions in the Judaeo-Christian tradition. If this is correct, the argument under consideration loses a good deal of its force. The law is then not protecting all religion and religious beliefs from offensive and insulting attack because, by definition, religions outside the mainstream of the

Judaeo Christian tradition are excluded

226 Another possible basis for the offence is that blasphemous attacks have a detrimental effect on society as a whole, (a) by damaging the mutual respect on which society operates, and (b) by damaging stability by disrupting the harmony between different religious groups, or between religious and non-religious groups. A related argument is that religious beliefs are an important and beneficial component of a civilised society and as such should be treated with respect. Such respect involves punishment for offensive attacks. As against this, it may be argued that the absence of prosecutions indicates that the stability of society and the mutual respect referred to is not dependent on penal sanctions.

227 Thirdly it may be argued that freedom from religious insult is a corollary to the religious freedom guaranteed in Article 44 of the Constitution. We have seen that this was the basis offered by Lord Scarman in the *Lemon*⁴ case, and that it was the reasoning adopted by the European Commission in relation to the guarantee of religious freedom under the Convention⁵. A related argument is that there should be protection from hurt caused to religious feelings by analogy with other offences which deter injury to other kinds of feeling, such as offences punishing indecent exposure, overt public sexual activity, or public nuisance in the context of the emission of objectionable noises and smells. Arguably, words which give rise to feelings of outrage are at least *prima facie* protected by a Constitutional right of free speech, unlike conduct. The lack of prosecution suggests that the type of injury described, injury to feelings, is a tenuous and anomalous basis on which to restrict freedom of speech. As against this it may be argued that the presence of the "blasphemous" offence in the Constitution points to the special nature of religious feelings to which freedom of speech must give way, or perhaps that speech which is insulting to religion does not come within the range of Constitutionally protected speech.

228 Related in another way to the above two arguments is the point that religious feelings deserve protection more so than other feelings, because of the special role they play in people's lives. One writer has argued against this as follows:

"There is a difference in protecting people in terms of race or gender because these are characteristics which are not chosen. What makes religion of special significance is that it is based on faith and commitment. I do not want to deny that religious belief plays a crucial role in forming individual and communal identity. However, there seems

4 [1979] 1 All ER 898
5 [1983] 5 EHRR 123 discussed in detail above at p86 et seq

to be a big gulf between recognising this fact and saying that religious groups should be protected by law.

"We should try to avoid what might be termed moral corporatism, the allocation of protected status to particular groups, when those groups are at bottom based upon commitment and consent".⁶

229. Finally it may be argued that religious insults have a tendency to disturb the public order by tending to cause breaches of the peace. This rationale in a modern context is questionable, although, in the light of the *Salman Rushdie* affair, this may depend on the religion in question.

230. Among the arguments against this offence are (i) that the offence constitutes an unreasonable restriction upon freedom of speech and conscience, (ii) that penalties in respect of blasphemous matter are not the proper function of the criminal law, (iii) that such sanctions are no longer necessary in a State which is no longer based on religion, (iv) that the publication of blasphemous matter is not a social problem of any significance, (v) the related argument that public money should only be spent on matters which threaten the wellbeing and safety of citizens, (vi) that religious feelings do not merit special treatment and, (vii) that blasphemy law, if used at all, is used primarily to punish obscene material.⁷ We have dealt with these arguments in summary form for reasons which will become apparent in the next section.

6 Why Religions Should Fight Their Own Fight *The Times*, 19 February 1989

7 Lous Blom Cooper, 1981 Essex Hall Lecture *Blasphemy: An Ancient Wrong or a Modern Right?*

"Blasphemy today has been revived as a crime but in a new guise. Fashioned originally to protect the established Church from subversion by heretics and unbelievers, it is now being devised more directly to protect the religious sensitivities of the waning numbers of Christian adherents. No one seriously contends that blasphemous libels strike at the stability of an ordered society, nor is there any real supposition that breaches of the peace are likely to erupt because of attacks on Christianity. It might be otherwise if it were Islam that were being assailed. The truth is that the emphasis of the protectors has shifted. It is an intolerance towards what is regarded as the obscenity of blasphemers. It is clear that the law of blasphemy no longer is concerned with attacks on, or criticism of, Christianity. It is being deployed to counter the indecent or obscene and certainly offensive treatment of subjects sacred to Christian believers, as such it is no longer a crime of disbelief or unbelief. It may be committed with the profoundest religious beliefs if the sentiments are expressed in an eccentric or shocking manner. The offence now, even in its latest form of strict liability, relates to outrageously indecent or irreverent remarks about God, holy personages or articles of Anglican faith. Modern blasphemy is no more than the old law of obscene libel in the context of religious subjects."

C. Abolition and Constitutional Considerations

231 We note that the English Law Commission stated that 'none of the arguments for retaining the law of blasphemy are sufficiently strong to support [the retention of the offence] and each of them is outweighed by other considerations which persuade us that a law of blasphemy is not a necessary part of a modern criminal code.' Accordingly it recommended the abolition of the offence.

We are of the view that there is no place for the offence of blasphemous libel in a society which respects freedom of speech. The strongest arguments in its favour are (i) that it causes injury to feelings, which is a rather tenuous basis on which to restrict speech, and (ii) that freedom to insult religion would threaten the stability of society by impairing the harmony between its groups, a matter which is open to question in the absence of prosecution. Indeed we consider the absence of prosecution to indicate that the publication of blasphemous matter is no longer a social problem.

We have also noted the provisions of the *Prohibition of Incitement to Hatred Act 1989*. Under this legislation, the publication of material designed to stir up "hatred" is made a criminal offence, and hatred is defined in section 1 as

"Hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation."

It may well be that any problems in this area which may exist are adequately covered by these provisions.

232 In Ireland, the abolition without replacement of the offence of blasphemy and blasphemous libel is impossible under the existing constitutional provision. A referendum which had as its sole object the removal without replacement of that provision would rightly be seen as a time-wasting and expensive exercise. Our provisional conclusion, however, is that in any more extensive revision that may be undertaken of provisions of the Constitution which, for one reason or another, are generally considered to be anachronistic or anomalous, the opportunity should be taken to delete the provision relating to blasphemy.

It must be recognised that it might be some time before any such revision took place and, in any event, our provisional recommendation may not be accepted. Accordingly, we must now consider what reforms should be introduced in the present law of blasphemous libel, assuming that it remains part of our law. It may, of course, be said with some force that, having regard

to the view we have expressed as to the undesirability of retaining the offence of blasphemy in modern conditions, providing for a new and reformed offence of blasphemy is simply encouraging the retention of a law which is anachronistic and anomalous. It will also emerge, moreover, from the ensuing discussion that there is considerable difficulty in reaching any acceptable definition of what constitutes a religion in the context of a modern law of blasphemy and that, from this point of view, any legislation we propose might be arguably in contravention of those provisions of the European Convention on Human Rights, as interpreted by the Court, which require a law restricting freedom of expression to be formulated with sufficient precision to enable a citizen to regulate his conduct.

D. A Re-Defined Offence

233 We have seen that the present law on the offence of blasphemous libel is not only defective in matters of detail, but is so uncertain as to its constituent elements that it offends against principles of criminal liability and may even be unconstitutional in its present form. Furthermore, since a defendant cannot ascertain what the offence consists of until trial, this may be in breach of the Convention following the views of the European Court in *Sunday Times v UK*⁸ and of the European Commission in *Lemon*⁹.

1 Title

234 As a preliminary point we may note that the common understanding of the word "libel" is matter which refers to an individual. In modern usage it does not bear the wider meaning of "speech", or even "pejorative speech". Blasphemous libel does not refer to an individual and the use of the word "libel" in this context is misleading. We would suggest that the word "libel" be treated as obsolete in this context and that the new offence be entitled "Publication of blasphemous matter".

Thus if our other recommendations are accepted, including the re-naming of the offence of defamatory libel as "defamation", the term "libel" will be obsolete. We believe this is desirable in order to emphasize the changes we have recommended in relation to forms of communication. There is a need to weaken the entrenched slander/libel distinction in the vocabulary and minds of lawyers as well as others.

2 Commencement of Prosecution

235 We believe that prosecution should only be commenced where the

8 (1979) 2 EHRR 245

9 *Supra* footnote 5

public interest so requires. This would involve consideration of whether the matter offended a substantial body of adherents to a religion. Prosecution should not be instituted because a particularly sensitive individual feels his religion has been insulted. We believe that the proper authority for deciding whether proceedings should be commenced is the Director of Public Prosecutions. We recommend that the DPP be given the sole authority to grant leave to prosecute, and that the provisions in the *Defamation Act 1961* pertaining to newspaper defendants should be repealed.

3 *The Actus Reus*

236 We are of the view that the strongest possible basis of the new offence is the protection of religious feelings and we will direct the subject-matter of the offence to matter which has this effect.

We begin by defining blasphemous matter as "matter the effect of which is likely to cause outrage to the adherents of a religion".

Discussion of many issues in society - such as abortion, contraception and other sensitive issues - may cause outrage and yet clearly should not come within the definition of blasphemous matter. The idea is to punish matter which attacks in an outrageous manner matters held sacred by the members of the religion in question. We would therefore limit our definition to "matter the effect of which is to cause outrage to the adherents of a religion by reason of its insulting content concerning matters held sacred by the religion in question".

237 This in turn raises another issue. We may quote from one commentator as follows:

"If the law were extended to other religions, what would constitute a sacred subject? Sacred subjects, such as the Eucharist in Christianity, are significant only to the religion concerned. Does this mean that Rastafarian dreadlocks and *ganja*, for example, would be regarded as sacred? On the other hand, the average man, on whose judgment we might have to rely, may not recognize the importance of a sacred subject within a religion."¹⁰

However, it is not correct to assume that the choice lies solely between allowing the religion in question to decide what is sacred or putting this question to the "ordinary man". We suggest that the definition we offered

10 *Why Religions Should Fight Their Own Fight* The Times 19 February 1990 p14

above be qualified to exclude activities which are criminal offences. Therefore if a particular sect advocated human sacrifice, it could not argue that insults directed at this activity constituted an attack on a matter held sacred by them. We would limit the definition of blasphemous matter to "matter the effect of which is likely to cause outrage to the adherents of a religion by reason of its insulting nature concerning a matter held sacred by that religion", coupled with a provision stating that "a matter held sacred by that religion shall not include any activity which amounts to a criminal offence" for the purposes of the definition.

238 We have considered the issue of "mixed" matter, that is matter which contributes to public discussion of an issue or is a serious literary achievement, but in which the speaker uses strong terms to expose what he perceives to be the flaws of a religion. The *Salman Rushdie* affair is a case in point. We wish to limit the offence to occasions where the speaker's predominant purpose is to cause offence and not to contribute to public discussion. We are undecided whether to limit the matter to matter the *sole* effect of which is to offend, or matter the *primary* effect of which is to offend. We tend to favour the former test as it is the stricter of the two. We therefore re-define blasphemous matter as "matter the sole effect of which is to cause outrage to the adherents of any religion by virtue of its insulting content concerning matters held sacred by that religion". We accept that this will exclude matter which has as its primary aim the contribution to public discussion but which incidentally insults or offends, but we feel the offence should be carefully confined. However, we welcome views on this matter.

239 We have also considered the fact that religious adherents range in sensitivity and that some would find certain matter very offensive and others not at all. We hope that the prosecuting authority would not allow a prosecution where the outraged feelings of a particularly sensitive individual were not representative of the body of adherents to that particular religion as a whole. However, we feel that this factor should be reflected in the definition and so we re-define blasphemous matter once again as "*matter the effect of which is likely to cause outrage to a substantial number of the adherents to a religion by reason of its insulting content concerning matters held sacred by that religion*".

240 We have expressed a number of times our view that the restriction of blasphemous matter to matter directed at the Christian religions to the exclusion of other religions is unacceptably discriminatory. *We recommend that 'religion' for the purposes of the definition include Christian and non-Christian religions*.

A difficult question is whether "religion" should be more specifically defined

Marginal cases such as Freemasonry, Rastafarianism, and Scientology would require consideration. The English Law Commission considered this problem and thought that some definition of the term "religion" was necessary. It felt, for example, that to leave the principles to be gleaned from existing areas of the law was undesirable, since a bequest to a Roman Catholic convent had been held uncharitable as not for the public benefit in *Gilmour v Coates*,¹¹ while two organisations associated with the Unification Church, commonly known as the Moonies, have been registered as charities for the advancement of religion in that jurisdiction.¹² There would also be the problem of religious groups whose leaders did not wish protection, such as Buddhists. This in itself does not seem to be a formidable obstacle since such groups are not obliged to avail themselves of the protection which is offered. The Commission rejected the possibility of a comprehensive list, such as applying the list of Places of Worship *Registration Act 1855*, since this "would again involve reliance upon criteria designed for another context which are inappropriate to a modern criminal offence of general application outside the confines of places of worship"¹³. It considered that, although definition was desirable, it was impossible. For this and a number of other reasons, the Commission recommended the abolition of the offence of blasphemous libel without replacement.

241 So long as the Constitutional prohibition on the publication of blasphemous matter remains in place, Ireland may not abolish the offence without replacement. We therefore cannot renounce the difficulties of definition, nor should we restrict the religions in question to Christian ones. Moreover the guarantee of religious equality in Article 44 means that the problem of defining "religion" is likely to arise in more contexts than this alone. We note that the Irish law on religious charities is different from that in England, and that section 45 (1) of the *Charities Act 1961* conclusively presumes any gift for the purpose of the advancement of religion to be a charitable gift. The effect of this is to ensure that gifts for the advancement of the Catholic religion are upheld as charitable gifts. The section appears to have been largely influenced by the decision of Gavan Duffy J in *Attorney General v Maguire*¹⁴. Accordingly the Irish law on religious charities is not as erratic as that in England.

11 [1949] AC 426. The House of Lords reviewed earlier authority on charitable gifts including the Irish cases of *O'Hanlon v Logue* [1906] 1 IR 24 and *Maguire v Attorney General* [1943] IR 238 and expressly approved *Cocks v Manners* (1871) LR 12 Eq 574 holding that a gift to a Roman Catholic priory was not charitable because it lacked the public benefit element necessary to render the purpose charitable at law.

12 The Holy Spirit Association for the Unification of World Christianity and the Sun Myung Moon Foundation.

13 The English Law Commission *Offences against Religion and Public Worship* Report No 145 at p27.

14 [1943] IR 238.

242 We favour the view that "religion" should be left to interpretation by the courts, and that if necessary, principles from the law on religious charities may provide guidance. Since the wide offence is not prosecuted at present, we do not expect that the rate of prosecution will increase when the offence is made narrow in other respects by virtue of our other recommendations. We reiterate, however, our concern as to whether any reform, short of abolition, is desirable or (in terms of the Convention) possible.

4 The Mens Rea

243 We recommend that the prosecution be required to show (a) that the defendant 'knew that the matter was likely to outrage, and (b) that the defendant "intended to outrage," the feelings of the adherents of any religion. We prefer this to the simple requirement of "intended to outrage" because a defendant might not have realised that the matter was offensive because he or she was ignorant of the teachings of a particular religion.

The requirement above would render it unnecessary to provide a defence for distributors or printers, or broadcasters of live programmes. For the purposes of clarity, we further recommend that it be clarified that the doctrine of vicarious liability, even in the restricted form set out in section 7 of the Defamation Act 1961, is abolished in relation to this crime.

5 Form of Communication

244 We see no reason to exclude broadcasts on television, radio or otherwise, since such publication can be as permanent as the written word. We therefore recommend that publication shall encompass communication by any means, including broadcast by wireless telegraphy.

It is to be expected that prosecutorial discretion will withhold prosecution where the form of communication is very transient.

Conclusion

245 Pending any amendments of the Constitution we provisionally recommend the abolition of the common law offence of blasphemous libel and its replacement by the following statutory offence.

Publication of Blasphemous Matter

(1) *It shall be an offence to publish matter the sole effect of which is likely to cause outrage to a substantial number of adherents to any religion by*

virtue of its insulting content concerning a matter or matters held sacred by that religion

- (a) with knowledge that the matter was likely to cause outrage, and*
- (b) with intent to cause outrage to such persons*

- (2) For the purposes of sub-section (1), a religion shall include Christian and non-Christian religions*
- (3) For the purposes of sub-section (1), matters held sacred shall not include activities the commission of which is a criminal offence*
- (4) For the purposes of sub-section (1), publication shall extend to communication by any means, including broadcasting by wireless telegraphy*
- (4) No person shall be deemed guilty of publishing blasphemous matter by reason only of the fact that his servant or agent published blasphemous matter or that he was negligent in not knowing that his servant or agent published such matter*

We further recommend that section 7(2) of the Censorship of Films Act 1923 be amended so that "blasphemous" matter is defined so as to bring it into conformity with the definition proposed in (1), (2) and (3)

CHAPTER 9: DISCUSSION AND REFORM OF OBSCENE LIBEL

A. Defects of the Present Law

246. The common law basis for the offence of obscene libel appears to be a desire to restrict the description or showing of explicitly sexual activity because it offends against morality. Some people would continue to take the view that this is a legitimate function. However, today there are more diverse views as to whether this is a legitimate function of the law, let alone whether the existing details of the offence achieve this proportionately or satisfactorily. For reasons which will be stated below, we do not propose to enter into a discussion of the merits of the various viewpoints. However, criticism of the present law will vary widely according to the viewpoint of the critic. Furthermore, some viewpoints might criticise the existing law but suggest a basis on which to enact a new offence. We propose to suggest summarily a number of rationales for the offence, either as it presently exists or in amended form. We will then suggest some criticisms of the present law. However we shall see that other factors will render it unnecessary to enter the issues presented in detail.

The suggested rationales of the offence are:¹

247. 1. The law on behalf of society wishes to prevent the minds of its members from being corrupted or depraved. It is morally wrong for people to have corrupt and depraved minds. A corrupt and depraved mind is assessed according to a given morality attributed to society.²

1 In all these cases the activity depicted in the publication is deemed to be depicted in a favourable or indifferent light. It is not condemned by the publication either expressly or impliedly.

2 e.g. "It is wrong to watch violent films simpliciter".

2 The law on behalf of society wishes to prevent the corruption and depravity of minds in society because it has an *immediate tendency* to encourage the commission of harmful acts, harmful in this context referring to an act which is considered harmful *from a moral viewpoint*

3 The law on behalf of society wishes to prevent the corruption and depravity of minds in society because it has an *immediate tendency* to encourage the commission of harmful acts, a harmful act being in this context *an act which is a criminal offence*

4 The law on behalf of society wishes to prevent the corruption and depravity of minds in society because in the *long term* it may create an atmosphere in which harmful activity is encouraged or tolerated, harmful in this context being harmful from a *moral point of view*

5 The law on behalf of society wishes to prevent the corruption and depravity of minds in society because *in the long term* it may create an atmosphere in which harmful activity is encouraged, a harmful act in this context being *an act which is a criminal offence*

Numbers 1, 2, and 4 are arguably open to objection on the ground that the law is being asked to accept a given morality on a specific issue, when in fact society reflects a number of different moralities and it is the freedom of each person to choose his or her own, within limits which are not transgressed in this context

We suggest that numbers 3 and 5 are the most acceptable suggestions for the basis of the offence. We note that number 3 most closely resembles the view taken by the Williams Committee in England, a committee which undertook a substantial review of the law of obscenity in that jurisdiction. That body found that the harm suggested was not supported by proof, and recommended a redefinition of the offence to cover "offensive" material which would not be prohibited but which would have to be on restricted access. Two exceptions were envisaged in the case of child pornography and violent pornography, because such matter would tend to the commission of harmful and illegal acts in the course of preparing the material (as opposed to its effects after viewing it). We are of the view however that no 5 is perhaps the strongest argument for suppression of obscene matter. If so, this would argue for redefinition of the offence.

248 Given that the basis of the offence is uncertain and open to opinion it is difficult to formulate criticisms of the existing law. However we tentatively suggest the following

- (a) The "deprave and corrupt" test is arguably objectionable in that it allows the court to impose a particular moral view upon

publications and therefore upon the range of matter which a citizen is entitled to read or watch.

- (b) The "deprave and corrupt" test is impractical because the causal element which it assumes is difficult if not impossible for a jury or judge to apply.
- (c) The "deprave and corrupt" test is objectionable because it is phrased in paternalistic terms and assumes that some members of society may choose what is fit viewing or reading for other more "vulnerable" members of society.
- (d) The "deprave and corrupt" test is too wide because it allows suppression of matter which the offence was never designed to capture, such as advocacy of drug-taking, and may theoretically be extended to matter which is not in any sense "obscene".
- (e) The "deprave and corrupt" test is objectionable because it departs fundamentally from the plain meaning of "obscenity".
- (f) The common law of obscene libel does not allow for the literary, academic, medical or other value of the context.
- (g) The absence of *mens rea* means that a defendant may be found guilty even where he had no knowledge that the obscene matter was contained in matter printed or distributed by him, unless under section 7 of the Defamation Act he can show that such lack of knowledge was not due to lack of negligence on his part.
- (h) The provisions of the *Defamation Act 1961* are discriminatory with regard to commencement of prosecution, summary trial of the case, and dismissal of the case.

B. Examination of Related Legislation

249. The primary means of suppressing the publication of obscene matter in Ireland is through censorship. However, there are a number of legislative provisions on obscenity which additionally punish the publication of obscene matter after the event. These are very similar in nature to the offence of obscene libel. It may be noted that "obscene" matter is usually classified alongside "indecent" matter. In some cases, the common law test of obscenity is used as a limb of the test of indecency.

The Censorship of Publications Act 1929

250. Section 2 defines "indecent" as "suggestive of, or inciting to sexual immorality or unnatural vice and likely in any other similar way to corrupt or

deprave "

Section 14(1) provides that it shall not be lawful to print or publish or cause or procure to be printed or published in relation to any judicial proceedings, (a) any indecent matter the publication of which would be calculated to injure public morals, or (b) any indecent medical, surgical, or physiological details the publication of which would be calculated to injure public morals

Section 15 sets out the penalties for this offence, and the offence in 14(2), (the publication of certain prohibited matter in relation to judicial proceedings concerning divorce, nullity, separation or restitution of conjugal rights)³

Under section 15(2) prosecutions in respect of the above offences must be brought at the suit of and in the name of the Director of Public Prosecutions

Section 16(1) as amended by section 12(1) of the *Health (Family Planning) Act 1979*, provides that it shall not be lawful for any person, otherwise than in accordance with a permit granted under the section, (a) to print, publish, or cause or procure to be printed or published, (b) sell, expose, offer, or keep for sale, (c) distribute, offer, or keep for distribution, any book or publication which advocates or might reasonably be supposed to advocate the procurement of abortion or miscarriage or any method, treatment or appliance to be used for the purpose of such procurement

Section 17(1) affects a provision in the *Indecent Advertisements Act 1889*, and will be returned to shortly

Section 18(1) prohibits the sale and importation for sale of "any indecent pictures" and sets out the penalties for the offence

The provisions of the 1929 Act do not apply to books *bona fide* directed at the medical or legal profession, by virtue of section 2 of the Act

3 These two sections appear to have been modelled on certain provisions of the *Judicial Proceedings (Regulation of Reports) Act* passed in England in 1926. The latter Act was apparently passed in response to the reproduction of proceedings in divorce cases, which Sir John Simon described in the House of Commons as "columns and columns of carefully and elaborately extracted evidence from chambermaids and ladies maids and all the wretched miserable business of the Divorce Court." See H.C. Deb April 16 1926. It shall be noted that the action for restitution of conjugal rights was abolished in 1988.

The Censorship of Publications Act 1946

251. The 1929 Act had provided for the establishment of a censorship of books and periodicals. The relevant provisions were repealed and replaced by the 1946 Act which also provided for an Appeal Board.

Section 1 again defines "indecent" as "suggestive of, or inciting to, sexual immorality or unnatural vice or likely in any other similar way to corrupt or deprave". Like the 1929 Act, the word "obscene" is not defined.

Section 7, as amended by section 12(3) of the *Health (Family Planning) Act 1979*, provides that the Censorship of Publications Board may prohibit a book from sale or distribution in the State if it is of the opinion that (a) it is indecent or obscene, or (b) that it advocates the procurement of abortion or miscarriage, or the use of any method, treatment, or appliance for the purpose of such procurement.

Section 9 empowers the Board to prohibit a periodical if it is found to be (a) usually or frequently indecent or obscene, (b) has advocated the procurement of abortion or miscarriage, (c) has devoted an unduly large proportion of space to the publication of matter relating to crime.

Unlike the 1929 Act, in the 1946 Act there is no exempting provision for books or periodicals directed at the medical or legal profession.

The Indecent Advertisements Act 1889

252. Section 3 makes it a summary offence to affix anywhere visible to the public "any picture or printed or written matter which is of an indecent or obscene nature". Matter of an "indecent or obscene nature" includes advertisements which refer to or may reasonably be supposed to refer to the following: (i) any disease affecting the generative organs of either sex, (ii) any complaint or infirmity arising from or relating to sexual intercourse, (iii) the prevention or removal of irregularities in menstruation, (iv) drugs, medicines, appliances, treatments, or methods for procuring abortion or miscarriage. This definition is supplied by section 17(1) of the *Censorship of Publications Act 1929*, as amended by the *Health (Family Planning) Act 1979*.

It may therefore be concluded in relation to written publications that the common law offence of obscene libel adds nothing to the legislation and indeed is a good deal narrower. Section 7 of the 1946 Act covers essentially the same ground as the common law offence of obscene libel by prohibiting the publication in written form of matter which is indecent or obscene, indecent being defined to include the common law test of obscenity, while

other provisions of the Acts capture additional material

The Customs Consolidation Act 1876

253 The table of items prohibited from importation is set out in Section 42 of this Act and includes "indecent or obscene prints, paintings photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles "

The word "indecent" in the above provision is construed in accordance with its definition in the *1929 Censorship of Publications Act*, by virtue of section 18(2) of the 1929 Act

254 In addition to the above provisions, which, as we have mentioned, are very similar in nature to the offence of obscene libel, there are a number of provisions for suppression of obscene or indecent matter prior to publication. The latest addition to this scheme of censorship is the *Video Recordings Act 1989*, section 3(1) of which provides that the Official Censor shall grant the applicant in relation to a video work a certificate declaring the work to be fit for viewing unless he is of opinion it is unfit because-

- (a) the viewing of it
 - (iii) would tend, by reason of the inclusion in it of obscene or indecent matter, to deprave or corrupt persons who might view it

255 We may also note the provisions in the *Censorship of Films Acts*, which control the matter in respect of which the Official Censor of Films and the Censorship of Films Appeals Board may issue a certificate. The crucial provision for our purposes is section 7(2) of the 1923 Act, which prohibits the Official Censor from certifying that a film is fit for exhibition if he is of the opinion that the picture, or a part of it, is unfit for general exhibition to the public "by reason of its being indecent, obscene or blasphemous or because the exhibition thereof in public would tend to inculcate principles contrary to public morality or would be otherwise subversive of public policy "

At common law libel does not include the publication of matter in oral form and section 15 of the *Defamation Act 1961* which extends the definition of libel to include broadcasts does not apply to criminal proceedings. Here we have the censorship of films on the grounds of obscenity. The common law offence does not deal with such publication at all

256 It may be concluded that supplemental to the Irish scheme of

censorship of obscene or indecent matter are a number of provisions designed to punish the publication of obscene or indecent matter after publication. They are as wide, and wider, in ambit than the common law offence of obscene libel. Furthermore censorship provisions not only deal with written publication of matter but address the broadcast of such matter by wireless telegraphy. In this sense they fill a gap left by the common law, although the mechanism of censorship is essentially different from an *ex post facto* punishment. We may conclude that abolition of the offence of obscene libel would have no impact on the theory or the practice relating to matter which may be seized or punished by virtue of its obscenity.

Conclusions

257. We believe that the decision whether to retain the offence of obscene libel must be influenced by two main considerations. The first is that the offence has not been prosecuted on many occasions in this century, and the recent *Fleming* case is not the type of case envisaged by the offence. Absence of prosecution may or may not raise a presumption that a particular offence is valueless. This was not for example the case in respect of blasphemous matter, where the offence was Constitutionally mandated, nor was it necessarily the case in respect of defamatory libel, since the Constitution protects the right to a good name. Furthermore, we observed in relation to sedition that it is not the type of offence in respect of which one would expect prosecution in a relatively peaceful society. In the present context, however, there is no Constitutional consideration to rebut the presumption that the offence is well nigh obsolete and which would point strongly to abolition.

The second factor we consider to be important is the fact that there are a substantial number of legislative provisions for the regulation of obscene matter. Since these cover the same area as obscene libel, it would appear to render the offence superfluous.

We note that our conclusion that the offence was covered by legislation would have not been correct if there had been merely provisions on censorship in operation. Clearly the offence of obscene libel differs from censorship in one important way. Censorship involves the suppression of matter by an official before it reaches the public whereas the common law offence punishes the matter after it has reached the public. The prosecuting authorities may well consider public reaction to it, and the final determination is achieved in a court with a jury. If the restriction on free speech is legitimate, clearly the *ex post facto* method is the preferable method of imposing the restriction. However, we are not faced with a choice between the common law offence

4 See Irish Times, 23 November 1989

and the scheme of censorship. The legislation we have looked at contains provisions for punishing the defendant *after* publication, as does the common law offence. Our narrow decision is simply whether to retain the offence of obscene libel. In view of the unsatisfactory state of the common law and in view of the specific legislative provisions which punish publication of the same matter, *we provisionally recommend the abolition of the common law offence of obscene libel*.

258 However, we would welcome the examination of the legislative provisions considered as many of these are out-dated. Furthermore the concept of obscene matter and the reasons for restricting its circulation should be re-addressed. We note that the Williams Committee in England undertook a substantial review of this area of the law, and the United States Supreme Court has had to review the whole issue in the light of its Constitutional guarantee of free speech. It may well be that rights of speech and access to information are unconstitutionally encroached upon in the legislation we have mentioned. Furthermore, the scheme of censorship may be incompatible with our guarantee of free speech. Prior restraints on speech have been outlawed in the United States⁵. We therefore suggest that an examination of (a) legislation on obscene and indecent matter and (b) the various schemes of censorship is necessary if we are to attach due weight to the Irish Constitutional guarantee of free speech.

⁵ See *Near v Minnesota* 283 US 697 (1931) holding that although prior restraint is not absolutely prohibited it requires exigent circumstances for justification.

SUMMARY OF RECOMMENDATIONS

Defamatory Libel

1. We recommend that the common law offence of defamatory libel be retained but in a more confined form.
2. We recommend that the offence should be triable on indictment or summarily at the option of the Director of Public Prosecutions.
3. We recommend that section 8 of the Defamation Act 1961, requiring that the leave of a High Court judge be obtained to prosecutions for defamation against newspapers, be repealed and replaced by a provision requiring the consent of the DPP to be obtained in all prosecutions for defamation.
4. We recommend that sections 9 and 10 of the *Defamation Act 1961*, enabling the District Court to dismiss or dispose of summarily prosecutions for defamation against newspaper, should be repealed.
5. We recommend that the prosecution be required to prove:
 - (a) that the matter was defamatory;
 - (b) that the matter was false;
 - (c) that the defendant knew the matter was defamatory;
 - (d) that the defendant knew the matter was false;
 - (e) that the matter was published to at least one person other than the victim.

- 6 We recommend that 'defamatory' be defined in accordance with the definition in our Consultation Paper on the Civil Law of Defamation
- 7 We recommend that publication for the purposes of recommendation 5(e) be defined as prosecution by any means, including but in no way limited to, broadcasting by wireless telegraphy
- 8 Consistently with the immediately preceding recommendation we recommend that the offence be re-named "defamation"
- 9 We recommend that the doctrine of vicarious liability in its application to this offence, whether in full form as at common law or in limited form by virtue of the provisions of section 7 of the *Defamation Act 1961*, be abolished
- 10 We recommend that, in place of the existing penalties, where the offence is disposed of summarily, the accused should be liable to imprisonment for a term not exceeding 12 months or a fine not exceeding £2,000 or both and, where it is disposed of on indictment, to imprisonment for a term not exceeding 5 years or a fine not exceeding £10,000 or both
- 11 We recommend that victims of the crime of defamation include a group, provided the individual members thereof are sufficiently identified We invite views as to whether it should include deceased persons and, if so, whether there should be a provision barring a prosecution within a specified time after the death of the alleged victim
- 12 We recommend a provision stating that defamation of a company shall not be a crime
- 12 We recommend a provision stating that in any prosecution for defamation in which the previous conviction of a person is at issue, proof that such person was convicted of the offence shall be (a) admissible, and (b) conclusive evidence that such person committed the offence

Seditious Libel

- 13 We recommend the abolition without replacement of the common law offence of seditious libel

Obscene Libel

- 14 We recommend the abolition without replacement of the common law offence of obscene libel

Blasphemous Libel

- 15 We recommend that in any revision which may be undertaken by referendum of the Constitution, so much of Article 40 6 1 which renders the publication or utterance of blasphemous matter an offence should be deleted

- 16 In the event of the foregoing recommendation not being accepted, we recommend the abolition of the common law offence of blasphemous libel and its replacement by a new offence entitled "publication of blasphemous matter"

- 17 We recommend that the blasphemous matter be defined as matter the sole effect of which is likely to cause outrage to a substantial number of the adherents of any religion by virtue of its insulting content concerning matters held sacred by that religion

However we invite views as to whether the word "sole" should be replaced by the term "primary"

- 18 We recommend that religion be defined to include Christian and non-Christian religions

- 19 We recommend that the phrase "matters held sacred" be defined to exclude acts the commission of which is a criminal offence

- 20 We recommend that publication for the purposes of the offence be defined as publication by any means, including but not limited to broadcasting by wireless telegraphy

- 21 We recommend that the prosecution be required to show (a) that the defendant knew the matter was likely to outrage the adherents of any religion, and (b) that his sole intent was to outrage the adherents of any religion. Again we suggest the word "primary" in place of the word "sole"

- 22 We recommend that the enactment of a provision stating that the

doctrine of vicarious liability shall not apply in any form to this offence

- 23 We recommend that section 7(2) of the *Censorship of Films Act* be amended so as to define blasphemy in similar terms to the above offence
- 24 Following upon all of the foregoing recommendations, we recommend the repeal of Part II of the *Defamation Act 1961*

Miscellaneous

- 25 Finally we recommend that the following matters not within our terms of reference should in the future be examined
 - (a) The scheme of censorship and the terms thereof maintained in respect of written publications, films and other methods of disseminating information,
 - (b) Other provisions of the *Censorship Acts* which make it an offence to publish certain matter,
 - (c) *The Offences against the State Act 1939*

Many of these provisions are outdated and may be inconsistent with modern views on what is required in the public interest. Others may be constitutionally suspect. Some are confusing and ambiguous.