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AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER
ON
THE CIVIL LAW OF DEFAMATION

March 1991

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<i>CONTENTS</i>	<i>PAGES</i>
INTRODUCTION	1- 2
PART I: THE PRESENT LAW	3-153
CHAPTER 1: GENERAL	3- 42
Purpose of the Law of Defamation	3
The Distinction between Libel and Slander	4
The Prima Facie Case	6
Defamatory Effect	7
Burden of Proof and Defamatory Effect	12
The Meaning of Words:	12
(1) The innuendo	12
(2) Pleading Innuendos	14
Functions of Judge and Jury	19
Identification	22
Group Defamation	25
Publication	28
Innocent Dissemination and Distributors	32
Multiple Publication	36
Slander and Proof of Damage	36
CHAPTER 2: DEFENCES	43-107
Defences Generally	43
Justification	44
Partial Justification	48
Justification and Previous Convictions	52
Repetition and Justification	54
Justification and Aggravated Damages	54
The Defence of Fair Comment	56
Proof of the Supporting Facts	60
Fairness of Comment	67
Matters of Public Interest	71
Malice and Fair Comment	73
Absolute Privilege	75
The President	75
Parliamentary Proceedings	75
Administration of Justice	77
Quasi-Judicial Bodies	83

<i>CONTENTS</i>	<i>PAGES</i>
Communications between Solicitor and Client	87
The Executive	87
Qualified Privilege	88
The Media	91
Fair and Accurate Reports of Judicial Proceedings	93
Statutory Provisions	94
Malice and Qualified Privilege	98
Relevance	102
Section 21 and Unintentional Defamation	104
CHAPTER 3: REMEDIES	108-134
Damages	108
Compensatory Damages	108
Aggravation of Damages	116
Mitigation of Damages	117
Punitive Damages	126
Injunctions	129
Interlocutory Injunctions	129
Ex Parte Injunctions and <i>in camera</i> proceedings	132
Perpetual Injunctions	133
Declarations	134
CHAPTER 4: MISCELLANEOUS	135-153
Payment Into Court	135
Limitation Periods	137
Malice and Joint Publishers - The Infectious	
Malice Rule	137
Corporate Bodies	143
Defamation of the Dead	148
Survival of the Defamation Action	148
Apology	149
Fault Issues in Defamation Law	149

<i>CONTENTS</i>	<i>PAGES</i>
PART 2 - THE LAW IN THE UNITED STATES	154-193
CHAPTER 5: UNITED STATES CASE LAW	155-174
(a) Birth of the Public Official Doctrine	155
(b) Transition from Public Official to Public Figure	159
(c) The Public Interest Experiment	160
(d) Public Figures Restored: New Law for Private Figures	161
(e) The question of punitive damages	162
(f) The Category of Public Figures Narrows	163
(g) The Content of the Speech Re-enters the Equation	164
(h) The Final Step: Reversal of the presumption of falsity	165
(i) Reservations as to the modern case law	168
(j) The Status of Opinions in United States Law	170
CHAPTER 6: COMPARISON BETWEEN UNITED STATES AND IRISH DEFAMATION LAW	174-175
CHAPTER 7: THE COMMON LAW AND <i>NEW YORK TIMES V SULLIVAN</i>	176-178
CHAPTER 8: AN ANALYSIS OF THE MERITS OF UNITED STATES DEFAMATION LAW	179-193
PART 3 - PROPOSALS FOR REFORM	194-439
Introduction	194
CHAPTER 9: PRELIMINARY	196-214
A. The Distinction between Libel and Slander	196
B. Definition of Defamation	199
C. Meaning of Words	207
D. Payment Into Court	211

<i>CONTENTS</i>	<i>PAGES</i>
E. Apology	213
F. Pleading the Words "Falsely and Maliciously"	215
 <i>II - Privileged Statements</i>	 216-253
A. Absolute Privilege	216
(a) Utterances made in Parliamentary Committees	219
(b) Statements made by One State Official to Another	220
(c) Statements made in the Course of Judicial Proceedings	220
(i) By Judges	221
(ii) By Parties, Witnesses, Advocates	222
(d) Communications between Solicitor and Client	223
B. Qualified Privilege	224-253
1. Malice	224
(i) Proposals to clarify the common law element of Malice	225
(ii) Qualified Privilege and Joint Malice	227
(iii) Abolition of the Malice Element in the defence of qualified privilege	228
2. Common Law Categories of Qualified Privilege	230
3. Creating a Defence of Fair Report	241
4. Statutory Qualified Privilege	242
5. Fair and Accurate Reports of Judicial Proceedings	250
Recapitulation on Qualified Privilege	252
 <i>III - Statements of Opinion</i>	 254-292
Introduction	254

	<i>CONTENTS</i>	<i>PAGES</i>
A.	Fair Comment	258
1.	Title	259
2.	Truth of Supporting Facts	259
3.	<i>Mangena v Wright</i>	265
4.	Malice	266
	(i) Reform of the Malice Element	267
	(a) Where the Defendant is the Author	267
	(b) Malice where the publisher is not the Author	270
	(ii) Abolition of the Malice Element	272
5.	Fair Comment and Joint Malice	274
6.	Fairness of Comment	275
7.	Base and Dishonourable Motives	277
8.	Rolled Up Plea	277
9.	Aggravated Damages	278
10.	Abolition of Action for Opinions	278
11.	Matters of Public Interest	280
B.	Distinction between Fact and Comment	281
C.	The European Court of Human Rights and the <i>Lingens Case</i>	285
	 <i>IV - Factual Statements</i>	 293-345
	Introduction	293
A.	Justification	294
1.	Title	294
2.	Substance or Sting	294
3.	Section 22 and Partial Justification	295
4.	Previous Convictions or Acquittals and Justification	298
5.	Aggravated Damages	300
6.	Reasonable Belief in Truth	301
B.	Wider Defences for factual statements	304
1.	The United States	304
2.	The Faulks Committee	306
3.	The New Zealand Committee	309
4.	The National Newspapers of Ireland	313

<i>CONTENTS</i>	<i>PAGES</i>
C. Defence of Reasonable Care	316-320
D. Presumption of Falsity	321
E. Section 21 and Unintentional Defamation	327
F. The Case for Protection of Sources	336
The Constitutional Problem	337
G. Statements of fact in the Context of Satire and Fiction	344
 <i>V - Remedies</i>	 346-364
A. Damages	364
1. Reforms of the present role of the jury in defamation cases	350
2. Statutory Guidance as to Factors which should affect damages	352
3. Abolition of Punitive Damages	359
4. Role of the Appellate Court	363
B. Injunctions	364
C. Proceedings for Declaratory Judgment	365
D. Correction Orders	374
E. Declaratory Judgment	376
F. Right of Reply	376
G. Publication of Judgment	383
 <i>VI - Juries in Actions for Defamation</i>	 384-391

<i>CONTENTS</i>	<i>PAGES</i>
<i>VII - Identity of Parties</i>	392-422
A. Public Figure Plaintiffs	392
B. Group Plaintiffs	398
C. Defamation of the Dead	401
D. The Libel-Proof Plaintiff Doctrine	406
E. Corporate Bodies	411
F. Media Defendants	414
G. Distributors and Printers	417
<i>VIII - Miscellaneous</i>	423-439
A. Limitation Periods	423
B. Striking Out and Dismissal for Want of Prosecution	426
C. Survival of Actions	428
D. Multiple Publication	431
E. Civil Legal Aid	436
F. Privacy Law and Defamation Law	438
<i>Summary of Provisional Recommendations</i>	440-453
Appendix A - Some Observations on the Right to Privacy in Irish Law	454
Appendix B - A Comment on Rule 18 - Rules of the National Union of Journalists	460
List of Commission Publications	464-467

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. In turn, criminal defamation takes four forms: criminal libel, obscene libel, blasphemous libel and seditious libel.

The Commission decided to undertake firstly an examination of civil defamation, the most extensive of these categories. This Consultation Paper contains the results of that examination together with the provisional proposals of the Commission for reforms in the law. We will, in the near future, be publishing further Consultation Papers on the other subjects comprised in the Attorney General's request.

Before embarking on their study of the subject, the Commission published an advertisement in the national press inviting submissions from interested persons as to aspects of these branches of the law which they considered in need of change. We have received a number of written submissions in response to this request from members of the public, Radio Telefis Eireann, the National Newspapers of Ireland and The Irish Publishers' Association. Members of the Commission also met representatives of these bodies and visited newspaper offices in Dublin.

We have been conscious throughout our examination of this area of the law that one of its principal functions is to preserve a balance between two competing interests, that of individuals in their good name and that of the

media in freedom of expression. We have in the result been concerned to familiarise ourselves, on as extensive a scale as possible, with the views of all those who are concerned with protecting these different interests.

The layout of the Consultation Paper is in general the same as in our previous papers and reports. We begin by setting out the present law and identifying the areas in which it is most clearly in need of reform. We consider models for change to be found in other jurisdictions or which have been put forward by commentators on the deficiencies of the present law, including the submissions made to the Commission in response to our advertisement. We have, however, departed from precedent in one way. A separate section is devoted to examining developments in the law during the past three decades in the United States of America. We considered that these developments merited detailed examination, since they raise fundamental issues as to the objectives which a defamation law should seek to attain in a modern democracy. We conclude by presenting our tentative recommendations for reform.

We emphasise again 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 also hope to hold a Seminar which will enable a full discussion of the Consultation Paper to take place, details of which will be announced shortly.

We would be grateful if submissions on the Consultation Paper were sent to us at the Commission's Offices not later than May 22nd 1991.

PART I: THE PRESENT LAW

CHAPTER 1: GENERAL

Purpose of the Law of Defamation

1. The law of tort seeks to redress two types of injury, namely, injury to the person and injury to property. Injuries to the person may be physical or non-physical. The core of the defamation action is one type of non-physical injury to the person, that is, injury to reputation. It can take two forms: libel, which is in written or permanent form and slander, which is in verbal form.

2. Defamation law attempts to serve and strike a balance between two competing interests, protection of reputation and freedom of speech. There are provisions in the Constitution of Ireland which affect both these interests and to which reference must be made at the outset.

Article 40.3 says:

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

Article 40.6.1° says:

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

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

- ii The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.
- iii The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law."

It will be noted that the Irish constitutional guarantee of free speech is a qualified one. This is in line with most theories of freedom of speech which recognise that freedom of expression requires some regulation.

"[It] is a cardinal principle that some restraint upon liberty of action is necessarily implicit in the very concept of 'freedom'. Otherwise, you have the law of the jungle, under which no one is really free, except the largest predators. A common lawyer believes that the preservation of freedom of speech requires the recognition of clear rules which impose reasonable regulation upon what one person may say about another; limitations designed to accommodate, in the context of a civilised society, one person's activities and interests to the competing activities and interests of another."¹

3. The action in defamation serves to prevent or provide redress for injury to a person's reputation caused by statements of defamatory effect.

The classic exposition of the basis of defamation law is provided by Cave J in *Scott v Sampson*² - "Speaking generally the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action".

The Distinction between Libel and Slander

4. The law of defamation divides defamatory statements into those which constitute *libel* and those which constitute *slander*.³

5. The distinction between libel and slander has been said to be between an

¹ Hughes, *Defaming Public Figures*, 59 Australian LJ 482, 483.

² (1882) 8 QBD 491, 503.

³ The historical origins of this distinction are traced in *Jones v Jones* [1916] 2 AC 481, 489-90; McMahon & Binchy, *Irish Law of Torts*, 332-3; Winfield & Jolowicz on Tort, 12 ed, 301-2.

oral and a written statement, the rationale being thought to be that a written statement reveals more design or malice. The more modern view is that the distinction is based on the permanency or transiency of the statement.

6. There are two main differences between libel and slander. First, libel is always actionable *per se*, i.e. without proof of special damage. Slander may or may not require proof of special damage, depending on the nature of the words spoken. Secondly, libel is a crime as well as a tort. Slander is not in itself a crime, although certain spoken words may breach the criminal law for being seditious, treasonable, blasphemous or tending to breach the peace.

More modern descriptions of libel include the word "permanent";

"Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel".⁴

"In my view, this action (arising out of a film), as I have said, was properly framed in libel. There can be no doubt that, so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye and is the proper subject of an action for libel if defamatory ... I regard the spoken words here necessarily accompanying the exhibition of the picture as being part of the circumstances and surroundings in which the picture is exhibited and, therefore, properly part of the libel ..."⁵

"The position in Ireland nowadays seems to be that if the defamatory statement is made in permanent form it is libel, but if it is made in an impermanent or transient form it is slander".⁶

Further support for this basis of distinction is found in the *Defamation Act 1961*, section 15 of which provides that broadcasting by means of wireless telegraphy shall be treated as publication in permanent form. Although section 15 does not state that such a broadcast is a libel, this is presumably the effect of deeming it to be a publication in permanent form.⁷

However as R.F.V. Heuston has pointed out in relation to the equivalent English provision,

"The draftsmen therefore clearly assumed that the true difference between libel and slander was not that slander was addressed to the ear and libel to the eye, but rather that libel was defamation crystallized

4 *Per Lopes LJ, Monson v Tussauds Ltd* [1894] 1 QB 671.

5 *Per Slessor LJ, Youssouf v MGM* (1933) 50 TLR 581, 587.

6 McMahon & Binchy, *Irish Law of Torts*, p 331.

7 This view is supported by the Explanatory Memorandum to the Defamation Act 1961.

into some permanent form while slander is conveyed by some transient mode of expression. Now this assumption is no doubt correct, but there might well be difficulties if any court should subsequently hold that publication in permanent form is not the criterion of the distinction between libel and slander."⁸

7. Most libels are both permanent and visible. Notably, gestures were slander at common law, and the 1961 Act includes gestures within its definition of "words" (section 14.2). However problems arose where there was a combination of oral delivery and permanency, compounded by modern electronic communication methods. These problems are now resolved by s15 of the *Defamation Act 1961*.

The reading aloud from a script was held to be the publication of a libel in *Robinson v Chambers*.⁹ In England, the *Theatres Act 1968* treats the publication of words in a play as publication in permanent form, "play" being widely defined, although it excludes domestic performances, rehearsals, and performances to enable records, film, or broadcasts to be made. At common law and apart from statute, it would appear that while a broadcast from a written script is libel, an extemporary broadcast is slander.¹⁰ It was held in *Youssouf v MGM*¹¹ that the communication of defamatory matter by means of a film constituted a libel rather than a slander.

Such questions in relation to the electronic media are now settled by section 15 of the *Defamation Act 1961* which provides that:

"for the purposes of the law of libel and slander, the broadcasting of words by means of wireless telegraphy shall be treated as publication in permanent form".

The *Prima Facie* Case

8. The following conditions must be demonstrated by the plaintiff to have been fulfilled in order to establish a *prima facie* case of defamation:

- (a) that the words complained of were published by the defendant or in circumstances in which the defendant is responsible for the publication;
- (b) that the words complained of were defamatory of the plaintiff.

In an action for libel, the plaintiff need not prove damage since damage is presumed. In an action for slander the plaintiff must in addition prove damage, except in four specific cases.¹²

8 "Recent Developments in the Law of Defamation", RFV Heuston, (1966) 1R Jur 247 at 249.

9 [1946] NI (No 2) 148.

10 *Gatley on Libel and Slander*, 8 Ed, p 146.

11 [1933] 50 TLR 581.

12 See below paras (39-52).

Defamatory Effect

9. The definition of defamatory effect is provided by a compilation of judicial statements. A defamatory effect is said to be produced where a statement tends to lower the person in the eyes of society,¹³ or in the estimation of "right-thinking members of society generally"¹⁴ or in the eyes of the "average right-thinking man"¹⁵ or tends to hold that person up to ridicule, hatred or contempt,¹⁶ or causes the person to be shunned or avoided.¹⁷

10. The standard of a reasonable man is used to measure whether a statement is considered defamatory or not.

The issue of defamatory effect is left to the jury as representing the reasonable man. The ordinary man is presumed to be somewhere between the two extremes of unusually suspicious and unusually naive.

"In defamation, as in perhaps no other form of civil proceedings, the position of the jury is so uniquely important that, while it is for the judge to determine whether the words complained of are capable of defamatory meaning, the judge should not withhold the matter from the jury unless he is satisfied that it would be wholly unreasonable to attribute a libellous meaning to the words complained of".¹⁸

As it is for the jury to determine whether the words were defamatory or not, the plaintiff or his witnesses may not be questioned as to the effect the words produced on them in the determination of this issue. RTE point out, however, that evidence of this kind can indirectly influence the 'libel or no libel' question in cases where actual damage is claimed, because questioning of this type will be admitted to establish actual damage. RTE claim that juries cannot be adequately warned that such evidence may not be used on the 'libel or no libel' question, and that evidence as to the effect of the statements on friends and family will heavily influence the jury towards the view that it is defamatory.¹⁹

The standard of the reasonable man may be seen as an average or aggregate view of society's opinion. The adoption of an objective standard encounters problems when the statement challenged touches on matter in relation to which there are sharply divided community viewpoints, whether political, social, religious or moral. The statement may be defamatory in the eyes of some sections of society and non-defamatory in the eyes of other sections of society. As McDonald states,

13 *Mawe v Piggott* (1869) IR 4 CL 54, 59.

14 *Sim v Stretch* [1936] 2 All ER 1237, per Lord Atkin at 1240.

15 *Quigley v Creation Ltd* [1971] IR 269, per Walsh J at 272.

16 *Parnier v Coupland* (1840) 6 M & W 105, *Mawe v Piggott*, supra, footnote 13.

17 *Youssoupoff v MGM* (1934) 50 TLR 581.

18 Per Walsh J, *Quigley v Creation Ltd* [1971] IR 269, at 272.

19 Part of an RTE submission to this Commission.

"in the many judicial references to the right-thinking person there has been an unspoken assumption by the courts that there is such a thing as a uniform set of values or priority in society."²⁰

One such issue encountered by the courts is relatively straightforward. This is where the statement challenged alleges that the plaintiff in some way upheld the law. Undoubtedly this would lower the plaintiff in the eyes of a section of the community who felt that the law should not have been upheld. However the courts have refused to hold defamatory a statement which imputes that the plaintiff upheld the law. An older example of this is *Mawe v Piggott*,²¹ where a newspaper article reported the plaintiff, a parish priest, as saying, "I will watch them, I will denounce them to the tender mercies of the Croydons, the Talbots, the Barrys." The innuendo alleged was that he would watch men who were ready to give up all for Ireland, and cause them to be prosecuted for a political offence. Lawson J said:

"[Counsel for the plaintiff] argued that amongst certain classes who were either themselves criminal, or who sympathised with crime, it would expose a person to great odium to represent him as an informer or a prosecutor, or otherwise aiding in the detection of crime; that is quite true, but we cannot be called upon to adopt that standard. The very circumstances which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men. We can only regard the estimation in which a man is held by society generally."²²

A more recent illustration of this principle is provided by *Berry v Irish Times*. The plaintiff, who was the Secretary of the Department of Justice, claimed to have been libelled by a placard, reproduced by a newspaper photograph, which bore the words:

"Peter Berry - twentieth century felon setter - helped jail republicans in England."

It was held by the Supreme Court that the words were not capable of a defamatory meaning. O'Dalaigh CJ, delivering the majority judgment said:

"It is perhaps surprising that the Supreme Court should be asked to hold, as a matter of law, that it is necessarily defamatory to say of one of the citizens of this country that he assisted in the bringing to justice in another country of a fellow countryman who broke the laws of that country and who was tried and convicted for that offence in the ordinary course of the administration of criminal justice. This court is bound to uphold the rule of law and its decisions must be conditioned

20 McDonald, *Irish Law of Defamation*, p16.

21 (1869) 1R 4 CL 54.

22 *Ibid.*, at 62.

by this duty."²³

Fitzgerald J, however, dissenting, identified a standard of opinion of which the law could approve and by which the statement could nonetheless be defamatory:

"'Felon-setter' and 'Helped Jail Republicans in England' were not words in respect of which one has to have recourse to a dictionary to know what they meant to an Irishman; they were equivalent to calling him a traitor."²⁴

McLoughlin J, also dissenting, took a similar view:

"Put in other words, the suggestion is that this Irishman, the plaintiff, has acted as a spy and informer for the British police concerning republicans in England, [...] thus putting the plaintiff into the same category as the spies and informers of earlier centuries who were regarded with loathing and abomination by all decent people."²⁵

In *Mawe v Pigott*, Lawson J considered the result to stem from the straightforward application of the "right thinking members of society" test. Right-thinking members of society could not consider the plaintiff's reputation injured if it was said of him that he upheld the law. However this view of such cases may be artificial. It is perhaps simpler to say that an allegation of upholding the law may never be defamatory, irrespective of the view of the average person. This rule therefore does not flow from the application of an average community standard but rather from the court's duty to uphold the rule of law. In this light the rule is a limited exception to the normal measure of defamatory effect. But the problem at least shows the law grappling to find a community standard by which defamatory allegations are to be measured. One American writer, examining this problem in relation to a similar American case, *Connelly v McKay*, notes that this exercise involves a slight shift in emphasis from the actual injury to reputation to enforcement of community standards.²⁶

The problems which are hinted at in the above type of case become more acute where the statement challenged concerns moral or political questions about which opinions are sharply divided. For example, is it defamatory to

23 *Ibid.*, at 375.

24 *Ibid.*, at 378.

25 *Ibid.*, at p 379-80.

26 See Post, 74 Calif L Rev 691, at 714-5, discussing *Connelly v McKay*, 176 Misc. 685, 28 NYS 2d 327 (1941). In that case the plaintiff maintained a service station and rooming house primarily patronised by interstate truck drivers. The plaintiff brought a libel action in respect of an allegation that he was informing the authorities of the names of truck drivers who were violating interstate rules. The Court refused to allow an action where the allegation concerned the giving of information on violations of the law to the proper authorities.

say (1) that a person was raped, (2) that a person engaged in extra-marital sexual intercourse (not consisting of adultery), (3) that a person was a "scab"? In America, such problems have arisen in relation to statements alleging a person is a Communist, or is a Republican where he is in fact a Democrat. In relation to an allegation of rape, there are two judicial statements to the effect that such an imputation is defamatory. The first is in *Youssouf v MGM*,¹⁹ where such an allegation formed the basis of libel proceedings. The second is the following dictum of Walsh J in *Quigley v Creation Ltd* -

"In a community which places a high value on female chastity, to say untruthfully of a woman that she was the victim of a rape may well lower her in the eyes of the community by creating an undesirable interest in her or by leaving her exposed to the risk of being shunned or avoided - however irrational it may appear that a person who has been the victim of a criminal assault should as a result, through no fault of her own, be lowered in the eyes of ordinary reasonable persons in the community."²⁷

Walsh J appeared to be of the view that although this was undesirable, the allegation of rape would *in fact* lower the plaintiff's reputation. However whether a statement "in fact" injures reputation may be more difficult, as with the examples of the "scab" or the "Democrat-Republican" above. Members of society may differ in their reaction to a statement although they are all on "the right side" of the law. According to which reaction is the Court to assess the effect of the statement? Modern Irish cases have been sensitive to this problem and have on more than one occasion recognised that a statement may be defamatory if it lowers the plaintiff's reputation in a section of the community only. For example, Walsh J stated in *Quigley v Creation Ltd* that words are defamatory if they injure the plaintiff's reputation "in the eyes of a considerable and respectable class of the community, though not in the eyes of the community as a whole". In *Berry v Irish Times*, McLoughlin J said with regard to the phrase "right-thinking people", "it does not mean all such people but only some people, perhaps even only one, because if a plaintiff loses the respect for his reputation of some or even one right-thinking person he suffers some injury".

11. The determination of the defamatory effect of a statement does not take into account the intention of the speaker.

An objective test is used to determine the meaning of a statement i.e. how the ordinary reasonable man would understand the words. Accordingly, (a) a statement which the ordinary reader would understand as defamatory will be so, even if the speaker meant no harm, (b) a statement which the ordinary reader would not find defamatory will not be so, even if the speaker was

²⁷ [1971] IR 269, at 272.

malicious. As Monahan CJ stated in 1856: "the question was not what the writer intended, but what effect (the words) were likely to produce on the person who read or heard them".²⁸

This follows from the rationale underlying defamation, which emphasises the effect of a statement on a standard of opinion, represented by the jury;

"And the question is one particularly for the determination of the jury, to whom the matter is submitted. The question is not what the defendant, in his own mind, intended by such language, but what was the meaning and inference that would be naturally drawn by reasonable and intelligent persons ..."²⁹

12. Mere vulgar abuse is not defamatory

The defence of vulgar abuse is probably entirely confined to cases of slander, since the context of a remark is much more significant in the case of slander. In the case of a written statement, one may expect a certain degree of deliberation. It is unlikely that a written statement would be protected on grounds of being mere vulgar abuse.

13. Ridicule is defamatory

"The publication of written matter, which includes any printed or any other permanent representation, or any picture, statue or effigy, may be defamatory if it appreciably injures a man's reputation, and the injury may be presumed from the nature of the publication if it disparages the plaintiff or tends to bring him into ridicule or contempt. This has been laid down in ancient times on authority entitled to the greatest respect".³⁰

In the *Dunlop* case, the plaintiff sought an injunction to restrain the defendant company from distributing material in Ireland containing caricatures, in which he was depicted "in an exaggerated foppish manner" and in absurd attitudes. The issue was whether leave to serve out of the jurisdiction should be allowed, and therefore Powell J did not determine whether such representation of the plaintiff was in fact defamatory, but as he found that it was capable of being so, he refused to discharge the order giving leave to serve out.

Nonetheless, material to which the plaintiff objects as ridicule may be found by the court to be mere humour, and therefore not defamatory. In *Emerson v Grimsby Times*,³¹ the alleged libel consisted of a full 'account' in the local newspaper of the plaintiff's wedding, and a statement about the honeymoon,

28 *White v Tyrell* (1856) 5 ICLR 477, 487.

29 Per May CJ, *Bolton v O'Brien* (1885) 16 LR Ir 97, 108.

30 *Dunlop v Dunlop Rubber Co* [1920] 1 IR 280, per Powell J at 291.

31 (1926) 42 TLR 238.

which was published one day before the plaintiffs wedding actually took place. The plaintiffs claim was struck out as frivolous and vexatious.

It may be that forms of satire or comedy are increasingly being held to be defamatory. McDonald cites a Circuit Court case in 1977, *Thorpe & Lee v Ames*³² in which two barmen recovered damages for the following statement in a local newspaper:

"One of the barmen looked like Lazarus before he came out of retirement. The other fellow was the reverse: he looked like him when he went back again."

RTE are of the view that there is a trend towards holding comical or satirical statements to be defamatory, and that this inhibits their presenting of comedy on television.³³

Burden of Proof and Defamatory Effect

- 14. The burden of proof lies on the plaintiff to establish that a defamatory imputation is conveyed.**

The defamatory nature of a statement is not to be confused with its falsity. While the burden is on the plaintiff to show that the statement was of a defamatory nature, he is not obliged to prove its falsity. The law presumes the falsity of defamatory statements.³⁴

The Meaning of Words

(a) The innuendo

- 15. The terminology of defamation law refers to the different meanings that may be ascribed to words as (a) the "ordinary and natural meaning" and (b) the "innuendo". In every day conversation, the word "innuendo" is used by people as referring to a statement made by way of hint or suggestion rather than directly. In the law of defamation, it has a different and rather artificial meaning.**

The distinction in law between (a) the ordinary and natural meaning of words and (b) an "innuendo" is best illustrated by examples. If it is said of a man that he was seen frequently entering a brothel, the words are regarded by the law as capable of being defamatory in their ordinary and natural meaning. If the statement is simply to the effect that the person was seen frequently entering a named premises, the words would not be regarded as capable of being defamatory in their ordinary and natural meaning. If, however, the

³² *Irish Times*, 23 November 1977.

³³ Part of an RTE submission to this Commission.

³⁴ See below, para 62.

named premises was a brothel, the statement is capable of containing a defamatory implication to any one who knew that the house was a brothel but not to any one who did not.³⁵ In this latter instance, the words, although not defamatory in their ordinary and natural meaning are capable of being defamatory by reason of an innuendo. The innuendo, it will be seen, depends upon the proof by the plaintiff of extrinsic facts which demonstrate that a statement innocent on its face is defamatory.

However, the expression "the ordinary and natural meaning" of words is deceptive, because it encompasses two things: the direct, literal meaning of the words and an inferential meaning inherent in those words. For example, the statement "McCarthy committed the murder" is plainly defamatory and requires no explanation. If, however, a lengthy article were to set out that McCarthy was in the vicinity of the crime, was found with the murder weapon and had a motive for killing the victim, it might not directly implicate McCarthy in the murder, but he could well argue that this meaning was to be inferred from the article. Understandably, the layman would regard this as a classic example of an "innuendo", but the law does not: it treats that inferential meaning as part of the "ordinary and natural meaning" of the words and not as an innuendo.

The confusion frequently evidenced in this area has been compounded by an insistence in England on referring to the meaning which depends on the establishment of extrinsic facts as a "true" innuendo, as distinct from the "false" innuendo where the pleader is simply elaborating the ordinary and natural meaning of the words. It is time that this unhappily worded terminology was replaced by the clearer distinction suggested by Lord Devlin, i.e. that between the "legal innuendo" and the "popular innuendo".³⁶

One of the clearest examples of a legal innuendo is *Tolley v Fry and Sons*.³⁷ The defendants, by way of advertisement for their chocolate product, issued a caricature of the plaintiff depicting him playing golf with a packet of their chocolate protruding from his pocket. Such a caricature was, of course, not defamatory *per se*: if the plaintiff was a professional golfer, there would have been nothing inconsistent with his status in his endorsing some one's products (by implication for reward). But the plaintiff was in fact an amateur golfer and the House of Lords held that the caricature was capable of bearing the meaning alleged in the legal innuendo, i.e. that the plaintiff had agreed to promote the defendant's products for reward and had thereby prostituted his reputation as an amateur golfer.

By contrast, in *Irish People's Assurance Society v City of Dublin Assurance Company Limited*³⁸ the plaintiff company claimed that a reproduction of

35 *Lewis v Daily Telegraph* [1962] AC, *per* Lord Devlin at 278.

36 *Lewis v Daily Telegraph* [1964] AC 234 at 279-280.

37 [1931] AC 333.

38 [1929] IR 25.

extracts from their balance sheet out of context implied that they were insolvent. This was clearly a "popular innuendo" as distinct from a "legal innuendo", since it did not depend for its establishment on the proof of extrinsic facts. The confusion rife in this branch of the law is, however, demonstrated by the fact that both Fitzgibbon J and Murnaghan J in the Supreme Court referred to it without qualification as an "innuendo".

(b) Pleading Innuendos

It might be thought that the distinction discussed in the preceding section is of academic importance only. This is to some extent true, but it has also a practical significance so far as the pleadings in defamation actions are concerned.

In the case of the legal innuendo, it might seem reasonable that, not merely the special meaning being attributed to the words should be pleaded, but also the extrinsic facts alleged to give rise to that meaning. It has always been, and still is, necessary to *prove* the supporting extrinsic facts at the trial and prior to the *Common Law Procedure Amendment Act (Ireland) 1853*, it was also necessary to *plead* the material extrinsic facts. The law was regarded as having been settled in this sense by the judgment of de Gray CJ, giving the unanimous decision of the judges in *R v Horne*³⁹ in 1777. The Irish Act of 1853, like its English counterpart of the preceding year, however, did away with the necessity of pleading the material extrinsic facts. Thereafter, in both England and Ireland only the innuendo meaning had to be pleaded and not the supporting facts, although it remained the practice to plead those facts. In England, however, the law was changed in 1949 as a result of a recommendation of the Porter Committee who thought that ignorance of the extrinsic facts supporting a legal innuendo could surprise and prejudice a defendant. As a result, Order 19, Rule 6(2) (RSC) was introduced, providing that:

"In an action for libel or slander if the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense."

There was no corresponding change in Ireland and in *Kavanagh v The Leader and Another*,⁴⁰ Lavery J said that the law still was that the extrinsic facts did not have to be pleaded. Since then, Order 19 Rule 5(1) of the Rules of the Superior Court 1986 has been introduced requiring particulars of the wrong alleged to be pleaded in the Statement of Claim. In the absence of any decision as to whether this general rule has altered the special position in defamation cases, the law remains to some degree uncertain. It is, however, customary in practice to plead the necessary extrinsic facts in the Statement

39 (1777) 2 Camp 680.

40 S Ct, unreported, 4 March 1955.

of Claim.

The English Act of 1852 introduced another change which was not paralleled in Ireland. Thereafter, a legal innuendo - as distinct from a popular innuendo - gave rise to a separate cause of action. Hence if the words were defamatory in the ordinary and natural meaning and also by reason of a legal innuendo, the plaintiff was entitled to a separate verdict in respect of each alleged meaning and, if he succeeded, to damages in respect of each meaning. Moreover, if more than one legal innuendo were pleaded, he was entitled to a separate verdict in respect of each such legal innuendo. A further consequence of this in England was that, if the plaintiff failed to establish a legal innuendo, he could fall back on the ordinary and natural meaning of the words. Blackburn J stated in *Watkin v Hall*:

"Those latter words I cannot put any other meaning on, than the legislature enacted that a declaration containing one count for libel or slander, with an innuendo that the words were used in a particular meaning shall be taken as if there were two counts, one with the innuendo and one without the innuendo, and if the plaintiff prove either, it is sufficient."

However, as the Irish Act of 1853 contained no equivalent provision, the Irish Courts continue to apply the former rule, that if an innuendo was pleaded and subsequently rejected, the plaintiff was not permitted to rely on the defamatory meaning of the words in their ordinary and natural sense. As was stated in *Bolton v O'Brien*⁴¹:

"It is a certain rule of law that when a libel is capable of several senses, and a plaintiff takes one sense in particular, he puts his case on that sense and if he fails to make out that sense, cannot reject it and fall back on some other sense, or upon the words themselves."

The twofold rationale for this rule was adverted to by Johnson J in the Queens Bench division in *Fisher v Nation Newspaper and Rooney*.⁴² First, the plaintiff by pleading an innuendo is saying that the defendant spoke the words in an innuendo sense and, when the jury finds that they were not spoken in this sense, it is as though they were never spoken at all. Second, it would take the defendant by surprise to expect him to defend a meaning at trial which he did not expect. However, in *Fisher's case*, the Court of Appeal reversed the Queen's Bench Division and laid down a new rule that a plaintiff should be allowed to fall back on the natural meaning of the words even if they had not been specifically relied on in the pleadings. The major consideration influencing the Court appears to have been a desire to make the English and Irish systems identical:

41 (1885) 16 LR Ir 97.

42 [1901] 2 IR 465.

"It seems therefore to me to be clear that the defendant is at liberty to defend himself by reference to the language he actually used in the sense which it will be determined by the jury it ought to bear and not in some artificial and fanciful sense invented by the pleader It follows that if this is the right of the defendant, a plaintiff may also claim to have the words complained of considered apart from the innuendo. This is the English practice and, if it is not yet definitely settled in this country, it is time that it should be."

In *Kavanagh v The Leader*,⁴³ Lavery J considered the decision in *Fisher's case* to be settled law.

So much for the legal innuendo. As for the popular innuendo, it was at one time the law in England, and may still be the law in Ireland, that there was no particular obligation on the plaintiff to specify in his meanings the popular innuendoes upon which he will rely. However in a series of decisions in the early 1970s, the Court of Appeal in England held that it was necessary for the plaintiff to set out the meaning alleged where the words were capable of more than one meaning. The Faulks Committee, examining the law in 1975, understood the effects of these decisions to be as follows:

- (a) The inferential meaning need not always be pleaded;
- (b) However, where there is any doubt as to the meaning, or a need to crystallise the meaning of a long article, such a meaning should be pleaded.

The Faulks Committee thought that the precise rules on pleading popular innuendoes were not settled and recommended clarification in this area.

The rules as to pleading innuendoes, whether legal or popular can, accordingly, be stated as follows:

- 16. **Where a legal innuendo is relied on, the extrinsic facts supporting it must be proved at the trial if the plaintiff is to succeed upon the innuendo. However, it would appear that it is not necessary in Ireland to plead the extrinsic facts in the Statement of Claim, although this appears to be the normal practice.**
- 17. **Where one or more legal innuendoes are successfully pleaded, each gives rise to a separate cause of action, entitling the plaintiff to a separate verdict and award of damages in respect of each innuendo.**
- 18. **Where a plaintiff pleads a defamatory meaning in the legal innuendo sense only and fails, he may fall back on the ordinary and natural meaning of the words.**

⁴³ *Supra*, footnote 40.

19. **Where it is contended that words are defamatory in their ordinary and natural meaning, it is not necessary for the plaintiff to plead any more than the words themselves. Hence where the plaintiff relies on a popular innuendo, it is not necessary in general for him to plead such an innuendo. However, it is probably necessary to plead such an innuendo where**
- (a) **there is any doubt as to the meaning;**
 - (b) **there is a need to crystallise the meaning of a long article.**
20. **A defamatory meaning may be conveyed by publishing true and accurate matter in a misleading way or context.**

In *Irish People's Assurance Society v City of Dublin Assurance Company Limited*, the alleged libel consisted of extracts from balance sheets. The plaintiff pleaded that the reproduction of these extracts out of context implied that the company was insolvent and that it was financially unsafe for policy holders to insure with them. The trial judge ruled that the document was true in substance and fact and directed that judgment be entered for the defendants. An appeal to the Supreme Court was allowed, on the ground that the jury should have determined whether the document as a whole conveyed an accurate impression of the society's financial position.

Fitzgibbon J stated:

"The figures and words may be correctly printed, but in my opinion if they are so arranged or excerpted as to convey an untrue impression of the financial condition of the company, and it is for a jury to decide whether they do so or not, the company is entitled to recover damages for the injury to its credit. It would be possible by judicial extraction to make almost any document convey the contrary of its real purport, and I hold that in such a case a jury is entitled to decide whether the statement of the extracts is true or not, and that mere accuracy of extraction is not *per se* conclusive of the truth of the statement made by the collected extracts."

Similarly, in the earlier English case of *Monson v Tussauds Ltd*, Lord Halsbury said:

"It is not the mere words of a written statement being true, or the accuracy of fact in a model or scene represented which will render it justifiable. The circumstances of time or place may raise such inferences as will render either libellous, but the words may be true and the model exact."

21. **The determination of the defamatory effect of a statement is a question for the jury. It is a general rule that a witness may not be asked what the**

effect of the statement was on him. This admits of one exception, viz. a witness may give evidence of defamatory meaning where a legal innuendo is involved.

In *Kenny v Freeman's Journal*⁴⁴ the issue was whether a new trial should be granted on the basis that evidence was improperly received, such evidence including that of witnesses as to the effect produced on them upon seeing the cartoon which constituted the libel. Palles CB stated:

"When the libel is entirely expressed in language, the rule of law is that a witness cannot be asked what impression was produced on him by the words, because the jury are the proper tribunal, and the witnesses would be usurping their province by doing so. The one exception to the rule is that you may prove a special fact, the effect of which is to show that the words were used in a different sense from their ordinary meaning, having proved which you may then ask the witnesses how did you understand the words used."⁴⁵

A common example of such evidence being received is in the case of an ironic statement; it appears also to be the case in relation to pictures and cartoons. The basis for the rule and its exception appears to be that where the meaning is plain, the jury are capable of interpreting it alone, but witness evidence is admissible where the meaning is more complicated:

"The meaning of slang expressions, or words used in a foreign language, or words ironically used, all can be proved, which shows that where the libel is contained in something still further distant from the English language, not in words at all, but in a picture, something is required to translate it into words."⁴⁶

22. All facts going to make up a libel must be known at the time of publication. Facts coming to the knowledge of a reader/hearer after this time are irrelevant.

In *Grappelli v Derek Block (Holdings) Ltd*,⁴⁷ the defendants had made bookings for concerts by the plaintiff, a musician of international repute, without his consent, and these were cancelled. On the occasion of cancelling the venues, the defendants told the managers of the concert-halls that the plaintiff was seriously ill and would probably never tour again. This false explanation was passed on to members of the public. Subsequently, notices appeared in newspapers announcing forthcoming concerts by the plaintiff. The plaintiff brought an action alleging that the defendant's statement gave rise to an innuendo that he had previously given a reason for cancelling concerts which

44 (1892) 27 ILTR 8.

45 *Ibid*, p 8 - 9.

46 *Ibid*, at p 9.

47 [1981] 2 All ER 272.

he knew to be false. It was held that, since the cause of action arose as soon as the words complained of were published, any extrinsic facts relied upon to support the innuendo had to be known to the audience at the time of publication. Accordingly, inferences put on the words as a result of facts coming to light after the publication did not make the words defamatory. (This might seem a somewhat harsh result, but it should be borne in mind that the plaintiff had a possible alternative remedy in injurious falsehood).

The Grapelli case was, however, distinguished in *Hayward v Thompson*⁴⁸ where facts coming to the knowledge of the readers subsequent to the initial publication were held admissible as they pointed to the identity of the person defamed. In that case, the plaintiff was well-known for his support of many charitable causes in Great Britain, and between 1970-1975 he contributed over £200,000 to the Liberal Party. In 1978 an article appeared in a national newspaper stating that the names of several people connected with an alleged murder plot had been given to the police, one of them being a "wealthy benefactor of the Liberal Party". A second article named the plaintiff in connection with the investigations. The plaintiff contended the articles meant that he was guilty or reasonably suspected of participating in or condoning the murder plot, and that the second article identified him as the person referred to in the first article. The jury awarded £50,000 damages. The Court of Appeal dismissed an appeal by the defendants, holding that although it is not possible to bring in a publication to make words defamatory which were not so in the initial publication, this does not apply where the words used in the first article are defamatory and the only question is one of identification.

Functions of Judge and Jury

23. Determination of whether the statement was capable of being defamatory is a matter for the judge. Determination of whether the statement was in fact defamatory lies with the jury.

"[It] has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction; and that, whether the libel is the subject of a criminal prosecution, or civil action."⁴⁹

A further authoritative statement as to the respective provinces of judge and jury in a defamation case is provided by Henchy J in *Barrett v Independent Newspapers*:

"In a libel action such as this where the defamatory nature of the words complained of is in issue, observance of the respective functions of the

⁴⁸ [1981] 3 All ER 450.

⁴⁹ Per Parke B in *Parmiter v Coupland* (1840) 6 M & W 105, 107.

judge and jury is of crucial importance. It is for the judge in the first instance to decide the preliminary question whether the words complained of are reasonably capable of having the defamatory meaning alleged. If the judge answers that question in the negative, the case cannot go to the jury and the action must be dismissed. But if the judge rules that the words complained of are capable of bearing the defamatory meaning alleged, it is then for the jury to say whether the words do in fact carry that meaning. Because the community standard represented by the jury may differ radically from the individual standard of the judge in determining what is defamatory, it would be a usurpation of the jury's function in the matter if the judge were to take upon himself to rule exclusively that the words were defamatory."⁵⁰

24. It is settled that the trial judge may withdraw the issue of libel or no libel from the jury on the ground that the words complained of are not capable of defamatory meaning. There has been more controversy as to whether the judge may withdraw the issue from the jury on the grounds that the jury would be perverse in holding that they were *not* defamatory, but the current Irish position is that he may not do so.

The role of the jury in defamation actions was stressed by Walsh J in *Quigley v Creation Ltd*,⁵¹:

"Basically, the question of libel or no libel is a matter of opinion and opinions may vary reasonably within very wide limits. When a jury has found that there has been a libel, this court would be more slow to set aside such a verdict than in other types of actions and it would only do so if it was of the opinion that the conclusions reached by the jury was one to which reasonable men could not or ought not to have come.

In defamation as in perhaps no other form of civil proceedings, the position of the jury is so uniquely important that, while it is for the judge to determine whether the words complained of are capable of a defamatory meaning, the judge should not withhold the matter from the jury unless he is satisfied that it would be wholly unreasonable to attribute a libellous meaning to the words complained of."⁵²

It has also been said that, in arriving at a conclusion as to whether the words are capable of defamatory meaning, unlikely and fanciful constructions should be avoided. The law was thus stated by Lord Morris of Borth-y-Gest giving

⁵⁰ [1986] ILRM 601, 606.

⁵¹ [1971] IR 269, 272.

⁵² But the actual finding in that case - that to say of a well known Irish actor that he chose to work and live in London because the rewards and opportunities there were better than in Ireland was capable of a defamatory meaning - seems surprising. Can it really be defamatory to say of an artist that he prefers to work abroad because he can make more effective use of his talents in another country?.

the advice of the Privy Council in *Jones v Skelton*.⁵³

"It is well settled that the question whether the words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for a decision by the court. If the words are so capable then it is a question for the jury to decide whether the words do in fact convey a defamatory meaning. In deciding whether the words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation."

It also follows that a judge may withdraw a particular innuendo from the jury on the basis that the words were incapable of bearing that particular defamatory meaning.

In *Barrett v Independent Newspapers*,⁵⁴ the converse situation arose. The trial judge held that the words complained of were defamatory as a matter of law, and left only the question of damages to the jury. The Supreme Court on appeal, by a majority of three to two, held that the judge had usurped the function of the jury in holding that the words were defamatory. As Henchy J noted,

"[the] law reports provide many examples of cases where the jury were held entitled to find that the words were not defamatory when the ruling of a judge on this point would have led to the opposite conclusion".

However, McCarthy J, dissenting, was of the opinion that the words in their ordinary meaning were clearly defamatory, that a finding by the jury to the contrary would have been perverse, and that therefore the trial judge was correct in acting as he did. Finlay CJ was of the same view:

"There does not appear to me to be either logic or justice in a principle which would prevent a judge of trial satisfied that the words complained of could not possibly be understood otherwise than to be defamatory from so directing a jury."⁵⁵

It may be noted that the view of the dissentients in the *Barrett* case was foreshadowed by Fitzgerald and McLoughlin JJ in *Berry v Irish Times*.⁵⁶ There, the jury had found that the publication of the words was not defamatory. The plaintiff's appeal, on the ground that this finding was perverse and the trial unsatisfactory, was dismissed by the Supreme Court. However the dissenting judges felt not only that the words were defamatory, but that they were so

53 [1963] 3 All ER 952 at p958.

54 [1986] ILRM 601.

55 *Ibid* at, p 603.

56 [1973] IR 368.

clearly so that a new trial should be ordered and limited to the assessment of damages. In other words, they envisaged a new trial where the issue of defamatory effect would not be left to the jury, because the statement was incapable of innocent meaning.

However, the current Irish position on this point would appear to be represented by the majority view in the *Barrett* case. Accordingly, while the issue of libel or no libel may be withdrawn from the jury where the judge rules the words incapable of defamatory meaning, he may not do the same in respect of words he thinks incapable of innocent meaning.

Identification

25. It is an essential element of the tort of defamation that the plaintiff was identified in the statement complained of. The plaintiff must satisfy the judge that he is reasonably capable of being identified from the statement. He must then satisfy the jury that he was in fact the person referred to. In most cases, the plaintiff is named; however, in others extrinsic evidence may be necessary.

In *Berry v Irish Times*,⁵⁷ the placard complained of merely bore the plaintiff's name, but it was not contested that this referred to the plaintiff who was the Secretary to the Department of Justice at the time.

Extrinsic evidence was admitted in the *Fullam* case⁵⁸ in order to identify the plaintiff, who was a renowned footballer. The defendants had stated in a newspaper article that the plaintiff used his right foot for balancing only and that the club managers had devised a scheme to improve his shooting by requiring him to wear a carpet slipper. (The article was published some 25 years after the end of the plaintiff's career). Objection was taken on behalf of the defendants to the admission of evidence of jeering by crowds and neighbours of the plaintiff. The evidence was held admissible for the purpose of identifying the plaintiff as the target of the libel.⁵⁹ Similarly, in *Morgan v Odhams Press Ltd*⁶⁰ and *Jozwiak v Sadek*⁶¹ extrinsic evidence was admitted to establish identification of the plaintiff.

The case of *Sinclair v Gogarty*⁶² involved an application for an injunction restraining the publication of a book entitled "As I Was Going Down Sackville Street". One of the questions for the court was whether the passages

⁵⁷ *Ibid.*

⁵⁸ *Fullam v Associated Newspapers Ltd* [1953-54] Ir Jur Rep 79, [1955-56] Ir Jur Rep 45.

⁵⁹ Furthermore, although such evidence is not admissible for the purpose of assessing the defamatory effect of a statement, if it is admitted for the purpose of identification, the jury need not be directed to exclude the evidence from their minds when considering the former issue.

⁶⁰ [1971] 2 All ER 1156.

⁶¹ [1954] 1 All ER 3.

⁶² [1937] IR 377.

complained of clearly referred to the plaintiff his brother and his grandfather. Hanna J accepted the uncontradicted evidence of Mr Samuel Beckett that the passages did refer to the plaintiff and that there were "sufficient indicia" in the passages to give readers the "necessary clue to their identity". Not only does the case illustrate the admissibility of extrinsic evidence to establish identity: it also emphasises that a thin veneer of disguise will not protect an author from libelling identifiable people:

"The author, by giving their business place as Sackville Street instead of Grafton Street, or Nassau Street, and referring to the Jewish grandfather as a usurer instead of an art dealer, has only resorted to the usual devices of those who lampoon others and seek to escape liability."⁶³

26. At common law the test of identification does not take into account the intention of the defamer.

The test of identification is whether the words would be understood by reasonable people to refer to the plaintiff. Therefore, the intent of the defendant is irrelevant in this context:

"Though the person who writes and publishes the libel may not intend to libel a particular person, and indeed, has never heard of that particular person, the plaintiff, yet, if evidence is produced that reasonable people knowing some of the circumstances, not necessarily all, would take the libel complained of to relate to the plaintiff, an action for libel will lie."⁶⁴

In *Hulton v Jones*,⁶⁵ the defendants who were proprietors and publishers of a newspaper, published defamatory statements about a person whom the author and editor thought to be fictitious. Unknown to them, the name used was actually the name of the plaintiff. It was held that in an action for libel, it was no defence to say that the defendant did not intend to defame the plaintiff, if reasonable people would find the language to be defamatory of the plaintiff.⁶⁶

The newspaper involved in *Newstead v London Express Newspaper*⁶⁷ published an account of the bigamy trial of one "Harold Newstead, 30 year old

63 *Ibid*, per Hanna J at p 380.

64 *Youssouf v Metro-Goldwyn-Meyer*, (1933) 50 TLR 581, per Scrutton LJ at p 583.

65 [1910] AC 20.

66 It may be that the holding in that case was influenced by the fact that the plaintiff had previously worked for the newspaper in question, and that in some senses the defendant was reckless in failing to realise that the "fictitious" name could refer to a real person. However the strict rule emerging from that case was applied thereafter even where there was no recklessness involved on the part of the defendant.

67 [1940] 1 KB 371.

Camberwell man", which was true of a barman of that name, but not as regards a hair-dresser of the same name. It was held on appeal that the evidence would have justified a jury finding that reasonable persons would understand the words to refer to the plaintiff, and that the fact that they were true of another person than the plaintiff did not afford a good defence.

A similar lack of detail was fatal to the defendant in *Outram v Reid*.⁶⁸ The Glasgow Herald published a notice, abbreviated from the Edinburgh Gazette, noting the bankruptcy of a wine and spirit merchant, without citing the address. A wine and spirit merchant of the same name recovered damages. The strictness of the common law position exemplified by these cases is now affected by s21 of the *Defamation Act 1961* and will be considered in more detail under Unintentional Defamation below.⁶⁹

However, if the defendant does not avail of the statutory machinery, the common law rule on liability applies. A recent example of a case of mistaken identity is *Charles Merrill v Sunday Newspapers Ltd*.⁷⁰ The plaintiff claimed that an article published in the Sunday World confused him with Charles Merrill-Mount, also an American living in Dublin, who was convicted of selling letters and documents from the US Congress Library. The plaintiff also claimed that the defendants published a photograph of himself with the caption, "Charles Merrill-Mount pictured in Dublin in 1972". The defendants admitted that a mistake had been made and apologised to the plaintiff. The jury awarded £35,000 damages.

27. Indirect Identification: In some cases, the plaintiff may establish that he was indirectly identified and defamed, although he was not referred to in any sense in the alleged libel.

The most commonly cited example of this is *Cassidy v Daily Mirror Newspapers Ltd*,⁷¹ where a photograph of one Mr C and a Miss X was published together with the words ; "Mr C, the racehorse owner, and Miss X, whose engagement has been announced". In fact, Mr C was married to the plaintiff who was not referred to in any sense in the photograph. Nonetheless, it was held that she was entitled to recover damages for libel and that a meaning defamatory of her had been conveyed, namely, that she "was an immoral woman who had cohabited with Corrigan without being married to him". Scrutton LJ said the following:

"Now the alleged libel does not mention the plaintiff, but I think it is clear that words published about A may indirectly be defamatory of B. For instance, 'A is illegitimate'. To persons who know the parents those words may be defamatory of the parents. Or again, 'A has given

68 (1852) 14 D. 577, cited by Walker, *Delict*, p 751.

69 At para 116 below.

70 Reported *Irish Times*, 9 and 10 June 1989.

71 [1929] 2 KB 331.

way to drink; it is unfortunately hereditary'. To persons who know A's parents these words may be defamatory. Or 'A holds a D.Litt. degree of the University of X, the only one awarded'. To persons who know B, who habitually describes himself (and rightly so) as 'D.Litt. of X', these words may be capable of a defamatory meaning. Similarly to say that A is a single man or a bachelor may be capable of a defamatory meaning if published to persons who know a lady who passes as Mrs A and whom A visits."⁷²

A similar mistake of identity occurred in *Hough v London Express Newspapers Ltd.*⁷³ The libel consisted of the following statement:

"Frank Hough's curly headed wife sees every fight. 'I should be in more suspense at home', she says. 'I always get nervous when he gets in the ring, although I know he won't get hurt. Nothing puts him off his food. He always eats a cooked meal at night, however late it is when he gets in'."

The plaintiff, Mrs Hough, who was not "curly headed", successfully relied on the innuendo that the words implied that she was a dishonest woman falsely representing to be Hough's wife.

Again in *Morgan v Odhams Press Ltd.*,⁷⁴ the article complained of did not directly refer to the plaintiff. The article concerned a dog-doping gang and a girl who had helped a reporter and police in connection with their arrest and was headed; "Dog-doping girl goes into hiding". It stated that the girl had been kidnapped by members of the gang and kept in a house in Finchley. In fact, the girl in question had been under the charge of the plaintiff reporter for some time, had stayed at lodgings and at his flat, and had been seen with him by other people. The plaintiff successfully contended that the article was defamatory of him, in that it suggested that he was connected with the dog-doping and kidnapping activities.

28. Group Defamation

No member of a group or class can bring an action in respect of defamatory statements made about the group unless he can establish that he was specifically referred to. The circumstances or words of the statement may indicate a reference to the plaintiff. Furthermore, where the reference is to a limited group, the plaintiff may be able to maintain an action. It is a matter of law for the Judge as to whether the words are capable of referring to the plaintiff who must then satisfy the jury that he was identified as a matter of fact.

⁷² *Ibid.*, at p 338-9.

⁷³ [1940] 2 KB 507.

⁷⁴ [1971] 1 WLR 1239.

The general rule is illustrated by a 1913 Irish case, *O'Brien v Eason & Son*.⁷⁵ In this case, an individual member of the Ancient Order of Hibernians brought an action in respect of comments made about this organisation in a weekly journal printed in England and circulated in Ireland. It was held that he could not maintain an action in respect of reflections upon a class or association, merely by virtue of his being one of its members. Commenting on the lack of sufficient identification, Cherry LJ said:

"How could anybody suspect, how could it be suggested to a jury that a general statement that crimes had been committed in these countries by so-called 'Molly Maguires' pointed to a certain individual carrying on a business as a saddler in Abbey Street, Dublin?"⁷⁶

Lack of precise identification was again the rationale for the dismissal of the plaintiffs' action in *Gallagher & Shatter v Independent Newspapers*.⁷⁷ A letter to the Evening Herald referred to a case in which the plaintiffs had acted as solicitor, involving the banning of a booklet on family planning, and described it as one of the examples of behind-the-scenes scheming and plotting against the Constitution and Catholic life by a handful of solicitors and judges. The jury found that the words complained of did not refer to the two plaintiffs. This seems unduly restrictive since many people would have known exactly who the acting solicitors were.

The circumstances or the wording of the article may disclose a reference to the plaintiff. An example of this is *Le Fanu v Malcolmson*,⁷⁸ in which the article complained of suggested that cruelties were practised upon employees in certain Irish factories. Although this appeared to be a class defamation, certain other statements in the article, including a reference to Waterford, constituted sufficient evidence for a jury to identify the plaintiff's factory as the one primarily attacked.

The size of the class referred to may have a bearing on whether the plaintiff may maintain an action. As Willes J expressed the matter in *Eastwood v Holmes*:⁷⁹

"If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual."

Yet if a man wrote that all lawyers in town X were thieves, and there were only two lawyers in that town, there would be sufficient identification of these two individuals.⁸⁰ This is illustrated by *Browne v DC Thomson & Co*,⁸¹ where

⁷⁵ (1913) 47 ILTR 266.

⁷⁶ *Ibid*, at 268.

⁷⁷ Reported in the *Irish Times*, 10 May 1980.

⁷⁸ (1946) 8 ILR 418; (1948) 1 HLC 637.

⁷⁹ 1 F & F 347, 349.

⁸⁰ This principle seems difficult to reconcile with the application of the law by the jury in the *Gallagher and Shatter* case.

a newspaper article stated that in Queenstown "the Roman Catholic religious authorities" had abused their influence. The seven pursuers showed that they were the sole persons who exercised Roman Catholic authority in Queenstown, and were held entitled to sue in libel as individually defamed. Lord Kinnear stated:

"It is a question of fact for the jury whether, holding the article to be libellous, it applies to the persons now complaining. That is a question of fact, and each of the pursuers must satisfy the jury that he is hit by the language of which they all complain. It might very well be that one might succeed and another might fail, but the question is one of fact."

An authoritative exposition of the rule in this context emerges from *Knuppfer v London Express Newspapers Ltd.*⁸² Viscount Simon LC stated:

"Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to. There are cases used in which the language used in reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action."⁸³

The crucial question is reference to the plaintiff, and not the size of the class:

"It will be as well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class."

Duncan & Neill⁸⁴ put forward the following statement on the law relating to group defamation:

"It is submitted, though there is no satisfactory modern English authority on the matter, that the right approach is that even a general derogatory reference to a group may affect the reputation of every member, and that the court would adopt as its test the intensity of the suspicion cast upon the plaintiff.

"Where therefore allegations are made against members of a class the question for consideration is whether, having regard to the size of the class, the gravity of the imputation, the number of members of the class against whom the allegation is made and any other relevant circumstance, reasonable persons would understand that the plaintiff

81 [1912] SC 359.

82 [1944] AC 116.

83 *Ibid.*, at 199.

84 Duncan & Neill, *Defamation* (1978), para 6.13, p 30. Footnote omitted.

himself had actually done the act alleged or (as the case may be) was reasonably suspected of having done it. Furthermore, there may be cases where the allegation in the words complained of implicates directly only some of the members of a class but the words may nevertheless bear a further inferential meaning (which would involve all the members of the class) that the remainder were, for example, associates of criminals, or were persons who had not made sufficient inquiry as to the character of their business associates. Indeed the problems presented by class libels underline the importance in every case of deciding what the words in their context would be reasonably understood to mean."

Publication

29. For a defamatory statement to be actionable, it must have been published to someone other than the plaintiff himself. This is because defamation serves to protect reputation in the eyes of others, and not merely hurt pride on the part of the plaintiff.

"What is the meaning of publication? The making known of defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication; for you cannot publish a libel of a man to himself".⁸⁵ Accordingly, the sending of a letter or the stating of defamatory matter to the individual concerned will not of itself constitute publication.

In *Berry v Irish Times*,⁸⁶ McLoughlin J defined defamation as a publication which tends to injure reputation in the minds of right-thinking people and continued: "It does not mean all such people but only some such people, perhaps even only one, because if a plaintiff loses the respect for his reputation of some or even one right-thinking person he suffers some injury".

One American writer has referred to the "defamation triangle" because of the necessity of third party involvement:

"The logic of defamation creates a tangled web because it necessarily involves at least three parties - the plaintiff, the defendant, and a third party - who interact in a wide array of circumstances. Often the cast of characters contains a far more extensive list of individuals, as when a newspaper (and its staff) makes false statements about a group (and each member) to its readership (of thousands, if not millions). The tripartite division of the tort largely dictates the elements of the standard defamation action."⁸⁷

85 Per Lord Esher MR, *Pullman v Hill*, [1891] 1 QB 514, 517.

86 [1973] IR 368.

87 Epstein, Was *New York Times v Sullivan* Wrong? 53 U Chicago L Rev 782, 785.

30. In some situations, there may be a handing over of defamatory matter to someone other than the plaintiff, but there is no publication in law. Where a typist hands back material to an employer, or a printer to the author, there is no publication. However, the initial passing of the material to the typist or printer will constitute publication.

As Andrews LCJ stated in *Eglantine Inn v Smith*:

"Were the law otherwise a clerk or typist to whom a defamatory statement was handed by his or her employer to be copied would be liable to damages in an action of libel when he handed it back to the employer, on the ground that he or she had published the words complained of 'to some person other than the plaintiff'. No case has been cited to me, nor am I aware of any, in which such an unjust and, as it appears to me, absurd conclusion was ever arrived at"⁸⁸

Nonetheless, although there is no publication, a printer may be held liable as a concurrent wrongdoer with the publisher. In the *Eglantine* case, an official of a trade union composed a handbill defamatory of the plaintiffs, which was printed by the defendant printers in the ordinary course of business and subsequently distributed by agents of the trade union. Andrews LCJ stated:

"[Plaintiff's counsel] submits that all persons concerned in the publishing of a libel are jointly liable as tortfeasors⁸⁹; and that a printer who sends forth a libel is liable as its publisher. It appears to me that there is much to be said in support of this view if once it be established as a fact, either from his being so informed or by reason of the nature of the document itself, that the printer knew or must be taken to have known that it was going to be published, and that he was performing a necessary act in or an essential part towards such publication."

The implications of this decision may be far-reaching. Presumably the position of a typist would not be affected, since it could seem unfair that a typist who has no choice but to follow orders would be held jointly liable for a libel published by his or her employer. A printer might be said to be in a different position in that they have a choice whether to accept the publication for printing or not. This point will be returned to when considering defences in respect of printers.

"Malicious" Publications

31. It is normally said that the words must be published "maliciously". The older cases say that malice is the gist of defamation. However, malice in this context refers to the wrongful intent which the law presumes from the making

⁸⁸ [1948] NI 29, 33.

⁸⁹ The phrase "joint tortfeasor" has been replaced in Irish law by "concurrent wrongdoer" since the enactment of the *Civil Liability Act 1961*.

of a defamatory statement and is known as "malice in law". Accordingly, the word "maliciously" is a formality which is normally inserted in the statement of claim. "Malice in fact" may, however, be relevant to certain defences.

32. Incidental Publication: If the defendant communicates defamatory matter to the plaintiff and a third party becomes aware of it, the defendant is liable for the publication to the third party only if he could reasonably have anticipated the third party intervention.

If the defendant leaves his correspondence about, or puts letters in wrong envelopes, or speaks too loudly, he will be liable because he could have anticipated that a third party would become aware of the defamatory material. However if the third party becomes aware of the material through an unauthorised act, the defendant will not be liable. Lord Esher MR, speaking in 1891, stated:

"And, if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication."⁹⁰

Similarly, in *Huth v Huth*,⁹¹ there was held to be no publication by the defendant where the posted communication had been taken out of its envelope and read by a butler, in breach of his duty and out of curiosity.

It will depend largely on the facts of each case whether the defendant should have foreseen the possibility of third party intervention. In *Paul v Holt*,⁹² the defendant sent a letter to a "Mr Paul, Ardavoyle, Meigh, Newry". The plaintiff had a brother by the same name, living in the same district. The letter was read by the brother, his wife and the plaintiff's wife. On appeal, it was held that the case should have gone to the jury because there was no want of publication. The defendant should have proved that he did not know of the existence of the plaintiff's brother. Conversely, in *Keogh v Incorporated Dental Hospital*⁹³ where the letter complained of was opened by the plaintiff's assistant, who was authorised to open letters in his absence, it was held that there was no publication. The defendants did not know, nor ought they have known, that the plaintiff had a clerk who was authorised to open his letters. In the *Paul* case, the defendant should have anticipated that the plaintiff might have a brother of the same name in the same district; in the *Keogh* case, the defendants need not have anticipated that a clerk might open a letter sent to a business address. From these two cases, it is perhaps questionable whether a sufficiently uniform standard of foreseeability is applied to defendants. It is possible that the bare facts of the *Keogh* case are coloured by the context in which the letter was written, namely, "a communication sent by the

⁹⁰ *Pullman v Hill*, [1891] 1 QB 524, 527.

⁹¹ [1915] 3 KB 32.

⁹² 69 ILTR 157 (1935).

⁹³ [1910] 2 IR 166, 577.

defendants, at *his own* request to the plaintiff, to the *address* given by him, though in fact opened by an assistant of the plaintiff, of whose existence or duties it is not proved the defendants had any knowledge".⁹⁴

Postcards

There is a legal presumption that the sending of a postcard is a publication.⁹⁵ Theoretically, this is justified because the law may assume in such a case that the sender should have anticipated the possibility of communication to a third party. However, the presumption has more to do with the practicalities of proof:

"It has been laid down - I think rightly - that the court will take judicial notice of the nature of the document i.e. that it is a postcard, and will presume, in the absence of evidence to the contrary, that others besides the person to whom it is addressed will read and have in fact read what is written thereon. That is a presumption of fact that arises as a matter of law. If, even in such a case as that, the defendant could establish that the postcard never was read by a single person although it is very difficult to conceive that the proof could be given - he would, notwithstanding the presumption, succeed in the action because he would have proved that there was no publication. The fact that it is practically impossible to prove that any third person read it is the reason why the law takes judicial notice of the nature of the document, and says that the mere fact that the words are written on a post-card which is posted must be taken as some evidence that a third person will read it, or has read it".⁹⁶

Swinfen Eady LJ re-affirmed the foreseeability principle in the *Huth* case:

"When the authorities which are referred to are considered it will be seen that, in each of those cases, the defendant - who must be dealt with upon the footing that he intended the natural consequences of his act in the circumstances of the case - intended the publication which in fact took place."⁹⁷

Husband and Wife

A communication between spouses is not a publication. Although this was formerly rationalised on the basis of the marriage unit in law, it now appears to be based on an argument of practicality. In *Wennhak v Morgan*,⁹⁸ Manisty

⁹⁴ Per Dodd J, *Keogh v Incorporated Dental Hospital* [1910] 2 IR 166, 577 at p 589.

⁹⁵ *Robinson v Jones* (1879) 4 LR 1r 391.

⁹⁶ *Huth v Huth*, [1915] 3 KB 32, per Lord Reading CJ at 39. In that case, the Court refused to extend the presumption of publication to unsealed envelopes.

⁹⁷ [1915] 3 KB 32, 43.

⁹⁸ (1888) 20 QBD 635, 639.

J stated:

"...would it be well for us to lay down now that any defamation communicated by a husband to a wife was actionable? To do so might lead to results disastrous to social life and I for one would be no party to making new law to support such actions."

A situation distinct from this is where a third party makes a defamatory communication to one spouse concerning the other. In such a case there is publication. In *Theaker v Richardson*,⁹⁹ the defendant, who was a rival candidate to the plaintiff in an imminent election for a local district council, wrote a letter addressed to the plaintiff and delivered it to her home. The plaintiff's husband opened it, thinking it was an election address. The jury found that it was a natural and probable consequence of the defendant's delivery of the letter that someone other than the plaintiff would open it, and it was held on appeal that the jury findings should not be disturbed.

A number of comments as to this case may be made. *First*, it does not lay down the proposition that judicial notice is taken of the fact that spouses read each other's letters. It confirms that the question of publication depends on the state of the defendant's knowledge, proved or inferred, as to the conditions likely to prevail at the destination of the letter. Commonsense, however, dictates that while the normal foreseeability test is applied, the reading of a letter by a spouse is an act which a jury will usually find to be capable of being anticipated by the defendant. *Secondly*, the case confirms that the communication of defamatory matter by a third party to a spouse does constitute publication.

There is no decision of which we are aware as to whether this principle extends to unmarried persons who are cohabiting or to those whose marriages outside the State are not recognised in this jurisdiction.

Innocent Dissemination and Distributors

33. Each time a person becomes aware of a defamatory statement there is an actionable publication. Technically, therefore, a libel on a television show would be a publication to every person who saw the show. Every person who repeats a libel is liable for its publication.

34. However, a distinction is drawn between those who take an active part in the publication and mere distributors. *Prima facie* the distributor is liable for publication. However, he may escape liability by showing:

- (i) that he had no knowledge of the libel contained in the material distributed,

99 [1962] 1 WLR 151.

- (ii) that there was nothing in the material or its surrounding circumstances to lead him to suppose that it contained a libel, and
- (iii) that there was no negligence on his part in failing to know that it contained a libel.

The burden of proof is on the defendant-distributor to displace the *prima facie* presumption of publication.

The rule that a news vendor could escape liability on this basis was laid down in *Emmens v Pottle*,¹⁰⁰ and affirmed in *Vizetelly v Mudie's Select Library*.¹⁰¹ The principles in this area were clearly explained by Romer LJ:

"The result of the cases is I think that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken what I may call a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and if he succeeds in showing (i) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (ii) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (iii) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was *prima facie* publication of it, he may nevertheless, on proof of the beforementioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury."¹⁰²

The rule in *Emmens v Pottle* was recognised in three Irish cases concerning Easons and Son; *FitzGibbon v Eason & Son*,¹⁰³ *Ross v Eason & Son*,¹⁰⁴ *McDermot v Eason & Son*.¹⁰⁵

What sort of circumstances might alert a distributor to the fact that a newspaper might contain a libel? One answer is the nature of the material itself:

100 (1885) 16 QBD 354.

101 [1900] 2 QB 170.

102 *Ibid*, at 180.

103 (1910) 45 ILTR 91.

104 (1911) 45 ILTR 89.

105 (1914) 48 ILTR 1.

"This depends to a great extent upon its character or reputation. I would name newspapers that once flourished, but have now ceased to exist, whose circulation depended on the fact that they were to a considerable extent composed of matter that was *prima facie* libellous. A news vendor who sold such papers cannot, in my opinion, excuse himself on the grounds that he has exercised reasonable care. If he desires to be safe he ought not to sell them at all."¹⁰⁶

Another answer is the context of the publication. In *McDermott v Eason & Son*,¹⁰⁷ a previous action concerning comments relating to the same subject matter was brought against the defendant news vendors, but proceedings were discontinued. Subsequently a second writ was issued against Eason and another defendant, Smith. The defendant Eason moved that all further proceedings be stayed as the action was frivolous and vexatious. The Court made an order staying all further proceedings against Eason. The plaintiff then obtained an order that Smith be struck out and that the plaintiff be at liberty to proceed against Eason alone. Subsequently the writ with which the present case was concerned was issued claiming damages against Eason alone. Prior to the distribution of the material which was the subject matter of the present action, the newspaper proprietors sent handbills, posters and circulars to the defendants promising an article "of keen local interest" and of a "sensational character". It was held that in view of these facts, the plaintiff was entitled to have a question left to the jury as to whether the defendants were guilty of negligence.

Another factor influencing the court as to whether the defendant was negligent as to the contents of the material distributed may be his system of checking the material. This was fatal to the defence in the *Vizetelly* case. The defendants were the proprietors of a library which circulated a book without knowing that it contained a libel on the plaintiff. One of the directors gave evidence that he and the co-director alone exercised supervision over the books and that the books were too numerous to be examined for libels. They did not employ readers because it was cheaper for them to run the risk of being sued for libel than to do so. It was held that the defendants had failed to discharge the *prima facie* presumption of publication.

The fact that a distributor is presumptively liable may lead him to refuse to distribute material. Thus, in *Goldsmith v Sperrings*,¹⁰⁸ the plaintiff, an international company chairman and director, considered himself to be the victim of a sustained campaign of libel in a fortnightly paper. In addition to bringing a civil action against the publishers, the editor and the main distributors, he issued 74 writs against 37 secondary wholesale and retail distributors. 16 of the distributors reached settlements with the plaintiff on terms that he discontinued the actions if they ceased to handle the paper.

¹⁰⁶ Per Samuel Walker, Bart, LC, *Ross v Eason & Son*, (1911) 45 ILTR 89, at p 93.

¹⁰⁷ (1914) 48 ILTR 1.

¹⁰⁸ [1977] 1 WLR, 478.

It is to be noted that 17 of the distributors continued to handle the paper, having being given an indemnity by the publishers against any legal costs or damages that would be incurred, while the remaining distributors applied for an order that the actions be stayed or dismissed as an abuse of court process, in that the plaintiff's purpose was not to protect his reputation but to destroy the paper by cutting off its retail outlets. A majority of the Court of Appeal held that the action should not be stayed at the interlocutory stage unless there was strong evidence to support the allegation that the plaintiff's purpose was collateral; and, further, that the settlements did not constitute unlawful agreements so as to taint the actions being continued against the remaining distributors.

Thus a distributor may, on his own initiative, cease to handle a journal which he suspects may contain defamatory material or may cease to handle it as the result of negotiations with the plaintiff. Bridge LJ, for the majority, rejected the proposition that this was a serious threat to the freedom of the press:

"There is no question whatever here of the publication of *Private Eye* being restrained. It is only the circulation of the magazine which is curtailed by the fact that *some* newsagents have agreed not to handle it. If *Private Eye* is engaged in the courageous exposure of public evils, no action taken by the plaintiff will in any way impede that righteous crusade. If it is, on the other hand, given to publishing what is improper, mischievous or illegal, the main defendants are likewise free to continue on that course but must, as Blackstone says, take the consequence of their own temerity.

"What they cannot do is to complain because some independent wholesale and retail newsagents, confronted with the possibility of taking the same consequence, should have decided neither to show the same temerity nor to participate in any righteous crusade, if such it is."

Lord Denning MR, dissenting, considered that the view of the majority could lead to a dangerous form of self-censorship:

"Even though a publication may be contentious and controversial - even though it may be scurrilous and given offence to many - it is not to be banned on that account. After all, who is to be the censor? Who is to assess its work? Who is to enquire how many libel writs have been issued against it? And whether the words were true or become unfair? No distributor can be expected to do that At any rate, no private individual should be allowed to stifle it (the paper) on his own estimate of its worthlessness - or the estimate of his friends and those about him. And he would stifle it - as this case shows if he was allowed to sue the distributors for libel simply for distributing it and thus making them afraid to handle it anymore. The freedom of the Press, depends

on the channels of distribution been kept open."¹⁰⁹

35. The above defence which is open to distributors is not available to printers.

This leaves printers in an even more precarious position. They may succeed in extracting an indemnity from the publishers, but they are not protected by defamation law. This difficulty is exacerbated by modern technology: the printers may never even see the hard copy of material which comes on to screens from external sources and is simply transferred to plates for publication.

Multiple Publication

36. At present, a plaintiff may take different actions against different defendants for publishing the same statement. This follows from the proposition that each person who repeats a libel is liable for it.

Slander and Proof of Damage

37. Unlike cases of libel where damage is presumed from the publication of the defamatory matter, the plaintiff in a slander action must prove actual damage in order to succeed. To this, there are four exceptions, i.e. cases in which the damage is presumed from the nature of the slander and there is no need for the plaintiff to prove special damage.

"Before considering whether the present slander falls within this category, it is pertinent to consider what is meant by saying that in the four special categories, damage is presumed. What is so meant would seem to be that these exceptional slanders are either so obviously damaging to the financial position of the victim that pecuniary loss is almost certain, or so intrinsically outrageous that they ought to be actionable even if no pecuniary loss results."¹¹⁰

38. The courts will not extend the categories of slander actionable per se.

"The action for slander has been evolved by the Courts of Common Law in a fashion different from that which obtains elsewhere. As one of the consequences the scope of the remedy is in an unusual degree confined by exactness of precedent. It is not for reasons of mere timidity that the Courts have shown themselves indisposed to widen that scope, nor do I think your Lordships are free to regard the question in

109 The dissenting judgment of Lord Denning MR was criticised in unusually forthright language by Bridge LJ on the ground that it rested on legal propositions and authorities produced by the Master of the Rolls as a result of private research with which counsel for the plaintiff had never been given an opportunity of dealing.

110 *Per* Asquith J, *Kerr v Kennedy* [1942] 1 KB at p 411.

this case as one in which a clear principal may be freely extended. Lord Herschell, in his judgment in *Alexander v Jenkins*,¹¹¹ remarked of this very point that

'when you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principles; but where we are dealing with such an artificial law as this law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the Legislature that must make the extension and not the Court'.¹¹²

39. The four categories of slander actionable *per se* are as follows:

- (1) **Words imputing the commission of an offence which is punishable by imprisonment.**
- (2) **Words imputing the possession of a contagious disease likely to cause others to avoid the plaintiff.**
- (3) **Words tending to cause injury in the way of the plaintiff's office, profession, calling, trade or business.**
- (4) **Words imputing adultery or unchastity to a woman or girl.**

40. The first two categories have developed purely at common law. The third category is now provided for in section 19 of the Defamation Act 1961, amending the common law position. The fourth category was created by the Slander of Women Act 1891, and is re-enacted in section 16 of the Defamation Act 1961.

41. Words Imputing the Commission of an Offence Punishable by Imprisonment: The offence imputed must carry with it the possibility of imprisonment. It does not include an offence punishable by fine, even where imprisonment may be imposed in default of paying such fine.

Examples of such offences include stealing,¹¹³ obtaining money by false pretences,¹¹⁴ perjury,¹¹⁵ and blackmail.¹¹⁶ In many of these cases, the fact that the slander was actionable *per se* is assumed rather than discussed, and the

¹¹¹ [1892] 1 QB 797, 801.

¹¹² Per Viscount Haldane, *Jones v Jones*, [1916] 2 AC 481, 489.

¹¹³ *McFadden v Lynch* (1883) 17 ILTR 93; *Ede v Scott* (1858) 7 ICLR 607; *Wallace v Carroll* (1860) 11 ICLR 485; *Corcoran v W & R Jacob Ltd* [1945] IR 446.

¹¹⁴ *Kirkwood v Hackett v Tierney* [1952] IR 158.

¹¹⁵ *Keanan v Wallace*, (1916) 51 ILTR 19.

¹¹⁶ *Hanery v Welltrade*, High Court, unreported 15 March 1978.

case is then decided on grounds of privilege. For example, in *Corcoran v W & R Jacob Ltd*, an allegation of larceny was made to an employee of the defendants by another employee of the defendants, who was a commissionaire, in the course of his report on the plaintiff. The occasion was held to have been privileged and the Supreme Court set aside the jury finding of malice, so that the action for slander was dismissed.

42. The imputation must be that the plaintiff actually committed the offence, and not merely that he is under suspicion of having done so.

43. The rationale for rendering this category of slander actionable per se may be either, (a) the fact that it threatens the plaintiff's freedom or (b) the fact that he may be socially ostracised as a result.

In *Gray v Jones*¹¹⁷ the basis of this category of slander was stated to be the fact that it would cause the person to be shunned or avoided, and not because it put him in danger of a criminal prosecution. Winfield & Jolowicz support this view:

"But there is authority for the proposition that the basis of the rule, that imputation of a criminal offence is actionable per se, is the probability of social ostracism of the plaintiff and not his jeopardy of imprisonment."¹¹⁸

McMahon and Binchy recognise that the rationale is not clear but submit that the policy promoted relates to the plaintiff's liberty.

44. Statements Imputing Possession of a Contagious Disease: There is uncertainty as to what diseases are included in this category as no modern cases deal with this type of slander.

In the older cases, imputations of French Pox,¹¹⁹ leprosy¹²⁰ and venereal disease¹²¹ were held to be actionable *per se*. This category takes on more significance in the light of the spread of AIDS today.

45. The basis for rendering this category of statements actionable per se may be either, (a) social ostracism through fear of infection, (b) reflection on the moral character of the plaintiff, or (c) imputation of personal uncleanness.¹²²

In *Crittall v Horner*¹²³ where the slander consisted in an imputation of having French Pox, the slander was said to lie not in the "wicked means of getting"

¹¹⁷ [1939] 1 All ER 798.

¹¹⁸ *Torr*, 11ed, p 280.

¹¹⁹ *Crittall v Horner*, (1614) Hobart 219; *Grimes v Lovell* (1699) 1 Ld Ray 446.

¹²⁰ *Taylor v Perkins* 79 ER 126 (1607).

¹²¹ *Bloodworth v Grey* (1844) 7 N Gr 334.

¹²² McDonald, *Irish Law of Defamation*, p 86.

¹²³ (1614) Hobart 219.

the disease but in the "odiousness of the infection, as a leper" - in other words, rationale (a) rather than (b). Similarly, in *Villers v Monsley*, the rationale appears to have been the social ostracism of the plaintiff: "nobody will eat, drink, or have intercourse with the person who has the itch ..."¹²⁴

46. Words Tending to Cause Injury in the Way of Office, Profession, Calling, Trade or Business: At common law, the plaintiff is required to satisfy the double burden of showing (a) that the words were spoken of him in the way of his office, profession, calling, trade or business, and (b) that the words were likely to injure him in that position.

This proved to be a difficult test to meet in practice, as the first limb was strictly interpreted. In *McMullen v Mulhall & Farrell*¹²⁵ the defendants said to the plaintiff's employer: "McMullen is not a member of any union, and you must dismiss him". The employer had an understanding with the unions that he would not hire non-union men if union-men were available to work, and dismissed the plaintiff. In fact, the plaintiff was a union member. The Supreme Court held that the words were not defamatory because there was no evidence that "non-membership of a trade union imports any want of skill, incapacity or unfitness to exercise the calling of a painter".¹²⁶ Kennedy CJ defined words touching a person in his trade as words which related to

"the conduct of his business, discharge of his duties, fulfilment of his obligations, or doing of his work in his profession, calling or office as by imputing incapacity or unfitness, disparaging his vocational skill or ability, or otherwise damaging his vocational reputation or prejudicing him in the exercise or practice of his calling".

In *Ayre v Craven*,¹²⁷ Lord Denman CJ noted that some of the cases in this context had produced "surprising" results, due to the limitation of the first limb of the double hurdle. Examples cited were that of a clergyman who failed to obtain redress for an imputation of adultery and a school mistress who failed despite a charge of prostitution. The words complained of did not technically refer to the plaintiffs in their respective callings.

The case of *Bennett v Quane*,¹²⁸ is an illustration of a plaintiff succeeding under the common law rule. The defendant, referring to the plaintiff's solicitor, said: "He brought an action in the Circuit Court instead of the District Court to get more costs for himself". It was held that these words had a natural tendency to injure the plaintiff's reputation as a solicitor. Again in *Curneen v Sweeney*,¹²⁹ it was accepted that an imputation of dishonesty

¹²⁴ 95 ER 886, 887 (1769).

¹²⁵ [1929] IR 470.

¹²⁶ *Ibid*, per Kennedy CJ at p 476.

¹²⁷ (1834) 2 Ad and E 2, 111 ER 1; cited in *Bennett v Quane*, (1947) IJR 28.

¹²⁸ (1947) IJR 28.

¹²⁹ (1969) 103 ILTR 29.

touched the solicitor plaintiff in the way of his profession.

47. The common law position is now altered by section 19 of the *Defamation Act, 1961*, which requires that the plaintiff prove only the second part of the double hurdle, i.e. that the words tend to disparage him in his calling, trade, or profession.

Thus, although an accusation of prostitution made against a schoolteacher would not refer to her in her occupation as a schoolteacher, they would certainly tend to disparage or injure her in that occupation.

48. **Offices of Profit and Offices of Honour:** As regards the third category of slanders actionable *per se*, the common law drew a further distinction between offices of profit and offices of honour. An office of profit is one which carries with it a salary or other emolument, the loss of which necessarily entails pecuniary damage. An office of honour is one to which no salary is attached. The common law rule was that an imputation of misconduct, but not unfitness, was actionable *per se*, if spoken about the holder of an *office of honour*. However, imputations of both misconduct and unfitness were actionable *per se*, if spoken about the holder of an *office for profit*.

McDonald suggests that a stricter test may have been applied in Ireland, namely, that an honorary office-holder was required to show likelihood of temporal loss before the words were actionable *per se*.¹³⁰ This would not cover the likelihood of removal from office.

In any event, it is unclear whether the distinction between the two types of office has survived the *Defamation Act, 1961*. McMahon & Binchy state:

"A distinction which the common law made, however, between offices for profit and offices of honour has seemingly survived section 19 of the 1961 Act."¹³¹

Gatley also states that the distinction appears to have survived the equivalent English provision, section 2 of the *Defamation Act, 1952*;¹³² whereas Winfield and Jolowicz observe that section 2 of the English Act appears wide enough to put an end to the distinction.¹³³

49. **Words Imputing Unchastity or Adultery to a Girl or Woman:** This category of slander actionable *per se* was introduced by the *Slander of Women Act, 1891* and finds current expression in section 16 of the *Defamation Act, 1961*.

130 *Irish Law of Defamation*, p 88.

131 *Irish Law of Torts*, p 335.

132 *Libel and Slander*, 8 ed, at para 174.

133 *Tort*, 12ed, p 301.

Notably this category applies to females only. The Judge must decide whether the act in question is "unchaste"¹³⁴ or constitutes adultery.¹³⁵

An interesting issue arises in relation to an imputation of rape. In *Youssouf v MGM*,¹³⁶ it was held that an imputation of rape was defamatory of the plaintiff, but the case concerned a libel by film, not a slander. Walsh J in *Quigley v Creation Ltd*,¹³⁷ agreed that an allegation of rape would be defamatory, saying that although society should not think less of a woman because she has been raped, regrettably this is the reality and the estimation of the plaintiff would be lowered. It seems likely that an allegation of rape would be regarded as an imputation of unchastity so as to make such a slander actionable.

The rationale for making this category of statements actionable *per se* is set out by Asquith J in *Kerr v Kennedy*.¹³⁸ Having stated that damages are presumed with regard to certain slanders because either pecuniary loss is almost certain, or the statement is intrinsically outrageous,¹³⁹ he continued -

"The false imputation of unchastity, in whatever sense of the term, to a woman falls within both of these classes since it is calculated both to bring her into social disfavour and, as the phrase runs, to damage her prospects in the marriage market and thereby her finances."

It is unlikely that the justification advanced in these cases for treating an allegation of rape as defamatory would command much support to-day. If the provisional recommendation made at a later stage in this paper were adopted, i.e. to abolish the distinction between libel and slander, the point would to that extent become academic. However, it would remain of possible relevance in the general law of defamation.

50. With regard to slanders falling outside the four categories, special damage must be proved by the plaintiff.

51. The term "special damage" signifies that no damages are recoverable merely for loss of reputation, despite this being the basis of the tort. Winfield and Jolowicz define special damage as "loss of money or of some temporal

134 Lesbianism has been held to be an unchaste act in this context - *Kerr v Kennedy*, [1942] 1 KB 409. In *Devine v Keane*, (1926) 61 ILTR 118, the charge was less specific, the slander consisting of the following words -

"Had I taken the ruffian as short as he took me and reported him for his gross misconduct with my servant girl he would not be wearing the jacket which he is wearing today."

135 *Tait v Beggs* [1905] 2 IR 525.

136 (1933) 50 TLR 581.

137 [1971] IR 269, at 272.

138 [1942] 1 KB at 411.

139 See above, para 41.

or material damage estimable in money".¹⁴⁰

McDonald describes special damage as "peculiarly and narrowly" defined.¹⁴¹ The loss of the material benefits of hospitality is special damage, whereas the loss of mere society is not.¹⁴² The loss of a tangible business advantage is special damage, whereas the loss of general business reputation is not.¹⁴³ The loss of the material needs of a member of a religious community who is expelled as a result of the slander is special damage.¹⁴⁴ The loss of a client¹⁴⁵ or the loss of customers is special damage.¹⁴⁶

52. The special damage must be the natural and probable consequence of the slander.¹⁴⁷

Thus there is no special damage where the damage complained of by the plaintiff is not deemed to be the natural consequence of the slander, although it was in fact the result of the slander.

¹⁴⁰ *Tort*, 12 ed p 298.

¹⁴¹ *Irish Law of Defamation*, p 92.

¹⁴² *Per* Harrison J, *Dwyer v Meehan* (1886) 18 LR Ir 138, 154, contrasting the "loss of substantial hospitality, which had been a permanent addition to a person's income" with "mere loss of the society of acquaintances".

¹⁴³ *Storey v Challands*, 173 ER 475 (1937) - here it was held that if A says of B, a commission agent, that he is an unprincipled man and borrowed money with repaying it, this is not actionable *per se*; but if A says this to C, who was preparing to deal with B, and C does not do so as a consequence of the slander, this constitutes a special damage.

¹⁴⁴ *Dwyer v Meehan* (1886) 18 LR Ir 138. However in *Roberts v Roberts* (1864) 5 B & S 384 where loss of membership of a religious society did not result in material loss, the action failed.

¹⁴⁵ *King v Watts* (1838) 8 C&P 614.

¹⁴⁶ *Bateman v Lyall* (1860) 7 CB (NS) 638.

¹⁴⁷ See *Halsbury's Laws of England*, vol 28, para 18.

CHAPTER 2: DEFENCES

Defences Generally

53. The following are the defences possible in an action for defamation:

- (1) That the defendant did not publish the words complained of;**
- (2) That the words complained of did not refer to the plaintiff;**
- (3) That the words complained of did not bear any meaning defamatory of the plaintiff;**
- (4) That the words complained of were true in substance and fact (Justification);**
- (5) That the words complained of were published on an occasion of absolute privilege;**
- (6) That the words complained of were published on an occasion of qualified privilege;**
- (7) That the words complained of were fair comment on a matter of public interest;**
- (8) That the words complained of were published innocently and that an offer of amends was made (Unintentional Defamation);**
- (9) That the defendant was an innocent disseminator;**
- (10) That the words complained of were published with the consent of the plaintiff;**

- (11) Accord and Satisfaction;
- (12) Res Judicata;
- (13) Release;
- (14) Lapse of time (under the Limitation Act 1957);
- (15) In actions for slander, (a) that the words complained of were mere words of anger or vulgar abuse, (b) that the words complained of were not actionable without proof of special damage and that no special damage is alleged or the special damage alleged is too remote in law.

Defences (1) - (3) are dealt with above under Publication and Identification. Defences (9) - (13) apply to torts generally. Defence (14) is dealt with above under Distinction between Libel and Slander. The main common law defences peculiar to the tort of defamation are, accordingly, Justification, Fair Comment, Absolute Privilege and Qualified Privilege.

"The law of defamation must strike a fair balance between the protection of reputation and the protection of free speech, for it asserts that a statement is not actionable, in spite of the fact that it is defamatory, if it constitutes the *truth* or is *privileged*, or is a *fair comment* on a matter of public interest, expressed without malice by the publisher. These defences are of crucial importance in the law of defamation because of the low level of the threshold which a statement must pass in order to be defamatory."¹

In addition to these common law defences there is a statutory defence of Unintentional Defamation. Before proceeding to consider in detail the defences of justification, fair comment, privilege and unintentional defamation, it is worth noting the figures offered by the Boyle-McGonagle Report (commissioned by the National Newspapers of Ireland) as to the use of the individual defences by national newspapers, who represent 55% of defendants in libel actions in the High Court. According to the High Court records in the period 1980-1985, justification was pleaded in only 5% of cases. Fair comment was pleaded in a healthier 41% of cases, and privilege in 12%. Most interestingly, the offer of amends in section 21 of the Defamation Act was not availed of at all. The most common form of defence, in 78% of cases, was denial of some form i.e. denial of defamatory meaning, denial of reference to the plaintiff or denial of damage.²

JUSTIFICATION

54. The defence of justification is that the words complained of were true

¹ Per Dickson J, *Cherneskey v Armadale Publishers* [1979] 90 DLR (3rd) 321, 342.

² *Report on Press Freedom and Libel*, para 614, Table H, p 44.

in substance and in fact.

"[T]ruth is an answer to the action not because it negatives the charge of malice but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess."³

55. Truth alone constitutes the defence of justification. There is no requirement that the defendant show that the statement was made for public benefit.

This is a major point of difference between the civil action in defamation and the crime of libel. The defence of truth is available to the crime of libel only where the public benefit is additionally involved.

Some jurisdictions require the test of public benefit to be met in civil defamation cases also. Whether such a requirement is additionally necessary depends on the state of the law on privacy. If a plaintiff can resort to principles of privacy to complain about true statements made about his private life, there is no need for defamation law to protect this interest. However if there is no separate protection of privacy, defamation law can be adjusted to protect plaintiffs from objectionable statements about their private lives, by requiring the defendant to show that not only was the statement true, but that it was within an acceptable area of comment, namely of public benefit or interest.⁴

A recent English case has held that although truth is a defence to a defamation action, the publication of a true statement may nonetheless be actionable on a different basis, namely if there is a conspiracy with the sole or dominant purpose of injuring the plaintiff.⁵ Publishers should therefore be wary of assuming that the publication of true material is sacrosanct. Although the publication of truth is indeed unimpeachable in terms of defamation law, it may be, for example, that a combined campaign by newspapers to smear a person's character, although the allegations are true, would be a conspiracy.

56. Malice does not affect the defence of justification. If a statement is true, the intent of the defendant when making it is irrelevant.

³ *Per* Littledale J, in *McPherson v Daniels* (1829) 10 B & C 263, 272.

⁴ For full discussion, see below, Privacy Law and Defamation Law, p436.

⁵ *Gulf Oil (GB) Ltd v Page* [1987] 3 All ER 14. The authority of this decision is somewhat weakened by the fact that it was a ruling on a motion for an interlocutory injunction. While the principle as stated in the text above seems unexceptionable, the actual decision is somewhat surprising: it is curious to find an injunction being granted to restrain publication of a statement admitted to be true by the invocation of the somewhat anomalous tort of conspiracy.

As a general principle, defamation law is preoccupied with injury to the plaintiff, rather than with the intention of the defendant. Moreover, in this instance, the state of mind of the defendant is irrelevant because there exists no injury at law. Similarly a *belief* in the truth of a statement on the part of the defendant does not constitute the defence of justification. It is the *factual* truth of the words that goes to make up the defence.

57. Presumption of Falsity: As stated at paragraph 10 above, the burden of proof is on the plaintiff to show that the words complained of are *defamatory*. However, once this is shown, the law presumes the statement to be false. The plaintiff does not have to prove the falsity of the statement; rather, the defendant who raises the defence must establish its truth.

Accordingly, where the defendant pleads a defence other than justification, the issue of truth does not technically arise. The case proceeds on the legal assumption that the statement is false and the defendant attempts to establish that he published the words on an occasion which is protected (privilege), or that the statement is of a type that is protected (fair comment). However, evidence of the falsity of the statement will usually emerge from the plaintiff's case.

The presumption of falsity is a separate issue from that of fault. The common law rule in relation to truth is that liability is strict, so that the plaintiff does not have to prove that the defendant was at fault in failing to realise the statement was true. If the statement is actually false, the state of mind of the defendant is irrelevant. The presumption of falsity is a separate point and tilts the balance even more in favour of the plaintiff. Not only does the plaintiff not have to show fault, he does not have to show falsity.

It is possible to separate the two issues so that, for example, the statement is presumed false but the plaintiff has to prove fault. This was the position in the United States in the period following *New York Times v Sullivan*⁶ and *Gertz v Welch*⁷ until 1986. However, the United States position has now been altered so that both rules are the converse of the common law rules. The plaintiff must show falsity, and must then show fault on the part of the defendant.⁸

58. Where the plaintiff relies on a legal innuendo, the defence of justification must meet the innuendo and not merely plead to the natural meaning of the words. Where he relies on a "popular" innuendo, the defence must similarly plead to the constructions sought to be put on the words complained of by the plaintiff in his pleadings.

As stated at number 15 above, the verbal accuracy of the statement published

6 (1964) 376 US 254.

7 (1974) 418 US 323.

8 See below, para 168.

may not be sufficient to constitute justification if there is an innuendo involved. In *Irish People's Assurance Society v City of Dublin Assurance Co Ltd*,⁹ proof by the defendant that the extracts of the balance sheets reproduced were accurate was not sufficient to constitute justification, where the popular innuendo pleaded was that the parent company was insolvent and it was not safe for policy holders to insure with them. The defence must match the imputation and justify it. So here it would have been necessary for the defendants to prove that the plaintiff was in fact insolvent.

In *Lewis v Daily Telegraph*,¹⁰ two national newspapers published front page articles headed: "Inquiry on Firm by City Police", and "Fraud Squad Probe Firm" respectively. It was stated in substance that the police were enquiring into the affairs of a company, of which the plaintiff was chairman. The defendants admitted that the words were defamatory in their ordinary and natural meaning, but pleaded justification i.e. that the police actually were investigating the company's affairs. The plaintiff relied also on an innuendo meaning, (pleaded as a legal innuendo, but held to be a popular innuendo) namely, that the plaintiff was guilty of fraud. However the House of Lords ruled that the words were incapable of bearing that meaning, and therefore the defendants were not required to justify the secondary meaning. If they had been capable of that meaning, the defendant would have had to show that the plaintiff had actually been guilty of fraud, since he would have to justify this secondary meaning.

59. Inaccuracy of Detail: Even at common law it is sufficient if the defendant establishes the truth of the substance of the imputation in order to succeed in the defence of justification. The inaccuracy of minor details will not result in the failure of the defence, whereas material inaccuracy will. The cases often refer to extracting the "sting" of the statement. "Unless the discrepancy between the statement complained of and the matter justified is so great that a defence of justification ought to be struck out, the question of fact for the court is whether the defendant has substantially justified the libel".¹¹

Referring to the defence of justification, Lord Shaw stated in *Sutherland v Stopes* that:

"[A]ll that was required to affirm that plea was that the jury should be satisfied that the sting of the libel or, if there were more than one, the stings of the libel should be made out. To which I may add that there may be mistakes here and there in what has been said which would make no substantial difference to the quality of the alleged libel or any justification pleaded for it."¹²

9 [1929] IR 25.

10 [1964] AC 234.

11 *Halsbury's Laws of England*, vol 28, para 84.

12 [1925] AC 47, 79.

He illustrated this with the following example:

"If I write that the defendant on March 6th took a saddle from my stable and sold it the next day and pocketed all the money without notice to me, and that in my opinion he stole the saddle, and if the facts truly are found to be that the defendant did not take the saddle from the stable but from the harness-room, and that he did not sell it the next day but a week afterwards but nevertheless he did, without my knowledge or consent, sell my saddle so taken, and pocketed the proceeds, then the whole sting of the libel may be justifiably affirmed by jury notwithstanding those errors in detail."

An example of such a case is *Alexander v N E R'way*.¹³ The defendants published at their stations a notice stating that the plaintiff had been convicted of riding in a train without a ticket and sentenced to a fine of £1 and the alternative of three weeks' imprisonment in default of payment. The fact that the term of imprisonment was two weeks did not prevent the defence of justification from succeeding, and it became a question for the jury whether the notice was substantially true.

PARTIAL JUSTIFICATION

60. Where the defendant makes defamatory statements as to two or more independent matters, he must in general be prepared to prove the truth of each, in order to succeed in a defence of justification. However a defendant may justify a part of a defamatory statement as long as he does not attempt to argue that this is justification of the whole. It is only if the statements are severable that the defendant may achieve partial justification in this way.

"There can be no doubt that a defendant may justify part only of a libel containing several distinct charges ... but if he omits to justify a part which contains libelous matter, he is liable in damages for that which he has so omitted to justify."¹⁴

"But a justification need not be to the whole, but may be to a part. If a man says that a certain neighbour of his was guilty of manslaughter and was also a thief, it is perfectly open to make a plea in justification of either charge only."¹⁵

A plea of full justification was amended to one of partial justification in *Goody v Odhams Press Ltd*.¹⁶ Against the background of the Great Train Robbery, the plaintiff was sentenced to thirty years imprisonment for robbery, conspiring to stop the mail and being armed with an offensive weapon. One

¹³ (1865) 6 B & S 340.

¹⁴ *Per* Tindal CJ, *Clarke v Taylor*, 2 Bing NC 654, 664.

¹⁵ *Per* Lord Shaw, *Sutherland v Stopes*, [1925] AC 47, 78.

¹⁶ [1967] 1 QB 333.

year later, a newspaper published an article headed, "A suburban housewife reveals how she was caught up in the great mail bag plot", the article containing many references to the plaintiff. As the rule in *Hollington v Hewthorn*¹⁷ was then still being applied, to the effect that evidence of the plaintiff's conviction was inadmissible, the defendants amended their defence of full justification to one of partial justification. This consisted of the following:

"In so far as the words complained of alleged that the defendant is imprisoned for thirty years and his appeal disposed of they are true in substance and fact."

61. Order 22, Rule 1(3) Rules of the Superior Courts prohibits the payment into court of money in actions for libel and slander unless liability is admitted in the defence.¹⁸ It is not clear that a partial admission of liability would be sufficient to allow payment into court.

62. Distinguishable from partial justification of an imputation, is attempted justification by proof of a less serious form of imputation. A defendant may not justify a statement by proving that a less serious form of the wrong alleged was committed by the plaintiff.

In *Morrow v McGaver*,¹⁹ a plea of justification failed because the justification showed only acts of oppression and harshness on the part of the plaintiff, while the slander itself imputed commission of those acts for selfish and personal motives. In *White v Tyrrell*,²⁰ proof that the plaintiff's father was guilty of one breach of contract did not constitute justification where the libel imputed fraudulent dealings to him.

63. If the statements are clearly severable, a plaintiff may choose the statements on which he wishes to bring his action. In such a case the defendant may not bring in uncontested parts of the publication before the court.

A case which illustrates the operation of this rule is *Plato Films v Speidel*.²¹ The plaintiff had been the Supreme Commander of the Axis Land Forces in Central Europe, and brought an action claiming that he had been libelled in a film in which he had been depicted as being privy to the murders of King Alexander of Yugoslavia and M. Barthou in 1934, and as having betrayed Field-Marshal Rommel in 1944. The appeal to the House of Lords concerned issues of pleading in preparation for a trial which had not yet occurred.

17 See below at para 65.

18 See para 141 below.

19 (1951) 1 ICLR 579.

20 (1856) 5 ICLR 498.

21 [1961] AC 1090.

The defendants sought to rely on the fact that the plaintiff chose to sue on certain parts of the film, and not on others which were also defamatory of the plaintiff, as a ground for mitigating damages. However, this course of action was vigorously rejected -

"[The defendants] plead that the respondent has been depicted in the film as having been 'guilty of the conduct hereinafter set out the truth of which the plaintiff does not deny'. It surprises me that it should be considered a proper matter for pleading that a plaintiff has not thought fit to include in his action every libellous statement made about him by a defendant. It is, in my opinion, wholly improper."²²

"If it is said that other parts of the entire film constitute 'circumstances in which the alleged libel was published' (in themselves a recognised head of mitigation), I think that is a highly artificial meaning to attribute to the phrase. The real purport of this portion of paragraph 5 of the defence seems to be to make the point that the plaintiff must be taken to have admitted the truth of such accompanying derogatory statements as he is not challenged in his libel claim. That is not a matter for pleading. If it amounts to anything at all, it is a matter for comment. As a proposition of law designed to set up some sort of estoppel, I think that it has no foundation."²³

However where the statements are not severable, the whole context may be examined. This is illustrated by *S & K Holdings v Throgmorton Publications*,²⁴ where the *Plato* case was distinguished. The defendants published an article on auditing matters relating to the plaintiff in a financial newspaper. The plaintiff brought an action in libel in respect of the entire article with one omission. This was paragraph 7, which referred to the plaintiff's involvement in certain "accounting controversies". The defendants' replies to a request for particulars included four pages relating to paragraph 7, and the issue arose as to whether this should be struck out. The Court of Appeal held that the paragraph in question was not clearly severable from the rest of the article, and the particulars objected to were admissible and should not be struck out. The case was treated as one in which severance was not possible - "unless the parts are clearly severable, I do not think it is open to the plaintiff to pick and choose. He must take the publication as it is, with all the defamatory statements about him."²⁵ The *Plato* case was considered to be one in which the statements were "clearly severable into distinct parts as if they were different chapters". This, however, was not a case in which severance was desirable:

"I must confess to having disliked the general approach of the plaintiffs

22 *Ibid*, per Viscount Simonds, p 1125.

23 *Ibid*, per Lord Radcliffe, at p 1127.

24 [1972] 1 WLR 1036.

25 *Ibid*, per Lord Denning MR at p 1039.

in this matter. This is the first time in my experience that, in defamation proceedings, an entire article is complained of save a solitary paragraph. One knows that from time to time out of a long article only a sentence or two are complained of as being defamatory, but here everything in a fairly long article is complained of save this one paragraph. When it emerges that it is a paragraph which gravely assails the reputation of one of the plaintiffs in the present proceedings, one is moved to ask why it is that it is excised from the statement of claim and the case is presented as though it had never been published at all. Is it due to a manoeuvring for position which might simply serve to embarrass the defendants by invoking the rules of pleading and procedure which have been built up in this branch of the law, some of which appear to have the defect of excessive technicality?²⁶

A similar result was achieved in the recent case of *Polly Peck (Holdings) plc v Trelford*.²⁷ The defendants published two articles concerning the plaintiffs' business affairs in their newspaper. The plaintiffs brought an action in libel, basing their complaint on some but not all of the articles' content. The defendant pleaded justification and fair comment. The plaintiffs sought to strike out certain particulars of the defence on the ground that they were irrelevant or that they were an attempt to justify matters which had not been complained of. It was held that where the plaintiff chose to complain of a part of a publication, the defendant was entitled to look at the whole of the publication in order to establish context. However, where the publication contained distinct and severable statements, the plaintiff was entitled to select some for complaint and the defendant was not entitled to assert the truth of the others by way of justification. In each case, it would be a question of fact whether the statements were severable. If the defamatory allegation had a common sting, they would not be regarded as separate and distinct allegations.

64. The common law position on partial justification outlined at no. 60 above is now altered by s22 of the *Defamation Act 1961*. Section 22 provides:

"In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the remaining charges."

The section applies only where the words complained of contain severable and distinct defamatory imputations. If some are proved true, a full defence will be established, provided the imputations not proved true do not add material injury to the plaintiff's reputation. The result is that a defence of partial

²⁶ *Ibid*, at 1040 per Edmund Davies LJ.

²⁷ [1986] 2 All ER 84.

justification will in certain circumstances provide a complete defence.²⁸

It seems that the section does not apply where the words complained of contain a single imputation. For example, if the defendant alleged the plaintiff was a murderer whereas the plaintiff had been convicted of manslaughter, the section would not apply and the common law rule prevents a defence of justification being established where the defendant succeeds only in showing that the plaintiff was guilty of a less serious form of offence.²⁹

JUSTIFICATION AND PREVIOUS CONVICTIONS

65. It may be that the alleged libel consists of an accusation of legal wrongdoing, and the defendant wishes to justify by adducing evidence of a previous conviction of the plaintiff for the offence. The Irish position on this has yet to be stated.

At common law the rule in *Hollington v Hewthorn*³⁰ was that evidence of a prior criminal conviction was not admissible in subsequent civil proceedings where the same issue was raised for determination. The case was not a libel case, but concerned a civil action for damages in negligence arising out of a car collision, in which the plaintiff wished to admit evidence of a conviction of the defendant driver for careless driving. This was held to be inadmissible.

The impact of this rule on libel actions was that a defendant could not rely on a previous conviction to justify a statement such as, "X committed the murder", or "X was guilty of the offence". This is illustrated by *Goody v Odhams Press*.³¹ The most that defendant could do was to plead partial justification, i.e. that the words were true insofar as the plaintiff had received a prison sentence, or his appeal was disposed of.

The rule in *Hollington v Hewthorn* attracted criticism from the time of its adoption. In the *Goody case* Salmon LJ referred to it as a "strange rule" and hoped that it would be reconsidered;³² and Lord Denning MR expressed the view that it was wrong. The latter Judge reiterated this view and Diplock LJ spoke of the rule as "ripe for re-examination" in *Barclays Bank v Cole*,³³ a case of curious facts. Here the defendant had received a fifteen year prison sentence for robbery of a bank, and his appeal was rejected. The bank sued to recover the money lost, alleging in its statement of claim that the defendant had wrongfully entered their branch and stolen their property, but were faced with the inadmissibility as evidence of the previous conviction.

28 See Duncan & Neill, (1978) para 11.09, p 57.

29 Duncan & Neill suggest that in such a case the conviction of the lesser offence would affect damages; and further that the defendant might be entitled to present the case as one of partial justification; para 11.10, p 57.

30 [1943] KB 587.

31 [1967] 1 QB 333. For facts, see above para 60.

32 *Ibid*, at p 342.

33 [1967] 2 QB 738, [1966] 3 All ER 948.

In 1968, the English Civil Evidence Act was enacted, section 13 of which provides that in an action for libel or slander, in which the question whether a person committed a criminal offence is relevant, proof that he stands convicted of the offence is "conclusive evidence" that he committed it.³⁴

The New Zealand courts similarly admit evidence of a conviction in this context, although it is not deemed "conclusive evidence" that the offence was committed, as in England. The test laid down in *Jorgensen v News Media* is that the previous conviction is "some evidence" of the plaintiff's guilt.³⁵

66. It seems unlikely that an Irish court would choose to apply the rule in *Hollington v Hewthorn*.

This statement is not based merely on the fact that English legislation has altered the rule in that jurisdiction, and that the New Zealand courts have declined to apply the rule. Common sense would seem to require that the previous conviction be given weight in a libel action. There may already be a basis in law for putting an end to plaintiff's action since the decision in *Kelly v Ireland*.³⁶ In that case O'Hanlon J identified evidential estoppel and abuse of process as doctrines by which a person might be prevented from having issues retried which were determined in earlier proceedings.³⁷

An English House of Lords case also supports the view that where a final decision has been made by a criminal court, it is a general rule of public policy that the use of the civil action to initiate a collateral attack on that decision is an abuse of court process. Therefore it may be that if a plaintiff wishes to bring an action in defamation in respect of matter which was already the subject of criminal proceedings, it will be considered an abuse of court process. This presumably depends on whether, on the facts, it is considered a collateral attack on the previous decision.³⁸

If the courts are reluctant to retry issues determined in previous criminal

34 A person stands convicted of an offence if there subsists against him a conviction of that offence by or before a court in the United Kingdom or a court-martial there or elsewhere - *Civil Evidence Act*, s 13(3).

35 [1969] NZLR 961, *per* North P, at p 980, Turner J, at p 992, McCarthy J, at p 994.

36 [1986] ILRM 318. See also *Breathnach v Ireland*, unreported, Lardner J, judgment delivered 1990; *McGrath v Commissioner of An Garda Siochana*, Supreme Court, unreported, judgments delivered 17th July 1990.

37 McDonald, *Irish Law of Defamation*, p 107.

38 The House of Lords case referred to is *Hunter v Chief Constable of West Midlands* [1982] AC 529. The prior criminal conviction there was the life imprisonment of six people for the Birmingham Bombings in 1974. During the criminal trial, there was a trial within a trial (*voir dire*) in the absence of the jury, to determine the question whether the accused had been assaulted by police and whether their confessions were voluntary. The statements were admitted in evidence as voluntary. The subsequent civil action was not one for libel, but for assault, brought by the Six against various police members and against the Home Office in respect of assaults by prison officers and prisoners. The House of Lords dismissed the plaintiffs appeal, holding that it was a collateral attack upon the previous criminal conviction.

cases, they may admit evidence of previous convictions in order to avoid this.

REPETITION AND JUSTIFICATION

67. It is not a defence for the publisher of the statement complained of to claim that he was merely repeating what someone else had said. He must prove that the statement is true.

In *Cleary v Lenihan*, following an election for the mayoralty in which the plaintiff was successfully re-elected, the defendant published in a newspaper a statement that the unsuccessful candidate was about to lodge a petition in the court against the election on the ground that intimidation and undue influence was employed by the plaintiff and that the latter had plied a large number of voters with drink prior to the voting. In an action for libel in respect of these allegations, the defendant pleaded that the unsuccessful candidate caused a petition to be prepared containing the allegations set out and that it was the intention of the defeated candidate to lodge the petition in court. The plaintiff demurred to the defence on the ground that the defendant circulated matter which was contained in the petition but which was never presented and that since the defendant did not purport to prove true what was allegedly contained in the petition, the defence of justification failed. The question was therefore whether the defendant had to justify all the allegations or whether he could point to the fact that a petition containing the allegations had been prepared by another, in other words, make out a defence on the basis of repetition. It was held that the defence failed.³⁹

JUSTIFICATION AND AGGRAVATED DAMAGES

68. Where the defendant attempts to plead justification and fails, the jury may award aggravated damages. This follows from the fact that the jury are entitled to look at the conduct of the defendant from the time of publication down to the time a verdict is given.

"The adoption of this line of defence is a very serious step, and if they fail to justify their alleged libel they will be severely dealt with."⁴⁰

The rule stated by Gatley⁴¹ was described as "well settled" by Lord Denning MR in *Associated Leisure Ltd v Associated Newspapers Ltd*.⁴² -

"A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial *may* properly be taken in aggravation of damages."

³⁹ (1874) 8 ILTR 146.

⁴⁰ Per Murnaghan J in *Gallagher v Touhy*, (1924) 58 ILTR 134, at 135.

⁴¹ *Libel and Slander*, 6 ed, p 462, para 1046.

⁴² [1970] 3 WLR 101, 105.

69. The original rationale for the aggravated damage rule in cases of unsuccessful pleas of justification was that the maintenance of the defence could be evidence of malice. However, persistence in a plea of justification may point more to the honesty and sincerity of the publisher, than to his malice.

As Sellers LJ stated in *Broadway Approvals Ltd v Odhams Press*, (No.2):

"The failure to apologise or retract and persistence in a plea of justification are in themselves not evidence of malice. They may be in certain circumstances but more frequently they would show sincerity and belief in which had been said and establish the best reason for the publication."⁴³

Another aspect of the rule was adverted to by Davies LJ in the *Broadway Approvals* case. If a failed plea of justification were held automatically to indicate malice, a defendant could never raise fair comment as a defence as well, because malice destroys the defence of fair comment -

"It may be that in some cases an unsuccessful plea of justification may be evidence of malice. But in many cases, such as in the present, so to hold would be to deprive a defendant of the right to raise a twofold defence of justification and fair comment, since to fail on justification would destroy his defence of fair comment; indeed, to plead justification may point more to honesty than to malice."

70. More recently the basis for the justification/aggravated damage rule has been identified as the increased circulation given to defamatory statements by the trial and media reports.

This rationale is supported by the comments of Lord Diplock in *Cassell v Broome*:⁴⁴

"So long as its withdrawal is not communicated to all those whom it has reached it may continue to spread. I venture to think that this is the rationale of the undoubted rule that persistence by the defendant in a plea of justification or a repetition of the original libel by him at the trial can increase the damages. By doing so he prolongs the period in which the damage from the original publication continues to spread and by giving to it further publicity at the trial extends the quarters that the poison reaches. The defendant's conduct between the date of publication and the conclusion of the trial may thus increase the damages"

43 [1965] 1 WLR 805, 814.

44 [1972] AC 1027, at p 1125.

In *Kennedy v Hearne*,⁴⁵ the defendants not only persisted in a plea of justification but also attempted to establish that the defendant already had a bad reputation, the latter being a factor which may mitigate damages.⁴⁶ The fact that the defendant's statements achieved greater circulation through the trial was clearly a factor influencing the Supreme Court in increasing the amount of aggravated damages:

"Having regard to what I would consider the very large difference between the seriousness of the original defamation and the much greater seriousness of the harm to the plaintiff's character and reputation as a solicitor arising from the conduct of the proceedings in the High Court, I conclude that the sum of £2,000 as aggravated damages was significantly inadequate to compensate a solicitor for being publicly accused in the city in which he practices, of being a cheat and having no reputation."⁴⁷

The proportion of aggravated damages in relation to the total award in that case illustrates how the aggravated damage rule is a real disincentive to pleading justification; of the £10,500 damages award, £10,000 consisted of aggravated damages.

71. The aggravated damage rule is not absolute. Aggravated damages may or may not be awarded in the case of a failed plea of justification. However, judicial statements are not specific as to when the full rigour of the rule should be invoked.

In the *Kennedy* case⁴⁸ the defendants accepted that aggravated damages were appropriate, but attempted to put forward a distinction between defendants on the basis of their fault. They argued that defendants who recklessly and without basis made an accusation which attracted aggravated damages should attract a higher level of aggravated damages than a person who made such an accusation with more basis to it. Finlay CJ refused to accept this submission.

THE DEFENCE OF FAIR COMMENT

72. The defence of fair comment is available to defendants who make defamatory statements which consist of fair comments on matters of public interest.

"The reason why, once a plea of fair comment is established, there is no libel, is that it is in the public interest to have free discussion of matters of public interest. In the case of criticism in matters of art, whether music, painting, literature, or drama, where the private person

45 [1988] ILRM 531.

46 See para 128 below.

47 *Ibid*, per Finlay CJ at p 541.

48 [1986] ILRM 531.

of a person criticised is not involved, the freer criticism is, the better it will be for the aesthetic welfare of the public."⁴⁹

In such cases, the criticism is often not a personal attack, but reflects on the subject's published work -

"In such a case the attack is not on the personal character of the person libelled, it is upon him as responsible for certain productions e.g. an article in the press, a book, a musical composition, or an artistic work."⁵⁰

73. Several elements are combined to make up the defence -

- (a) the statement itself must consist of comment,
- (b) the comment must be supported by fact,
- (c) the subject matter must be one of public interest,
- (d) the comment must be "fair".

The burden of proof is on the defendant to establish these matters.

74. Notwithstanding the presence of all these elements, the defence will fail if malice on the part of the defendant is shown. The burden is on the plaintiff to establish malice in order to defeat the defence. Thus it is said that malice destroys the defence of fair comment.

The question of malice and the issue of fairness of comment are separate. The question of malice arises only where the ingredients of the defence have been established, including fairness of comment. "Fairness" and "malice" are therefore sequential issues in the defence, and are not merged into a single test. The test of fairness is *objective*, i.e. "Is the comment one that an honest, albeit prejudiced, person might make in the circumstances?"⁵¹ The test of malice is *subjective* - "whether the publisher himself was actuated by malice".⁵² As Dickson J said in the *Cherneskey* case:

"In my view, the legal position is this; if a defendant raises the defence of fair comment, he has the burden of establishing that the facts on which it is based are true and that it is *objectively* fair; if he discharges this burden he will, nevertheless, lose the defence if the plaintiff proves

49 Per Scott, LJ in *Lyon v Daily Telegraph*, [1943] 2 All ER 316, 319.

50 Per Lord Porter, *Kensley v Foot*, [1952] AC 345, at 355.

51 Per Dickson J, *Cherneskey v Armadale Publishers*, (1978) 90 DLR (3rd) 321, 345. Although Dickson J dissented in that case, his views on fairness and malice are the orthodox ones. See *Halsbury's Laws of England*, vol 28, paras 141 and 145.

52 *Ibid.*

that the comment was published maliciously. It is this second stage of analysis which raises the subjective issue of the defendant's state of mind or motive."⁵³

75. The defence of fair comment is not applicable in the case of an assertion of pure fact. However, the truth of the supporting facts is an essential element of the defence. This makes the defence more difficult to rely on than qualified privilege, where malice alone defeats the defence. The defence of fair comment originated out of the refusal of judges in the nineteenth century to extend qualified privilege to public comment, and offers a lesser protection to those who make comments on matters of public interest.

76. Difficulties arise in relation to distinguishing comment from fact, and the court draws guidance from the circumstances and context of the statement. Just as a statement may be defamatory in one context, and non-defamatory in another, a statement may constitute a comment in one and a fact in another.

Some of the cases illustrate the difficulties of distinguishing between comment and fact. In *Dakhyl v Labouchere*,⁵⁴ the plaintiff was described in a newspaper article as "a quack of the rankest species". Was this a statement of fact, the truth of which had to be established, or was it a comment? The House of Lords ordered a re-trial, holding that it was capable of being a comment.

In *Campbell v Irish Press*⁵⁵ the following statements about an exhibition of snooker were held by the trial judge to be statements of fact:

- (1) "The only thing that was missing was no table."
- (2) "He failed to make a century break because the table told lies."

On appeal, Kingsmill-Moore J held that the first statement could be regarded as an expression of opinion, namely, that the exhibition was being badly run. As to the second statement, he felt that its first part could be a comment on the ability of the player, while the second part could be a comment resulting from the fact that the ball had deviated, namely, that the table was uneven.

The manner in which the defendant conducts his case may be one of the circumstances which the court takes into account in deciding whether a statement is a fact or a comment. In *London Artists v Littler*,⁵⁶ the defendant published a letter which suggested that the plaintiffs had taken part in what appeared to be a plot to force the end of the run of the play which the defendant was producing. The Court of Appeal held that the allegation of a

53 *Ibid.*

54 [1908] 2 KB 325.

55 (1955) 90 ILTR 105.

56 [1969] 2 QB 375.

plot was an allegation of fact, which the defendant had failed to substantiate; alternatively, that the allegation of a plot was a comment without any basis of fact. One of the factors influencing the Court to the conclusion that the allegation was one of fact, was that the defendant had originally intended to plead justification, but withdrew this defence.⁵⁷

Duncan & Neill suggest the following as guidelines for distinguishing statements of fact from comment:

- (a) A bare statement of fact without reference to any other fact on which it is based cannot be defended as a comment.
- (b) If the defendant sets out or refers to other facts, and makes it clear that the statement complained of is his inference from these facts, the statement may be defended as comment.
- (c) The use of phrases such as "in my opinion" or "in other words" is not decisive. However, they are an indication that the succeeding words are comment.
- (d) The defendant must separate the comment from statements of fact. If the comment is so inextricably mixed up with statements of fact that the reader will be unable to distinguish the two, it cannot be defended by a defence of fair comment.⁵⁸
- (e) Newspaper headlines will rarely be treated as comment.

77. The Rolled Up Plea: Due to the difficulty of distinguishing facts from comment, there arose the practice of pleading what is known as the rolled up plea. Now it appears to be better practice to set out in the particulars which statements are comments and which are facts, and to state which facts are relied on to support the comment.

The original rolled up plea consisted of the following formula:

"Insofar as the words complained of consist of allegations of fact, they are true in substance and in fact, and insofar as they consist of opinion they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest."

The plea was developed to cater for comments the supporting facts of which were to be found elsewhere. The final part of the plea read:

"... and insofar as they consist of opinion they are fair comments made in good faith and without malice on a matter of public interest."

⁵⁷ Lord Denning MR, at p 392.

⁵⁸ See *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309, Fletcher Moulton LJ at 319.

For some time this gave rise to a confusion that the plea consisted of a rolled up plea of *justification* and fair comment. However, the House of Lords in *Sutherland v Stopes*⁵⁹ put an end to this confusion by holding that the rolled up plea is a defence of fair comment only.

Recently, in *Cooney v Browne*,⁶⁰ Hamilton J held that where the facts alleged to support the comment in the defence of fair comment are so numerous and unspecific that it would be unfair to expect the plaintiff to present his case without notice of their true range, the plaintiff is entitled to particulars of which of the words are alleged to be statements of fact, and of the facts relied on to support such factual statements. This judgment was affirmed by the Supreme Court.

A point which is sometimes overlooked is that the onus is on the defendant to prove the truth of the supporting facts. This parallels the onus of proof in relation to truth as it arises in relation to the defence of justification. The Boyle-McGonagle Report not only advocates a reversal of the presumption of falsity in the context of justification,⁶¹ but also in the context of fair comment.⁶²

The Boyle-McGonagle Report refers to *Cooney v Browne* as tilting the balance against the defendant. It is submitted that the effect of *Cooney v Browne* is merely to clarify pleading procedure. If the balance is tilted against the defendant, this is inherent in the defence of fair comment as it exists at common law.

We will consider later in this Paper whether the present presumption of falsity should be retained. However, at this point a question may be simply posed but not answered, namely whether it is a logical necessity that the same presumption should exist in relation to justification and the factual elements of fair comment.

PROOF OF THE SUPPORTING FACTS

78. One of the elements of the defence of fair comment is that the comment must be based on facts which were either stated by the defendant or indicated by him so that the recipient may ascertain the matter on which the comment is based.

To say, for example, of AB that "he is unfit to hold public office since he has been convicted of embezzling" is clearly a comment based on stated facts. To say of AB that "he is unfit to hold public office, having regard to events in which he was involved in 1983" (where AB was convicted of embezzlement in

59 [1925] AC 47.

60 [1985] IR 185, (High Court) and 190 (Supreme Court).

61 *Report on Press Freedom and Libel*, para 5.16.

62 *Ibid*, para 5.21.

that year) is a comment based on facts indicated by the defendant rather than stated expressly. The important feature is that, before the defence can be availed of, the facts must be either so stated or indicated. In the example chosen, if the defendant contented himself with saying "AB is unfit for public office" that would be treated as a statement of fact and the defence of fair comment could not arise.

As Palles CB stated in 1879:

"That a fair and *bona fide* comment on a matter of public interest is an excuse for what would otherwise be a defamatory publication is admitted. The very statement, however, of this rule assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented, in what would be a fair and *bona fide* manner on the supposition that the facts were true."⁶³

The same proposition was thus stated in the modern case of *Kemsley v Foot*⁶⁴ where Lord Porter stated:

"The question, therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject matter of the action"⁶⁵

If the defendant makes a statement and fails to identify facts on which it is based, it will be treated as a statement of fact which must be defended by justification or privilege:

"If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful' this is merely an expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and therefore, what would otherwise be an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what the conduct was, this is an allegation of fact for which there is no defence but privilege or truth."⁶⁶

79. Where a defendant set out the facts on which his comment was based,

⁶³ *Lefroy v Burnside* (1879) 4 Lr Ir 556, 565. The case of *Eglantine Inn v Smith*, [1948] NI 29 is an example of a defence of fair comment failing because the defamatory document contained allegations of fact which were not truly stated.

⁶⁴ [1952] AC 345.

⁶⁵ *Ibid.*, at 355.

⁶⁶ *Kemsley v Foot* [1952] AC 345, per Lord Porter at 356.

he was obliged at common law to prove all those facts to be true, however unimportant some of them might be. This was modified by s23 of the *Defamation Act 1961* which provides that the defence of fair comment is not to fail because the truth of every allegation is not proved, if the expression of opinion is fair comment having regard to the facts which are proved.

"In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence."⁶⁷

80. An unsuccessful attempt to show the truth of supporting facts may result in a jury award of aggravated damages.

This proposition was affirmed by Kingsmill-Moore J in *Campbell v Irish Press*,⁶⁸ in which he stated that where a defendant failed to show the truth of supporting facts, he "not only automatically failed in making good his plea of fair comment, but would leave it open to a jury, if they should think fit, to mark their opinion of his conduct by an increase in damages".

This is part of the wider principle that any unsuccessful attempt to prove the truth of a statement may result in an award of aggravated damages for the defendant, which was seen in relation to justification.

81. Where the facts on which the comment is based are not stated by the defendant but are indicated by him to be elsewhere, the common law appears to have applied a less rigid rule in relation to proving the truth of each fact. It seems that the proof of only some, or even one, of the facts by the defendant would support the comment.

That a less rigid rule was applied to the latter situation is supported by *Kemsley v Foot*. Lord Porter stated as follows:

"In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence. Does the same principle apply where the facts alleged are found not in the alleged libel but in particulars delivered in the course of the action? In my opinion it does not. Where the facts are set out in the alleged libel, those to whom it is published can read them and may regard them as facts derogatory of the plaintiff, but where, as here, they are contained only in particulars and are not published to the world at large, they are not the subject-matter of the comment, but facts alleged to justify that comment. In the present case, for instance, the substance of fact on which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that the

⁶⁷ *Kemsley v Foot* [1952] AC 345, per Lord Porter at 357-8.

⁶⁸ (1955) 90 ILTR 105.

Press is a low one. As I hold, any facts sufficient to justify that statement would entitle the respondents to succeed on a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact was sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not necessarily defeat the respondent's plea."⁶⁹

Lord Tucker stated:

"... where the facts relied on to justify the comment are contained only in the particulars it is not incumbent upon the defendant to prove the truth of every fact as stated in order to establish his plea of fair comment, but ... he must establish sufficient facts to support the comment to the satisfaction of the jury."⁷⁰

82. The common law rule that where the facts are stated by the defendant each fact must be proved true has been modified by section 23 of the *Defamation Act 1961*.

Section 23 provides:

"In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved, if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

There are three areas of doubt concerning the operation of this section. The first question raised is whether s23 modifies the common law rule relating to proof of (i) supporting facts contained within the material complained of only, or also (ii) supporting facts referred to in the material complained of but located elsewhere. The second question is whether s23 operates in a manner similar to s22 (justification), so that imputations have to be divided into major and minor facts. The third question is in relation to the standard of fairness envisaged by the section.

Question 1: Does s23 apply to facts stated in the defamatory material only, or does it also apply to facts located elsewhere?

The Irish s23 has its equivalent in the English Defamation Act 1952, which provision was based on a recommendation by the Porter Committee in 1948. The wording of the Porter Committee proposal is quite different from the legislative provision enacted and therefore references to that committee's intent are not a reliable guide to the meaning of s23 of our Act. The Porter

69 [1952] AC 345, at 358.

70 Ibid, at 362.

Committee proposal would have confined the new rule to statements of fact "contained in the alleged libel". McDonald is of the view that s23 is restricted in a similar way. However, we are of the opinion that s23 is ambiguous, since it refers to "facts alleged *or referred to* in the words complained of", which would seem to indicate the wider interpretation. It may be wondered whether it makes any difference whether facts merely referred to in the words complained of come within the section, because the old common law rule was that proof of any fact sufficient to support the comment would enable the defendant to succeed. Therefore the section merely makes the position identical for both cases. This is our view. However, there are two interpretations of s23 in relation to Question 2 which follows. Under one of these, the effect of s23 would not be to make the two cases identical. This is the interpretation adopted by McDonald, which would make the s23 rule stricter than the common law rule on proof of facts located outside the words complained of. On this view, it would become necessary to know whether s23 applies to facts located outside the defamatory material as well as facts located within it.

Question 2: How does s23 operate? In particular, what kind of facts may remain unproved?

There appears to be a conflict of opinion regarding the effect of section 23. The first view is that the defendant need not prove the truth of every fact stated, provided the facts not proved to be true are unimportant as regards further injury to reputation. The second view is that the defendant need not prove the truth of every fact stated, provided the expression of opinion is fair comment with regard to such of the facts as are proved true. There is no difference involved between these views where the unproved facts are unimportant. However, a difference of result does arise where the unproved facts are important. On the first view the defence would not succeed in such a case; whereas on the second view it would succeed. This is illustrated by the following examples.

Example 1:

Suppose the defendant made the following two statements of facts - "X is a murderer and X stole a cream bun" - and followed them with the comment "X is despicable". It would seem that if he proved that X was a murderer, and the jury found that the comment was fair in relation to this fact, the defence would succeed even though X had not stolen a cream bun. However, at common law the falsity of one of the facts would apparently have destroyed the defence.

Example 2:

Suppose the defendant makes two statements of fact - "X was convicted of drunken driving and X is guilty of manslaughter" - followed by the comment, "X is despicable". The defendant proves that X was convicted of drunken

driving but fails to prove the allegation of manslaughter. On the first view of section 23, the defendant would not be entitled to avail of the section, because the allegation of manslaughter is significant. On the second view, the defendant may succeed under s 23 if the jury are of the opinion that the expression of opinion was fair comment in relation to the offence of drunken driving. However, it can be argued that a careful reading of section 23 allows only for the second interpretation advocated. This appears to be supported by Duncan & Neill.⁷¹ Furthermore, it would make identical the rules governing proof of facts *indicated* in the words complained of and proof of facts *contained* in the words complained of. However, the first interpretation is adopted by McDonald. It is submitted that this view is erroneous and results from two sources: (a) an incorrect comparison between proof of facts under s 23 (fair comment) and proof of facts under s 22 (justification), and (b) the wording of the original Porter Committee proposal.

McDonald argues that s23 operates only if the facts are divisible into major and minor facts, and that it preserves the defence only if the major facts are proved true and the minor ones are not, as in Example 1. This weighing of the gravity of allegations is phrased by McDonald in a similar way to his interpretation of s22, dealing with justification, although that section is worded in a different way. Curiously, the McDonald interpretation of s23 matches the original proposal of the Porter Committee, which was worded as follows:

"We accordingly recommend an amendment of the existing law analogous to that which we have recommended in relation to the defence of 'justification', namely, that a defence of 'fair comment upon a matter of public interest' should be entitled to succeed if (a) *the defendant proves that so much of the defamatory statements of fact contained in the alleged libel is true as to justify the court in thinking that any remaining statement which has not been proved to be true does not add materially to the injury to the plaintiff's reputation*, and (b) the court is also of opinion that the facts upon which the comment is based are matters of public interest and the comment contained in the alleged libel was honestly made by the defendant."⁷²

Although the Porter Committee proposal does indeed support the McDonald interpretation of s 23, it is submitted that a careful reading of the section will reveal that it does not give precise effect to the recommendation.

Question 3: What standard of fairness does s23 envisage?

The final question in relation to s 23 arises in connection with the use of the phrase "fair comment". Does fairness in this context import the wide common law interpretation or does the section envisage a new statutory standard of fairness? If the latter solution is the correct one, the effect of the section is

⁷¹ *Defamation*, at para 12.10, p 65-66.

⁷² Porter Committee Report, para 90.

to relax one common law rule while tightening another. However the section is silent on this point.

In conclusion, s 23 raises a number of questions: (1) in relation to its ambit, because of the doubts as to the location of the facts to which it applies, (2) because of the discrepancy between the Porter Committee recommendation and the wording of the section, and (3) because of the ambiguity of the word "fair" which has bedeviled this defence at common law. It requires a large measure of clarification.

However for the time being we accept the statement of Duncan & Neill as a correct analysis of the rules on proof of facts supporting a comment:

- "(a) If the facts are stated by the commentator the question is: is the expression of opinion fair comment having regard to such of the facts stated in the words complained of as are true?
- (b) If the commentator merely indicates the conduct or matter on which he is commenting without stating the facts, the facts being set out for the first time in particulars of his defence in the action, the question is: is the expression of opinion fair comment having regard to such of the facts set out in the particulars as are proved?
- (c) If the commentator sets out some of the facts in the words complained of and also indicates that there are other matters to which the comment is directed the question is: is the expression of opinion fair comment having regard both to
 - (i) such of the facts stated in the words complained of as are proved, and
 - (ii) such of the additional facts set out in the particulars as are proved?"⁷³

83. There is one exception to the rule that the supporting facts must be true in order to succeed in the defence of fair comment. This arises where the facts pointed out are contained in a privileged document. This is known as the rule in *Mangena v Wright* from the case in which the proposition was laid down.

In *Mangena v Wright*,⁷⁴ Phillimore J defined the exception as applying to facts contained in a "privileged document", giving as examples a vote in Parliament, and a Judge giving reasons for judgment.

⁷³ Duncan & Neill, *Defamation*, para 12.10, p66.

⁷⁴ [1909] 2 KB 958.

84. The extent of the application of the rule of *Mangena v Wright* is unclear.

In *Bailey v Truth & Sportsman*⁷⁵ Starke J referred to "findings of fact or conclusions of Parliament or of a Commission or other tribunal" as falling within the ambit of the rule. In *Grech v Odhams Press*,⁷⁶ Jenkins LJ thought that the rule also applied to statements made by witnesses in judicial proceedings, provided they were fairly and accurately reported by the defendant.⁷⁷

The most recent formulation of this rule is provided by Edmund Davies LJ in *London Artists v Littler*⁷⁸ in more general terms:

"... fair comment is available as a defence only in relation to facts which are either (a) true, or (b) if untrue were published on a privileged occasion."

FAIRNESS OF COMMENT

85. It is usually stated that to avail of the defence, the defendant must show that the comment was fair.

86. A fair comment is not necessarily one which the judge or jury would make themselves, or would consider reasonable. The essential point in this context is that fairness is not equated with reasonableness. Thus extravagance of language or violence of criticism does not render the comment unfair, as long as it is still within the parameters of opinion. The test of fairness is an objective one.

A test of fairness was enunciated by Lord Esher MR in 1887:

"Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is - would any fair man, no matter how prejudiced he may be, however exaggerated, or obstinate his views, have said that which the criticism has said?"⁷⁹

This test was approved by the House of Lords in *Stopes v Sutherland*, where Lord Hewart CJ said⁸⁰:

75 (1938) 60 CLR 700.

76 [1958] 2 QB 275.

77 Jenkins LJ, at p 285.

78 [1969] 2 QB 375 at 395.

79 *Per* Lord Esher, MR, *Merivale v Carson*, (1887) 20 QBD 275.

80 [1925] AC 47, 375.

"Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view - could a fair-minded man have been capable of writing this? - which, you observe, is a totally different question from the question, 'Do you agree with what he has said?'."

The test of Lord Esher MR, adopted in *Sutherland v Stopes*, is ambiguous. One would expect a fair-minded man not to hold prejudiced or exaggerated views. Although the test clearly implies that the comment need not be reasonable, it is difficult to give the description "fair" a meaningful content. Halsbury recognises that a precise test is difficult to discern from the cases and states that the question is whether the comment is one that a man could honestly make on the facts proved.⁸¹ Thus fairness appears to be a misleading description, for a comment which might appear unfair to many will be considered "fair" in the specialised sense in which it is used in relation to the defence of fair comment. Duncan & Neill similarly state:

"The word 'fair' in the phrase 'fair comment' can be a source of difficulty because it suggests a test of reasonableness, whereas the defence will often cover comment which would strike many people as unfair."⁸²

Other reform bodies have considered the term "fair" in this defence to be devoid of meaning and have recommended dropping the word from the title.⁸³

87. Imputation of Base and Dishonourable Conduct or Motives: The law is uncertain as to the test to be applied where the comment contains allegations that the plaintiff has acted dishonestly or dishonourably or was inspired by base or sordid motives. The first view is that the defence of fair comment does not apply at all in this case and such allegations must be defended by justification. The second view is that the defence of fair comment does apply, but the defendant must show that the comment was reasonable. The third view is that the defence of fair comment applies and the ordinary test of fairness is used.

The singling out of this class of case occurred in *Campbell v Spottiswoode*⁸⁴ where Cockburn CJ stated that:

"But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation

81 *Halsbury's Laws of England*, vol 28 para 141.

82 Duncan & Neill, *Defamation*, para 12.01, footnote 1, p 62.

83 See below, paras 301-305.

84 (1963) 3 B & S 769.

that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury will say that the criticism was not only honest, but also well-founded, the action is not maintainable."⁸⁵

This ambiguous formulation led to the three interpretations set out above and detailed as follows:

- (a) The view that the defence of fair comment does not apply at all where there is an imputation of base and dishonourable motives is supported by a number of cases. In *Joynt v Cycle Trade Publishing Co*, Vaughan Williams LJ stated that in such a case where the imputation was "not warranted by the facts", the defence of fair comment was of no application.⁸⁶

In *Hunt v Star Newspaper Co Ltd*⁸⁷ Fletcher Moulton LJ took a similar view:

"In other words, a libellous imputation is not warranted by the facts unless the jury hold that it is a conclusion which ought to be drawn from these facts. Any other interpretation would amount to saying that, where facts were only sufficient to raise a suspicion of a criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English law. *To allege a criminal intention or a disreputable motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence.*"

In *Homing Pigeon Publishing Co v Racing Pigeon Publishing Co*, Scrutton LJ averted to the choice of viewing imputations of base and sordid motives as (a) conclusions drawn from facts, and (b) statements reasonably supported by facts, but opted for the former interpretation because he felt bound by the decision in *Hunt v Star Newspaper Co*.⁸⁸

- (b) The second view is that where there is an imputation of base and sordid motives, the expression of opinion should be reasonable having regard to the facts. This means that a stricter test of "fairness" is applied in relation to this type of case. This is supported by the statement of

⁸⁵ Ibid, at 776-777.

⁸⁶ [1904] 2 KB 292 at 298.

⁸⁷ [1908] 2 KB 309, at 321.

⁸⁸ (1913) 29 TLR 389 at 391.

Lord Atkinson in *Dakhyi v Labouchere*.⁸⁹

"A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by the facts - in other words, in my view, if it be a reasonable inference from those facts."

and by Cozens-Hardy MR in *Hunt v Star Newspaper Co Ltd*.⁹⁰

"But there still remains the question whether if, and only if, the facts are substantially true, the comment made by the defendant, based upon those true facts, was fair and such as might, in the opinion of the jury, be reasonably made."

Finally, the judgment of Buckley LJ in *Peter Walker & Son Ltd v Hodgson* supports this view:

"The defendant may nevertheless succeed upon his defence of fair comment, if he shows that that imputation of political bias, although defamatory, although not proved to have been founded in truth, yet was an imputation in a matter of public interest, made fairly and *bona fide* as the honest expression of the opinion which the defendant upon the facts truly stated, and was in the opinion of the jury, warranted by the facts, in the sense that a fair-minded man might upon those facts *bona fide* hold that opinion."⁹¹

- (c) The ordinary test of fairness, without any notion of "reasonableness", has been applied in *Silkin v Beaverbrook Newspapers Ltd*⁹² and *Broadway Approvals Ltd v Odhams Press Ltd*.⁹³ In the latter case, Sellers LJ stated:

"An honest fair expression of opinion on a matter of public interest is not actionable even though it be untrue and fail at justification. It may be said in the appropriate circumstances that a man's conduct is discreditable and it may be a fair comment to make although a jury is not prepared to find that the substance of the comment was true."⁹⁴

Duncan & Neill suggest that in each case the statement should be examined in order to see whether it is an assertion of fact or an expression of opinion.⁹⁵

89 [1908] 2 KB 325n.

90 [1908] 2 KB 309, 317.

91 [1909] 1 KB 239, 253.

92 [1958] 2 All ER 516.

93 [1965] 2 All ER 523.

94 *Ibid*, at 535.

95 Duncan & Neill, *Defamation*, para 12.30 p 77.

It is quite possible that in some contexts the imputation of base and dishonourable motives is an assertion of fact which requires justification, while in others it is more in the nature of a comment. Once the statement is capable of being defended as a comment, there does not appear to be any special reason for imposing a special test of reasonableness upon it.

There appears to be only one Irish case dealing with allegations of base and sordid motives. This is *Black v Northern Whig*,⁹⁶ where it was stated of the plaintiffs that they were "impelled by motives which they themselves emphasise unblushingly and propelled by anxious and apprehensive interests behind the scenes". In the course of his judgment Brown J referred to *Joynt v Cycle Trade Publishing Co* and *Hunt v Star Newspaper Co* which, we have seen above, support the view that such allegations must be treated as allegations of fact and justified. Brown J stated "There is no evidence to support them as facts. If they are comment they are not warranted by any facts set out in the article". Although Brown J did not expand on his understanding of what was required to "warrant" the comment, and he did not decide definitively whether the allegations were statements of fact or opinion, the case probably aligns itself with those other cases where the imputations of sordid motives was treated as a statement of fact.

MATTERS OF PUBLIC INTEREST

88. The third element to be established by the defendant in the defence of fair comment is that the subject matter consists of a matter of public interest.

89. Matters of public interest include a wide range of activities, including matters inherently of interest to the public and matters submitted to the public for their attention. Whether the material is a matter of public interest is for the judge to decide.

"There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as it will affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment".⁹⁷

Gatley lists the following topics as matters of public interest:

- (1) The public conduct of any man who seeks or holds a public office or position of public trust,

⁹⁶ (1942) 77 ILTR 5.

⁹⁷ Per Lord Denning MR, *London Artists v Littler* [1969] 2 QB 375 at p 391.

- (2) Political or state matters,
- (3) Church matters,
- (4) The administration of justice,
- (5) The management of public institutions,
- (6) The administration of local affairs,
- (7) Books, pictures, works of art, public performances,
- (8) Any place or species of public entertainment,
- (9) Anything which may be fairly said to invite comment.⁹⁸

90. The defence of fair comment on a matter of public interest does not protect a defendant in making comments on the private lives of public persons, except where this appears to be relevant to their involvement in public affairs.

91. Although 'matters of public interest' open to comment include the administration of justice, a defendant must be careful not to overstep the boundaries of contempt of court. This includes (1) statements which "scandalize" the court, i.e. undermine confidence in or impute improper motives to the judiciary, (2) statements which seriously misrepresent judicial proceedings, (3) statements which are likely to prejudice a fair and unbiased trial, where proceedings are pending. In this latter category, where a judgment is under appeal, the likelihood of discussion prejudicing its outcome is greatly reduced, because no jury is involved.

This latter point is illustrated by *Cullen v Toibin and Magill Publications*.⁹⁹ While the plaintiffs appeal to the Court of Criminal Appeal was pending, the defendants entered into a contract to publish the account of one Elizabeth Madden of her relationship with the plaintiff prior to and including the events which were the subject matter of the trial. The grounds of appeal related to the insufficiency of the uncorroborated evidence of an accomplice necessary to sustain a conviction for murder. The Supreme Court refused to grant an injunction to the plaintiff, holding that the publication of the article could not possibly prejudice the objective determination by the appellate court of pure issues of law:

"While I sympathise with the view that anybody reading the article might be affected by the article, that is not the issue. There is not any reason for suggesting prejudice or any form of contempt in relation to

⁹⁸ *Libel and Slander*, 8ed, pp 315-324, paras 732-746.

⁹⁹ [1984] ILRM 577.

the hearing before the Court of Criminal Appeal".¹⁰⁰

92. It is sometimes erroneously assumed that the issue of a writ in respect of a publication precludes further comment on the same matter. Plaintiffs have on occasion exploited this fear of defendants by issuing so-called "gagging writs". However, the issue of a writ in itself does not put an end to further comment on the same subject-matter.

In *Thomson v Times Newspapers* Salmon LJ stated that:

"[I]t is a widely held fallacy that the issue of a writ automatically stifles further comment. There is no authority that I know of to support the view that further comment would amount to a contempt of court."¹⁰¹

"The law says - and says emphatically - that the issue of a writ is not to be used so as to be a muzzle to prevent discussion".¹⁰²

Again in 1974, Lord Reid stated:

"There is no magic in the issue of a writ or in a charge being made against an accused person. Comment on a case which is imminent may be as objectionable as comment after it has begun; a 'gagging writ' ought to have no effect."¹⁰³

Thus in *Irish Provident Association v Hastings*,¹⁰⁴ where proceedings were instituted against a newspaper proprietor in respect of articles published in his newspaper, mere republication of matter along the same lines did not in itself constitute a contempt of court.

Furthermore, the issue of a writ with the objective of stifling further comment may constitute malicious prosecution, in respect of which damages may be recovered. Such an action exists where the proceedings have been commenced or maintained without reasonable or probable cause and maliciously i.e. out of some improper and wrongful motive, which includes the use of the legal process for some other than its legally appointed and appropriate purpose.¹⁰⁵

MALICE AND FAIR COMMENT

93. A "fair" comment which is based on facts, and concerns a matter of public interest may nonetheless fall outside the defence of fair comment if it is shown that the defendant was actuated by malice.

100 *Ibid*, per O'Higgins CJ at p 582.

101 [1969] 1 WLR 1236, 1240.

102 Per Lord Denning MR, *Wallersteiner v Moir* [1974] 1 WLR 991, 1004-5.

103 *Attorney General v Times Newspapers* [1974] AC 273, at p 301.

104 (1904) 5 New Ir Jur Rep 10.

105 *Doreen v Suedes (Ireland)* [1982] ILRM 126.

We discuss the legal concept of 'malice' in greater detail at a later stage. At this point, it is sufficient to note that the term as used in the law of defamation is not confined in its application to spite or ill-will. Malice in law is a wrong or improper motive or feeling existing in the mind of the defendant at the time of publishing and actuating that publication. That 'malice' in this sense may defeat a defence of fair comment was established in *Thomas v Bradbury Agnew and Company Limited*¹⁰⁶ which concerned the publication of a review of a book, written by the plaintiff, in *Punch*. There was evidence of malice on the part of the defendant from the relations between the parties before the action, the special manner in which the article appeared in the magazine, the expression of the defendant, and his demeanour in the witness box. Collins MR stated:

"Proof of malice may take a criticism *prima facie* fair outside the right of fair comment, just as it takes a communication *prima facie* privileged outside the privilege."¹⁰⁷

"It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgement to bear on his literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgement. Comment distorted by malice cannot in my opinion be fair on the part of the person who makes it."¹⁰⁸

Fairness and malice are separate enquiries. This is borne out by the language of Denning LJ in *Adams v Sunday Pictorial Newspapers (1920) Ltd v Champion*:

"[If] the defendant proves that the facts were true and that the comments, objectively considered, were fair, that is, if they were fair when considered without regard to the state of mind of the writer, I should not have thought that the plaintiff had much to complain about; nevertheless it has been held that the plaintiff can still succeed if he can prove that the comments, subjectively considered, were unfair because the writer was actuated by malice."¹⁰⁹

The concept of malice in relation to the defence of qualified privilege was examined thoroughly in *Horrocks v Lowe*.¹¹⁰ It has been suggested by Duncan and Neill that the criteria governing the malice element set out in that case apply equally to fair comment. Accordingly, the defence of fair comment will only be defeated if the plaintiff shows that the defendant had an improper

106 [1906] 2 KB 627.

107 *Ibid* at p 640.

108 *Ibid* at p 642.

109 [1951] 1 KB 354, at p 360. See also the comments of Scrutton LJ in *Lyle-Samuel v Odhams*, [1920] 1 KB 135, at 143.

110 [1974] 1 All ER 662.

motive for publishing the words and that the improper motive was the sole or dominant motive. If the comment did not represent the honest opinion of the defendant this would constitute improper motive. Furthermore, even if the comment did represent the honest opinion of the defendant the plaintiff may still prove improper motive of another form e.g. spite, ill-will, or publication for personal gain.¹¹¹

It may also be that the publication by a defendant of the opinion of another, with which it does not agree, will be indicative of actual malice. This is discussed at no. 148 below.

ABSOLUTE PRIVILEGE

94. Absolute privilege protects statements in situations in which the law considers that absolute freedom of communication is so essential that no action in defamation should be allowed, regardless of the truth of the statement or the motive of the speaker.

In such cases, the speaker is totally immune from liability, even if he published the words with full knowledge of their falsity and with the express intention of injuring the plaintiff. Malice is therefore irrelevant to the defence of absolute liability. A study of the defence focuses on the occasions on which such privilege is said to exist.

THE PRESIDENT

95. Article 13.8(i) of the Constitution provides that

"the President shall not be answerable to either House of the Oireachtas or any court for the exercise and performance of the powers and functions of his office, or for any act done or purporting to be done by him in the exercise and performance of these powers and functions."

This immunity from liability would appear to be wide enough to encompass defamatory statements made by the President other than in his or her private capacity.

PARLIAMENTARY PROCEEDINGS

96. Article 15.12 of the Constitution provides as follows:

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

¹¹¹ See Duncan & Neill, *Defamation*, para 17.10, p 126.

Although it is not specified, it is probable that such privilege is absolute.

Three types of statement enjoy absolute privilege due to Article 15.12; utterances in either House, reports of such utterances, and official reports and publications. The word "utterances" would seem to exclude written statements as well as signs and gestures. Reports of utterances are privileged regardless of whether they are official or unofficial, or made by a media or non-media publisher.

97. Utterances in parliamentary committees are privileged by virtue of the Committees of the Houses of the Oireachtas (Privilege and Procedure) Act 1976. A "committee" is defined as a committee appointed by either House of the Oireachtas or jointly by both Houses. Section 2 of the 1976 Act provides:

- "(1) A member of either House of the Oireachtas shall not, in respect of any utterance in or before a committee, be amenable to any court or any authority other than the House or the Houses of the Oireachtas by which the committee was appointed.
- (2) (a) The documents of a committee and the documents of its members connected with the committee or its functions,
- (b) All official reports and publications of a committee, and
- (c) The utterances in a committee of the members, advisors, officials and agents of the committee, wherever published

shall be privileged."

Again the nature of the privilege is not specified, but is probably absolute.

A doubt continues to exist whether the privilege attaches to *witnesses* summoned to give evidence before a committee.¹¹² McDonald submits that such witness statements are nonetheless absolutely privileged at common law.¹¹³ However, if the cases cited by the author, dealing with the proceedings of parliamentary committees, do not appear to have definitively settled the common law position with regard to utterances of members of the committee,¹¹⁴ it is hard to see how they are any more authoritative on the

112 At least, with respect to a committee other than the Public Accounts Committee, since witness statements to that committee are given the same immunities and privileges as a witness before the High Court under s.3(2) of the Committee of Public Accounts of Dail Eireann (Privilege and Procedure) Act 1970.

113 See McDonald, *Irish Law of Defamation*, p 124-5.

114 See John Kelly TD, *Dail Debates*, vol 289, col 322.

statements of witnesses.

ADMINISTRATION OF JUSTICE

98. At common law, the general principle is that anything said in the course of judicial proceedings is absolutely privileged.

This principle is usually stated in absolute terms. Gatley, for example, says:

"No action will lie for defamatory statement, whether oral or written, made in the course of judicial proceedings before a court of justice or a tribunal exercising functions equivalent to those of an established court of justice."¹¹⁵

Winfield & Jolowicz also state the immunity in absolute terms:

"Whatever is stated, whether orally or in documentary form, in a judicial proceeding is absolutely privileged. It does not matter how false or malicious the statement may be, and does not matter who makes it - the judge, the jury, the parties, the advocates or the witnesses".¹¹⁶

Halsbury also adopts a concise formulation:

"No action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of proceedings before any court or tribunal recognised by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not. The privilege extends to documents, properly used and regularly prepared for use in the proceedings ... Advocates, judges, and juries are covered by this privilege."¹¹⁷

McDonald, however, states that the general principle fragments, according to whether relevant or irrelevant statements are involved, and secondly, according to whether a judge, party, witness or advocate makes a statement.¹¹⁸

99. Judicial Privilege; Surprisingly, there is no direct Constitutional provision dealing with judicial privilege. It may be implicit in Article 35.2, which provides that all judges shall be independent in the exercise of their judicial functions, subject only to the Constitution and the law. At common law, a Judge of Record is absolutely privileged for liability in respect of any

¹¹⁵ Gatley, *Libel and Slander*, 8ed, p 159, para 383. Footnotes omitted.

¹¹⁶ Winfield & Jolowicz, *Tort*, 12 ed, p 333-4. Footnotes omitted.

¹¹⁷ *Halsbury's Laws of England*, vol 28, para 98.

¹¹⁸ McDonald, *Irish Law of Defamation*, p127.

statement made by him in the performance of his office.¹¹⁹ This does not apply in two situations: first, where the judge acts ministerially¹²⁰ as opposed to judicially, and secondly, if the judge acts in excess of jurisdiction.¹²¹

The general principle was stated by Lord Mansfield as follows:

"By the law of England if an action is brought against a Judge of Record for an act done by him in his judicial capacity he may plead that he did so as a Judge of Record, and that will be a complete justification."¹²²

Its importance was reiterated in *Ward v Freeman*:

"It is a principle of law, established from the early times, that the acts of a Judge of Court of Record, if within the limits of his jurisdiction, are not to be reviewed or questioned in an action brought against him. This principle is most important, as regards not only the Judge, but the general interests of justice, and ought not to be impaired or frittered away on light or subtle grounds or distinctions."¹²³

In *Tughan v Craig*, the judge sued in a defamation action had said of the plaintiff's solicitor in an earlier case:

"He was addressing the jury in a case here last night, and he told them that he could twist black and make it white, and even if he liked, he would twist white again and make it black ... I suppose it was the vanity of the man who is not only brazen-faced enough to make a defence by twisting black into white and white into black, but was boasting how clever he was."

Dodd J held that the action was not maintainable against the defendant judge. He stated:

"If a judge can sit upon a judge, where is it to end? This is what Mr Justice Fletcher meant by 'infinite'. Can I review the Lord Chancellor? The Chief Justice? Would it tend to decency or decorum, that even while I was restraining another judge I was preparing material for some other judge to restrain me?"¹²⁴

119 See *Tughan v Craig*, [1918] 1 IR 245, where Dodd J reviewed the earlier authorities such as *Taafe v Downes*, (1813) 3 Moore PC 36n, *Ward v Freeman*, (1842) 2 ICLR 460, *Money v Leach*, 1 WBL 560 and *Mostyn v Fabrigas*, Cowp 172.

120 *Ferguson v Kinnoull*, (1852) 9 CL & Fin 251; *Ward v Freeman*, (1842) 2 ICLR 460, 469, 513.

121 *O'Keefe v Cullen*, (1873) IR 7 CL 319, 411; *Houlden v Smith*, (1850) 14 QB 841; *Sirros v Moore*, (1975) QB 118, 140.

122 *Mostyn v Fabrigas*, Cowp 172.

123 (1852) 2 ICLR 460, *per* Greene B at p 467.

124 [1918] 2 IR 245.

In *Macauley & Co Ltd v Wyse-Power*,¹²⁵ Maguire J held that an action against a Circuit Court judge for slander was not maintainable, where the matter complained of was uttered in the course of his performance of judicial duties. It was better, he said, that an individual should suffer than that the Court of Justice be hindered by apprehensions on the part of judges that their words may become the subject of an action. He described the privilege as the privilege of the People:

"The People were entitled to have the opinion of the Judge without the fear of his words being challenged elsewhere. It was a salutary and beneficial privilege."

The first exception to the judicial immunity rule is that the privilege does not attach to words spoken by a judge when acting ministerially. This was recognised implicitly in *Ward v Freeman*,¹²⁶ where the central issue was whether the act in question, the refusal of an appeal, constituted a judicial or a ministerial act. The essence of a ministerial act appears to be an absence of discretion. This will most frequently arise in the District Court where, for example, the District Justice is obliged to grant a particular licence if certain conditions are met and exercises no judicial discretion.

The second exception to the principle of judicial immunity is where the judge acts in excess of jurisdiction. In *O'Keeffe v Cullen*, Whiteside CJ recognised the privilege of judges:

"If an alleged defamatory statement were pronounced or if comments were made by a Judge of the Superior Courts or by a County Court Judge while sitting in Court and trying a case in which the plaintiff was a party, and if an action of libel were brought, it would be a sufficient defence to say: 'I was a Judge, duly appointed to administer the law; I had full jurisdiction to try the cause; I am protected in all I uttered for the benefit of the public and for the sake of the jurisdiction entrusted to me, and I am responsible only to public opinion and Parliament'.¹²⁷

However he added:

"Even a Judge of a Court of Record, whose acts and language are challenged, is bound to show that what he did or said was in the exercise of jurisdiction lawfully committed to him. If he transgresses

125 (1943) 77 ILTR 61.

126 *Supra*, footnote 123.

127 (1873) IR 7 CL 319, 410.

the bounds of that jurisdiction he is responsible for his acts."¹²⁸

In the recent case of *Sirros v Moore & Others*,¹²⁹ the Court of Appeal held that although a judge will be liable for acts in excess of jurisdiction, he must additionally be aware that he was acting outside his jurisdiction. In the course of his judgment, Lord Denning MR stated:

"So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction - in fact or in law - but so long as he honestly believes it to be within his jurisdiction, he should not be liable... nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

Buckley LJ said:

"In my judgement, it should now be taken as settled both on authority and on principle that a judge of the High Court is absolutely immune from personal liability in respect of any judicial act which he does in his capacity as a judge of that court. He enjoys no such immunity, however, in respect of any act not done in his capacity as a judge. This does not mean that if a High Court judge, or indeed a judge of the Court of Appeal, purports to do something demonstrably outside his jurisdiction, he will be entitled to immunity. He must have acted reasonably and in good faith in the belief that the act was within his powers."

100. Parties and Witnesses: Parties and witnesses enjoy absolute liability in respect of defamatory statements made in the course of the administration of justice.

The privilege which attaches to witness statements is based on policy reasons:

"The immunity of witnesses in the High Court does not exist for the benefit of witnesses, but for that of the public and the advancement of the administration of justice and to prevent witnesses from being deterred, by the fear of having actions brought against them, from coming forward and testifying to the truth. The interest of the individual is subordinated by the law to the higher interest, viz, that of

¹²⁸ *Ibid.*, at 411. *Houlden v Smith* 14 QB 852 and *Beaurain v Scott*, 3 Camp. 388, illustrate instances of judges acting in excess of jurisdiction. In the former case the defendant judge had no jurisdiction to commit the plaintiff to jail, nor even to summon him to show cause for non-payment of a debt; in the second case, the defendant, a member of the Ecclesiastical Court, was held liable in damages to the plaintiff for unlawfully excommunicating him because the plaintiff had refused to obey an order the Court had no power to make.

¹²⁹ [1975] QB 118.

public justice, for the administration of which it is necessary that witnesses should be free to give their evidence without fear of consequences."¹³⁰

101. It is clear that this privilege protects statements properly and lawfully made in the due course of judicial proceedings; however a doubt exists as to whether irrelevance or malice defeats the privilege.

In *Kennedy v Hilliard*,¹³¹ it was held that no action lies against a party for a statement in an affidavit made by him as a witness, even if the statement was irrelevant and was expunged from the affidavit by an order of the competent court. This case was approved in *McCabe v Joynt*, where Palles CB stated:

"In the first place, it is clear that this protection is not limited to words spoken or written in due and regular course of justice: *Kennedy v Hilliard*, 10 ICLR 195, *Henderson v Broomhead*, 4 H & N 569. So, too, is it settled by the same cases, and by the numerous old authorities elaborately considered in the judgment in the former case, that it is not sufficient, to take words out of the protection, that they are false and malicious."¹³²

The same judge quoted with approval the policy considerations outlined by Pigot CB in *Kennedy v Hilliard* for the view that false malicious witness statements are covered by the privilege:

"I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a Judge, in dealing with the matter before him, a party in preferring or resisting legal proceedings, and a witness in giving evidence, oral or written, in a Court of Justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel ... It is of far less importance that occasional mischief should be done by slander under such circumstances, than that the whole Court of Justice should be enfeebled and impeded ... But if parties and their witnesses ... were exposed to actions of this nature, not only would the cases be innumerable in which such actions will be brought ... But, in every case, the party and the witness will be fettered in seeking or in aiding justice by his own fears more or less influencing him, according to his strength or the weakness of his individual character, his positional circumstances in life, and the known wealth, obstinacy or malevolency of the party offended."¹³³

¹³⁰ Per O'Dalaigh CJ, *In Re Haughey* [1971] IR 217, 264.

¹³¹ (1859) 10 ICLR 195.

¹³² [1901] 2 IR 115, 126.

¹³³ *Supra*, footnote 132, at 128, at 209-210.

Later, in explaining why both material and non-material matter in the affidavit should be protected, Pigot CB said that:

"[The] purpose is, to give him the courage to resort as a party to the legal tribunals for justice, or, as a witness, to give his evidence before these tribunals, undeterred by the fear of a prosecution or an action. It is impossible that he can be free from that fear, if his immunity must depend on his not mistaking what is not material for what is, and upon his rightly distinguishing what is from what is not libel or actionable slander."¹³⁴

Despite this authority, McDonald¹³⁵ says that the position is not totally settled and argues that the authorities prior to *Kennedy v Hilliard* went both ways, but on the whole tended to the view that irrelevant statements were not protected. Furthermore, O'Dalaigh CJ in *Re Haughey*¹³⁶ expressed the view that an irrelevant statement loses the witness his privilege and he may be sued in defamation. Walsh and Budd JJ agreed with the judgment of O'Dalaigh CJ. However it is diluted by the fact that it was *obiter dictum* and stated without reference to authority.

In conclusion, the view that irrelevant or malicious statements made by a witness or party are within the privilege is supported by two decisions, one in 1859 and one in 1901. On the other hand, there are a number of older authorities tending to the opposite view and a recent Supreme Court *obiter dictum* supported by two other members of the court, stating that irrelevancy destroys the privilege.

102. Advocates' Privilege: Advocates include barristers, solicitors, and parties appearing on their own behalf. Such persons have an absolute privilege in relation to relevant statements they make in the course of the administration of justice.

103. It is unclear whether this privilege extends to irrelevant or malicious statements. The current Irish position appears to be that such statements are not privileged.

In the Irish 19th century case of *The Queen v Kiernan*,¹³⁷ Crompton J cited an earlier English case, *Hodgson v Scarlett*,¹³⁸ as laying down two propositions:

"The first is, that a Counsel, in the discharge of his duty, is not in an action answerable for words spoken by him in a case where those words were pertinent or relevant to the issue, however strong or severe they

134 *Ibid*, at 211.

135 *Irish Law of Defamation*, p 133.

136 [1971] IR 217, at 264.

137 (1885) 5 ICLR 171.

138 1 B & A 232.

may have been. The second position is, that if it be proved that the injurious words were not spoken *bona fide*, or if express malice be shown, there the words may be actionable."

Another Irish case of the same period supports this view. In the *Queen v Hutchins*,¹³⁹ the defendant, conducting his own case at Quarter Sessions, made slanderous statements concerning the plaintiff at the conclusion of the case. Lefroy CJ made absolute a conditional order for leave to file a criminal information against the defendant, on the basis that the advocate's privilege is lost when the terms used are calculated to produce a breach of the peace:

"The order must be made absolute, if for no other purpose than to put an end to any such idea of privilege existing in such cases. It is a violation of the very decorum of the court ... and it is aggravated by the fact that the cause was then at an end; even pending the cause such language cannot be tolerated."

Although the loss of the privilege was because the words tended to breach the peace and not because of irrelevancy, the case supports the view that the privilege may be lost if the words are not pertinent to the proceedings.

In conclusion it would appear that the Irish position is that all statements made by an advocate do not automatically enjoy privilege. The English position, however, has been altered since the decision in *Munster v Lamb*.¹⁴⁰ In this case, the Court of Appeal held that no action would lie against an advocate for defamatory words spoken in the course of judicial proceedings, even though they were uttered maliciously and with no object of supporting the client, and without justification, lawful excuse or personal ill will towards the plaintiff arising out of a previously existing cause, and the statements are irrelevant to every issue of fact before the tribunal. McDonald doubts the correctness of this decision.¹⁴¹ However Gatley¹⁴² notes that *Munster v Lamb* was cited with approval in *Rondel v Worsley*¹⁴³ and that the rule in *Munster v Lamb* has been held as binding on the New Zealand courts.¹⁴⁴

QUASI-JUDICIAL BODIES

104. There is English authority in support of the view that the doctrine of absolute liability existing in respect of statements made in the course of proceedings before a Court of Justice equally applies to tribunals which

139 (1857) 7 ICLR 425.

140 (1883) 11 QBD 588.

141 *Irish Law of Defamation*, p136.

142 *Libel and Slander*, 8ed, p 166, footnote 72.

143 [1969] 1 AC at pp 229, 252, 266-7, 271.

144 *Richardson v Harley* (1911) 31 NZLR 464.

exercise judicial functions.¹⁴⁵

This would presumably apply to bodies exercising limited functions and powers of a judicial nature under Article 37 of our Constitution.

In *Royal Aquarium v Parkinson*, Lord Esher MR stated:

"It is true that, in respect of statements made in the course of proceedings before a Court of Justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of courts of justice; but the doctrine has been carried further; and it seems that this immunity applies whenever there is an authorised inquiry which, though not before a Court of Justice, is before a tribunal which has similar attributes."¹⁴⁶

Similarly, in *O'Connor v Waldron*,¹⁴⁷ Lord Atkin stated:

"The law as to judicial privilege has in the process of time developed. Originally it was intended for the protection of judges sitting in recognised courts of justice established as such. The object no doubt was that judges might exercise their functions free from any danger that they might be called to account for any words spoken as judges. The doctrine has been extended to tribunals exercising functions equivalent to those of an established court of justice."¹⁴⁸

The doctrine has been held to apply to the proceedings of a number of bodies in England; a Justice of the Peace,¹⁴⁹ a Commission issued by the bishop of a diocese,¹⁵⁰ the Disciplinary Committee constituted under the Solicitors Act,¹⁵¹ the Benchers of an Inn of Court¹⁵² and a local military tribunal.¹⁵³

It is a difficult task to draw a precise line between judicial and non-judicial functions. English case law provides guidance as to how to identify judicial functions for the purpose of applying the doctrine of absolute privilege. Irish case law provides guidelines identifying limited judicial functions for the purposes of Article 37.

145 See Gatley, *Libel and Slander*, 8ed, p 173, para 409; Duncan & Neill, *Defamation*, para 13.11, p 85; *Royal Aquarium v Parkinson* [1892] 1 QB 431; *O'Connor v Waldron* [1935] AC 76.

146 [1892] 1 QB 431, 442.

147 [1935] AC 76.

148 *Ibid.*, at 81.

149 *Hodson v Pare* [1899] 1 QB 455.

150 *Barratt v Kearns*, [1905] 1 KB 504.

151 *Addis v Crocker*, [1961] 1 QB 11.

152 *Lincoln v Daniels* [1962] 1 QB 237.

153 *Copartnership Farms v Harvey Smith* [1918] 2 KB 405.

Gatley¹⁵⁴ identifies a number of elements that go to make up an administration of justice:

- (1) The nature of the question to be determined; for example, whether the decision affects the status of a person or the power is exercised for public benefit.
- (2) Powers and procedure; the more closely the procedure of the body in question resembles that of a court of justice, the more likely it will be held that its powers are judicial. An important power leaning to the judicial side is the power to compel witnesses.
- (3) The consequences of the decision; for example, if the decision is an essential step towards an effective decision, or has a major influence upon a final decision which is binding in law. By contrast, where the enquiry merely consists of a preliminary investigation, its proceedings will not attract absolute privilege.

In the Irish context, the doctrine that absolute liability protects statements made in the course of quasi-judicial proceedings would presumably apply to bodies exercising limited judicial functions under Article 37 of our Constitution. The exercise by a body of non-limited judicial powers would be an unconstitutional usurpation of the sphere of the courts. In this respect, the Irish case law on drawing the boundaries of "limited" judicial powers is relevant to ascertaining the bodies to which the doctrine of absolute privilege would apply.

In *Re Solicitor's Act 1954*,¹⁵⁵ the power to strike a solicitor off the roll exercised by the Disciplinary Committee of the Incorporated Law Society was held to be a sanction of such severity that its exercise amounted to an administration of justice which was not limited. In a later case, *Re Solicitor's Act 1954 and D, a Solicitor*,¹⁵⁶ it was held that the power to deny a solicitor of a practising certificate for a year was not so final a decision as to amount to an administration of justice. In *Cowan v Attorney General*,¹⁵⁷ a test based on a statement of the Supreme Court in the first Solicitor's Act case was formulated by Haugh J:

"... findings by the Court that could well affect, in the most profound and far reaching way, the lives, liberties, fortunes or reputations of those against whom they are exercised."

154 *Libel and Slander*, 8ed, p 167-170, paras 404-406.

155 [1960] IR 239.

156 95 ILTR 60.

157 [1961] IR 411.

A body acting in such a way would not be exercising limited judicial functions. A similar test was adopted in *McDonald v Bord na gCon, (No 2)*¹⁵⁸ by Kenny J in the High Court.

A recent English case specifically examines the issue of determining whether a body is quasi-judicial for the purpose of absolute privilege. In *Hasselblad (GB) Ltd v Orbinson*,¹⁵⁹ the body in question was the European Commission. In the course of an investigation into alleged anti-competition practices by the plaintiff, the Commission received a letter from the defendant stating that the plaintiffs had refused to repair a camera purchased by him on the ground that although it was manufactured by the plaintiff's parent company, it had not been purchased from an authorised dealer. As required under its procedure, the Commission sent a copy of this letter to the plaintiff in order to afford an opportunity of reply. The plaintiff denied the allegations and threatened the defendant with defamation proceedings. When the defendant refused to apologise or retract, the plaintiff commenced defamation proceedings on the basis of the letter.

The Court of Appeal held that the letter was sufficiently connected with the process of giving evidence as to come within the privilege, if any, afforded to written or oral evidence given directly to or before the Commission. Accordingly, it was necessary to decide whether the Commission was a quasi-judicial tribunal to which the rule of absolute privilege applied. The court considered (a) the authority under which the Commission acted, (b) the nature of the question into which it was its duty to inquire, (c) the legal consequences of its decision, and (d) the procedure adopted by the Commission. It held that although the Commission's duties required it to investigate infringements of the anti-competition principles and to take appropriate measures to bring these to an end, and although its decisions were enforceable by the High Court, the procedure adopted by the Commission indicated that it acted in a manner dissimilar to a court of justice. In particular, the Court of Appeal noted the fact that its decisions were reached by Commissioners who had not attended the hearing on the basis of the advice of Member States who were not directly concerned. Accordingly, the Commission and its procedures were administrative rather than judicial or quasi-judicial in character, and evidence given to it did not attract absolute privilege.

However, although the Court of Appeal held that the letter given to the Commission did not attract absolute privilege, it refused to allow the letter to form the basis of defamation proceedings on a different ground. The public interest in having libellous allegations investigated and redressed by the law had to be balanced against the public interest in ensuring that the Commission would not be frustrated in its duties under the Treaty. On balance, the court held, the public interest in favour of assisting the

¹⁵⁸ [1965] IR 217, 100 ILTR 89.

¹⁵⁹ [1985] 1 All ER 173.

Commission in carrying out its duties required the court to refuse to allow the letter to be produced in a libel action.

This public interest argument leaves room for expansion. On this view, if a body and its functions are held to be administrative rather than judicial or quasi-judicial, the battle is not over. It may be that there is such a public interest in assisting the functions of the body in question that evidence given to it may not be used to ground defamation proceedings. The Ombudsman, for example, would probably not be a judicial or quasi-judicial entity. However, there is no doubt that to allow defamation proceedings to be brought on the basis of a complaint made to him would greatly hamper his functions and duties. It is surprising, however, that the Court of Appeal in the *Hasselblad* case did not hold the occasion to be one of qualified privilege. It might easily have been found that the defendant had an interest to make the statement and that the Commission had a duty to receive it. Complaints made to the proper authorities attract qualified privilege at common law, as is clear from *Hynes-O'Sullivan v Driscoll*.¹⁶⁰

COMMUNICATIONS BETWEEN SOLICITOR AND CLIENT

105. It has been held that communications between solicitor and client are absolutely privileged.

This was held by the Court of Appeal in *More v Weaver*,¹⁶¹ although the correctness of the decision was doubted by Lord Atkin in *Minter v Priest*.¹⁶² It is clear, however, that they attract at least qualified privilege.

THE EXECUTIVE

106. Statements made by certain public officials concerning matters of State in the course of their official duties are absolutely privileged at common law.

There is little Irish authority in this area and this statement represents the generally accepted position at common law as laid down in a number of

160 Unreported, Supreme Court, 21 July 1988.

161 [1928] 2 KB 570.

162 [1930] AC 588.

English, Australian and United States decisions.¹⁶³ While the cases support the view that it would extend to communications made by Government Ministers to each other or to their subordinate officials, it is not clear how far beyond these categories it extends. It is thought, however, that McDonald is correct in stating that the limitations recently recognised by Irish decisions¹⁶⁴ on claims of executive privilege in relation to the production of documents in civil or criminal proceedings do not affect the privilege now under consideration. At a later point in this paper, we consider the desirability of clarifying the extent of this absolute privilege.

QUALIFIED PRIVILEGE

107. The law affords protection on certain occasions to a person acting in good faith and without improper motive who makes a statement which is untrue and defamatory.

"The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion."¹⁶⁵

108. There are a number of occasions which attract qualified privilege:

- (a) **Statements made pursuant to a legal, social or moral duty to a person who has a corresponding duty or interest to receive the statement;**
- (b) **Statements made for the protection of an interest to a person who has a duty or interest to receive the statement;**

¹⁶³ *Dawkins v Lord Paulet*, (1869) LR 5 QB 95; *Chatterton v Secretary of State for India in Council* [1895] 2 QB 198. *Isaacs & Sons Ltd v Cook* [1925] 2 KB 391. See *Halsbury's Laws of England*, vol 28, para 107. In a recent English case, the issue of executive privilege was raised but the case was disposed of on other grounds. The subject-matter of the proceedings in *Fayed v Al-Tajir* [1987] 2 All ER 396 was an inter-departmental memorandum prepared in a foreign embassy in London, which criticized the plaintiff and was seen by embassy officials and members of the foreign government. The trial judge held that the memorandum was privileged because it was a communication by one officer of state to another related to a matter of state. However, the Court of Appeal dealt with the case on the basis of international comity, holding that the court would refrain from enquiring into the merits of an internal document of a foreign embassy, in the same way as it would expect a foreign court to behave in similar circumstances.

¹⁶⁴ *Murphy v Dublin Corporation*; [1972] IR 215.

¹⁶⁵ *Horrocks v Lowe* [1974] 1 All ER 662, per Lord Diplock at 668-9.

- (c) Fair and accurate reports of judicial proceedings, howsoever published or whether or not published contemporaneously with the proceedings;¹⁶⁶
- (d) Reports which are privileged by virtue of section 24 and the Second Schedule of the Defamation Act 1961;
 - (i) Without explanation or contradiction, as listed in Part I of the Schedule;
 - (ii) Subject to explanation or contradiction, as listed in Part II of the Schedule.

109. Malice defeats the defence of qualified privilege.

"[T]he privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit - the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege."¹⁶⁷

110. Statements made pursuant to a legal, social or moral duty to a person who has a corresponding interest to receive the statement:

The fact that a person to whom defamatory matter is published had an obvious interest in receiving the matter is not sufficient to establish a privileged occasion. The person making the statement must also have a legal, social or moral duty to make it. This element of reciprocity was recognised in *Watt v Longsdon*.¹⁶⁸ The test of "duty" advanced in that case was as follows:

"Would the great mass of right-minded men in the position of the defendant have considered it their duty, under the circumstances, to make the communication?"¹⁶⁹

Examples of such duty and interest are provided by *Lawless v Anglo-Egyptian Cotton & Oil Co*,¹⁷⁰ *Kirkwood-Hackett v Tierney*¹⁷¹ and *Hartery v Welltrade*.¹⁷² In the first case, the defamatory material was contained in the auditors' report

166 (a) (b) and (c) attract qualified privilege at common law.
 167 *Horrocks v Lowe* [1974] 1 All ER 662, per Lord Diplock at 669.
 168 [1930] 1 KB 130.
 169 *Ibid*, per Greer LJ, p 153.
 170 (1869) LR 4 QB 262.
 171 [1952] IR 185.
 172 High Court, Unreported, 15 March 1978.

of a company which had been circulated to the company share-holders after a resolution of an ordinary general meeting. It was held that the occasion was privileged because the directors had a duty to communicate the report to the shareholders, and it was in the interest of all the shareholders to be informed of its contents. In the second case, the defamatory statement was made by the President of University College Dublin to a student in the presence of the College Secretary, in the course of an enquiry into a money draft allegedly wrongly paid to the student. The occasion was privileged because the speaker had a duty to make a full enquiry into the matter. In the third case listed, it was held to be a privileged occasion where the author of the statement had made a complaint to the Garda Síochána and a request that a criminal offence be investigated, since the statement was made pursuant to a legal duty.

The duty may also be of a more social or moral character, such as where an employer writes a character reference in respect of an employee, or a father speaks to a son or daughter about his/her intended spouse, or an employer warns an employee about their associates. It also encompasses those cases where the maker of a statement has spoken to the proper authority in order to redress a public grievance.¹⁷³

An example of the failure of the defence due to a want of duty and interest is provided by *Sevenoaks v Latimer*.¹⁷⁴ One L, a postmaster, was instructed to make inquiries by the Post Office authorities with regard to the misappropriation of a postal order. The defendant stated his belief to one M that the plaintiff was guilty of the crime under investigation. It was held that, as the defendant had no duty to make the statement, and M had no duty or interest to receive it, there was no occasion of qualified privilege.

Reciprocity of interest means that the person receiving the statement must actually have an interest in its receipt. It has recently been held by the Supreme Court in *Hynes - O'Sullivan v O'Driscoll*¹⁷⁵ that it is not sufficient if the maker of the statement honestly and reasonably believed that the recipient had an interest to receive it, if the recipient did not actually have such an interest.

In England, there appears to be one exception to this reciprocity rule. In *London Association v Greenlands Ltd*¹⁷⁶ it was held that where an enquiry is made of a person as to the financial circumstances and credit of a trader, that person is deemed to be giving the information on an occasion of qualified privilege if (a) he bona fide believes in the truth of the information and (b) bona fide believes that the person making the enquiry has an interest which

¹⁷³ McMahon & Binchy, *Irish Law of Torts*, p 363, Gatley, *Libel and Slander*, 8ed p 221, para 522, *Hynes-O'Sullivan v O'Driscoll*, Unreported, Supreme Court, 21 July 1988.

¹⁷⁴ 54 ILTR 11.

¹⁷⁵ Unreported Supreme Court 21 July 1988.

¹⁷⁶ [1916] 2 AC 15.

justifies the enquiry. This decision does not appear to have been considered by any Irish Court.

A distinction is made in relation to bodies which make statements as to the credit of other commercial bodies in answer to specific enquiries. If the body giving the information does so for profit, at common law it does not attract privilege; but if it does not do so for profit, it does attract privilege.¹⁷⁷

111. Statements made for the protection of an interest to a person who has a duty or interest to receive the statement.

The interest protected may be the property or the person of the speaker himself,¹⁷⁸ the interest of a third party,¹⁷⁹ or the interest of a group.¹⁸⁰

Examples of such occasions of privilege include a decision by the Stewards of the Jockey Club published in the Racing Calendar to an audience which is interested in horse racing,¹⁸¹ a statement made to parishioners about their priest,¹⁸² and a statement made in answer to a request by an interested party as to the plaintiff's commercial standing or credit.¹⁸³ Furthermore, when a person is threatened with legal proceedings for libel or is a defendant in such proceedings, the publication by him of an apology in the newspaper in which the alleged libel appeared is an occasion of privilege.¹⁸⁴

The Media

The courts have consistently refused to recognise an interest or duty on the part of the press to report matters of public interest to the public sufficient to constitute an occasion of privilege. There is therefore no media qualified

177 *London Association for Protection of Trade v Greenlands Ltd*, *Ibid*, and *Macintosh v Dun* [1908] AC 390 (Privy Council).

178 *McMahon & Binchy*, *Irish Law of Torts*, p.364, McDonald, *Irish Law of Torts*, p.146-150.

179 McDonald, p 150-6; here, however, factors such as the relationship between the speaker and the person protected, and the risk posed by the person defamed to the person protected, come into play.

180 McDonald, p 156-161, including proceedings of domestic tribunals.

181 *Chapman v Ellesmere* [1932] 2 KB 431.

182 *O'Keeffe v Cullen*, (1873) IR 7 CL 319.

183 *Davis v Reeves* (1855) 5 ICLR 79, *Fitzsimmons v Duncan & Kemp & Co* [1908] 2 IR 43.

184 *Willis v Irish Press Ltd* 72 ILTR 238.

privilege as such.¹⁸⁵ In *London Artists v Litle*,¹⁸⁶ a theatrical producer published a letter in the national press suggesting that the plaintiffs had taken part in a plot to force the end of the run of a play produced by him. The defence of qualified privilege, *inter alia*, was pleaded. The Court of Appeal felt that a duty to communicate information to the public arose where it was in the interest of the public that such publication be made, but that such a duty did not arise simply because the information appeared to be of legitimate public interest.

The same result was reached in the more recent case of *Blackshaw v Lord*.¹⁸⁷ In that case, the defendant journalist attended a press conference where it was stated that it had emerged from committee investigations that there had been irregularities in the management of a government department scheme to provide finance for companies developing oil and gas resources in the North Sea, and that a senior official had been dismissed. The defendant subsequently attempted to glean more information from the press officer of the relevant department. In the course of a telephone conversation, the press officer denied that anyone in the department had been dismissed, but stated that the plaintiff had held the post of under-secretary at the relevant time and was in charge of the division operating the scheme, that the plaintiff had subsequently left the division for a position of equal rank in a different division, and had then resigned for personal reasons, mainly to pursue a writing career. The defendant wrote an account of the information obtained from the press conference and the press officer, stating that the plaintiff had resigned, but omitted to state that he had done so for personal reasons. In the libel action brought by the plaintiff, the defendant pleaded, *inter alia*, qualified privilege. However, the Court of Appeal held that it was not sufficient that the report was of general interest to the public. The public would have to have a legitimate interest in receiving the information and the publisher would require a corresponding duty to publish the report to the public at large. The question whether this interest and duty existed would depend on the particular circumstances of each case, and on the facts, did not exist in the present case. Similarly in the New Zealand case, of *Truth (New*

185 However it may be that matter published in a media organ attracts qualified privilege for other reasons. In *Nevin v Roddy & Carty* [1935] IR 397 the plaintiff brought a libel action against C, the writer of the letter complained of, and R, the proprietor of the newspaper in which it was published. The jury found the letter to be defamatory of the plaintiff. However the defendant argued that the letter was a response to the action of the plaintiff and another in making defamatory statements concerning the defendant at an open Corporation meeting, with the intention that they should be published in the press. On appeal, the Supreme Court held that the occasion of C's reply was privileged and that he had lawful justification for resorting to the newspaper in which the plaintiff's charges appeared. There was nothing in the defendant's letter which was not sufficiently connected with the indication of his character to ground an objection of irrelevancy. The jury finding that there was no malice on the defendant's part should not be disturbed, and the judgment entered for the defendant should stand.

186 [1968] 1 WLR 607.

187 [1983] 2 All ER 311.

Zealand) Ltd v Holloway,¹⁸⁸ it was held that the defence of privilege could not be claimed by a newspaper simply because the topic covered was of public interest.

No court in this jurisdiction has ruled on this specific point, but the Northern Ireland decision in *Doyle v The Economist*¹⁸⁹ is in conformity with the English and New Zealand position. In that case the defendant published an article concerning the appointment of the plaintiff and two others as County Court judges, which allegedly implied that the plaintiff's appointment was not made on merit. The author of the article said that its content was based on interviews with senior Bar members and other eminent persons, but refused to give these sources in a witness box. It was held that although the matter was undoubtedly of public interest, it could not be said that there was any kind of duty on the defendant to pass on views to the public which were exposed in private and confidential discussion by unidentified persons, and untested for reliability and motive.

112. *Fair and Accurate Reports of Judicial Proceedings*

The rule was stated by Lord Esher MR in 1893 as follows:

"The rule of law is that, where there are judicial proceedings before a properly constituted tribunal exercising its jurisdiction in open Court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged. Under certain circumstances, that publication may be very hard on the person to whom it is made to apply, but public policy requires that some hardship must be suffered by individuals rather than that judicial proceedings should be held in secret."¹⁹⁰

The rationale of this common law privilege is clearly explained by Salmon LJ in *Burnett & Hallamshire Fuel Ltd v Sheffield Telegraph and Star Ltd*:

"Not only should justice be done, but it must manifestly be seen to be done. Justice is not a cloistered and secluded virtue. Behind closed doors, justice withers and dies, that is why in this country the doors of our courts are open to every member of the public so that the public may walk into court and see justice being done ... and a principle has grown up which is merely an extension of the principle which I have indicated to you, that the press has the freedom to report any proceedings in open court, providing that the report is fair and accurate, so that justice is seen to be done not only by the few members of the public who can spare the time to come to court, but

188 [1960] NZLR 69.

189 [1980] NI 171.

190 *Kimber v Press Association Ltd* [1893] 1 QB 65, 68.

by the whole, vast public which is reached by our press."¹⁹¹

An example of such a report failing for lack of accuracy is in *Mitchell v Hirst, Kidd & Rennie Ltd.*¹⁹² The plaintiffs had been charged with theft and taking a car without the owner's consent against road traffic legislation. The charges of theft were dropped at the police court. Nonetheless, newspaper reports appeared subsequently with the headings "Stolen Motor Car" and "Motor Car Theft". The reporters at the police court had not heard the withdrawal of the charge of theft, and this was found to be due to their inattention. The lack of accuracy was fatal to the privilege, and the plaintiffs recovered damages for libel.

Section 18 of our Defamation Act sets out a privilege in relation to the reporting of judicial decisions. It is not clear whether this privilege is absolute or qualified. However, it differs from the common law privilege under discussion in a number of other respects. First, the statutory privilege is confined to the media, whereas the common law privilege is not. Secondly the statutory privilege is conditional upon the report being "contemporaneous with" the proceedings reported, whereas there is no such time restraint upon the common law privilege. Thirdly, the statutory defence may be wider than the common law privilege in its geographical aspect, for it covers reports of court proceedings in Northern Ireland as well as the Republic of Ireland. The common law privilege appears to attach to proceedings in the domestic country only, and is extended to foreign court proceedings only reluctantly. However, where the foreign court proceedings are tied in closely with the administration of justice in the domestic country, the reporting of such proceedings may attract privilege at common law.¹⁹³

113. *Reports Privileged by Virtue of s24 of the Defamation Act*

The Second Schedule to the Defamation Act 1961 sets out a lengthy list of matters the reports of which attract qualified privilege. Section 24 of the Act provides that in respect of the matter listed in Part II of the Schedule, the defence of qualified privilege shall fail if it is proved that the defendant was requested by the plaintiff to publish a reasonable statement by way of explanation or contradiction and refused or neglected to do so, or has done so in a manner not adequate or reasonable in the circumstances. The matter listed in Part I is not made subject to this condition.

As with all the occasions of qualified privilege, malice destroys the defence.¹⁹⁴ As malice is not defined in the Act, its interpretation appears to be left to the common law. Section 24(3) adds that the defence does not attach to publications which are prohibited by law, or to the publication of matter

191 [1960] 1 WLR 502, at p 504.

192 [1936] 3 All ER 872.

193 *Webb v Times Publishing Co.* [1960] 2 QB 535.

194 *Defamation Act 1961*, s24(1).

which is neither of public concern nor of public benefit.

It should be borne in mind that the cases of common law privilege already discussed remain part of the law: the cases set out in the Second Schedule supplement rather than replace them.

The list of matters contained in the Second Schedule is as follows:

PART I

Statements privileged without Explanation or Contradiction

1. A fair and accurate report of any proceedings in public of a house of any legislature (including subordinate or federal legislatures) of any foreign sovereign State or any body which is part of such legislature or any body duly appointed by or under the legislature or executive of such State to hold a public inquiry on a matter of public importance.
2. A fair and accurate report of any proceedings in public of an international organization of which the State or the Government is a member or of any international conference to which the Government sends a representative.
3. A fair and accurate report of any proceedings in public of the International Court of Justice and any other judicial or arbitral tribunal deciding matters in dispute between States.
4. A fair and accurate report of any proceedings before a court (including a courtmartial) exercising jurisdiction under the law of any legislature (including subordinate or federal legislatures) of any foreign sovereign State.
5. A fair and accurate copy of or extract from any register kept in pursuance of any law which is open to inspection by the public or of any other document which is required by law to be open to inspection by the public.
6. Any notice or advertisement published by or on the authority of any court in the State or in Northern Ireland or any Judge or officer of such a court.

PART II

Statements privileged subject to Explanation or Contradiction

1. A fair and accurate report of the findings or decision of any of the following associations, whether formed in the State or Northern Ireland, or of any committee or governing body thereof, that is to say:
 - (a) an association for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and empowered by its constitution to exercise control over or adjudicate upon matters of interest or concern to the association or the actions or conduct of any persons subject to such control or adjudication;
 - (b) an association for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession or of the persons carrying on or engaging in any trade, business, industry or profession and empowered by its constitution to exercise control over or adjudicate upon matters connected with the trade, business, industry or profession or the actions or conduct of those persons;
 - (c) an association for the purpose of promoting or safeguarding the interests of any game, sport or pastime, to the playing or exercise of which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudicate upon persons connected with or taking part in the game, sport or pastime;being a finding or decision relating to a person who is a member of or is subject by virtue of any contract to the control of the association.
2. A fair and accurate report of the proceedings at any public meeting held in the State or Northern Ireland, being a meeting *bona fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern whether the admission to the meeting is general or restricted.
3. A fair and accurate report of the proceedings at any meeting or sitting of -
 - (a) any local authority, or committee of a local authority or local authorities, and any corresponding authority, or committee thereof, in Northern Ireland;
 - (b) any Judge or Justice acting otherwise than as a court exercising

judicial authority and any corresponding person so acting in Northern Ireland;

- (c) any commission, tribunal, committee or person appointed, whether in the State or Northern Ireland, for the purposes of any inquiry under statutory authority;
- (d) any person appointed by a local authority to hold a local inquiry in pursuance of an Act of the Oireachtas and any person appointed by a corresponding authority in Northern Ireland to hold a local inquiry in pursuance of statutory authority;
- (e) any other tribunal, board, committee or body constituted by or under, and exercising functions under, statutory authority, whether in the State or Northern Ireland;

not being a meeting or sitting admission to which is not allowed to representatives of the press and other members of the public.

- 4. A fair and accurate report of the proceedings at a general meeting, whether in the State or Northern Ireland, of any company or association constituted, registered or certified by or under statutory authority or incorporated by charter, not being, in the case of a company in the State, a private company within the meaning of the Companies Acts, 1908 to 1959 and 1963 to 1990,¹⁹⁵ or, in the case of a company in Northern Ireland, a private company within the meaning of the statutes relating to companies for the time being in force therein.
- 5. A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any Government department, local authority or the Commissioner of the Garda Síochána or by or on behalf of a corresponding department, authority or officer in Northern Ireland.

The sum of these matters constitutes the range of subjects of which the media are entitled to make fair and accurate reports. There is consequently no protection for reporting statements by public figures such as politicians, judges acting unofficially, the Attorney General, the DPP or the Ombudsman. If a media organ were to report a statement by such a figure which was defamatory of an individual, it would have to avail itself of the other defences in defamation law, since it is as liable as the original author of the statement.

¹⁹⁵ The 1961 Act refers to the Companies Acts 1908-59, which code has been replaced by the Companies Acts 1963-90. Section 4 of the *Companies Act 1963* provides that references in any Act to a company formed and registered, or registered, under the *Companies (Consolidation) Act 1908* shall be construed as references to a company formed and registered, or registered, under that Act or the 1963 Act.

114. *Malice and Qualified Privilege*

Malice destroys the defence of qualified privilege. If an occasion of privilege has been shown by the defendant to exist, the onus is on the plaintiff to establish malice on the part of the defendant.

The occasion which is privileged is so for a reason and the defendant must use the occasion for that reason. "He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to ratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect or wrong motive"¹⁹⁶

The use of the term "malice" has not been without ambiguity and the comments of Duncan and Neill are helpful:

"The term 'express malice' has been the source of some confusion because the word 'malice' as a word in general use connotes spite or ill-will whereas the express malice which can defeat a defence of fair comment or qualified privilege can include within its ambit not only spitefulness but also a state of mind which is not 'malicious' in the ordinary sense of the word. Furthermore, in cases where the express malice relied on does in fact involve evidence of ill-will between the parties the jury may find it difficult fully to appreciate that proof of the existence of bad feeling is not equivalent to proof that the defendant was *actuated* by malice at the time of publication."¹⁹⁷

Malice has been described in various ways; a "wrong or improper motive or feeling existing in the mind of the defendant at the time of publishing and actuating that publication", or "want of good faith";¹⁹⁸ "feelings not accounted for by the exigencies of the occasion ... but male fide, and in order to injure the complainant";¹⁹⁹ "an improper purpose i.e. a purpose inconsistent with the social policy which it is the policy of the law to secure by the technical device of privilege".²⁰⁰

In some cases personal spite or ill-will may indicate wrong motive. In others, a belief in the falsity of the statement or a reckless disregard as to its truth may constitute malice. McMahon & Binchy state that on some occasions, however, the making of a statement by a person who does not believe in its truth would not defeat the privilege, as where a person making a character reference draws attention to the fact that an offence was suspected of the plaintiff, although the referee does not himself believe it.²⁰¹

196 *Per* Brett LJ, *Clarke v Molyneux*, 3 QBD 246-247 (1877).

197 Duncan & Neill, *Defamation*, para 17.04, p 121.

198 *Kirkwood v Hackett v Tierney* [1952] IR 185, 203 and 199 respectively.

199 *Jacob v Lawrence* (1879) 4 LR Ir 579, 582.

200 McMahon & Binchy, *Irish Law of Torts*, p 369, quoting I Harper & James, 452.

201 McMahon & Binchy, *Irish Law of Torts*, 369.

McDonald also mentions this exception:

"A man may believe a statement to be untrue and yet may be perfectly justified in publishing it to the persons with whom he is in communication and with whom it may be his duty to communicate freely on the subject of the information he has received."²⁰²

However McDonald voices a number of objections to this exception. Firstly, the authority in support of this exception is scarce, and is mostly obiter or academic. Secondly, it is wrong in principle because it facilitates the telling of falsehoods with knowledge of their falsity. McDonald suggests that if such an exception were sanctioned, it should at least be made conditional upon the informer additionally communicating his knowledge that the statement is untrue.²⁰³

Where the author of the statement is an expert, and the statement is untrue, this does not of itself indicate malice which would defeat the defence of qualified privilege. In *Denvir v Taylor*²⁰⁴ an engineering expert supervising an electrical plant made certain allegations in a letter concerning an electrician employed in connection with the plant. The occasion was admitted to be privileged, but the jury found malice. On appeal it was held that the fact that the defendant was an expert making unfounded allegations did not of itself indicate malice, and as there was no other evidence of express malice the plaintiff could not succeed.

In England, there is now an authoritative statement as to the malice element in relation to the defence of qualified privilege. This is provided by the House of Lords in *Horrocks v Lowe*.²⁰⁵ Lord Diplock, with whom three of the law Lords concurred, stated as follows:

"So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is a term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant

202 McDonald, *Irish Law of Defamation*, p 206, quoting from *Butterill v Whytehead* (1879) 41 LT 588, 590.

203 McDonald, *Irish Law of Defamation* p206.

204 [1936] Ir Jur Rep 4.

205 [1974] 1 All ER 662.

is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologically termed, 'honest belief'. If he publishes untrue defamatory matter, recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false.

But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in lesser degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfections of the mental process by which the belief is arrived at it may still be 'honest' i.e. a positive belief that the conclusions they have reached are true. The law demands no more.

Even a positive belief in the truth of what is published on a privileged occasion - which is presumed unless the contrary is proved - may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill-will towards the person he defames. If this be proved, then even positive belief in the truth of what is

published will not enable the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled. There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true.

Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that 'express malice' can properly be found."

The guiding principles in English law as regards malice may therefore be stated as follows:

- (1) In order to defeat a defence of qualified privilege, the onus is on the plaintiff to show that the defendant was actuated by an improper motive when making the publication.
- (2) The plaintiff must show that the improper motive was the defendant's dominant motive in making the publication.
- (3) As a general rule, improper motive will be established by showing that the defendant did not believe the matter to be true.
- (4) Exceptionally, it seems that the privilege will not be lost where the defendant did not believe the matter to be true, provided (a) he had a duty to pass on the report and (b) he did not endorse the report.
- (5) Improper motive will not be established by showing that the defendant arrived at a belief that the matter was true through impulsiveness, irrationality or carelessness.
- (6) Improper motive will be established by showing that the defendant was reckless or indifferent to the truth.

- (7) A lack of honest belief in the truth of the matter is not the only type of improper motive. Speaking or writing out of spite or ill-will, or for personal gain, would establish improper motive. However, the court should be reluctant to find malice in such cases. A conclusion of malice should only be reached where it was found that the relevant duty or interest played no significant part in motivating the defendant to publish.

As these principles clarify the existing law on malice, it is likely that they would be persuasive in an Irish case.

Relevance

115. Irrelevance and Qualified Privilege: If the defendant makes statements which are irrelevant to the occasion of privilege, the defence may be lost.

For example, in *McKeogh v O'Brien Moran*²⁰⁶ the plaintiff doctor wrote a report to a local Government Department complaining of the way a Mrs N, midwife, conducted her cases. The Department referred the matter to the county council and the report was published in the local press. The defendant solicitor wrote to the county council on behalf of Mrs. N, denying the contents of the report and adding: "She will be able to prove when the time comes that there was greater reason for complaint against Dr. McKeogh in his treatment of his patients than there was against her". It was held that this statement was irrelevant to and unconnected with the purpose of the letter, which conferred privilege on the other sections of the letter. The irrelevant statement destroyed the defence of privilege.

It is not clear whether irrelevant matter is treated as falling outside the privilege or whether it should be seen merely as evidence from which malice may be inferred. In *Horrocks v Lowe* Lord Diplock took the view that irrelevant material should be taken as evidence of malice. Otherwise the court might be tempted to apply an objective standard of relevancy which would detract in a large measure from the protection afforded by the privilege:

"Logically it might be said that such irrelevant matter falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which on logical

206 [1957] IR 348.

analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right on which the privilege was founded. As Lord Dunedin pointed out in *Adam v Ward*²⁰⁷ the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference."

Again, as the cases are English they are not binding on the Irish courts but it is to be expected that they would be of persuasive influence. Accordingly, it is helpful to set out the principles submitted by Duncan & Neill as representing the current English position:

- "(a) Any matter which is in any way relevant to or connected with the subject matter which is protected by privilege will *prima facie* be covered by the privilege.
- (b) If the defendant includes matter which is only marginally relevant such inclusion *may* provide evidence of malice as showing that the defendant was using the privileged occasion for some improper purpose.
- (c) The court or jury should not apply any strict standard in determining relevance and should be slow to find malice merely because something has been included which logically is not relevant.
- (d) A defamatory statement which is wholly unconnected with the subject matter which is protected by privilege will not be covered. The inclusion of this 'foreign matter' may also provide evidence that the relevant material was published with malice."²⁰⁸

According to this analysis irrelevance may defeat the defence in two ways. Firstly, if material is grossly irrelevant it may destroy the privilege by itself. Secondly, if material is irrelevant, it may provide evidence of malice which destroys the defence.

²⁰⁷ (1877) 3 QBD 237.

²⁰⁸ Duncan & Neill, *Defamation*, para 17.09, p 125.

SECTION 21 AND UNINTENTIONAL DEFAMATION

116. At common law, the intent of the defamer is not relevant to (a) the determination of the defamatory effect of the statement, and (b) the issue of identification.²⁰⁹ Section 21 of the Defamation Act 1961 was introduced as an attempt to allow the defendant to establish a defence where (a) the defamatory effect of the statement was unanticipated, or (b) the defendant was unaware that the plaintiff would be identified from the statement.

Central to the defence is the element of fault. The section may only be availed of if the defendant exercised reasonable care prior to the publication. The crucial step in the procedure of the section is the offer of amends. Provided the defendant makes an offer of amends and complies with all the terms of the section, no proceedings may subsequently be taken against him.

Section 21 reads as follows:

- "(1) A person who has published words alleged to be defamatory of another person may, if he claims that the words were published by him innocently in relation to that other person, make an offer of amends under this section, and in any such case -
 - (a) if the offer is accepted by the party aggrieved and is duly performed, no proceedings for libel or slander shall be taken or continued by that party against the person making the offer in respect of the publication in question (but without prejudice to any cause of action against any other person jointly responsible for that publication);
 - (b) if the offer is not accepted by the party aggrieved, then, except as otherwise provided by this section, it shall be a defence, in any proceedings by him for libel or slander against the person making the offer in respect of the publication in question, to prove that the words complained of were published by the defendant innocently in relation to the plaintiff and that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff, and has not been withdrawn.
- (2) An offer of amends under this section must be expressed to be made for the purposes of this section, and must be accompanied by an affidavit specifying the facts relied on by the person making it to show that the words in question were published by him innocently in relation to the party aggrieved;

²⁰⁹ See para 26 above; *Hulton v Jones*, [1910] AC 20; *Newstead v London Express Newspapers*, [1940] 1 KB 371; *Cassidy v Daily Mirror Newspapers Ltd*, [1929] 2 KB 331.

and for the purposes of a defence under paragraph (b) of subsection (1) of this section no evidence, other than evidence of facts specified in the affidavit, shall be admissible on behalf of that person to prove that the words were so published.

- (3) An offer of amends under this section shall be understood to mean an offer -
 - (a) in any case, to publish or join in the publication of a suitable correction of the words complained of, and a sufficient apology to the parties aggrieved in respect of those words;
 - (b) where copies of a document or record containing the said words have been distributed by or with the knowledge of the person making the offer, to take such steps which are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the party aggrieved.
- (4) Where an offer of amends under the section is accepted by the person aggrieved:
 - (a) any question as to the steps taken in fulfilment of the offer as so accepted shall, in default of agreement between the parties, be referred to and determined by the High Court or, if proceedings in respect of the publication in question have been taken in the Circuit Court, by the Circuit Court, and the decisions of such Court thereon shall be final;
 - (b) the power of the court to make orders as to costs in proceedings by the party aggrieved against the person making the offer in respect of the publication in question, or in proceedings in respect of the offer under paragraph (a) of this sub-section, shall include power to order the payment by the person making the offer to the party aggrieved of costs on an indemnity basis and any expenses reasonably incurred or to be incurred by that party in consequence of the publication in question;

and if no such proceedings as aforesaid are taken, the High Court may, upon application by the party aggrieved, make any such order for the payment of such costs and expenses as aforesaid as could be made in such proceedings.

- (5) For the purposes of this section words shall be treated as published by one person (in this subsection referred to as the publisher) innocently in relation to any other person if, and only if, the following conditions are satisfied, that is to say:
- (a) that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or
 - (b) that the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person,

and in either case that the publisher exercised all reasonable care in relation to the publication; and any reference in this subsection to the publisher shall be construed as including a reference to any servant or agent of the publisher who was concerned with the contents of the publication.

- (6) Paragraph (b) of subsection (1) of this section shall not apply where the party aggrieved proves that he has suffered special damage.
- (7) Paragraph (b) of subsection (1) of this section shall not apply in relation to the publication by any person of words of which he is not the author unless he proves that the words were written by the author without malice."

The section has been criticised by McDonald as ineffective for three main reasons:

- (1) The difficulty and expense of preparing the affidavit on time,²¹⁰
- (2) The prohibition on the use of facts, other than those stated in the affidavit, in a subsequent action,
- (3) The necessity of proving that the author acted without malice, where the publisher is not the author.²¹¹

RTE complain that the definition of innocent defamation is too narrow and unduly restricts the type of mistakes that may gain protection.

210 Part of an RTE submission to this Commission.

211 McDonald MD, *Irish Law of Defamation*, p 231.

The Boyle-McGonagle Report²¹² additionally criticises the following aspects of the section -

- (1) If the section is effective, it should not be limited to victims of unintentional defamation.
- (2) Alternatively, the section is not effective enough, because the requirement of "reasonable care" limits its use excessively.
- (3) The section is unavailable where the party shows special damage,²¹³ a distinction which appears arbitrary.

Perhaps the strongest criticism of the section is the statistic offered by the Boyle-McGonagle Report. In the period 1980-85, the High Court records show that the national newspapers did not once avail of the section.²¹⁴

212 *Report on Press Freedom and Libel*, para 5.5 - 5.9.

213 Under S 21(b). *Defamation Act 1961*.

214 Remembering that national newspapers represent 55% of defendants in High Court libel actions.

CHAPTER 3: REMEDIES

Three remedies exist in Ireland at present for the plaintiff in a defamation action. The principal remedy consists of damages. The second type of remedy is the injunction, which may be an injunction awarded after verdict for the plaintiff (in addition to or instead of damages), or an interlocutory injunction awarded prior to the hearing in order to prevent publication pending the hearing. The final remedy is the declaratory judgment, which is not, however, availed of in practice.

DAMAGES

117. Damages may be of four different types. Compensatory damages are awarded for injury to reputation and hurt feelings.¹ Nominal damages are awarded where the plaintiff has a proper case and wishes only to vindicate his character. Contemptuous damages are awarded as a mark of disapproval by the jury of the plaintiff having brought the action, although he has nonetheless established some damage to his reputation. Punitive damages are awarded in order to punish the defendant.

COMPENSATORY DAMAGES

118. Compensatory damages are of two types, general and special. General damages are the sum awarded in respect of the loss of reputation which the law presumes to follow from the publication of all libels and of slanders

1 "In a case such as this in which there is no question of punitive, exemplary or aggravated damages, it is the duty of the judge to direct the jury that the damages must be confined to such sum of money as will fairly and reasonably compensate the plaintiff for his injured feelings and for any diminution in his standing among right thinking people as a result of the words complained of ..." per Henchy J, Barrett case [1986] ILRM 601.

actionable per se. Evidence of such loss is not necessary, but the plaintiff may produce it if he wishes.² Special damages consist of the sum awarded in respect of the special damage which must be proved in cases of slanders actionable only on proof of special damage.

119. A judge sitting alone determines the amount of damages. Where there is a jury, the jury sets the sum to be awarded. Damages are said to be "at large" i.e. the award is not limited to pecuniary loss that can be proved.

120. Assessment of General Damages: The jury award of damages is discretionary. As Palles CB stated in *Harris v Arnott*:

"[C]ases are of little or no value in reference to the question of amount, as distinguished from that of principle. Each case must depend emphatically upon its own peculiar circumstances ..."³

Nonetheless the courts have considered certain factors to be relevant in considering the extent of damage.

In *Barrett v Independent Newspapers*, Henchy J listed as relevant considerations in the assessment of damages: "the nature of the libel, the standing of the plaintiff, the extent of the publication, the conduct of the defendant at all stages of the case".⁴ Griffin J listed similar factors and added, "any social disadvantage which may result or be thought likely to result from the wrong which has been done to the plaintiff, and the injury to his feelings".⁵ Notably a factor held not to be relevant is the fact that a plaintiff agrees to donate all damages to a named charity.

In *Uren v John Fairfax*, Windeyer J explained the variety of factors that may be taken into account in assessing compensatory damages as follows:

"It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation for damages operates in two ways - as a vindication of the plaintiff to the public and as a consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money. The variety of matters which, it has been held, may be considered in assessing damages for defamation must in many cases mean that the amount of a verdict is a product of inextricable considerations. One

2 In *Campbell v Irish Press*, (1955) ILTR 105, the Supreme Court found erroneous a direction of the trial judge that gave the impression that special damage was required to be shown in a libel action.

3 (1890) 26 LR Ir 55, 67-68.

4 [1986] ILRM 601, 608.

5 *Ibid*, at p614.

of these is the conduct of and the intentions of the defendant, in particular whether he was actuated by express malice. Yet in the abstract the harm that a plaintiff suffers cannot be measured by, nor does it necessarily depend at all upon, the motive from which the defendant acted or upon his knowledge or intentions. These, however, have always been regarded as important in assessing damages.⁶

Despite the wide variety of relevant factors emerging from these quotations, it is clear that these judges envisaged injury to reputation as the primary wrong to be redressed, while hurt feelings would be a side issue. RTE, however, complain that in practice counsel are allowed by trial judges to base their line of presentation on the emotional distress inflicted on the plaintiff, which is not the core of the tort, in theory at least.⁷ They ask the Commission to address this problem.

RTE's criticism is supported by the decision in an English case, *Fielding v Variety Incorporated*⁸ where the injury to reputation was negligible but the court held that the plaintiff was entitled to compensation for feelings of "anxiety and annoyance".⁹ The plaintiff was a theatre impresario and the defendants published in their journal an article which falsely stated that his latest London production was a flop. The court considered that the fact of the play's success would speak for itself and if American producers read the article they would know its falsity, and therefore no material injury to reputation had been caused. If compensation for injured feelings may be awarded not merely in addition to, but instead of, injury to reputation, this raises questions as to the direction which defamation actions are taking. It may be that it is desirable to allow recovery for such injury. However, it is unfair to impose rules relating to reputational injury upon defendants and expect them to defend an action, the gist of which is something quite different.

121. Assessment of Special Damages: Special damages are awarded to the plaintiff for quantifiable loss suffered as a natural result of the publication on the basis of principles of causation and remoteness applicable to any other tort.¹⁰ "The special damage must be the natural and reasonable result of the defendant's words".¹¹

6 (1966) 117 CLR at p150.

7 Part of an RTE submission to this Commission.

8 [1967] 2 QB 841.

9 *Ibid*, per Salmon LJ at 856.

10 *Halsbury's Laws of England*, vol. 28, para. 18.

11 Gately, *Libel and Slander*, 8ed, p97 para. 209. For example in *Lynch v Knight* (1861) 9 HLC 577, the loss of consortium by a wife after a slander imputing that she had been seduced was held to be damage too remote to be actionable; the husband's reaction was not the reasonable consequence of the words uttered.

Although the tort of defamation serves to protect reputation, injury to reputation is the one thing that does not constitute special damage.¹² The principal types of special damage are pecuniary or material loss, such as loss of a contract, or employment, or membership of a club, or a spouse. The question of remoteness of damage arises in this area because the pecuniary loss depends to a large extent on the act of a third party, and it may be raised in argument that the third party's act is an intervening act which relieves the defendant from liability.

Where the damage is directly attributable to the independent act of a third party, the defendant will not be liable unless (a) he intended that as a consequence of his publications a third party would act as he did, or (b) it was a natural and probable consequence of his words that the third party would act as he did.

In the case of *Vicars v Wilcocks*,¹³ it was held that damage was too remote where B was wrongfully dismissed by C after A slandered B. Now, however, it seems that such damage would not necessarily be too remote:

"It is submitted that the true test of liability for damage occasioned by the act of a third party is not whether the act was legal or illegal, but whether the act, legal or illegal, was the natural and probable result of the defendant's words."¹⁴

"In other words, if A does an unlawful act to B, the chain of causation may possibly be severed by the unlawful act of C, but it does not follow that it must necessarily be severed thereby."¹⁵

Further authority for the view that *Vicars v Wilcocks* no longer represents the law is found in *McGregor on Damages*.¹⁶ That author argues that the decision in *Vicars* case was based on a previous decision, *Morris v Longdale*¹⁷ where Lord Eldon LC expressed the view that if a third party refused to complete his contract with the plaintiff, the plaintiff could not sue the slanderer because the plaintiff could sue the third party instead.

However, this line of reasoning was discredited in relation to another tort in the later case of *Lumley v Gye*.¹⁸

Where the termination of contract was lawful, the courts have been more willing to allow recovery to the plaintiff from the slanderer.¹⁹

12 See *McGregor on Damages*, 15ed, para. 1639-1641.

13 (1806) 8 East 1.

14 Gatlley, *Libel and Slander*, 8ed, p98, para. 211.

15 *Winfield and Jolovicz on Tort*, 12ed, p299.

16 See paras 1648-9.

17 (1800) 2 B and P 284.

18 (1853) 2 E and B 216.

19 *Longdon-Griffiths v Smith* [1950] 2 All ER 662.

Where A slanders B to C, and C repeats it to D, who then refuses to deal with B, this was held in *Ward v Weeks*²⁰ to be damage too remote for B to recover from A. The spontaneous and unauthorised communication by C to D was not considered the necessary consequence of A's original statement to C. The decision has been criticised on the grounds that, taking account of human nature, the repetition of the slander to someone who is in a position to injure the victim is a foreseeable event. However, liability for repetition was held to exist in four types of case in *Speight v Gosnay*:²¹

- (1) if the slanderer authorised the repetition,
- (2) if the repetition was the natural consequence,
- (3) if the slanderer intended the repetition,
- (4) if there was a moral duty to repeat on the part of the person to whom it was uttered.

Although the general principles of remoteness apply, there appears to be one peculiarity in relation to defamation. In the case of slanders not actionable *per se*, illness arising from mental worry is too remote, whereas in relation to slanders actionable *per se*, libel and other torts, such injury is actionable, provided the damage amounts to nervous shock.

122. Reputation and Damages: The law presumes a man to have a good reputation and it is not necessary for the plaintiff to adduce evidence of his good reputation. However, for a number of reasons it may be advisable for a plaintiff to do so. First, the standing of the plaintiff in the community will affect the measure of damages. Secondly, the plaintiff may have been cross-examined as to credibility and evidence of his good reputation will serve to counteract any bad impression left by such cross-examination. Thirdly, the defendant may intend to produce evidence of bad reputation in relation to the imputation in question in order to mitigate damages.²²

123. An appeal lies against a jury award of damages where there is no proper proportion between what was actually awarded and what could reasonably have been awarded. However, an appellate court will be very reluctant to overturn a jury verdict. The appellate court does not merely substitute its own view of what should have been awarded, but rather looks to see whether there was any basis for the sum awarded.

This reluctance to interfere with jury verdicts on damages is illustrated by the following examples of judicial statement:

20 (1830) 7 Bing. 211.

21 (1890) 60 LJQB 231.

22 See paras 128-129 below.

"We are cautious in meddling with verdicts of juries on matters of fact, or on the ground of excessive damages ..."23

"I am not called on to say what sum, if I had been in the place of the jury, I should have given. In this class of action damages are peculiarly for the jury, and the Court cannot interfere with them unless it can come to the conclusion that the damages are unreasonably large."²⁴

"... [W]hile the assessment by a jury of damages for defamation is not sacrosanct, in the sense that it can never be disturbed upon appeal, it certainly has a very unusual and emphatic sanctity in that the decisions clearly establish that appellate courts have been extremely slow to interfere with such assessments, either on the basis of excess or inadequacy".²⁵

124. Where the Supreme Court is of the opinion that the jury's award of damages was unreasonable, it appears that it can substitute its own figure without ordering a re-trial.

This was affirmed by a majority of the Supreme Court in the recent case of *Holohan v Donohue*²⁶ in 1986. The specific question raised on appeal to the Supreme Court was whether it had jurisdiction under Article 34.4.3° of the Constitution to substitute its own figure for the jury award in the High court in a civil case, or whether a restriction was imposed on its appellate jurisdiction in this context by s96 of the *Courts of Justice Act 1924*.

Article 34.4.3° provides that the Supreme Court shall have appellate jurisdiction from "all decisions of the High Court", subject to such exceptions and regulations as may be prescribed by law. S 94 of the *Courts of Justice Act 1924* provides that nothing in the 1924 Act "shall take away or prejudice the right of any party to an action in the High Court ... to have questions of fact tried by a jury in such cases as he might heretofore of right have so required in the Supreme court of Judicature in Ireland", subject to certain exceptions of which the *Holohan* case was not one. S 96 of the 1924 Act provides that every appeal from a judgment in the High Court in an action tried by judge and jury shall be made by way of motion to the Supreme Court for a new trial and that, in any appeal to which the section applies, "the appellate tribunal may, in lieu of ordering a new trial, set aside the verdict, findings and judgment appealed against and enter such judgment as the court considers proper".

The plaintiff in the *Holohan* case had been awarded over £94,000 for personal injuries and loss caused by the negligence of the defendant in a road traffic

23 Per Whiteside CJ, *Cosgrave v Trade Auxiliary* (1874) IR 8 CL 349, 358.

24 Per Johnson J, *Bolton v O'Brien* (1885) 16 LR Ir 97, 131.

25 Per Finlay CJ, *Barrett v Independent Newspapers*, [1986] ILRM 601.

26 [1986] ILRM 250.

accident. The defendant appealed the award of general damages, which consisted of £30,000 for pain and suffering to date, and £55,000 for future pain and suffering. All the members of the Supreme Court agreed that this award of general damages was excessive. A majority of the Supreme Court (Finlay CJ, Hederman, Henchy and Griffin JJ) held that the Court had jurisdiction to substitute its own figure of damages. McCarthy J, dissenting, was of the view that it had jurisdiction only to order a re-trial.

Finlay CJ, with whom Hederman J concurred, rejected the first submission of the respondent, that the reference in s96 of the right of the appellate tribunal to set aside the "verdict, findings and judgment" appealed against, as opposed to the power of the appellate court to enter a "judgment", meant that where a re-trial was not ordered, the only alternative was a reversal of the entire judgment of the High Court. The Chief Justice also rejected the submission of the respondent to the effect that to exercise a power of substitution would be, in effect, to deprive him of the right to have questions of fact involved in the assessment of damages tried by a jury. While s94 dealt with the right of trial in the High Court, it did not purport to deal with the right of appeal to the Supreme Court. He noted that his chief difference of opinion from McCarthy J was that he was not of the view that the measurement or assessment of damages was a finding of fact.

Henchy J reached the same conclusion. He noted the only Supreme Court decision dealing with the power to assess damages as an alternative to ordering a re-trial was *Gahan v Engineering Products Ltd.*²⁷ In that case a jury award of damages was held to be so excessive as to require the court's intervention and re-assessment. In the *Gahan* case, O'Dalaigh CJ stated:

"At the conclusion of the argument, enquiry was made of counsel as to whether, in the event of the damages being considered excessive, the parties were agreeable to this Court re-assessing the damages in lieu of ordering a re-trial. Agreement has not been forthcoming. The parties were reminded that, independent of the agreement between the parties, the court has jurisdiction to exercise that function. The jurisdiction is expressly conferred by s96 of the *Courts of Justice Act 1924*."

The Supreme Court proceeded to assess damages itself and the question of the jurisdiction itself was not argued before it. For over fifteen years, the Court acted on that ruling, and the jurisdiction to do so was not challenged until the *Holohan* case.

Henchy J said that although the conclusion in the *Gahan* case was correct, it was based on an incorrect assumption:

²⁷ [1971] IR 30.

"It would appear that the decision of this Court in *Gahan v Engineering Products Ltd* rested on the assumption that the jurisdiction of this Court to assess damages, rather than order that they be re-assessed by a jury in the High Court, derived from s96 of the 1924 Act. Such an assumption was not properly founded and was probably due to the fact that the point being decided by the court was not argued before it. The true position is that the court's jurisdiction to make such an order has a constitutional and not a statutory basis. As was stated by Walsh J in *The People v Conneely*, [1975] IR 341 the appellate jurisdiction of this court from decisions of the High Court flows directly from the Constitution."²⁸

The question then became whether s96 of the 1924 Act constituted a restriction on this constitutionally granted appellate jurisdiction. Henchy J answered as follows:

"In my opinion, s96 could not, by any stretch of interpretation, be said to be so clear and unambiguous in its scope as to deprive this Court of jurisdiction to make such order as it deems necessary for the purpose of doing justice in the disposition of the appeal, and in particular, to assess damages rather than order a new trial on the issue of damages".

McCarthy J was of the opinion that the Supreme Court has jurisdiction only to order a re-trial on the issue of damages. He observed that the majority holding would logically extend to all other civil cases involving a jury, including defamation actions. Thus, although a re-trial would always be an alternative, in an appropriate case, the Supreme Court would have the power to substitute damages in defamation actions, although such assessment was normally stated to be "peculiarly the province of the jury". The majority judgments do not refer to defamation actions. However, as the power was found to have a constitutional basis, it is unlikely that defamation actions would be treated any differently, in the absence of specific legislation. McCarthy J was clearly of the opinion that the majority result affected defamation actions.

The present Irish position following the *Holohan* case is that the Supreme Court may substitute its own award of damages in a case on appeal from a High Court civil action involving a jury. However, the power to order a re-trial is always an alternative. The decision as to which course to adopt depends on the circumstances of the case and not on the wishes of the parties, although their wishes would be "an important factor".²⁹ The Chief Justice stated that if the respondent expressed a strong desire to have a new trial, the appellant would have to advance "very compelling and strong reasons" as to why the court should not do that. Furthermore, if the transcript of the trial did not contain a "sufficiently clear and concrete set of facts" which would

28 [1986] IR 250, 259-60.

29 *Ibid.*, at 254, per Finlay CJ, see also Henchy J at 261.

allow the Supreme Court to assess damages, it should order a re-trial. However, a substitution of damages was made in the *Holohan* case because there was no conflict of medical evidence and there was no reason why the Court could not make its own assessment. The defendant was anxious to have the case disposed of as it was eight years since the accident had occurred. These factors combined to make it an appropriate case for the exercise of this aspect of the Court's appellate jurisdiction.

AGGRAVATION OF DAMAGES

125. A plaintiff may obtain aggravated compensatory damages. They are not a separate award but are still within the "compensatory damages" award. They are awarded as a response to particularly offensive conduct by the defendant. In theory they are distinct from punitive damages. However the case law has not always upheld this distinction.

One type of conduct which will justify a jury award of aggravated damages is where the defendant persists in a plea of justification which fails,³⁰ or where he unsuccessfully insists on the truth of the supporting facts in a defence of fair comment.³¹

Other examples of aggravating circumstances include the lack of a full and proper apology,³² although a lack of apology is not automatically an aggravating factor; the publication of felonious charges at the time of the withdrawal of the defamatory statement;³³ and the extent of circulation.³⁴ The aggravating conduct of the defendant may be peculiar to the individual case.

In *Higgins v Monaghan & O'Reilly*,³⁵ the libel consisted of a false charge of personation at an election, followed by an arrest at the instance of the personation agent. The plaintiff was detained in a voting-booth for about an hour and then marched publicly to barracks where she was held for a further two hours before being charged. The plaintiff was heavily pregnant at the time and alleged that as a result of this ordeal she gave birth to a still-born child. These factors were presumably the basis for the aggravated damages awarded by the court.

Malice will also inflate damages. According to McGregor, this is merely part of a principle that the whole conduct of the defendant at all times may be

30 *Bell v Parke* (1860) 11 ICLR 413, 423; *Gallagher v Tuohy* (1924) 58 ILTR 134, 135; *Associated Leisure Ltd v Associated Newspapers Ltd*, [1970] 3 WLR 101, 105; *Cassell v Broome* [1972] AC 1027, 1125. See para 68 above.

31 *Campbell v Irish Press* (1955) ILTR 105 24 per Kingsmill-Moore J. See para 84 above.

32 *Harriss v Arnott* (1889) 26 LR 1r 55. Halsbury is of the view that an apology is a mitigating factor only in certain circumstances - see *Halsbury's Laws of England*, vol 28 para 240.

33 *Bolton v O'Brien* (1885) 16 LR 1r 97, 112.

34 See *Halsbury's Laws of England*, vol 28, para 237.

35 (1940) 74 ILTR 56.

examined. "The practical effect is that damages will fluctuate up or down with the degree of culpability of the defendants behaviour".³⁶ Indeed, McGregor includes persistence in a plea of justification, and a lack of apology as instances of malice on the part of the defendant.

Damages may also be aggravated where the defendant unsuccessfully attempts to mitigate damages by adducing evidence of the plaintiff's bad reputation.³⁷

Mitigation of Damages

126. The defendant may lead evidence in mitigation of damages as follows:

- (a) Evidence that the plaintiff had a general bad reputation prior to the publication of the defamation.
- (b) Under s26 of the Defamation Act, evidence that the plaintiff has recovered damages, or has brought actions for damages, for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication.
- (c) Under s17 of the Defamation Act, evidence that the defendant 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, in case the action was commenced before there was an opportunity for making or offering such apology.
- (d) Evidence of retractions or corrections by the defendant, or the offer of a right of reply.
- (e) Evidence of the conduct of the plaintiff.³⁸
- (f) Evidence of the circulation of the libel.
- (g) Repetition and disclosure of source.

127. Order 36, R 36 RSC (1986) provides the following requirements of notice in relation to mitigation of damages:

"In actions for libel and slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief,

³⁶ *McGregor on Damages*, 15ed, para 1665.

³⁷ *Kennedy v Hearne* [1988] ILRM 531.

³⁸ [1986] ILRM 601, e.g. *Barrett v Independent Newspapers* where the plaintiff wrote a moderate letter to the defendant concerning the defamation and failed to request even an apology.

with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before trial he furnished particulars to the plaintiff of the matters as to which he intends giving evidence."

Notably, the notice requirement may be dispensed with by the judge. Furthermore the rule is of no application where the defence of justification is raised.

128. Evidence of the plaintiff's bad reputation may serve to mitigate damages.

"First, is it to be permissible to call evidence of character at all by way of mitigation? There is much to be said against allowing it, because, if it is allowed, there comes in all the difficulties of limitation and possible unfairness of which we have been made conscious in the arguments in this case. On the other hand, there is, I think the preponderating consideration in favour of this head of evidence that it would be outrageous that a person should recover damages for injury to a character that he is generally known not to possess, or, to put it another way, to a reputation that is not his."³⁹

129. There are three types of evidence by which reputation can be proved;

- (1) evidence of general reputation in relation to the imputation in question,
- (2) evidence of specific acts of misconduct by the plaintiff,
- (3) evidence of rumours of misconduct.

In England, evidence of the first type only is admissible. In Ireland, in at least one case, evidence of the second type was admitted.

The leading authority for the English position is *Scott v Sampson*.⁴⁰ It is worth setting out a portion of the judgment of Cave J in this case at length, as it represents the English position in this area:

"From this review of the authorities it will be seen that there is a considerable conflict of opinion, but before discussing them further it seems desirable to consider the principles underlying them. Speaking

³⁹ Per Lord Radcliffe, *Plato Films v Speidel* [1961] AC 1090 at p1128. See also the remarks of Pigot CB in *Bell v Parke* (1860) 11 ICLR 413, at p425 where he contrasts the case of an individual about whom a general suspicion of his having committed a murder exists, and an individual who is a person of "unblemished fame, upon whose character the breath of slander has never been blown".

⁴⁰ (1882) 8 QBD 491.

generally the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held. He complains of an injury to his reputation and seeks to recover damages for that injury; and it seems most material that the jury who have to award these damages should know if the fact is so that he is a man of no reputation."

He proceeded to quote from Starkie on Evidence:

"To deny this would be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantum of injuries sustained a knowledge of the party's previous character is not only material but seems to be absolutely essential."

With regard to the first category of evidence he said:

"On principle, therefore, it would seem that general evidence of reputation should be admitted, and on turning to the authorities previously cited it will be found that it has been admitted in a great majority of cases ..."

With regard to the second category of evidence he said:

"As to ... evidence of facts and circumstances tending to show the disposition of the plaintiff, both principle and authorities seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation, and to admit evidence of this kind is in effect as was said in *Jones v Stephen*, 11 Price 235, to throw upon the plaintiff the difficulty of showing a uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of."

On the third category of evidence he said -

"As to ... evidence of rumours and suspicions to the same effect as the defamatory matter complained of, it would seem that on principle such evidence is not admissible as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have, in fact,

affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it they are not relevant to the issue. To admit evidence of rumours and suspicions is to give anyone who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading through the means of the publicity attending judicial proceedings what he may have picked from the most disreputable sources, and what no man of sense, who knows the plaintiff's character, would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all that those who know him best can say is that they have not heard anything of these rumours. Moreover, it may be that it is the defendant himself who has started them."

This was accepted as an accurate statement of the law in *Hobbs v Tinling*,⁴¹ and in *Plato Films v Speidel*⁴² the House of Lords refused to review the decision in *Scott v Sampson*. Viscount Simonds admitted the difficulty of drawing the boundaries between the types of evidence in certain cases:

"It is, no doubt, true that in practice it may be difficult to define exactly either the border line between evidence of general bad reputation and that of specific conduct which has lead to it or the area of conduct which the general bad reputation is to cover. That is only to say that a libel action is an imperfect instrument for doing justice in every case. There may, in the result, be cases in which a rogue survives both evidence of bad reputation and, where he has gone into the witness box, a severe cross-examination, nominally directed to credit, and recovers more damages than he should. But I would rather have it so than that the law should permit the injustice, and, indeed, the cruelty of an attack upon the plaintiff for offences real or imaginary which, if they ever were committed, may have been known to few and by then have been forgotten. It says nothing more of the inconvenience of having one or more trials within the original trial. The main issue has been determined when the defendant has failed in his plea as justification. How many other trials of the offences pleaded in mitigation are to be admitted?"⁴³

A predominant consideration in limiting evidence of reputation is to prevent the trial becoming unduly lengthy and complicated:

"If in a quest to discover or to assess the true character and disposition of a plaintiff a defendant could assert and seek to prove certain deeds which were discreditable to the plaintiff, the latter could hardly be denied the right to counterbalance them by asserting and seeking to

41 [1929] 2 KB 1, see in particular Scrutton LJ at p17-18.

42 [1961] AC 1090.

43 *Ibid.*, at 1124-5.

prove deeds which rebounded to his credit. The limits of roving enquiry would be hard to control. There would be trials within a trial."⁴⁴

It may be noted that the holding in the *Plato* case was not unanimously supported. Lord Radcliffe dissented vigorously:

"These considerations lead me to the opinion that it would be wrong to hold that general evidence of reputation, which must mean reputation in that sector of a plaintiff's life that is relevant to the libel complained of, cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to his current reputation. Such incidents are, after all, the basic material upon which the reputation rests, and I cannot see the advantage to anyone of excluding the better form of evidence in favour of the worse. It remains true that the issue is not whether the incidents actually happened but whether it is common report that they did. If it is, that seems to me to be the best available evidence of the plaintiff's reputation. I find it difficult to combine an aversion from rumour with an indulgence for general evidence of reputation which, unvouched, is virtually the same thing."⁴⁵

Resistance to the decision in *Plato* was also evidenced in *Goody v Odhams Press*.⁴⁶ The defendants sought to introduce evidence tending to show bad reputation of two types: (a) evidence of a general bad reputation as a thief and robber given to violence, and (b) evidence of previous convictions for such offences. The first type of evidence was clearly admissible as coming within the first category. However, a strict reading of the second category might have equated previous convictions with specific acts of misconduct. But, Lord Denning MR held that evidence of previous convictions was essentially different from "previous instances of misconduct" because the latter "had not been tried out or resulted in convictions or come before a court of law". Salmon LJ distinguished the *Plato* case on the grounds that the latter case excluded evidence of facts "tending to prove that the plaintiff ought not to have a good reputation", whereas in the case before him the evidence was that the plaintiff in fact had a bad reputation. The rule that evidence of specific acts of misconduct are inadmissible to mitigate damages therefore admits of an exception. Where the specific acts of misconduct have resulted in convictions, they may properly be admitted in evidence to mitigate damages.

A further inroad into the "specific acts" rule appears to have been made in the recent English case of *Pamplin v Express Newspapers Ltd (No 2)*.⁴⁷ There the plaintiff had devised a scheme for avoiding the payment of parking fines

44 *Ibid.* at p1144, per Lord HARRIS.

45 *Ibid.* at p111.

46 [1967] 1 QB 333.

47 [1988] 1 All ER 282.

and television licence fees by registering his car and television set in the name of his son, who was too young to be prosecuted for a criminal offence. A national newspaper commenting on this scheme described the plaintiff as a "slippery, unscrupulous spiv". In an action in defamation brought by the plaintiff, the defendants pleaded fair comment and justification. At trial, the plaintiff admitted some of his behaviour could be described as "slippery" and "unscrupulous", and this was treated as admitted partial justification. The judge directed the jury that even if the defendant's plea of justification was unsuccessful the jury could take into account the acts of misconduct in relation to mitigation of damages, where the specific acts of misconduct are relied on in support of the plea of justification. The jury awarded the plaintiff a sum of one halfpenny, and the judge ordered him to pay costs. The plaintiff appealed contending, *inter alia*, that the judge had misdirected the jury on the matters that could properly be taken into account in mitigation of damages. The Court of Appeal dismissed the appeal, holding that although a defendant when adducing evidence of bad reputation was not allowed to introduce specific acts of misconduct, the defendant was entitled to rely in mitigation of damages on any evidence properly before the jury, including evidence of specific acts of misconduct or other evidence adduced in support of an unsuccessful plea of justification.

Following this decision, the English rule may be re-stated as follows: The defendant may not adduce evidence in mitigation of damages of specific acts of misconduct on the part of the plaintiff, excepting previous convictions of the plaintiff; but the jury may consider evidence of specific acts of misconduct in mitigation of damages if this evidence was already before the court on some other issue.

Scott v Sampson was accepted as settled law in the Irish case of *Kavanagh v The Leader* in 1955.⁴⁸ However, McDonald observes that in the older Irish case of *Bolton v O'Brien*⁴⁹ specific instances of conduct related to the libel were admitted not only in relation to cross-examination as to credit but also with a view to reducing damages.⁵⁰ No modern Irish case appears to deal specifically with this point and it is accordingly unclear to what extent the rule in *Scott v Sampson*, and its exceptions, apply in Ireland.

130. The circulation of the libel may mitigate damages.

This is supported by *Gathercole v Miall*⁵¹ where it was stated:

"[In] order to show the extent of the mischief that may have been done to the plaintiff by a libel in a newspaper, you have a right to give evidence of any place where any copy of that libel has appeared, for

⁴⁸ Unreported, Supreme Court, 4 March 1955.

⁴⁹ (1885) 16 LR Ir 97.

⁵⁰ McDonald, *Irish Law of Defamation*, p249.

⁵¹ (1846) 15 M and W 319, 153 ER 872.

the purpose of showing the extent of the circulation."

In the straightforward case, the circulation of the libel will match the circulation of the publication. However, in some cases, paradoxically, the circulation of the libel may be small although the circulation of the newspaper is large. This may occur where, for example, no direct reference is made to the plaintiff, but defamatory matter is understood to refer to him by a small number of people who know of certain circumstances.

In *Morgan v Odhams Press Ltd*⁵² a House of Lords decision, a new trial was ordered on the ground that damages were inordinately large and that the jury had not been warned that the article complained of would be understood as referring to the plaintiff only by a small circle of friends and neighbours. Lord Reid stated:

"Although 'The Sun' has a very large circulation only a very few of its readers could have read this article as referring to the appellant - only those who knew the special facts proved in evidence. It was for the jury to decide how many that might be. No doubt there would be a few more than the six who gave evidence. But the jury ought to have been warned that it was only publication to these few that could have in any way damaged the appellant's reputation and that they should bear that in mind when assessing damages. Failure to give that warning may well have caused the jury to assess damages on too wide a basis."⁵³

Lord Guest said:

"This was not an ordinary libel by a newspaper where the plaintiff was named in the article and where publication would consequently be to all the readers of the newspaper. The appellant could only be identified by those persons who knew the special facts which enabled them to identify him with the article. There was, therefore, a very limited publication including, and not far beyond, if at all, the witnesses who gave evidence of identification. The jury were not told in the summing up that the damages must accordingly be limited by reasons of those considerations. This was, in my view, a serious misdirection."⁵⁴

This principle would presumably also apply in a case where the words are innocent on their face but have a defamatory effect because of special circumstances known only to some of the recipients of the statement. For example, if a newspaper article stated that Mrs X had a child in 1942, but it was known to some readers that Mrs X was unmarried until 1946, the circulation of the libel would not be the extent of the newspaper's circulation, but rather measured according to an approximation of the number of people

52 [1971] 1 WLR 1239.

53 *Ibid.* at 1247.

54 *Ibid.* at 1262. See also *Halsbury's Laws of England*, vol 28, para 237.

who would be aware of the marriage date and for whom the statement would take on a defamatory meaning.

This could reduce the damaging circulation of the libel from a national one to a small locality or district. This basis for mitigating damages is therefore significant, although it appears to be frequently overlooked by textbooks and litigants alike.

It should, however, be borne in mind that the gravity of the defamation is not necessarily co-extensive with the size of its audience. A letter to a person such as an employer, or to a circle of friends, could be as damaging as the same material published to the world at large. While the assessment of damages would benefit from consideration of this factor i.e. the circulation of the libel to measure damages, it should enter the equation as one and not the dominant factor.

131. It is not clear whether the defendant's state of mind may mitigate damages under the present law.

The recent case of *Lynch v Irish Press Ltd*⁵⁵ supports the view that a lack of culpability on the defendant's part will not reduce damages. In that case, Mr Justice O'Hanlon directed the jury that if they found that the reporter had reasonable grounds for believing in the truth of the statement, this would be a factor affecting damages. However, he recalled the jury and altered his direction after counsel objected that there was no basis in law for this direction. (We should point out that there is no formal report of O'Hanlon J's charge and our summary is based on newspaper reports).

There is also authority to the contrary. Gatley states as follows:

"Although it is no defence that the defendant did not intend to refer to the plaintiff, or intend the words to be understood in any defamatory sense, the defendant can give such fact in evidence of mitigation of damages 'as negating express malice on his part', provided he has complied with the rule. So the defendant may urge in mitigation any fact which goes to show that he honestly believed or had reasonable grounds for believing that what he said or wrote was true ... he can, for example, prove that he received such information from others as induced him to believe that the charge was true ..."⁵⁶

McDonald takes a similar view:

⁵⁵ Unreported. See *Sunday Tribune*, 12 February 1989.

⁵⁶ Gatley, *Libel and Slander*, 8ed, p585, para 1431. The reference to "the rule" is to a rule of court requiring notice of matters to be pleaded in mitigation of damages. Our equivalent is Order 36, r 36 RSC.

"A defendant is entitled to produce in evidence matter which shows that the actual damage caused to the plaintiff's reputation by his publication was not as great as it might have been, and also matter, which while not showing that he had not done wrong, shows that he was not responsible as he might otherwise have been."⁵⁷

An old Irish case also supports this view. In *Harris v Arnott*, Barry LJ stated the position in very strong terms:

"But the question of malice enters into consideration in actions for libel in another point of view, namely, as bearing on the amount of damages to be awarded to the plaintiff by the jury. Mr Healy, indeed, was very severe on newspapers, and suggested, indeed I may say argued, that the proprietors or editors of such [publications] containing libellous matter are entitled to no consideration, and that the only measure of damages is the degree of pain or injury inflicted on the plaintiff, irrespective of the circumstances of the publication. That view has been suggested before now and if the learned counsel were in another place, advocating an alteration in the law, he doubtless would find much to say in its favour; but such is not the law at present. *It is quite settled that, whilst, of course, the plaintiff is entitled to reasonable compensation for the injury he has sustained, the defendant, whether a journalist or other person, may show in mitigation of damages that the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, or that the defendant acted in good faith, and with honesty of purpose, and not maliciously.*"⁵⁸

Duncan & Neill state -

"Though the honest belief by the defendant in the truth of what he published does not by itself provide any defence to an action for defamation it *may* be a relevant factor in the assessment of damages. The defendant may therefore wish to rely on his own bona fides (for example, he might have received the information from a reliable source and have made such checks as he could), or on other circumstances, to reduce the damages which would otherwise be appropriate."⁵⁹

Indeed, in one of the most important cases establishing that an innocent state of mind on the part of the defendant is not a defence, it was stated that this factor could nonetheless affect damages. In *Hulton v Jones*, Farwell LJ said in the Court of Appeals -

"And in my opinion he [the defendant] cannot now be heard to say that he did not intend the true meaning of his words as interpreted

57 McDonald, *Irish Law of Defamation*, p251.

58 (1889) 26 LR IR 55, 75-6, italics supplied.

59 Duncan and Neill *Defamation*, para 18.21, p141.

by relevant surrounding circumstances on the issue of publication of the plaintiff, *although such evidence would be admissible in mitigation of damages as negating express malice.*"⁶⁰

132. The defendant may mitigate damages by showing that he repeated the material from another source and disclosed that source in the publication. The defendant must fulfil both of these requirements; it is not sufficient to show one or the other.⁶¹

PUNITIVE DAMAGES

133. Punitive damages are awarded to mark the jury's sense of outrage at the defendant's conduct. The object of such an award is to teach the defendant that tort does not pay, to deter him and others from similar conduct in the future and to punish the defendants for the conduct in question.

134. A number of criticisms have been directed at the use of punitive damages in civil actions:

- (1) the incompatibility of a punitive element with compensatory proceedings,
- (2) the absence of procedural safeguards in a civil action which would be available to the defendant in criminal action,
- (3) the absence of fixed limits on such awards, and therefore the risk of self censorship by the press through undue caution,
- (4) the fact that in the High Court juries and not judges make the award, and
- (5) the fact that the additional sum imposed to punish the defendant goes into the pocket of a private individual.

135. In England, the House of Lords limited the occasions on which punitive damages may be awarded to three categories in the celebrated case of *Rookes v Barnard*.⁶² These are set out as follows in the speech of Lord Devlin, who delivered the opinion of the court:

- (1) in cases of oppressive, arbitrary or unconstitutional acts by Government servants,
- (2) where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable

60 [1909] 2 KB at 479. (Emphasis added).

61 *Halsbury's Laws of England*, vol 28, para 250, *McGregor on Damages*, 15ed, para 1676.

62 [1964] AC 1129.

to the plaintiff,

(3) **in cases expressly authorised by statute.**

Lord Devlin specifically envisaged the second category as covering certain libel cases:

"It is a factor also that is taken into account for damages in libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to make out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity."⁶³

With reference also to this second category, Lord Diplock stated in *Cassell v Broome*:

"While, of course, it is not necessary to prove that the defendant made an arithmetical calculation of the pecuniary profit he would make from the tortious act and of the compensatory damages and costs to which he would render himself liable, with appropriate discount for the chances that he might get away with it without being sued or might settle the action for some lower figure, it must be a reasonable inference from the evidence that he did direct his mind to the material advantages to be gained by committing the tort and came to the conclusion that they were worth the risk of having to compensate the plaintiff if he should bring an action."⁶⁴

However, the mere fact that a defendant will profit from the article would not of itself point to exemplary damages, since newspapers are in the business for profit. The failure of the trial judge to point this out to the jury and to emphasise that such an award was rare and unusual was one of the grounds for ordering a re-trial on the issue of damages in *Riches v News Group Newspapers Ltd.*⁶⁵

The requisites in England for an award of punitive damages in a defamation action are therefore (a) knowledge that what is to be done is against the law or a reckless disregard whether what is to be done is illegal, and (b) a decision to continue with the publication because the material advantages outweigh the prospects of material loss.⁶⁶

⁶³ *Ibid*, at p1227.

⁶⁴ [1972] AC 1027 at p1130.

⁶⁵ [1985] 2 All ER 845.

⁶⁶ *Halsbury's Laws of England*, vol 28, para 18.

The decision in *Rookes* was a major curtailment of the law on punitive damages. Indeed, the English Court of Appeal in *Cassell v Broome*⁶⁷ refused to follow the categories set out in *Rookes v Barnard*, Lord Denning MR observing, "Lord Devlin threw over all that we ever knew about exemplary damages. He knocked down the common law as it had existed for centuries." However the House of Lords rejected the Court of Appeal contention that *Rookes* had been decided per incuriam, and by a majority of five to two, it re-instated the authority of Lord Devlin's judgment,⁶⁸ which accordingly now represents the English position on punitive damages.

The High Court of Australia refused to follow the categories set out in *Rookes v Barnard* in *Uren v John Fairfax*,⁶⁹ and this was upheld by the Privy Council in *Australian Consolidated Press v Uren*.⁷⁰ The Canadian Courts⁷¹ and the New Zealand Courts⁷² likewise preferred to maintain the old position on punitive damages, i.e. that they can be awarded in any case where the court considers the conduct of the defendant to be such that damages should not be by way of compensation only, but should also punish the defendant, help to deter others from acting likewise and reflect the detestation of the court for the conduct in question.

It would appear that in Ireland the categories of cases in which punitive damages may be awarded are not confined to those laid down in *Rookes v Barnard*. In *Dillon v Dunnes Stores (Georges Street) Ltd*,⁷³ O'Dalaigh CJ stated that it was not open to question that the jury could award punitive damages in an action for false imprisonment. Similarly, in another post-*Rookes* case, McWilliam J accepted in *McDonald v Galvin*⁷⁴ that exemplary damages could be given in the case before him, which concerned an action for assault and battery resulting in pain, shock and humiliation i.e. one falling outside the Devlin categories. In *Garvey v Ireland*⁷⁵ the same judge held exemplary damages to be recoverable, on facts, however, that fell within Lord Devlin's first category.

Punitive damages were mentioned by Hamilton P in the recent case of *Kennedy and Arnold v Ireland*.⁷⁶ In that case he held that punitive damages so called were inappropriate because the Minister for Justice who took up office after the occurrence of the wrong in question, telephone tapping, had publicly vindicated the good name of the plaintiffs. However he noted Lord Devlin's first category of exemplary damages and continued:

⁶⁷ [1971] 2 QB 354.

⁶⁸ [1972] AC 1027.

⁶⁹ (1966) 117 CLR 118.

⁷⁰ (1966) 117 CLR 221.

⁷¹ *Paragon Properties Ltd v Magna Investments* (1972) 24 DLR (3d) 156.

⁷² *Fogg v McKnight* [1968] NZLR 330, *Taylor v Beere* [1982] 1 NZLR 81.

⁷³ Unreported, Supreme Court, 20 December, 1968.

⁷⁴ Unreported, High Court, 23 February 1976.

⁷⁵ Unreported, High Court, 19 December 1979.

⁷⁶ [1988] ILRM 472, 478.

"The action of the executive in this case in tapping the telephones of the plaintiffs without any lawful justification, and interfering with and intruding upon the privacy of the plaintiffs constituted an attack on their dignity and freedom as individuals and as journalists and cannot be tolerated in a democratic society such as ours is and our Constitution requires it to be and the injury done to the plaintiffs has been aggravated by the fact that it has been done by an organ of the state which is under a Constitutional obligation to respect, vindicate and defend their rights.

The plaintiffs are in my opinion entitled to substantial damages and it is, in the circumstances of this case, irrelevant whether they be described as 'aggravated' or as 'exemplary' damages."⁷⁷

It is at least arguable that "aggravated" and "exemplary" damages are two distinct heads of damage and that such dicta do not encourage careful awards by juries.

It appears from the award of exemplary damages in the recent INTO case, reported in the *Irish Times*, Friday 15 February 1991, that the Supreme Court has refused to follow the categories set out in *Rookes v Barnard*. The award appears to have been based on infringement of the constitutional right to primary education.

INJUNCTIONS

136. An injunction to restrain the publication or republication of a defamatory statement may be granted during, before or after a hearing. The Judicature (Ireland) Act 1877 conferred jurisdiction on the High Court to grant injunctions in all cases where it appears just and convenient to do so, and on such terms as the court sees fit. Order 50 Rule 6 RSC authorises the grant of interlocutory injunctions.

INTERLOCUTORY INJUNCTIONS

137. A plaintiff in a defamation case seeking to obtain an interlocutory injunction will be met with more stringent standards than a plaintiff in any other tort case.⁷⁸ In the ordinary case, the court considers whether the plaintiff has raised a fair or serious question, whether damages would adequately compensate the plaintiff and whether the balance of convenience favours the granting of the interlocutory injunction. The defamation plaintiff must show, however, that it is highly unlikely that the defendant will succeed in the main action. An interlocutory injunction will not be granted if

- (a) there is any doubt that the words are defamatory, or

⁷⁷ *Ibid.*

⁷⁸ See *Halsbury's Laws of England*, vol. 38, para 167.

- (b) **the defendant intends to plead justification or, probably, any other recognised defence.**

In *Sinclair v Gogarty*,⁷⁹ Sullivan CJ delivering the judgment of the Supreme Court commented on the jurisdiction of the court in this area as being "a jurisdiction of a delicate nature". Applying the principle stated by Lord Esher in *Coulson v Coulson*,⁸⁰ Sullivan CJ stated:

"The principle is this, that an interlocutory injunction should only be granted in the clearest cases where any jury would say that the matter complained of was libellous, and where if the jury did not so find the court would set aside the verdict as unreasonable."

The rule in *Bonnard v Perryman*⁸¹ is that where a defendant in a libel action intends to plead justification, a court will not grant an interlocutory injunction to restrain publication of the statement complained of. This principle probably applies to any other defence raised. Halsbury states the law to be as follows:

"It is well settled that no injunction will be granted if the defendant states his intention of pleading a recognised defence, unless the plaintiff can satisfy the court that the defence will fail. This principle applies not only to the defence of justification, but also to the defence of privilege, fair comment, consent, and probably any other defence."⁸²

More recently, the English Court of Appeal has held that the principle that no injunction will issue if the defendant intends to plead justification extends to allegations which cannot be proved but which are inseparable from other allegations the sting of which the defendant intends to justify. In *Khashoggi v IPC Magazines Ltd*⁸³ the defendants published an article associating the plaintiff with a number of men, including a foreign head of state. The plaintiff brought an action in respect of her alleged affair with the head of state and obtained an interlocutory injunction. The defendants applied for the injunction to be discharged on the ground that although they were unable to prove the particular allegation complained of, this allegation was inseparable from the other allegations the common sting of which was general promiscuity, and which they intended to justify. The court of Appeal discharged the injunction.

In *Monson v Tussauds Ltd*,⁸⁴ the plaintiff sought an interlocutory injunction to restrain the exhibition of a model representing him in an exhibition of wax

79 [1937] IR 377.

80 (1887) 3 TLR 846.

81 [1891] 2 CH 269.

82 *Halsbury's Laws of England*, 4ed, vol. 28, para 168, footnotes omitted.

83 [1986] 3 All ER 577.

84 [1894] 1 QB 671.

figures by the defendants, complaining that it portrayed him as guilty of a murder for which he had been tried and acquitted. Initially the defendants intended to plead merely that the exhibition was not libellous and the Queens Bench Division granted an interlocutory injunction. On appeal, it appeared from further affidavits that there would be a question at trial as to whether the plaintiff had consented to the exhibition. The Court of Appeal held unanimously that, under the rule in *Bonnard v Perryman*, an interlocutory injunction should not be granted.

The three judges differed as to the nature of the rule in *Bonnard v Perryman*. Lord Halsbury felt that the rule was not absolute and did not automatically preclude a court from granting the interlocutory injunction: "If I were to understand the tests suggested to be applicable to all cases, so that it practically excluded actions of libel from the operation of the Judicature Acts with regard to granting interlocutory injunctions, it would be to overrule the legislature - a power which is not possessed either by this or any other Court". Lopes and Davy LJ held that the rule was an absolute rule of practice with regard to the circumstances in which an interlocutory injunction may be granted in libel cases. However, the apparent difference between the two views may be reconciled. Lord Halsbury resisted the conclusion that the raising of a defence (such as justification of a consent) would necessarily entail the refusal of an interlocutory injunction. However, the same result may be achieved by simply applying the rule in *Bonnard v Perryman*, bearing in mind that the rule is qualified by the phrase "save in the clearest of cases". In the clearest of cases, i.e. where the matter is unarguably defamatory and the defence will also obviously fail, an interlocutory injunction will issue. In other cases, an interlocutory injunction will not be granted. It appears sufficient if the defendant raises "a case for consideration by the jury".⁸⁵

How is a court to determine whether a case for a jury arises, or whether a defence such as justification has been raised merely to prevent the granting of an interlocutory injunction? The simple solution is to examine the affidavits in order to see whether the plea of justification has any substance. However, it appears that this is not always the practice and that a rigid approach refusing the injunction categorically where the defence is raised may be applied.

The case of *Cullen v Stanley*⁸⁶ illustrates what is arguably the better course for a court to adopt in deciding whether to grant an interlocutory injunction in this context.⁸⁷ The plaintiff was a baker who had been selected by the Labour Party to stand for election. He sought an interlocutory injunction to restrain the publication of statements by the defendants to the effect that he had acted as "scab" on an occasion of a baker's strike. The plaintiff deposed that the statements were absolutely false and that he believed the publication

85 Per Davy LJ at p697.

86 [1926] IR 73.

87 See McDonald, *Irish Law of Defamation*, p261.

was for the purpose of prejudicing his position as a candidate. One of the defendants submitted an affidavit simply stating that all the allegations were true, and that he would prove this at trial. The Supreme Court held that the plaintiff was entitled to the interlocutory injunction. O'Connor J referred to the argument of the defendant that the rule in *Bonnard v Perryman* automatically precluded the grant of an interlocutory injunction once the defence of justification was raised, and continued:

"I do not think that the Court of Appeal intended to lay down a rule which should be rigidly applied to every case, because the judgment of Coleridge CJ wound up with the observation that, on the whole, the Court thought that it was wiser *in that case*, as it generally, and in all but exceptional cases, must be, to abstain from interference until the trial of the plea of justification."⁸⁸

The judge then proceeded to examine the detailed affidavit of the plaintiff, which he contrasted with the "baldest affidavit" of the defendant, and held that on the evidence before the court, there was nothing to support the plea of justification.⁸⁹

An example of the more rigid type of approach is *Gallagher v Tuohy*,⁹⁰ where the matter complained of consisted of a circular containing defamatory statements concerning the plaintiff in his business capacity. Murnaghan J stated:

"The question I have to decide is whether an order should be made restraining the defendants from repeating statements which they allege to be true and provable. Against the granting of such an order the authority of *Bonnard v Perryman* has been cited to me, and that authority has not been controverted by the plaintiff. The effect of that decision seems to be reasonably clear. The Court should not readily restrain the publication of any matter which is not obviously a libel. I would have no difficulty at all in deciding that the statement was defamatory but for the plea of justification. That plea having been raised, it seems to me that I cannot prejudge the issue decided, and decide that the plea of justification is erroneous. That would be the effect of the injunction sought."

Ex parte injunctions and in camera proceedings

138. A recent Irish decision in which the ACC sought an injunction has attracted criticism as to the ambit of the judicial power to order proceedings

⁸⁸ [1926] IR at 85-85.

⁸⁹ Kennedy CJ at p83 also observed the detail of the plaintiff's affidavit as compared with that of the defendant.

⁹⁰ (1924) 58 ILTR 134.

to be held in camera.⁹¹

In August 1985, the Agricultural Credit Corporation sought an injunction to restrain the publication of an article in the magazine *Irish Business* concerning the business affairs of the ACC. On August 1, O'Hanlon J granted an *ex parte* injunction to ACC at a special sitting at his home. The *Irish Times* reported that the original terms of the injunction prohibited not only a report of the proceedings but also of the fact that they had taken place.⁹² However, Casey suggests that it is not clear that the judge did actually so rule, and that such a ruling might not be competent.⁹³ The relevant part of s45 of the *Courts (Supplemental Provisions) Act 1961* merely states that justice shall be administered other than in public in cases involving applications of an urgent nature for relief by way of an injunction. This would seem to prohibit public attendance at the proceedings without prohibiting media coverage of the decision. In any case, whether the ban was the result of a prohibition or a misunderstanding, on Saturday 3 August O'Hanlon J made an order clearly allowing the fact of the injunction to be reported.

A few days later, ACC's application for an interlocutory injunction was heard. *Irish Business* undertook not to publish the original article, but said that they intended to publish a substitute article. ACC sought to enjoin this also on the ground that it was based on documents belonging to them and the publication of which would be a breach of confidence and/or copyright. Lardner J granted the injunction to restrain such breach of confidence, *Irish Business* having conceded ACC's property in the documents. The judge reserved the question as to whether the author of the article should be compelled to disclose the source of the documents.

It is not entirely clear that O'Hanlon J in making his first order imposed a ban on the reporting of the fact of the injunction, or, if he did, that such a power was inherent in s45, but the decision has caused concern and attracted criticism.⁹⁴ Accordingly, the ambit of s45 in the context of defamation law requires some clarification.

Perpetual Injunctions

139. The court may award a perpetual injunction to the plaintiff at the hearing where it is established that there is a likelihood of repetition. In general, this will reduce the amount of compensatory damages because the injunction prevents future damage to reputation.

91 Reported in the *Irish Times*, 5-9 August 1985.

92 *Irish Times*, 5 August 1985, p1.

93 Casey, *Constitutional Law in Ireland*, p455.

94 See *Irish Times*, 7 August 1985; *Report on Press Freedom and Libel*, p28.

DECLARATIONS

140. Under Order 19, Rule 29 of the Rules of the Superior courts there is a general power in the court to make a declaratory judgment or order whether or not consequential relief is claimed. However, in practice this remedy does not appear to be availed of in defamation actions.

Order 19, rule 29 RSC provides:

"No action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not."

CHAPTER 4: MISCELLANEOUS

Payment into Court

141. Order 22 of the Rules of the Superior Courts contains the Irish rules on the payment into court procedure. The most controversial aspect of these rules in the context of defamation law is that the defendant in a defamation action, unlike other actions, may only make a payment into court if liability is admitted in the defence.

The payment into court procedure encourages the parties to settle without proceeding to trial. The defendant pays a sum of money into court in satisfaction of the claim and, if this is accepted by the plaintiff, further proceedings are stayed. There is a disincentive to the plaintiff to proceed to trial because if the sum awarded at trial is less than the sum paid into court, the plaintiff will incur costs. This is the result of Order 22, rule 6(4) which provides, in the event of the sum awarded being less than the sum paid in, that the plaintiff is entitled to the costs incurred up to the point of payment into court while the defendant is entitled to costs after this act. As the costs prior to the payment into court will always be trivial as compared with those incurred thereafter, the net result is that the plaintiff will be liable for most of the costs where the sum awarded at trial is less than the amount paid in.

For no apparent reason a distinction is drawn in Order 22 between actions for death, damages or concerning admiralty on the one hand, and actions for libel or slander, *inter alia*, on the other. Whereas the defendant may make a payment into court irrespective of whether liability is admitted in the first set of cases, he may only do so in libel or slander actions if he admits liability.¹ This distinction has been widely criticised.²

1 Order 22, rule 1(3).

2 See, for example, *Report on Press Freedom and Libel*, 3.43.

Curiously, the *Libel Act 1843* contained a provision allowing for payment into court, provided (1) the defendant was a newspaper or other periodical, (2) the defendant pleaded that the libel was inserted without actual malice and without gross negligence and, as soon afterwards as possible, a full apology was inserted in the newspaper or other periodical.

Apart from the fact that it is limited to the press, the provision is altogether different as regards liability. To plead that there was no malice and no gross negligence comes close to saying that there was no liability.

By contrast, Order 22 allows payment into court *only* when there is admission of liability. However, the 1843 Act was repealed by the *Defamation Act 1961*, and no similar provision has been re-enacted.

It appears that the Rules of the Superior Courts and the Circuit Court Rules are not in harmony in this area. Order 12, rule 9 of the Circuit Court Rules provides -

"Any defendant may with his defence lodge in Court an amount which he alleges is sufficient to satisfy the plaintiff's claim, and such lodgement may be made with an admission or denial of liability. Where there is more than one claim or cause of action the defendant shall state in respect of which of them such lodgement is made".

There is no exception to the rule that the defendant may make a payment into court with a denial of liability, and it would appear that this course of action is open to a defendant in a defamation action. An argument might be made that Order 59, rule 14 of the Circuit Court rules would import the High Court rule disallowing payment into court by a defamation defendant unless liability is admitted, since it provides -

"Where there is no Rule provided by these rules to govern practice or procedure, the practice and procedure in the High Court may be followed".

However since this is less a case of "no Rule provided" and more a case of a "Rule which differs" from a High Court Rule, it is more likely that Order 59, rule 14 is inapplicable. It appears that the present Circuit and Superior Court Rules are different in that the former allow a defamation defendant to pay a sum into court while denying liability whereas the latter do not.

A defendant may also increase the amount paid into court under Order 22 Rule 1(2). This states that a defendant may "at once, without leave, and upon notice to the plaintiff, pay into Court an additional sum of money as an increase in a payment made under paragraph (1) hereof" and that notice must be given and payment made at least three months before the date on which the action is first listed for hearing. An action for libel or slander where liability is admitted comes within the class of actions in which payment into

court may be made under paragraph (1), and therefore the rule on increased payment into court applies to such actions.

LIMITATION PERIODS

142. Under section 11(2)(a) of the Statute of Limitations 1957, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. This six year limitation period encompasses actions for libel. Under section 11(2)(c), the limitation period for actions for slander is three years from the date on which the cause of action accrued. In cases of libel, the cause of action accrues when the publication is made. In cases of slanders actionable per se, the cause of action accrues when the words are spoken, and in cases of slanders actionable on proof of special damage, the cause of action accrues when the special damage occurs.³

MALICE AND JOINT PUBLISHERS - THE INFECTIOUS MALICE RULE

143. The defences of privilege and fair comment are defeated by a showing of malice on the part of the defendant. If A is sued as being responsible for the publication of a defamatory statement by B, the question arises whether malice on the part of B destroys a defence of privilege or fair comment for A. In Irish law, the answer is provided by section 11(4) of the Civil Liability Act, 1961, which provides:

"Where there is a joint libel in circumstances normally protected by the defences of qualified privilege or fair comment on a matter of public interest, the malice of one person shall not defeat the defence for the other, unless that other is vicariously liable for the malice of the first."

Vicarious liability is therefore the deciding criterion. If A is vicariously liable for B, B's malice will destroy A's defence. If A is not vicariously liable for B, it will not.

Section 11(4) applies only to libels. Therefore, in relation to slander, the old position governs whereby all defendants responsible may be infected by the malice of one.⁴

The typical case of infectious malice through vicarious liability is illustrated by *Fitzsimmons v Duncan and Kemp & Co.*⁵ The defendants were a company carrying on the business of mercantile inquiry agents. Their clients filled out forms and the defendants supplied the answers to their queries after obtaining

3 McDonald, *Irish Law of Defamation*, p238.

4 McDonald, *Irish Law of Defamation*, p270. However the decision in *Egger v Viscount Chelmsford* [1965] 1 QB 248 (discussed below) may alter the common law position in relation to slanders as well as libels.

5 [1908] 2 IR 483.

reports from their local correspondent in the district where the person enquired about carried on business. In this case, an unfavourable report was made by a local correspondent about the plaintiff, which was sent to the local manager, then to the defendants and ultimately to the client. The occasion was held to be privileged, but the defendants were held liable on the basis of malice on the part of the local correspondent. Fitzgibbon LJ described the law as settled that

"the corporate employer who takes his profit must answer for the wrong or default of the servant who does the work. Negligence, fraud and malice are all in the same footing in this respect, so long as what the servant does is within the scope of his employment, and of the employer's business, and the wrong is not some personal act of the individual, outside that business. If the libel here conveys the purport of [the agent's] information, and is defamatory, his malice is fatal to the Company's privilege".⁶

Later, he said:

"In our view the case is the same as any other in which a principal contracts to make or prepare and supply an article for a customer, and employs more than one servant to do the work. If one assistant prepares or weighs out drugs, and another compounds them; or if one set of workmen are employed to prepare materials, and to construct the parts of a machine, and another to put them together, the employer's liability for defective work is the same whether it has arisen from the fault of one servant or the other."⁷

There is no English statutory provision equivalent to our section 11(4), but a similar position exists there since the decision in *Egger v Viscount Chelmsford*.⁸ The *Egger* case illustrates the converse situation to the Fitzsimmons case i.e. where there is no vicarious liability involved. The plaintiff in the *Egger* case was a judge of Alsatian dogs whose name was kept on a list by the Kennel Club. A Miss R, arranging a dog show, wrote to the Kennel Club asking that the plaintiff be approved for the show. The Club responded by a letter to the effect that they did not approve. The action was brought against the assistant secretary and ten members of the sub-committee of the Club. The defendants pleaded *inter alia*, an occasion of qualified privilege, but the plaintiffs argued that the malice of some members of the sub-committee ousted the privilege for all the defendants. The Court of Appeal allowed the appeal by the secretary and the three committee members found at the trial to be innocent of malice. Each of these was held to have an independent and individual privilege in relation to the publication, which could not be defeated by malice on the part of others. Explaining the

⁶ *Ibid.* p513.

⁷ *Ibid.* p514.

⁸ [1965] 1 QB 248.

rationale behind this holding, Lord Denning MR said:

"All I would say is that the defence of qualified privilege is a defence for the *individual* who is sued and not a defence for the publication. It is quite erroneous to say that it is attached to the publication as distinct from the individual."⁹

Later he stated what is the current English position, akin to the Irish one:

"If the plaintiff seeks to rely on malice to aggravate damages, or to rebut a defence of qualified privilege, or to cause a comment, otherwise fair comment to become unfair, then he must prove malice against each person he charges with it. A defendant is only affected by express malice if he himself is actuated by it; or if his servant or agent concerned with the publication was actuated by malice in the course of his employment."¹⁰

144. It is necessary to know when a person is vicariously liable for the acts of another. Employers are clearly responsible for their employees, and principals for their agents. Less clear is whether a publisher of a journal or broadcast is liable for unpaid contributors to his paper or programme. If a paper is liable for such persons, and therefore infected by their malice, this would pose threats to press efficacy.¹¹

145. Infectious malice becomes a relevant enquiry in relation to another defence, namely, the offer of amends under s21 of the Defamation Act 1961. Section 21(7) provides that, in relation to the defence of unintentional defamation under that section, where a newspaper wishes to rely on the defence in respect of a defamatory statement made by a contributor, it must actually prove that the author acted without malice. Thus, if the newspaper fails to establish lack of malice, it will be infected by it and lose the defence.

146. The publication of a contributor's letter may also lose the newspaper the defence of fair comment or privilege on the grounds of malice, on the basis of actual, not infectious, malice. Up to now, we have been considering the case where the malice of the unpaid contributor may infect the publisher. However, it may also be that the view expressed by the unpaid contributor will result in an imputation of actual malice to the publisher. This is because the publisher might disagree with the view expressed, or might express differing views elsewhere in the paper, and the plaintiff may plead that this shows a lack of honesty, and therefore malice, in the statement. The media position

9 *Ibid* at p259.

10 *Ibid* at p265.

11 This point is made by RTE in their submission to the Law Reform Commission. The comments of Dickson J in *Cherneskey v Armadale Publishers*, 1979 90 DLR (3rd) 321, in relation to press freedom are relevant to this point, although they were spoken in the context of actual, not infectious, malice - see para 149 below.

here is delicate and would require to be clarified.

The real problem in this area arises where the newspaper holds or publishes an opinion different from that voiced in the contributor's letter. Where the newspaper shares the views expressed in the letter, there is no real problem as is shown by *Lyon v Daily Telegraph*.¹² In that case, the letter published in the correspondence columns of the defendant newspaper was purportedly written from a vicarage by one A. Winslow, but in fact the address given was fictitious and there was no clergyman named A. Winslow existing. The letter was defamatory in that it referred to a radio programme, in which the plaintiffs were the principal artists, as costly, vulgar and unworthy. The defendants pleaded fair comment. The Court of Appeal held that the defence was open to the defendants because the letter itself did not exceed the limits of fair comment and there was no evidence of malice. It is important to note that the fact that the paper shared the views contained in the letter was relevant to the question of malice -

"There is no question but that the comments contained in the letter represent the honest opinion of the Daily Telegraph; and at the trial no doubt was cast upon the complete belief of the newspaper that they were publishing a letter in which the writer was making a fair comment on a matter of public interest."¹³

The plaintiffs attempted to argue that the failure of the paper to make enquiries as to the identification of the author rendered the comment unfair, but Scott LJ replied:

"The answer to this is that fairness and carefulness are different moral and legal qualities; and that, whilst malice or indirect motive may destroy the fairness of an apparently fair comment, negligence does not. I hold, accordingly, that the letter itself in no way exceeded the bounds of fair comment on a matter which was obviously one of public interest, and that, on the facts in evidence, there was nothing to destroy the defendant newspaper's plea of fair comment."¹⁴

He felt that a general rule of law requiring a newspaper to verify the signature and address of every letter would result in "a burden so deterrent in practice as very much to reduce the valuable contribution to public discussion which results from a free publication of correspondence in the press". Although the Court of Appeal did not have to consider the case where a newspaper publishes conflicting opinions and whether this establishes actual malice on its part, the tenor of the judgment of Lord Justice Scott was much in favour of full and free discussion in the newspapers -

12 [1943] 2 All ER 316.

13 *Ibid.*, per Scott LJ at p318.

14 *Ibid.* at p319.

"[The right of fair comment] is one of the fundamental rights of free speech and writing, which are so dear to the British nation, and it is of vital importance to the rule of law upon which we depend for our personal freedom, that the courts should preserve the right of 'fair comment' undiminished and unimpaired."

The Supreme Court of Canada faced a more difficult problem in *Cherneskey v Armadale Publishers Ltd.*¹⁵ The defendants had published an article in their newspaper concerning a meeting of the city council, at which the plaintiff, lawyer and city alderman, was present. They subsequently published a letter in response to this article, in which the writers accused the plaintiff of taking a "racist" position on the matter before the council. The evidence established that the honest opinion of the newspaper differed from that expressed in the letter. The issue, therefore, was squarely before the court as to whether actual malice is shown from the fact that the newspaper itself holds different views from those expressed in its letter columns.

A majority of the Supreme Court held that in this situation actual malice is imputed to the newspaper defendant. They held that it was a constituent part of the defence of fair comment that the defendant show that the opinion was an honest expression of his views. The same considerations, they held, applied to each publisher of the comment - "each publisher in relying on the defence of fair comment is in exactly the same position as the original writer. When there is no evidence as to the honest belief of the writers of the letter, and the newspaper and its publisher have disavowed any such belief on their part, the defence of fair comment cannot be sustained". However, in that case a vigorous dissent was led by Dickson J.¹⁶ The objections of Dickson J may be analysed as two-fold, legal and practical. From the legal point of view, Dickson J felt that the majority had lost sight of the fact that the defence of fair comment involved a double hurdle i.e. first, the objective test as to whether the comment is fair, and secondly, the subjective test involving the state of mind of the defendant. One could merge the two tests and ask whether the statement was the publisher's real opinion, and while "this works passably well when the defendant is the writer ... it does not work at all if he is not". In relation to the second, subjective test, Dickson J said:

"Malice includes any indirect motive or ulterior purpose, and will be established if the plaintiff can prove that the defendant was not acting honestly when he published the comment. This will depend on all the circumstances of the case. Where the defendant is the writer or commentator himself, proof that the comment is not the honest expression of his real opinion would be evidence of malice. If the defendant is not the writer or commentator himself, but a subsequent publisher, this is an inappropriate test of malice. Other criteria will be relevant to determine whether he published the comment from spite or

15 1979 90 DLR (3d) 321.

16 Spencer and Estey JJ concurred in the opinion of Dickson J.

ill-will, or from any other indirect and dishonest motive."¹⁷

"Confusion arises because the writer is the most common defendant, and the need to keep clear the distinction between the sequential tests of 'fair comment' and 'malice' is not so great. Where the publisher is not the writer, the need is imperative ... It is readily apparent that newspapers need not be in any different position from the rest of the population. Once a comment which is defamatory ... is shown to be objectively fair, the only question is whether it was published with malice. This will depend on whether there is appropriate evidence of malice, which will be different depending on whether the newspaper, or its staff, writes the comment, or whether the newspaper publishes comments written by others."¹⁸

From a practical point of view, Dickson J analysed the impact of the majority holding on press freedom. If there were a rule denying the newspaper the defence of fair comment unless it could show that it honestly believed in the views expressed, the effect on press freedom would be extremely negative:

"An editor receiving a letter containing matter which might be defamatory would have the defence if he shared the views expressed, but defenceless if he did not hold those views. As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of censorship, antithetical to a free press. One can readily draw a distinction between editorial comment or articles, which may be taken to represent the paper's point of view, and letters to the editor in which the personal opinion of the paper is, or should be, irrelevant. No one believes that a newspaper shares the view of every hostile reader who takes it to task in a letter to the editor for error of omission or commission, or that it yields assent to the views of every person who feels impelled to make his feelings known in a letter to the editor. Newspapers do not adopt as their own the opinions voiced in such letters, nor should they be expected to."¹⁹

"Newspapers will not be able to provide a forum for dissemination of ideas if they are limited to publishing opinions with which they agree. If editors are faced with the choice of publishing only those letters which espouse their own particular ideology, or being without defence if sued for defamation, democratic dialogue will be stilted. Healthy debate will likely be replaced by monotonous repetition of majoritarian ideas and conformity to accepted taste. In one-newspaper towns, of which there are many, competing ideas will no longer gain access.

17 *Ibid* at 346.

18 *Ibid* at 348.

19 *Ibid* at 343.

Readers will be exposed to a single political, economic and social point of view. In a public controversy, the tendency will be to suppress those letters with which the editor is not in agreement. This runs directly counter to the increasing tendency of north American newspapers generally to become less devoted to the publisher's opinions and to print, without fear or favour, the widest possible range of opinions on matters of public interest. The integrity of a newspaper rests not on the publication of letters with which it is in agreement, but rather on the publication of letters expressing ideas to which it is violently opposed."²⁰

No Irish case appears to have dealt with the problem of contributors' comments or letters. The resulting doubt in this area places organs of the media in a precarious position when publishing such statements. The disadvantages of forcing a newspaper to publish only the views with which it agrees have been eloquently set out by Dickson J in the *Cherneskey* case. However, RTE may be in an even more difficult position, as its obligation of impartiality under the Broadcasting Act precludes it from ever adopting a contributor's viewpoint as its own. Accordingly, RTE argue, since it cannot adopt a contributor's comment as its own opinion (something which would be necessary to enable it to deny malice) it cannot, in the event of such comment containing defamatory material, avail of the defence of fair comment.²¹

CORPORATE BODIES

147. Trading Corporations: It appears that a trading corporation may sue in respect of defamatory statements concerning its trading capacity or business activities, and defamatory statements concerning its more general activities, such as treatment of employees or sponsorship of public events. No proof of special damage is required. There are naturally some allegations in respect of which a trading corporation may not sue, such as murder, incest or adultery.

In *South Hetton Coal Co. Ltd. v North Eastern News Association Ltd.*²² where the cause of action at the suit of an incorporated trading company was recognised, Lord Esher MR explained the doctrine as follows -

"I have considered the cause, and I have come to the conclusion that the law of libel is one and the same as for all plaintiffs; and that, in every action of libel, whether the statement is, or is not, a libel, depends on the same question - viz., whether the jury are of the opinion that what has been published with regard to the plaintiff would tend in the minds of people of ordinary sense to bring the plaintiff into contempt, hatred or ridicule, or to injure his character. The question

20 *Ibid* at 344.

21 Part of an RTE submission to this Commission.

22 [1894] 1 QB 133.

is really the same by whomsoever the action is brought - whether by a person, a firm, or a company. But though the law is the same, the application of it is, no doubt, different with regard to different kinds of plaintiffs ... For instance, it might be stated of a person that his manners were contrary to all sense of decency or comity, and such that, if the statement were true, they would render him deserving in the minds of persons of ordinary sense of contempt, hatred, or ridicule; but if the same thing were said with regard to a firm, or company, it would be impossible that it should have the same effect, because a firm or company as such cannot have indecent or vulgar manners."²³

However Lord Esher went on to draw an analogy between defamatory statements concerning a person in the way of his business and defamatory statements reflecting on a company's mode of carrying on business, both of which could be actionable, but declined to attempt definition of an exhaustive rule of all statements which would be libellous of a company.²⁴

In the same case Lopes LJ echoed Lord Esher's comments about statements which are not capable of being defamatory of a company -

"A corporation or company could not sue in respect of a charge of murder, or incest, or adultery, because it could not commit these crimes. Nor could it sue in respect of a charge of corruption or of an assault, because a corporation cannot be guilty of corruption or of an assault, although the individuals composing it may be. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position".²⁵

Leaving aside allegations such as murder, incest and adultery, of which presumably no one would be foolish enough to accuse a company in the first place, the language used by both of the judges considered allows for considerable latitude in relation to the statements upon which a company may sue. In the words of Lopes LJ, "method(s) of conducting its affairs" would arguably include allegations of bad treatment of employees, negative statements concerning sponsorship of public events, or more importantly in a modern context, allegations that the company is not environmentally conscious or fails to observe safety standards. It may be noted however that the third judge, Kay LJ, expressed the right of the company in narrower terms, stating that "a trading corporation may sue for a libel calculated to injure them in respect of their business".

It was specifically held in the *South Hetton* case that no specific damage must be proved by the company where the statement is defamatory of it. However

23 *Ibid* at 138.

24 *Ibid*, 139.

25 *Ibid*, 141.

a competing view is that a company should have to show financial loss, or at least that the allegation was likely to cause it financial loss. Such a view is expressed by Lord Reid in *Lewis v Daily Telegraph*²⁶.

"A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must be found in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured."

These comments do not make clear whether Lord Reid would require the company to show financial loss, or show that the statement would *tend to cause* financial loss. However, he certainly envisaged that even where the effect of the allegation was to injure the company's goodwill, financial implications would have to be involved for the statement to be actionable.

Surprisingly, two cases more in line with this view were cited to the Court in the *South Hetton Coal* case and do not seem to have influenced the more wide-ranging view of actionable allegations which was arguably evidenced by Lord Esher MR and Lopes LJ in that case. Lord Esher did not refer to the cases at all in his judgment, while Lopes LJ approved the decisions in *Metropolitan Saloon Omnibus Co. v Hawkins*²⁷ and *Mayor of Manchester v Williams*²⁸ but arguably did not adopt the reasoning of those cases. In the *Hawkins* case, Pollock LB stated that "a corporation at common law may maintain an action for a libel by which its property would be injured". This would seem to be a good deal narrower than the view of Lopes LJ that allegations in respect of "methods of conducting its affairs" would be actionable. Again in the *Williams* case, Day J stated that "[the] limits of a corporation's right of action are those suggested by Pollock, CB in the case which has been referred to. A corporation may sue for a libel affecting property, not for one merely affecting personal reputation". In the *Williams* case, the statement of claim complained that the plaintiffs had been charged with corrupt practices and contained no allegation that the plaintiff had suffered any special pecuniary damage in consequence of such publication. It is difficult to resist the conclusion that Day LJ would have required not only an allegation affecting the plaintiff's property, but indeed specific damage to be illustrated.

Such decisions do not make for clarity and it is difficult, in the apparent absence of Irish authority on this point, to know the extent of a trading corporation's right to sue in defamation, if any, in Ireland.²⁹

26 [1964] AC 234, 262.

27 4 H & N 87.

28 [1891] 1 QB 94.

29 In *Eglantine Inn v Smith* [1948] NI 29, the plaintiffs who were inn proprietors were held entitled to recover in respect of allegations concerning the plaintiff's treatment of employees. However, the right of action was assumed without being discussed.

148. Non-Trading Corporations: It appears that non-trading Corporations may sue in respect of defamatory statements concerning their necessarily non-profit making activities.

The important case here is *Bognor Regis UDC v Champion*³⁰ where it was held that a local government corporation had a "governing" reputation which could be protected from defamatory allegations by recourse to an action in defamation.

It was seen above that there was some confusion as to whether a trading corporation could sue in respect of defamatory allegations not reflecting on the property or business itself, but that the *South Hetton Coal* case appeared to have settled that such allegations would be actionable, without expressly overruling the *Williams* case. Since non-trading corporations are not in the business of making profit, it was natural that the question would be raised in a case concerning such a body. The *Williams* case was again cited to the court in *Bognor Regis UDC v Champion*, where Browne LJ disposed of it on three grounds. He distinguished the *Williams* case on the basis that a different type of body was here in question and that no allegation of corruption was here involved. However, he questioned the more general view of Day J in the *Williams* case that a corporation may sue only in respect of a libel affecting property and not one affecting personal reputation:

"If this was ever right, it has in my view been overruled by *South Hetton Coal Co. v North Eastern Association Ltd.* ... and by *National Union of General and Municipal Workers v William*".

He also questioned the view of Day J that a charge of corruption cannot ever be actionable at the suit of a corporation, noting that this view had been severely criticised by Spencer Bower, Fraser, and Oliver J in the case of *Willis v Brookes*.³¹ Furthermore the libel found actionable in *National Union of General and Municipal Workers v William* closely resembled a charge of corruption.

Again the absence of Irish authority renders it difficult to point a conclusive picture in relation to the capacity of non-trading bodies to sue in defamation.

149. Unincorporated Associations: The general rule is that unincorporated associations cannot sue or be sued in their own name. The two exceptions to this rule are trade unions and partnerships.

150. Trade Unions: The position of trade unions as plaintiffs in libel suits in Ireland is unclear. Trade unions are however immune from tortious liability by virtue of s4 of the Trade Disputes Act 1906 and may therefore not be sued in defamation. The constitutionality of this broad immunity has been

30 [1971] 2QB 109.

31 [1947] 1 All ER 191.

questioned.

In England, the right of trade unions to maintain an action in tort, specifically including libel, was recognised in *National Union of General and Municipal Workers v William*.³² Sufficient personality in the eyes of the law was attributed to trade unions by an examination of the legislation governing these bodies, and once this was found, it was a short step to confer actionability in respect of defamation. Uthwatt J stated as follows -

"It is well established that in certain cases a trading corporation may bring a suit in respect of an imputation on its trading reputation, and I see no reason why a non-trading corporation should not have the same rights as respects imputations on the conduct by it of its activities.

A trade union to my mind stands in the same position. Why should it not be protected? The social duty so to conduct the affairs of the union so as not to invite well-founded criticism is hardly forwarded by a denial of the right to seek redress for an unjustified disparagement of its activities".

However in 1971 the English Trade Union and Labour Relations Act was passed which provided in section 2(1) that a trade union should not be, or be treated as if it were, a body corporate. It was held in *EETPU v Times Newspapers*³³ that accordingly a trade union (not being a special register body) could not maintain an action in its own name for damages in relation to reputation. Nonetheless Gatley is of the view that a trade union can still sue in libel notwithstanding the *EETPU* case. There has since been a 1974 Trade Union and Labour Relations Act which although it also provides that a trade union shall not be, or be treated as if it were, a body corporate, confers a capacity on a trade union to sue in "proceedings relating to property or founded on contract or tort or any other cause of action whatsoever". These are the same as the relevant provisions in the 1971 Act and the comments of Gatley continue to apply.³⁴ Duncan and Neill also take the view that a trade union can sue in respect of libel under the new legislation.³⁵

If there is no Irish case-law on trade unions as libel plaintiffs, there is at least statutory provision for trade unions as tort defendants. Section 4 of the Trade Disputes Act 1906 provides that a trade union is immune from liability "in respect of any tortious act alleged to have been committed by or on behalf of the union". The equivalent immunity in England was held to include actions in respect of libel.³⁶

32 [1946] KB 81.

33 [1980] QB 585.

34 See Gatley, *Libel and Slander*, 8ed, para 970.

35 See Duncan and Neill, *Defamation*, para 9.11.

36 *Vacher and Son v London Society of Compositors* [1913] AC 107.

The immunity of trade unions is, however, confined by s11 of the Trade Union Act 1941 to authorised trade unions, their members or officials which or who for the time being are holders of negotiating licences under that legislation.

151. Partnerships: An unincorporated partnership possesses sufficient legal personality to sue or be sued in its own name,³⁷ and if sued, the partners are jointly and severally liable for the wrong committed.³⁸

DEFAMATION OF THE DEAD

152. An action in defamation may not be brought in respect of a statement which is defamatory of a person who was dead at the time of publication.³⁹

153. However if the defamatory statement about a dead person also has the effect of defaming a living person, an action lies in respect of the latter injury.

SURVIVAL OF THE DEFAMATION ACTION

154. Death of the wrongdoer: Unlike most civil actions, the cause of action in defamation does not survive the death of the wrongdoer.

Section 6 of the *Civil Liability Act 1961* defines an "excepted cause of action" to include defamation, and section 8(1) provides:

"On the death of a person on or after the date of the passing of this Act, all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate."

It appears that this special exemption for the defamation cause of action, among others, is because the absence of the wrongdoer could prejudice the defences that might be raised by his personal representatives, especially those which may be rebutted by malice.

However the death of a wrongdoer after the verdict or judgment would not affect the plaintiff's rights, nor would his death between verdict and judgment.⁴⁰

155. Death of the person defamed: The right of action in defamation does not survive the death of the defamed person.

Section 7(1) of the *Civil Liability Act 1961* provides:

37 *Le Fanu v Malcolmson* (1846) 8 ILR 410, *Meekins v Henson* [1846] 1 QB 472.

38 Sections 10 and 12, Partnership Act 1890.

39 *Halsbury's Laws of England*, vol 28, para 6; McDonald, *Irish Law of Defamation*, p281.

40 *Order 17, Rule 1, RSC*.

"On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) vested in him shall survive for the benefit of his estate."

One of the excepted causes of action is defamation.

APOLOGY

156. Apology: An apology is not a defence to a defamation action. Under section 17 of the Defamation Act 1961 evidence that the defendant 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 may mitigate damages.

The fact that an apology will mitigate damages under section 17 appears to suggest that the making of an apology is an admission of liability. The Boyle-McGonagle Report records that defendants are unwilling to offer an apology for this reason and suggests that the section should be re-formulated so that the publication of an apology should be seen as a matter of courtesy rather than an admission of liability.⁴¹

FAULT ISSUES IN DEFAMATION LAW

157. Relevance of the Defendant's State of Mind.

It is usually stated that liability in defamation law is strict. "Liability for libel does not depend on the intention of the defamer; but on the fact of defamation".⁴² This position of strict liability has been rationalised as follows:

"The general tendency in defamation cases has always been for a powerful rule of strict liability. I think this result rests upon commendable moral instincts here as it does with physical injuries. Defamation is made to a third person about the plaintiff, so that prima facie the plaintiff is in no way responsible for the commission of the wrong and typically could do very little, if anything, to protect himself. As the defendant is prima facie the sole actor, the rule that places powerful incentives against his misconduct will be one which tends to deter the abuse that will otherwise take place."⁴³

However, as the tort of defamation is a composite one, the issue of fault arises in many different aspects of the case.

The plaintiff must show, as part of his case, a number of things;

⁴¹ *Report on Press Freedom and Libel*, paras 5.30-5.31.

⁴² *Cassidy v Daily Mirror Newspaper* (1929) 2 KB 331, per Russell LJ.

⁴³ Epstein, *Was New York Times v Sullivan Wrong?*, 53 U Chicago L Rev 782, 797.

- (a) that the defendant published the statement complained of;
- (b) that the statement was defamatory;
- (c) that the statement referred to the plaintiff.

In a typical case, the defendant (a) realised the statement was defamatory, (b) intended to refer to the plaintiff, and (c) intended to publish it. However, in any given case, any one or several of these elements might be lacking e.g. the defendant may not have intended to refer to the plaintiff, or he may not have intended to publish.

The issue of fault may arise in a number of different ways:

- (a) Was the defendant at fault in failing to anticipate publication?
- (b) Was the defendant at fault in failing to realise that an innocent statement might become defamatory?
- (c) Was the defendant at fault in failing to realise that a statement which did not overtly refer to the plaintiff might be understood to refer to him?
- (d) Was the defendant at fault in his failure to realise that the plain meaning of his words was defamatory?
- (e) Was the defendant at fault in failing to realise that the statement was false?
- (f) Can an innocent state of mind mitigate damages?
- (g) Can a malicious state of mind destroy a defence?

We believe that the statements 'Liability in defamation law is strict' and that 'The defendant's state of mind is not relevant' are too broad to be helpful. The answers to (a)-(g) above are not a uniform 'yes' or 'no'. The response varies according to the question. Most of the solutions have emerged in previous discussion. It is proposed to draw attention briefly to the answer to each question.⁴⁴

A. Where the State of Mind is Relevant

1. The Defendant Who Does Not Intend to Publish

In order for a defamatory statement to become actionable, the statement must

⁴⁴ In two cases, the answer is that strict liability does or does not apply, depending on whether a statutory provision is availed of. This is in relation to the defence provided in s21 of the *Defamation Act 1961*.

have been published to someone other than the plaintiff himself. However, the mere fact of publication will not always render the statement actionable. The law has developed a defence of unintentional publication in the following circumstances. If the defendant communicates defamatory matter to the plaintiff and it becomes known to a third party, he will be liable for the publication only if he should reasonably have foreseen that there might be publication to a third party. However, if the law considers that the defendant could not have reasonably foreseen the possibility of communication to a third party, he will not be liable.⁴⁵

The test is therefore one of reasonable foreseeability; the defendant may escape liability if he shows that he published the statement to the plaintiff in circumstances in which he could not have reasonably foreseen its publication to someone other than the plaintiff. The defence applies only where the defendant communicated the matter to the plaintiff and a third party intervened.

2. *The Defendant Who Makes an Innocent Statement Which Becomes Defamatory by Virtue of Circumstances Unknown to Him*

An example of this situation is *Cassidy v Daily Mirror Newspaper*.⁴⁶ An announcement by a newspaper of a couple's engagement is an innocent statement on its face. However, the circumstance unknown to the publisher here was that one of the persons in the photograph was already married. Because of this fact, the statement was defamatory of the person's spouse. At common law, the defendant was liable in such a situation.

It was considered that the common law position was too harsh in this respect and an attempt was made to alleviate the position of such a defendant by means of s21 of the *Defamation Act 1961*. This provided certain types of defendant with an opportunity to make an offer of amends which, if accepted, would preclude an action being brought. One of the types of defendant envisaged was precisely the defendant in *Cassidy's case* since innocent publication in the section was defined to include the situation where "the words were not defamatory on the face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person".⁴⁷ Whereas the common law position in this context was one of strict liability, under s21 of the *Defamation Act 1961* the fault criterion is "reasonable care". In order to come within the section, the publisher must prove he exercised all reasonable care in relation to the publication.

Accordingly, the current legal position as to a defendant who makes an innocent statement which becomes defamatory by virtue of circumstances

⁴⁵ See para 32 above.

⁴⁶ [1929] 2 KB 331. For facts, see para 27 above.

⁴⁷ Section 21(5)(b).

unknown to him is that a statutory standard of reasonable care has replaced the common law strict liability rule. The standard of reasonable care is combined with the different remedy, i.e. the offer of amends. However, if the defendant does not avail of s21, the common law rule of strict liability applies.

3. *The Defendant Who Does Not Intend to Refer to the Plaintiff and is Unaware of the Circumstances Which Have the Effect of Making the Publication Refer to the Plaintiff*

An example of such a case is *Hulton v Jones*,⁴⁸ where a newspaper published an article depicting the life of a fictitious individual, but his name coincided with that of a real person. The article was understood by those who knew the plaintiff to refer to him. At common law, the defendant is liable.

Again, the *Defamation Act 1961* attempts to alleviate the position of such a defendant by means of s21 and the offer of amends. Innocent publication is defined to include the case where "the publisher did not intend to publish them [the words] of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him".⁴⁹ The use of the section is conditional upon the publisher having exercised reasonable care in relation to the publication.

Accordingly, the current legal position as to a defendant who does not intend to refer to the plaintiff and is unaware of the circumstances which have the effect of making the publication refer to the plaintiff, is that a standard of reasonable care has replaced the common law strict liability rule. However, if the defendant does not avail of s21, the common law rule of strict liability applies.

4. *Can a Malicious State of Mind Destroy a Defence? - Fair Comment and Qualified Privilege*

With regard to fair comment and qualified privilege, it is for the defendant to establish each of the elements which go to make up the defence in question. However, if the plaintiffs thereafter succeed in establishing malice on the part of the defendant, this will defeat the defence. The state of mind of the defendant while making the publication is a highly relevant factor; it may be a point on which the defence stands or falls.

5. *Can an Innocent State of Mind Mitigate Damages?*

It was argued at para 131 above that the authority prior to *Lynch v Irish Press Ltd* tended to the view that the defendant's state of mind may reduce damages. However, the view was accepted by O'Hanlon J in the *Lynch* case (as reported by the press) that there was no authority to support this

48 [1910] AC 20. See para 26 above for facts.

49 Section 21(5)(a).

proposition. On balance, it seems that the point remains open as the question does not appear to have been fully argued before O'Hanlon J.⁵⁰

B. Where the State of Mind is Not Relevant

158. The defendant's state of mind is not relevant to the determination as to whether a statement is defamatory. This is measured according to a community standard, represented by the jury.

159. The defendant's state of mind is not relevant to the issue of falsity. If a statement of fact is false, it is no defence for the defendant to say that he has reasonable grounds for believing in its truth. Where the defendant cannot prove the truth of a defamatory statement, the only defence available is privilege.

⁵⁰ See *Sunday Tribune*, 12 February 1989.

PART 2: THE LAW IN THE UNITED STATES

160. In the discussion of Irish defamation law which the publication of the Law Reform Commission's Consultation Paper will produce, references to United States law will most certainly be made. This is for a number of reasons. First, American jurisprudence on defamation has undergone a radical transformation in the last 25 years and has rejected much of the common law framework in this area. Secondly, the changes effected were achieved under the guidance of a Constitutional guarantee of free speech. The parallel with Ireland is obvious. Thirdly, many cases emerging over that period were dealt with by the United States Supreme Court, thus providing a unique opportunity to see continuous treatment of a single topic by the final court of appeal in that jurisdiction. Already a number of defences drawing inspiration from United States law have been proposed to the Commission and are discussed at a later point. We therefore feel that a thorough examination of United States law is vital, and have set out the case law in detail together with a discussion of the merits of the American system in both its theoretical and practical aspects.

CHAPTER 5: UNITED STATES CASE LAW

(a) *The Birth of the Public Official Doctrine*

161. The leading American case in the context of modern defamation law is *New York Times v Sullivan*, a decision of the United States Supreme Court in 1964.¹ This is the case which set the Supreme Court upon its path of the public figure/private figure dichotomy in defamation law. However, in some senses, the stage was set for a major reform in the area of defamation in a 1931 decision, *Near v Minnesota*.² In that case, the Supreme Court interpreted the First Amendment of the Constitution and its guarantee of free speech as prohibiting prior restraints on freedom of speech in all but a few cases. The majority opinion, delivered by Chief Justice Hughes, justified the removal of prior restraint by pointing to the availability of the action in defamation after publication:

"Public officers, whose character and conduct remain open to debate and free discussion in the press find their remedies for false accusation in actions under libel law as providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals."³

The fact that the First Amendment had an effect on prior restraints of speech clearly had implications for restrictions on or punishments for speech once published. As one writer puts it:

"As understood in *Near*, prior restraint and common law actions were substitutes for one another. The injunction can be removed from the

1 (1964) 376 US 254.

2 283 US 697.

3 283 US 697, at 718-9, *per* Hughes, CJ.

plaintiff's legal arsenal precisely because the common law action remains. Yet once the two are recognised as substitute forms of social control, it becomes hard to say that one mode of control is subject to constitutional restraint while the other remains wholly beyond constitutional review."⁴

That opportunity to review the common law rules on defamation arose in *New York Times v Sullivan*. The dispute arose out of the publication in the New York Times of a page advertisement alleging violation of black civil rights in Alabama. Although the plaintiff was not specifically referred to, he claimed to have been defamed in his capacity as supervisor of the police department. The local jury awarded \$500,000 damages and the Supreme Court of Alabama affirmed.

There was arguably a number of ways in which the plaintiff's appeal to the United States Supreme Court could have been disposed of.⁵ However, the Supreme Court chose to carve out a whole new standard for the law of defamation. It singled out public officials as a special category of plaintiff and replaced the common law rule of strict liability with a narrowly defined fault criterion:

"The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice', that is with knowledge that it was false or with reckless disregard of whether it was false or not."⁶

Henceforward a defendant could make false defamatory statements about a public official without fear of a defamation action, unless the plaintiff could show the defendant actually knew the statement was false or was reckless as to its falsity. It is crucial to note that the Supreme Court's definition of malice is an entity quite distinct from malice at common law. It has since been held that proof of actual malice must be "clear and convincing". In *Bose Corp v Consumers Union of United States*⁷ the court held that the plaintiff must "demonstrate with clear and convincing evidence that the defendant realised that his statement was false or that he subjectively entertained serious doubts as to the truth of the statement."⁸

Pausing for a moment, it is worth recalling that the facts giving rise to this innovation involved high-level official conduct in relation to a fiercely controversial issue, namely the civil rights debate. Epstein writes:

4 Epstein, Was *New York Times v Sullivan* Wrong? 53 U Chicago L Rev 782, 789.

5 See below, p184.

6 376 US 254, at p.279 - 80, per Brennan, J.

7 466 US 485 (1984).

8 Ibid at 511, n 30.

"[T]he great principle of *New York Times* was that there was no such thing as seditious libel. Criticism of the government was to be regarded as protected from both criminal punishment and private defamation suits, while false statements of fact about public officials received a qualified privilege rendering them actionable only in cases of 'actual malice' carefully circumscribed in *New York Times* to cover only statements published 'with knowledge that it was false or with reckless disregard of whether it was false or not'.

"and

"[At] the time the decision was, if anything, viewed more as a victory for the civil rights movement The desire to reach the right result in *New York Times* had as much to do with the clear and overpowering sense of equities arising from the confrontation over racial questions as it did with any strong sense of the fine points of the law of defamation. The source of many of the modern problems with the law of defamation is that the *New York Times* decision was influenced too heavily by the dramatic facts of the underlying dispute that gave the doctrine its birth."⁹

From another viewpoint the *New York Times* decision was an attempt to use the substantive rules of law to curb high damages awards -

"When the inflationary increase in tort verdicts produced a libel judgment of half a million dollars, the Supreme court in *New York Times v Sullivan* responded by imposing constitutional constraints on the damage action. The *New York Times* decision rested on concern that truthful, socially desirable speech would be debarred by the threat of libel judgments virtually unlimited in amount ... Rather than reduce this chilling effect by directly limiting the damage amounts recoverable in libel actions, however, the Court instead chose an indirect means: it engrafted a new substantive element onto the existing common law elements of the plaintiff's case, holding that plaintiffs could recover damages only if they proved that the defendant acted with a culpable state of mind".¹⁰

A crucial point about *New York Times v Sullivan* is that it concerned false statements of *fact*. The correct analogy is therefore with our defence of justification, and not the defence of fair comment. It is sometimes stated that *New York Times* opened up the way for "criticism" of public officials. This is misleading. In cases of real comment or opinion, the common law defence of fair comment would have applied. Indeed, opinion statements have become

9 Epstein, Was *New York Times v Sullivan* Wrong? 53 U Chicago L Rev 782, at 782 respectively.

10 Barrett, Symposium: *New Perspectives in the Law of Defamation: Declaratory Judgments for Libel: A Better Alternative*, 74 Calif L Rev 847, 854.

non-actionable in the United States.¹¹ However, it is inaccurate to think of *New York Times* as applying to expressions of opinion; it applies to statements of fact.

The range of plaintiffs coming within the *New York Times* innovation were public officials. It was inevitable that further definition of this concept would be required. A number of decisions followed in which it was necessary for the Supreme Court to decide whether a specific plaintiff was a 'public official' for this purpose. In *Rosenblatt v Baer*¹² the plaintiff was a supervisor of a county-owned ski recreation centre. Was he a public official, and if so, why? The Supreme Court answered as follows:

"[A person is a public official if] the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."

Moreover, the statements complained of must consist of statements reflecting on the person *in their capacity* as that public official. Statements about fitness for office would therefore clearly come within the *New York Times* protection. As a result, the Supreme Court was asked to decide whether particular charges touched on fitness for office, and whether long forgotten charges would come within the *New York Times* protection. In *Garrison v Louisiana*¹³, the Supreme Court held that charges of laziness and inefficiency in relation to judges were charges touching on fitness for office. Accordingly, they came within the *New York Times* protection and the statements were actionable only on proof of malice. In *Monitor Patriot Company v Roselle A Roy*¹⁴ it held that charges involving illegal conduct some forty years previously were not too remote to come within the protection, because a charge of criminal conduct would always be relevant to fitness for office. It will be remembered that none of these charges would be actionable unless the plaintiff could show that the defendant actually knew the statement was false, or was reckless as to its falsity. Otherwise, the truth of the statement would not be at issue.

This could lead to some curious results, as shown by *Ocala Star-Banner v Damron*.¹⁵ A Leonard Damron was running for election as county tax assessor. A reporter telephoned a story to his newspaper that James Damron (Leonard's brother) had been indicted for perjury by a grand jury. The editor had never heard of James Damron, and the newspaper reported that Leonard

11 See below, p177 et seq.

12 383 US 75.

13 379 US 64.

14 401 US 265.

15 401 US 295.

Damron had been charged in a Federal Court with perjury in a civil rights suit. The jury awarded compensatory damages to the plaintiff and the Florida District Court of Appeal affirmed. On *certiorari*, the United States Supreme Court reversed and remanded, holding that a charge of criminal conduct is never irrelevant to an official's fitness for office. Accordingly the plaintiff could not maintain an action in defamation. The case illustrates the extent of the *New York Times* protection where the plaintiff is unable to prove malice.

(b) *Transition from Public Official to Public Figure*

162. Meanwhile, in 1967 the Supreme Court had embarked on an extension to the *New York Times* protection by widening it to cover statements made about a greater range of plaintiffs. The category of "public officials" who would have to overcome the *New York Times* hurdle in a defamation action was expanded to include "public figures" generally. This was the result of two cases decided together;¹⁶ *Curtis Publishing Company v Butts* and *Associated Press v Walker*. In the *Butts* case, the defamatory matter consisted of a *Saturday Evening Post* article claiming that the athletic coach of the University of Georgia had "fixed" a football game. The plaintiff in the *Walker* case was a retired General challenging a report that he had led a violent crowd in opposition to a desegregation decree at the University of Mississippi. Chief Justice Warren stated:

"[D]ifferentiation between 'public figures' and 'public officials', and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinction between governmental and private sectors are blurred. It is plain that although they are not subject to the restraints of the political process, 'public figures', like 'public officials', often play an influential role in ordering society. And surely as a class these 'public figures' have as ready access as 'public officials' to mass media, to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials'."

As a result, the public figure was to be equated with the public official for the purposes of the *New York Times* rule. The 'public figure' was defined in the *Butts* case as including persons "ultimately involved in the resolution of important public questions or (who), by reason of their fame, shape events in areas of concern to society at large".¹⁷ This definition therefore included figures who drew public attention through no desire of their own. In *Time*

16 At 388 US 130.

17 *Ibid.*, p164.

*Incorporated v Hill*¹⁸ the plaintiff and his family had attracted the public's attention because they were held hostage in their home by some escaped convicts. They subsequently discouraged publicity efforts about the incident, which had caused extensive involuntary notoriety. A novel, and then a play, about a hostage incident later appeared, and the magazine *Life* published an account of the play relating it to the Hill incident. The plaintiff sued for damages under a New York statute providing a cause of action to a person whose name or picture is used by another without consent for the purposes of trade or advertising. The Supreme Court held that the *New York Times* standard applied to the New York statute and held that the trial court's failure to direct the jury accordingly constituted reversible error. The essential point, however, although it was not a defamation action, is that the *New York Times* standard was held to apply to the plaintiff despite active efforts on his part to *resist* publicity.

At this point, the momentum of the Supreme Court was towards expanding the *New York Times* rule. It reached a certain point, as will be seen below, and began to constrict again. This wide definition of public figure would be cut down in time. However, before that development, another innovation was taking place.

(c) *The Public Interest Experiment*

163. The Supreme Court had moved from "public officials" to "public figures", and had defined the latter in a manner emphasizing the nature of the person's activities and influence. As if looking for a peg on which to hang the *New York Times* rule, it seized on this aspect of the "public figure" category to formulate a new concept on which to base the rule, namely "public interest". If the real reason for allowing debate about public officials and public figures was because of the activities in question, it seemed logical to base the rule on the public nature of these activities. The focus was therefore shifted from the status of the plaintiff to the content of the publication.

This was the holding of the plurality opinion in *Rosenbloom v Metro Media*¹⁹ where the split in views evidenced the problems posed by the major reshaping of defamation law. A magazine distributor had been described in a radio broadcast as a "smut merchant". One judge, Mr Justice Black, took his by now customary absolutist view, holding that the First Amendment gave the press complete immunity from libel actions. Mr Justice White thought that there should be a complete immunity except where malice was present. The three dissenting judges argued that a fault concept should replace strict liability in public interest cases and that only actual damages should be allowed. The plurality opinion, however, held that the *New York Times* rule applied because the subject matter was one of public interest. Mr Justice Brennan expressed the plurality opinion as follows:

18 385 US 374.

19 403 US 29.

"If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. [We] honour the commitment to robust debate on public issues [by] extending constitutional protection to all discussion and communication involving matters of public or general concern without regard to whether the persons involved are famous or anonymous."

The result of this would be that wherever a defamatory statement of fact were made about a person which involved a matter of public interest, that person would have no redress unless he could prove that the defendant knew of, or was reckless as to, the falsity of the statement. However the "public interest" experiment was soon to be abandoned.

(d) Public Figures Restored: New Law for Private Figures

164. The second leading case in American defamation law is *Gertz v Welch*.²⁰ The plaintiff was a lawyer who had been retained by a family in a civil suit against a policeman who had been convicted of murder. A magazine called '*American Opinion*' accused Gertz of being the architect of a frame-up of the policeman in the murder trial, and called him a "Communist-fronter". The District Court entered judgment for the defendant on the basis that the plaintiff was a public figure and had failed to prove malice on the part of the defendant. However the United States Supreme Court allowed the appeal, holding that Gertz was not a "public figure". The test of public interest was dropped. The court affirmed the public/private figure dichotomy and set out the guiding considerations for each category.

(i) Public Figures - These were defined as governmental officers and those who by reason of the notoriety of their achievements, or the vigour and success with which they sought the public's attention, were properly classed as public figures. The *New York Times* test was retained for these plaintiffs. A plaintiff falling into this category would therefore have an action in defamation only if he could prove that the statement was made with knowledge of its falsity or reckless disregard of its truth. The justification for this harsher rule was (i) that such persons would usually enjoy a greater access to channels of communication and have an opportunity to correct false statements, and (ii) that such persons would have voluntarily exposed themselves to the risk of defamatory falsehood, unlike a private individual.

(ii) Private Figures - The test of the dissentients in *Rosenbloom* was adopted. Such individuals could recover damages in respect of defamatory falsehood provided fault on the part of the defendant was shown. Although this was a

²⁰ 418 US 323 (1974).

less harsh rule than the public figure rule, it still represented a departure from the common law strict liability position:

"We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual. This approach provides a more equitable boundary between the competing interests involved here. It recognises the strength of the legitimate State interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigours of strict liability for defamation."

The essential difference between public and private figure plaintiffs was therefore that negligent statements of fact could be made about public figures, but not about private individuals.

(e) *The question of punitive damages*

165. The Court in *Gertz v Welch* went on to set out guidelines for damages. Actual damages only could be recovered, unless there was knowledge of falsity or reckless indifference to truth. It would seem that the statement of Powell J. allows room for punitive damages where such knowledge or recklessness is present, and therefore in all cases where a public figure has overcome the *New York Times* actionability hurdle:

"[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

That this leaves the way open for an award of punitive damages where actual malice is supported by the statement by O'Connor, J in the later case of *Hepps v Philadelphia Newspapers*:

"In addition, the Court in *Gertz* expressly held that, although a showing of simple fault sufficed to allow recovery for actual damages, even a private-figure plaintiff was required to show actual malice in order to recover presumed or punitive damages."²¹

A later case, *Dun & Bradstreet Inc v Greenmoss Builders Inc*²² limited the above holdings to cases where the speech was of public concern. In that case, there was a private figure plaintiff and speech of purely private concern. The court held that in such a case, punitive damages could be recovered without a showing of actual malice.

21 475 US 767, 774.

22 472 US 749.

The result would seem to be as follows:

In cases where the speech is of public concern;

- (a) Where the private figure shows that the defendant was at fault, he may recover actual damages.
- (b) Where the private figure shows that the defendant was not only at fault, but actually knew of the falsity of the statement or was reckless as to its truth, he may recover punitive damages.
- (c) The public figure will have difficulty bringing an action in the first place, because he will have to show actual knowledge or reckless disregard for truth. However, if he succeeds in overcoming this hurdle, he is apparently entitled to punitive damages.

In cases where the speech is of purely private concern,

- (d) The private figure plaintiff may recover punitive damages without a showing of actual malice.

An important point to note is that "actual damage" was widely defined. Unlike "special damage" at common law, it is not equated with financial loss. Mr Justice Powell stated specifically that it was "not limited to out-of-pocket loss" and that "the more customary types of actual harm inflicted by defamatory falsehood included impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering".

This would appear to be similar to our compensatory damages. Perhaps the difference is that evidence of such damage must be adduced by the plaintiff, and is not presumed by the court. However, one writer has stated as follows:

"The Gertz 'limitation' of recovery under the negligence standard to 'actual injury' has proven illusory. The Gertz court defined 'actual injury' to include personal humiliation, and mental anguish and suffering, 418 US at 350; the court later held that this could mean emotional injury alone. See *Time Inc. and Firestone*, 424, US 448, 458-61 (1976). Thus, the court kept the door open for virtually unlimited awards for 'actual' mental suffering."²³

(f) The Category of Public Figures Narrows

166. The holding in *Gertz* that the plaintiff was not a public figure, and the emphasis of the court that a public figure must have voluntarily placed himself in that position, started a trend in reading the public figure category restrictively. Mr Justice Powell cautioned against finding the person to be a

23 Barrett, *Supra* footnote 10 at p. 854 n. 45.

public figure too readily:

"We would not lightly assume that a citizen whose participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking at the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

In *Time Incorporated v Firestone*²⁴ the plaintiff had been involved in a sensational divorce case and the defendants argued that she had become a public figure by virtue of this publicity and press interviews given by her. The Court refused to hold that the plaintiff was a public figure on the basis that she had been involuntarily drawn into the public forum. In *Hutchinson v Proxmire*²⁵ the plaintiff was a scientist whose federally funded research had been described by the defendant Senator as an example of wasteful government spending. Again the court held that the failure of the plaintiff to throw himself into public controversy prevented him from being a public figure. And in 1979, the plaintiff in *Wolston v Readers Digest Association Inc*²⁶ brought an action in defamation because a book had listed him as a Soviet Agent. In 1958, this person had been briefly in the public eye after his failure to appear before a grand jury investigating Soviet espionage, which resulted in a criminal conviction for contempt. The mere fact of his being cited for contempt was held to be insufficient reason to render him a public figure in the context of statements about Soviet espionage. Thus, while the *New York Times* standard continues to apply to "public figure" plaintiffs, it seems that this category is restrictively construed.

(g) The content of the speech re-enters the equation

167. It was pointed out at (c) that the Supreme Court in *Rosenbloom v Metro Media*²⁷ flirted with the idea of replacing the "public figure" concept with a "public interest" criterion. This was discarded in *Gertz v Welch*²⁸. However, following *Dun & Bradstreet*, the content of the speech would seem to have re-entered the equation, but this time as an additional, rather than an alternative, requirement. In that case, the court held that where the speech did not concern matters of public interest, awards of presumed and punitive damages could be made under standards less stringent than *New York Times* and *Gertz*:

24 424 US 488.

25 443 US 111 (1979).

26 443 US 157 (1979).

27 *Supra*, fn.

28 *Supra*, fn.

"In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the State interest adequately supports awards of presumed and punitive damages - even absent a showing of actual malice".²⁹

Following the *Greenmoss* case, we may conclude that the appropriate level of protection for speech in United States law depends on the configuration of the case, with three variables involved:

"The Court has discussed three factors in dividing defamation cases into various categories, which receive different levels of constitutional protection. The factors are whether the plaintiff is a public official, public figure, or private figure, whether the defendant is a member of the media and, finally, whether the subject-matter of the alleged defamatory speech is public or private. The permutations of these variables lead to a large number of categories, each with its own set of applicable standards".³⁰

It may be noted that only the issue of damages was before the court in *Dun and Bradstreet*. It leaves open the question whether the *Gertz* fault standards are also swept away where the speech is of private concern and the plaintiff is a private individual.

(h) The Final Step: Reversal of the presumption of falsity

168. In *New York Times* and *Gertz*, the primary issue was fault in relation to truth. The public figure plaintiff would have to show that the defendant knew of or was reckless as to the falsity of the statement. The private figure plaintiff would have to show some less stringent standard of fault in relation to falsity. However, these cases left undisturbed the common law presumption of falsity, which places the burden of proof of truth on the defendant. The sequence of trial would therefore be as follows: (1) The plaintiff shows the statement is defamatory; (2) the Court presumes the falsity of the statement; (3) the plaintiff shows the defendant is at fault (private plaintiff) or acted with malice (public plaintiff). It might have been thought that a part of the plaintiff's case in showing fault would be a showing of falsity. However, the Supreme Court in 1986 chose to reverse this presumption so that (2) above would read as follows: "The plaintiff shows the falsity of the statement".

This reversal was effected in *Hepps v Philadelphia Newspapers*.³¹ The newspaper

29 *Ibid*, at 761. Interestingly, the false "fact" asserted in that case consisted of an inaccurate credit report stating that a building contractor had filed a voluntary petition for bankruptcy. The holding that this was a matter of private concern has been criticised on the basis that the bankruptcy announcement of a local company is information of great concern to residents of the community in which the company is located; See Kellerman, 54 U Cin L Rev 1375, 1392.

30 Kalm, 62 NYUL Rev, 812, 813.

31 (1986) 475 US 767.

had published a series of articles alleging that the plaintiff corporation had links with organised crime and had used these to influence the State's governmental processes. The trial court, a Pennsylvania State court, instructed the jury that the burden of proving falsity was on the plaintiff. The Pennsylvania Supreme Court remanded the case for a new trial, holding that a showing of fault did not require a showing of falsity, and that the burden of proving truth was on the defendant.

In the United States Supreme Court, O'Connor J, delivering the opinion of the Court, stated:

"We believe that the common law's rule on falsity - that the defendant must bear the burden of proving truth - must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."³²

O'Connor J justified this rule on the basis that a presumption either way would be of significance only in cases of doubt or ambiguity, and that in areas of public concern, the presumption should operate in favour of free speech -

"Because the burden of proof is the deciding factor only when the evidence is ambiguous, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false. In a case presenting a configuration of speech and plaintiff like the one we face here, we believe that the Constitution requires us to tip them in favour of protecting true speech. To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."³³

O'Connor J thought that in most cases this reversal would be of little practical significance for the plaintiff:

"We note that our decision adds only marginally to the burdens that the plaintiff must already bear as a result of our earlier decisions in the law of defamation. The plaintiff must show fault. A jury is obviously more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statements at issue if convinced that the relevant statements were false. As a practical matter, then, evidence offered by the plaintiffs on the publisher's fault in investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted."³⁴

32 *Ibid*, at 776.

33 *Ibid*, at 776-7.

34 *Ibid*, at 778.

It is crucial to note that this reversal of presumption was effected only in cases where the speech is of public concern. It is this factor which tips the presumption in favour of speech. Presumably, in a case where the speech is of private concern, the common law rule continues to apply. More worrying, however, is O'Connor J's reference to "media" defendants. In practice, the defendant is more than likely to be a media defendant. It may be, however, that a new theoretical distinction was introduced. Strictly speaking, the new presumption operates where the speech is of public concern *and* the defendant is a media organ. Brennan J wrote a separate concurring opinion in which he adverted to this point:

"I write separately only to note that, while the Court reserves the question whether the rule it announces applies to non media defendants, I adhere to my view that such a distinction is irreconcilable with the fundamental First Amendment principle that the inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual."³⁵

A vigorous dissent in the *Hepps* case was written by Stevens J, with whom Burger CJ, White and Rehnquist JJ agreed. He argued that the new presumption would undoubtedly benefit defendants, but only unmeritorious defendants:

"The issue the Court resolves today will make a difference in only one category of case - those in which a private individual can prove that he was libelled by a defendant who was at least negligent. For unless such a plaintiff can overcome the burden imposed by *Gertz v Robert Welch Inc* 418 US 323, 347 (1974) he cannot recover regardless of how the burden of proof on the issue of truth or falsity is allocated. By definition, therefore, the only litigants -and the only publishers - who will benefit from today's decision are those who act negligently or maliciously."

Accepting that a risk would have to be borne by either the plaintiff or the defendant, Stevens J disagreed with the majority that the plaintiff should be required to bear the risk, in light of the fact that the defendant had made the statement "either with a mind toward assassinating his good name or with careless indifference to that possibility".

Stevens J also accepted the view of the majority that the reversal of the presumption would make little practical difference in most cases. However, he observed -

"That allocation of the burden of proof is inconsequential in many cases provides no answer to cases in which it is determinative".

35 *Ibid.*, at 779.

He noted also that proof of fault would not necessarily entail proving falsity. A plaintiff could show negligence in the way in which the material was gathered, regardless of truth or falsity. Stevens J thought that in a case where the plaintiff could show the defendant was at fault in the reckless way he collected the material, the presumption advocated by the majority would achieve an unjust and unconstitutional result:

"To appreciate the thrust of the Court's holding, we must assume that a private-figure libel plaintiff can prove that a story was published with 'actual malice' - that is, without the publisher caring in the slightest whether it was false or not. Indeed, in order to comprehend the full ramifications of today's decision, we should assume that the publisher knew that it would be impossible for a court to verify or discredit the story and that it was published for no other purpose than to destroy the reputation of the plaintiff. Even if the plaintiff has overwhelming proof of malice the Court today seems to believe that the character assassin has a constitutional licence to defame. In my opinion deliberate, malicious character assassination is not protected by the First Amendment to the United States Constitution."

However, the result of the majority holding in *Hepps* is that where speech is of public concern, the plaintiff must show falsity as a prior matter to showing malice (in the case of a public figure plaintiff) or fault (in the case of a private plaintiff).

(i) Reservations as to the modern caselaw

169. All of these developments were, as we have seen, emphatically grounded on the First Amendment guarantee. At its most extreme, this viewpoint is to be found in the view of Jefferson which was cited by Douglas J in *Gertz v Welch*;

"Libels, falsehoods and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals".

Thus, in *New York Times*, Black J stated the majority view in its starkest form:

"In my opinion, the Federal Constitution has dealt with the deadly danger to the press in the only way possible - without leaving the free press open to destruction - by granting the press an absolute immunity for criticism of the way public officials do their public duty".

But dissentient views emerged at a relatively early stage in the court. Thus, Stuart J in *Rosenblatt v Baer* gave early expression to unease at the new developments:

"The protection of private personality, like the protection of life itself, is left primarily to the individual States under the 9th and 10th

Amendments. But this does not mean that the right (to the protection of the individual's good name) is entitled to any less recognition by this court as a basic of our constitutional system".

It is interesting to note that some of the most cogent restatements of the orthodox law are to be found in the dissenting opinions of White J in recent cases: interesting because White J had joined the majority opinion in *New York Times*. Thus, he had this to say in *Gertz v Welch*:

"I doubt that jurisprudential resistance to liability without fault is sufficient ground for employing the First Amendment to revolutionise the law of libel and, in my view, that body of rules poses no realistic threat, to the press and its service to the public. The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition and the court furnishes none."

"The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the nation into every home. Neither the industry as a whole nor its individual components are easily intimidated and we are fortunate they are not. Requiring to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence".

In *Dun & Bradstreet v Greenmoss*, the same Justice made explicit his reservations about the view which he had previously held as a member of the majority in *New York Times*:

"I have also become convinced that the court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation".

He went on to associate himself, to some extent at least, with those who criticised the *New York Times* decision on the ground that it needlessly jettisoned the common law standard of liability in defamation and summed up his view as follows:

"I suspect that the press will be no worse off financially if the common law rules were to apply if the judiciary was careful to insist that damages awards be kept within bounds. A legislative solution to the damages problem would also be appropriate".

Even stronger criticism of the majority decisions in *New York Times* and its progeny can be found in such remarks as those of Stewart J in *Rosenblatt v*

Baer:

"Surely if the 1950s taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."

And, to the same effect, Stevens J, dissenting, said in *Hepps v Philadelphia Newspapers*:

"By attaching no weight to the States' interest in protecting the private individual's good name, the court has reached a pernicious result".

(j) *The Status of Opinions in United States Law*

170. *New York Times* and its successors concerned defamatory statements of fact. This raises the question of how opinion statements are dealt with under the First Amendment. The prevailing view appears to be that opinion statements have been rendered non-actionable following the celebrated statement of Powell J. in *Gertz v Welch*:

"Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas".³⁶

However, unlike *New York Times* this turning point was not followed up by a succession of Supreme Court decisions. Unfortunately the two Supreme Court cases in which opinion statements have been at issue, the actionability of opinions is not faced squarely as an issue. The first of the two cases usually cited actually preceded *Gertz v Welch*. This is *Greenbelt Publishing Assoc v Bresler*³⁷ where the Court held that the use of the word "blackmail" to describe the plaintiff developer's use of bargaining power did not amount to libel as a matter of law. However, it has been suggested that the holding of the court is open to a number of interpretations:³⁸

- (1) The statement was protected because it was part of a fair report; the court characterised the story as an accurate and truthful report of what had been said at a public meeting and said that the newspaper was performing a legitimate community function in publishing the report.
- (2) The statement was protected because the use of the word "blackmail" in a rhetorical way negated the defamatory impact of the statement. On such a view, the court's holding was the result of the straightforward application of principles concerning defamatory effects and did not

³⁶ 418 US 323, at 339.

³⁷ 398 US 6.

³⁸ Thomas, Statements of Fact, Statements of Opinion, and the First Amendment, 74 Calif. L. Rev. 1001.

concern the First Amendment.

- (3) The statement was protected because it could not be considered an accusation of crime (i.e. a fact) in the context, since it was clear that the term had been employed as "rhetorical hyperbole, a vituperous epithet". On this view the statement was protected precisely because it was an opinion.

The second case, *Letter Carriers v Austin*,³⁹ was decided on the same day as *Gertz*. The subject matter consisted of trade union literature containing an abusive and insulting definition of a "scab". Justice Marshall writing for the majority noted that federal labour policy required more protection for a union involved in a labour dispute than State law, and reasoned that the right to persuade others to join a union should not be easily stifled by threats of defamation. However he first cited *Gertz* as authority for the proposition that there must be a statement of fact to ground a libel action. It was held that even the most pejorative opinion would be protected under labour law. Despite this more limited holding, the court did recognise the legitimacy of the reasoning in *Gertz*. It is also noteworthy that it interpreted *Greenbelt* as authority for the opinion privilege i.e. interpretation 3 suggested above.

The result of this scanty case law is that the opinion doctrine is subject to some controversy. One commentator states the doctrine is not yet settled.⁴⁰ On the other hand, the recent Annenburg Washington Report assumes that opinion statements are not actionable:

"[S]tatements of opinion are never actionable in a cause of action for defamation. This principle is now entrenched in federal constitutional law".⁴¹

Another writer states that most federal and state courts have interpreted *Gertz* as providing absolute constitutional protection for opinions, but admits that there is confusion as to how the distinction between fact and opinion is to be drawn and the exact contours of the privilege.⁴² We adopt the following statement as the most concise analysis of the situation:

"Nearly every jurisdiction in the United States cites the *Gertz* dictum as binding constitutional authority. Although the Supreme Court has not yet directly ruled on the issue, one recent Supreme Court opinion has implicitly accepted the lower courts recognition of a constitutional privilege for statement of opinion.⁴³ On the other hand, some members of the court have questioned the validity of this view. It remains to be

39 418 US 264.

40 Elder, *Defamation and Freedom of Expression*, 35 ICLQ 891, 921.

41 Report, p.20.

42 See Berritt, *The Fact Opinion Distinction in Libel Law*, 52 Brooklyn L. Rev. 879.

43 *Base Corp. v Consumers Union Inc.* 104 S.Ct. 1949, 1961 (1984).

determined whether the common-law predecessor of the constitutional privilege for opinions, the fair comment privilege, has become obsolete."⁴⁴

It is interesting to note that if the lower courts have seized upon the *Gertz* dictum to abolish the law on fair comment, this may not have been the result intended by the court in that case. Justice Rehnquist, who joined in Powell J's opinion in *Gertz*, subsequently stated:

"At the time I joined the opinion in *Gertz*, I regarded this statement as an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there is no such thing as a false 'idea' in the political sense, and that the test for truth for political ideas is indeed the market place and not the courtroom. I continue to believe that is the correct meaning of the quoted passage. But it is apparent from the cases cited by petitioner that lower courts have seized upon the word 'opinion' in the second sentence to solve with a meat axe a very subtle and difficult question, totally oblivious of the rich and complex history of the struggle of the common law to deal with this problem".⁴⁵

While the lower courts appear to be implementing the 'non-actionability for opinion' doctrine, there appears to be a lack of uniformity in their method of application. One writer discerns two approaches currently being used.⁴⁶ The first approach categorically prohibits actionability in respect of any type of opinion, once a statement has been characterised as such. Accordingly it becomes crucial to distinguish between fact and opinion and various tests are used to this end - the verifiability test, the totality of circumstances test, or combination of these two.

The second approach is based on the Restatement (Second) of Torts (1977). Section 566 provides -

"A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion".

The section thereby retains actionability for "mixed" as opposed to "pure" statements of opinion. A "pure opinion" is one which sets out the facts on which it is based, or refers to facts already known to the general public. A "mixed" opinion is one that is apparently based on facts which are neither stated or implied. We find the terminology of "pure" and "mixed" opinions misleading and prefer the terms "supported opinion" and "unsupported

44 Thomas, *supra* footnote 38, at p1008.

45 Justice Rehnquist dissenting on the Court's denial of certiorari in *Ollman v Evans* 105 S Ct 2662 (1985).

46 Thomas, *supra* footnote 28.

opinion". The following examples illustrate the different types of opinion under the restatement test:

1. An article sets out certain facts and says "X is dishonourable".
2. An article discusses a TV station and concludes "It is a low-quality station".
3. An article states that the behaviour of X was dishonourable.

Example 1 would be "pure" (supported) opinion because the facts supporting the conclusion are set out. Example 2 is also pure (supported) opinion because the facts on which the conclusion is based, the content of the TV station's broadcasting, are a matter of public knowledge. Example 3 is a "mixed" or (unsupported) opinion since no facts are in any way pointed to as foundation for the opinion.

The rationale for differentiating between the two types of statement was given by the Eight Circuit as follows:

"This stricture on publication of opinion rests on the assumption that, given all the facts of a situation, the public can independently evaluate the merits of even the most outrageous opinion and discredit those that are unfounded. On the other hand, when an opinion held out for belief is stated so that the average listener could infer that the speaker had an undisclosed factual basis for holding the opinion, the listener does not have the tools necessary to independently evaluate the opinion and may rely on unfounded opinion that defames an individual."⁴⁷

It does not appear that there is any requirement that the facts to support a "pure opinion" be proved true. If this is correct, then this test only superficially resembles the common law requirement that the comment must be based on fact to avail of the defence of fair comment, for the common law imposes the additional requirement that such facts be proved true.

⁴⁷ *Lauderback v American Broadcasting Co.* 741 F.2d. 193, 195-96 (8th Cir. 1984).

CHAPTER 6: COMPARISON BETWEEN UNITED STATES AND IRISH DEFAMATION LAW

171. For purposes of clarity, the following is a brief summary of the essential differences between current United States and Irish law on defamation.

1. United States law is built on a public figure/private figure dichotomy. In our law, there is no such distinction. All plaintiffs are subjected to the same standards. Distinctions are made on the basis of the content of the speech. Thus, if a statement is one of fact, the defendant must either justify or point to an occasion of privilege, irrespective of the identity of the plaintiff. If the statement is one of opinion, the defendant may avail of the defence of fair comment, irrespective of the identity of the plaintiff.
2. In the United States, a public figure can bring an action in respect of *a defamatory statement of fact* only if he shows the publisher had knowledge of the falsity of the statement, or was reckless as to its truth. In Ireland, public and private figures alike can bring actions in respect of defamatory statements of fact without having to show any fault on the part of the defendant. On the issue of truth, the Irish position is one of strict liability.
3. In the United States, a private figure can bring an action in respect of *a defamatory statement of fact* only if he shows fault on the part of the publisher. The appropriate fault criterion is left to the individual States, but it must at least consist of negligence. In Ireland, as stated above, the plaintiff need not show fault in relation to falsity.
4. In the United States, where the speech is of purely private concern, the same standards appear to apply as in Ireland. In Ireland, defamation law does not distinguish between actions for defamatory statements of

fact on the basis of whether the speech is of public or private concern. The truth of the statement continues to be the decisive criterion. However, a remedy under privacy law may be available to the plaintiff if the speech is of purely private concern. In the case of defamatory comments, there is a distinction between speech of public interest or speech of private interest. The defence of fair comment will fail unless the subject-matter of the comment is one of public interest. Therefore, there is no defence for defamatory comments on matters private to the plaintiff. Furthermore, the plaintiff may have an action under privacy law for comments of any kind on his private life.

5. In the United States, the general view is that no person can bring an action in respect of *defamatory statements of opinion* although the contours of this privilege are uncertain.

In Ireland, a plaintiff may bring an action in respect of defamatory statements of opinion, but the defendant may resort to the defence of fair comment. This allows a defence for a wide range of comment provided the supporting facts are true, although it may be defeated by a showing of malice on the part of the defendant.

6. In the United States, where the speech is of public interest damages are confined to actual damages, unless there is a showing of knowledge of falsity or reckless disregard for truth. In such a case, it would seem that punitive damages may be awarded. Where the speech is of private concern, punitive damages may be awarded without a showing of actual malice. In Ireland, general damages are presumed, and it is probable that punitive damages may still be awarded under present law. However, there is no distinction based on the type of speech or the element of fault, at least in theory. The difference between "actual" and "presumed" damages may be narrowed when it is recalled that "actual" damage is not confined to pecuniary loss.
7. In the United States, the plaintiff in a defamation action involving speech of public concern must show falsity as a prior matter to showing malice or fault. To date this has been applied only where the defendant is a media organ. In Ireland there is a presumption of falsity in all cases, so that the onus is on the defendant to show truth.

CHAPTER 7: THE COMMON LAW AND NEW YORK TIMES v SULLIVAN

172. The modern United States law on defamation has its origins in the case of *New York Times v Sullivan*. The decision was hailed as a victory for freedom of speech and the removal of the fetters imposed on such freedom by the common law. In the discussion of the decision and its aftermath, an important point has often been overlooked. Could the proper application of the common law itself have reached a satisfactory result in the *New York Times* case? It is usually assumed that the common law rules would have allowed the plaintiff in that case to recover damages, an assumption which is fortified by the award of \$500,000 by the Alabama jury. Yet most would agree that the plaintiff was not meritorious and such a result would have been unsatisfactory. The common law was deficient, the argument goes, and therefore something radical had to be done.

It is submitted that this assumption is incorrect. It is thought that the Supreme Court in *New York Times* could have reached a satisfactory conclusion without departing from common law principles, or at most, by refining those common law principles in a constitutional light. The award of \$500,000 by the Alabama jury was not due to the application of common law principles; rather, it was due to their misapplication. This conclusion is supported by the comment of Epstein:

"My sense is that tried anywhere outside the deep South, the plaintiff would have been sent home packing. The common law was sound; its application was not."¹

If it is true that common law principles could have satisfactorily resolved the

1 Epstein, *Was New York Times v Sullivan Wrong?* 53 U Chicago L Rev 782, 790.

New York Times dispute, it seems that the United States Supreme Court turned its back on the easier course of applying and, where necessary, developing the common law and embarked on the arduous task of building up an entirely new body of defamation law fraught with its own difficulties. It is a reassuring lesson of caution for those of us who have not yet turned our backs on a body of law which has been built up over centuries.

173. The following are ways in which it is suggested that the Supreme Court in *New York Times* could have dismissed the plaintiff's case by means of the application, or reform, of common law principles.

1. *Identification of the Plaintiff* - The plaintiff was not specifically referred to in the article. This, at the very least, weakened his case. In the recent Irish case of *Cole v RTE*² a jury found that an article in which the plaintiff was not named was not defamatory of the plaintiff. Alternatively, if the defendant argued that the article would have been understood by some people to refer to him, the jury could have been instructed that damages should only be awarded in respect of this smaller circulation of the libel. In *Morgan v Odhams Press*³ a new trial was ordered by the House of Lords precisely because the judge had failed to make a similar direction to the jury in a case of this kind.

One American judge has specifically adverted to this point:

"The Supreme Court could have vacated the award of damages to this plaintiff [i.e. *Sullivan*] on narrower, more traditional grounds, without having to create new constitutional doctrine. In fact, the Court expressly ruled as an alternative ground for reversal that the Times advertisement did not refer sufficiently to the plaintiff to support a libel judgement."⁴

2. *Damages* - The Supreme Court could easily have held that the damages were excessive. The lack of precise identification of the plaintiff and the small local circulation of the publication would have weighed heavily against the plaintiff. Furthermore, the Supreme Court could have clarified the law as to when, if ever, punitive damages could be awarded. There would seem to be a very strong flavour of punishment about the award in the *New York Times* case which was probably not merited.
3. *Justification* - A number of details in the defamatory article were incorrect. Under s22 of our Defamation Act, a defendant may justify even though he fails to prove the truth of all the statements contained in the Article, provided the unproved statements do not materially

² Reported *Irish Times*, 5 May 1989.

³ [1971] 1 WLR 1239.

⁴ Leval, Commentary: The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in its proper place, 101 Harv L Rev 1287, 1289.

injure the plaintiff's reputation having regard to those proved true. Because of this provision, it is probable that the defendant in *New York Times* would have been able to justify and avoid liability completely. Here, the Supreme Court could have achieved a similar result by bringing the law into conformity with s22.

At least one American writer has criticised the manner in which the Court in *New York Times* approached the common law principles:

"[There was no reason to presume that] the common law rules crafted over many centuries struck the wrong balance between speech and reputation. There may be ample reasons for federal constitutional *review* of common law principles, but it need not follow that there is any parallel presumption for constitutional *rejection* of state common law principles If there is any presumption, it should be in favour of the constitutional permissibility of the common law rules."

"Once it is recognised that the Alabama decision in *New York Times* was a common law aberration, the right Supreme Court strategy should have been to colonize as little as possible of the common law tort in its initial foray."⁵

5 Epstein, *supra*, footnote 1, pp791-2.

CHAPTER 8: AN ANALYSIS OF THE MERITS OF UNITED STATES DEFAMATION LAW

174. (i) *Arguments in favour of United States position*

1. The *New York Times* rule which applies to public figures has the undoubted advantage that it opens up discussion of the public activities of central figures in society. The media are no longer confined to the defence of justification in relation to false statements of fact. The Irish media say that they cannot get their sources to testify in open court with the result that they cannot avail of the defence of justification in many cases. (It is thought that, in any event, some of the sources would not survive cross-examination). Unless the statement comes within an occasion of privilege, they claim that they are effectively left without a defence. They argue that, under the *New York Times* test, they may publish statements of fact concerning public figures freely and without fear of having to exercise self censorship.
2. *New York Times* has been criticised on the grounds that it did not go far enough and that it should have rendered statements concerning public figures entirely nonactionable. One writer rationalises this on the basis that "truth" in a political context is illusory:

"The stuff of government decisions cannot be subject to a legal test of truth in our constitutional system. One man's truth is not another's. That is the central meaning of the first amendment: the right to differ about political truth, the right to criticise those who govern us without being held to a standard of temperateness or truth.

New York Times v Sullivan rested on that proposition. But the Court shied away from its own logic when it said in the end that critical statements about public officials could be penalized

if they were knowingly or recklessly false."¹

Another writer rationalises the view that *Sullivan* did not go far enough on the basis that the justification for the rule was the content of the speech in question and that the motive of the speaker was irrelevant to this issue:

"The double criterion of deliberate falsehood and reckless disregard for truth or falsity focuses on the intention of the speaker or writer; the important question, however, is the content of what was said or written. According to the tradition of common law libel, the question is whether the publisher, reporter, or author is trying to hurt another person by damaging his reputation. In first amendment cases, however, that is not determinative. Rather what must be asked is: Does this expression provide information relevant to the process of the public's self-government in the face of the 'exigencies of that period'? The argument that the deliberate lie or the negligent or reckless report corrupts public discussion rests upon a confusion between the state of mind of the writer or speaker and the objective situation written about. Indeed, for all we know, a deliberate liar may hit the truth in spite of himself, and a reckless gossip may throw unintended light on an area of popular interest. They may often do otherwise. But the first amendment's premise is that the public is able to receive and appraise the reporting of genuinely free press."²

3. The introduction of a fault standard in defamation cases involving private individuals represents a fairer balance between individual reputation and free speech than does strict liability.

175. (ii) *Arguments against the United States position*

1. *Benefit to Unmeritorious Defendants*

The very argument that is cited in favour of the *New York Times* rule may be used against it. It was said that the rule opened up public discussion on the public activities of public figures, which it does. Unfortunately, however, the defence is so wide that it allows unmeritorious as well as meritorious defendants to avail of it. A defendant may be sloppy, careless or negligent; he may make large and unjustified mistakes; however, the plaintiff cannot bring an action unless he shows that the defendant actually knew of, or was reckless as to, the

1 Lewis, *New York Times v Sullivan* Reconsidered, 83 Columbia L Rev 603, 620 (1983).

2 Meiklejohn, Speech and the First Amendment; Public Speech and Libel Litigation: Are They Compatible? 14 Hofstra L Rev 547, 557. Meiklejohn advocates an absolute privilege for the press when speaking on matters of public concern, provided there is a statutory right of reply.

falsity of the statement. The *Damron* case discussed above shows how it may be difficult to meet this test of actual knowledge or recklessness.

This argument would probably be met if the 'malice' element in *New York Times* were widened to include negligence. Thus public and private figures alike could bring actions if they proved that the defendant knew of the falsity or was reckless or negligent as to the falsity.

2. *Truth*

The American public/private figure dichotomy moves away from the issue of truth. If we picture all statements of facts as a set, the common law divides it into two sub-sets on the basis of truth or falsity, the latter only being actionable. *New York Times* divides it on the basis of the status of the plaintiff and his involvement in public affairs. The logical result of this would be that all statements of fact about a public figure would be non-actionable. However, the court shied away from this absolutist position and added the gloss that the public figure could recover damages if he showed the defendant knew or was reckless as to the issue of truth. There seems to be an underlying unease about permitting false statements of fact to go unpunished.

It is submitted that in the case of statements of fact, truth should, as far as possible, be the main criterion. Suppose X were to say that Y is a thief. The average onlooker is asked whether Y should be allowed recovery. The natural response of the observer is to ask whether the statement is true. Yet in most of the United States cases cited since *New York Times*, we do not know whether the statement at issue was true or false. Were the judges in *Garrison v Louisiana* lazy and unfit for office? Did Butts 'fix' the football game? Did Walker lead a violent crowd? Was Rosenbloom a "smut" merchant? We simply do not know because truth was never a central factor. In the one case where we do know the statement was false, the *Damron* case, the plaintiff lost and yet our sympathies are clearly with the plaintiff. The less the law focuses on truth, the greater is the sense of dissatisfaction by the parties involved and the public:

"The greatest cost of the present system is that it makes no provision for determining truth. When a defendant wins a case on actual malice, there is no correction of past errors, and no sense of vindication for the plaintiff who can complain bitterly that he lost on a technicality that was of no concern to him. Indeed it is not surprising that the plaintiff's level of frustration is so great in defamation cases precisely because of the frequency with which the defendant avoids the only issue that matters to the plaintiff - falsehood, which would allow rehabilitation of the plaintiff's reputation. The public, too, is

a loser because the present system faces systematic roadblocks against the correction of error. If it is important for the public to know that Jones has been a faithless public official, it is equally important for the public to know that Jones has been a diligent public official falsely accused by the press. The centrality of truth is of critical importance to any overall assessment of the system."³

"By requiring plaintiffs to prove fault, the *New York Times* and *Gertz* rules shifted the focus of libel suits away from the question of falsehood and to the constitutionally mandated question of the defendant's state of mind. As the Iowa Libel Project has now demonstrated, the libel action, theoretically intended to vindicate the plaintiff's reputation, has become an 'action for enforcement of press responsibility'. Since seven out of eight libel suits are now decided on constitutional privilege grounds - that is, the defendant's state of mind - 'as a practical matter, the truth or the falsity of the challenged statement is no longer pertinent'."⁴

If defamation law is to allow sufficient latitude to freedom of speech to allow for vigorous exposure of official misconduct, it must also be careful not to allow for false accusations of official misconduct. If the public interest is extremely high in relation to official actions, it is equally high in having false accusations in this area corrected. In this respect, the American position arguably fails to serve the public interest -

"Under the current system, when the issue is a public one and the interest of the public in exposing false facts is at its highest, a false fact will remain unexposed unless the plaintiff shows not only that the fact was false, but that the publisher acted either negligently or recklessly, depending on whether the plaintiff was a public or private figure. Those latter concerns are irrelevant to whether the public should be allowed to perceive the false fact as true. Thus, many false facts are allowed to remain unexposed simply because the plaintiff could not prove that the defendant acted with the requisite mental element".⁵

On the other hand, it is strongly arguable that the common law does not make truth the central enquiry. While it renders truthful

3 Epstein, *Was New York Times v Sullivan Wrong?*

4 Barrett, *supra*, page 158, footnote 10, at 859. The phrases within single quotation marks are from Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 Iowa L. Rev. 226.

5 Mathews, *American Defamation Law: From Sullivan, Through Greenmoss, and Beyond*, 48 Ohio St. L.J. 513, 530.

statements non-actionable in theory, by means of the defence of justification, the reality is that truth is not litigated at all. This is due to the combined result of the presumption of falsity and the difficulties of justifying, so that falsity may not be contested by the defendant. Again neither party is the victor; the plaintiff will maintain that the statement is false and that the defendant won on a technicality (that is, if the defendant succeeds in another defence).

If neither the United States nor the common law position is a system which adequately makes provision for the determination of truth, other ways of bringing this issue to the forefront of libel actions must be addressed e.g. declaratory actions, correction orders, a reversal of the presumption of falsity.

3. *Balancing of Interests*

Defamation law attempts to strike a balance between the competing interests of free speech and individual reputation. It is arguable that the American public figure rule abandons one interest virtually to the exclusion of the other. This may be the result of having a constitutional guarantee of free speech without having its constitutional counterpart, the guarantee of protection of reputation. However, in Ireland there are constitutional guarantees of both these interests. If the American position represents a bias rather than a compromise, it may not be a position open to Ireland.⁶

4. *Flexibility of Remedy*

The American position does nothing to alleviate the all/or nothing damages situation. It does not attempt to introduce any flexibility into the law of defamation by means of new remedies. It merely swings from a pro-plaintiff to a pro-defendant position, in the name of free speech. Where the plaintiff cannot overcome the *New York Times* hurdle, he is without redress despite actual injury to his reputation. Where he does overcome the hurdle, it seems that not only is he entitled to damages, but also to punitive damages.

"From the view point of the plaintiff, whose primary aim is to set the record straight, state of mind is at best an irrelevancy and at worst an insurmountable barrier. The plaintiff suffers the same ill effects and has the same need for redress whether

6 One American writer has specifically examined the competing interest of reputation and analysed its components and how they affect common law doctrine. He stresses that First Amendment decisions have failed to address overtly this countervailing interest in great detail and that the clarity of the Supreme Court's reasoning has suffered as a result; See Post, Symposium: New Perspectives in the Law of Defamation: The Social Foundations of Defamation Law: Reputation and the Constitution, 74 Calif L Rev 691.

a falsehood was a calculated lie or merely resulted from sloppy typesetting. Yet the present system forces a plaintiff to undertake discovery and trial of negligence or actual malice and to expend money and energy to prove facts that are wholly tangential to the primary goal of vindication. If the plaintiff cannot prove the requisite state of mind, he or she has no remedy whatsoever."⁷

Indeed, the position may even be worse than that. The recent Annenburg Washington Program Report on Libel points out that many expensive and complex suits end in an inconclusive way, with millions spent and neither party the winner. The following is a set of examples set out in their Report:

In Carol Burnett's suit against the *National Enquirer*, the tabloid erroneously reported that Burnett had been drinking heavily and had made a spectacle of herself at a Washington restaurant. The *Enquirer* printed a retraction, but it was held to be legally insufficient under California law. After years of legal proceedings and at a cost of millions in attorneys' fees, the suit finally ended with a settlement; its terms were not publicly disclosed.

In General William Westmoreland's libel suit against CBS, both sides spent millions of dollars in an enormously complex trial that came to focus on the historical record of the Vietnam War. After months of trial, the suit was terminated just before the case was sent to the jury, with a joint statement by the general and the network.

Israeli General Ariel Sharon's suit against *Time* ended in a technical victory for the newsmagazine, but with both sides claiming that the jury had vindicated their reputations.

In a case involving the *Alton Telegraph*, a small newspaper in downstate Illinois, the costs of appealing a multi-million-dollar jury award were so high that the paper was forced into bankruptcy and was eventually sold.

When William Tavoulareas, President of Mobil Oil, sued the *Washington Post* for reporting that he had improperly set up his son in business, the jury's award of \$2 million merely covered Tavoulareas' attorneys' fees. But after several rounds of appeals, the award was finally reversed by an appellate court - with each side claiming the court had vindicated its position.⁸

⁷ Barrett, *supra* page 158, fn 10, at 856. Footnotes omitted.

⁸ AWP Report at p.9.

5. *Dichotomy between Public and Private Figures*

Is a distinction between public and private individuals desirable, given that the defence applies to false statements of fact? The defence of fair comment in our law protects a wide range of opinions and, with reforms, could protect an even wider range. Public expression of opinions about public figures is therefore protected. There may be no need, or desirability, for a defence which protects the false statements of facts about such persons. A politician certainly "consents" to being in the public eye; however, he does not necessarily "consent" to being the subject of false statements of fact. Such a rule might well be a disincentive to persons to enter the public arena. Apart from the injustice to the plaintiff, the rule does not benefit the public. The public no longer knows whether statements about public figures are true or false, except in the rare case where the plaintiff can go into court and prove the defendant knew that the statement was false or was reckless as to its falsity.

6. *Definition of Public Figures*

There are practical difficulties with the public figure concept. As has emerged from the United States cases, a number of questions fall to be determined: do all Government officials come within the *New York Times* rule, or only high level officials?⁹ Where is the cut-off point? What is conduct touching on fitness for office? How remote in time can the charge be? Who is a public figure? Is a person a public figure for the purposes of the test if he has voluntarily thrust himself into the public arena but cannot be said to have ready access to channels of communication? What happens where a person has access to the channels of communication only for a limited period?

It could be said that these are only the difficulties of circumscribing the limits of the rule, as occurs with any rule of law. A body of case-law might answer some of these questions, but the difficulty of adopting an appropriate category may well be insurmountable.

7. *Application*

Even if the *New York Times* rule were considered to be a good balance between freedom of speech and individual reputation, it is not clear that the safeguards built in to the rule will be understood and applied by the jury. One American author writes:

⁹ For example, whether public school teachers are faced with the *New York Times* hurdle is a question of some controversy. Some state courts have held teachers to be public officials, others have held them to be public figures, and others again have held that they are neither. One writer explores this dilemma and suggests that teachers must be held to the *New York Times* Standard - see Cane, *Defamation of Teachers, Behind the Times?* 56 *Fordham L Rev* 1191.

"When a case goes to a jury, the Sullivan rule means little or nothing. All those phrases designed by the Supreme Court to protect freedom of speech and press may not in fact be applied."¹⁰

Another writer observes:

"In defamation cases, most jury verdicts in favour of libel plaintiffs are overturned on appeal ... The most common rationale for reversal is that the jury improperly applied the 'actual malice' rule established in *New York Times v Sullivan*."¹¹

This argument should not be pressed too far. If the jury's dislike for the media is so strong that it will misapply the law, this will be true for any rule of law, not merely the *New York Times* rule. If anything, it argues more towards a *New York Times* type rule where the media is given a wider margin of error than is theoretically necessary. This is a point adverted to by Epstein:

"We can assume, I think, that the error rate in litigation is high so that private decisions on publication are, consequently, clouded. The theory of *New York Times* is that a malice rule reduces the level of false positives (ie cases in which liability is found where none should be imposed) to a level that satisfies the First Amendment. That it *increases* the number of false negatives (ie cases in which no liability is found when some should be imposed) simply becomes a cost to be borne for making good the constitutional commitment to freedom of speech."¹²

In other words, while a *theoretical* rule would allow the plaintiff to recover if he could show negligence, recklessness or actual knowledge of falsity, the error rate in litigation requires a stricter *practical* rule that only allows the plaintiff to recover if he can show recklessness or actual knowledge of falsity. If this was indeed the reasoning of the Supreme Court in *New York Times*, it gives the rule a sophistication which its critics do not normally accord it. It is a point which should be seriously considered.

8. *Difficulties of Proving Malice*

When the defendant consists of more than one person, it is very difficult for the plaintiff to prove malice on its part. It involves

10 Lewis, *New York Times v Sullivan* Reconsidered, 83 Columbia, L. Rev. 603, 613.

11 Plave, *Tavoulareas v Piro*; An Extensive Exercise of Independent judgment, 56 Geo. Wash. L. Rev. 854.

12 Epstein, *supra*, footnote 1, at 802.

investigations into the internal workings of, for example, a media organ. Allied to this difficulty of proof is the cost of proof, which is discussed below.

The above arguments have been from a theoretical point of view, and, sometimes, from the plaintiff's point of view. The next three arguments are in some ways even more powerful because they work on the premise that the *New York Times* rule does not, in fact, benefit the defendant. The basic argument is that while the defendant believes that he is better off under the *New York Times* rule, the truth is that he is incurring more costs, paying more damages, and losing credibility.

9. *Cost of Proving Malice*

Once malice is essential to liability, as under the *New York Times* rule, costs are increased. Under Irish law, the question of liability turns largely on external facts. The element of malice shifts the enquiry to the defendant's internal state of mind, which in the case of a media defendant may be the internal state of mind of many people. Discovery then has the potential to become an enormous process. As one writer puts it:

"The reckless-disregard standard serves as the foundation for dragnet-style discovery demands. Who knows what scrap of conversation or paper will reveal the stone left unturned that proves reckless disregard of truth?"¹³

This view is widely supported:

"The post-New York Times focus on state of mind has raised the stakes in libel actions so high that the chilling effect - the original target of the state of mind defenses - has remained a serious problem, notwithstanding defendants' impressive success rate. Even if the defendant avoids damage liability, it must incur the enormous expense of litigating state of mind and may find that the exposure of questionable reporting practices stings almost as much as an adverse judgement."¹⁴

"The most obvious social cost of libel damage awards is the chilling effect on the press, which leads to reduced investigative reporting and reduced coverage of controversial issues and personalities."¹⁵

13 Shapiro, Symposium: *New Perspectives in the Law of Defamation, Libel Regulatory Analysis*, 74 Calif L Rev 883, 886.

14 Barrett, *supra* page 158, n 10, at 855-6. Footnotes omitted.

15 *Ibid.*, at 861.

"*Sullivan*, for reasons that need not detain us here, seems not to have provided in full measure the protection for the marketplace of ideas that it was designed to do. Instead, in the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the First Amendment most certainly would not permit."¹⁶

"This continuing threat has several causes. First, defending a libel suit is both economically and psychologically expensive. Even where a statement is privileged under *New York Times* or its progeny, it may take hundreds or thousands of hours of discovery to prove that a publisher did not know of the falsity of the statement and was not reckless. In addition to the costs of legal fees for discovery, editors and writers bear the psychological costs of spending many hours answering probing and personal questions about their mental processes during publication. If a case goes to trial, the legal fees may be hundreds of thousands or even millions of dollars.

For example, the recent *Westmoreland* case, which was not appealed, cost CBS an estimated three to six million dollars. It is hardly surprising that the press avoids publishing statements that might give rise to litigation."¹⁷

It may be noted that in the early years following *New York Times*, public-figure libel cases were quickly disposed of by summary judgment on the malice issue. Usually the motion for summary judgment by the defence was based on affidavits of the reporter and editor describing the reporting process and asserting that the responsible person had no knowledge of the falsity. If the plaintiff merely repeated in an affidavit that there was actual malice without supporting facts, the defendant was entitled to summary judgment. However plaintiffs' lawyers gradually realized that they could avoid summary judgment by taking discovery on the state of mind issue and in *Herbert v Lando*¹⁸ the Supreme Court expressly authorised inquiries into the editorial process in order to facilitate proof of actual malice. The costs of libel actions rose accordingly.

16 *Ollman v Evans*, 750 F 2d 970, 996 (DC Cir 1984) Bork J.

17 Thomas, *Statements of Fact, Statements of Opinion, and the First Amendment*, 74 Calif L Rev 1001, at 1026-7, footnotes omitted.

18 441 US 153 (1979).

10. *Damages*

It is difficult to assess whether the overall damages incurred by the press have increased since *New York Times*, or whether that rule has curbed their levels. One American writer is of the view that if damages awards have not *increased* both in number and in content, there is certainly no indication that they have been *reduced* since *New York Times v Sullivan*.¹⁹ Barrett, however, is of the view that the *New York Times* rule has resulted in a reduction of damages for defendants:

"Two decades of experience with *New York Times* and *Gertz* demonstrate that the Court anticipated that fault-based rules would reduce the incidence of damage recoveries. In recent years, damage awards have been upheld in only five to ten per cent of all libel suits".²⁰

Furthermore, Professor Bezanson, who was involved in the Iowa Libel Research Project states as follows:

"Most plaintiffs lost in court. Even for those who won, the terms of judicial victory were disappointing. Successful litigants obtained an average of \$80,000 in damage awards. Excluding two large awards, however, the average recovery was only \$20,600, a sizeable portion of which went to fees and costs. Plaintiffs who settled their claims obtained an average of \$7,000, which also must be reduced for fees and costs. By most standards, plaintiffs' financial victories were of modest proportions."²¹

11. *Social Cost*

The preceding two arguments showed that the *New York Times* rule is probably detrimental to the finances of defendants, due to costs and damages. The following argument against the *New York Times* rule is that it is detrimental to the defendant's credibility.

This is similar to argument number 7 above. Once defamation law moves away from the issue of truth, the public no longer know who to believe.

"In addition to direct transaction costs, libel suits today generate large social costs in the form of increased public cynicism. Because truth has become almost irrelevant in libel actions, the press has lost credibility; political leaders and public figures

19 Epstein, *supra* footnote 1.

20 Barrett, *supra*, page 158, footnote 10, at 855. Footnotes omitted.

21 Bezanson, Symposium etc. *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 Calif L Rev 789, 790-1. Footnotes omitted.

have lost respect; and the legal system is viewed as having elevated technicality over principle. The public has no way of discerning whether news stories that become subjects of libel suits are true or false."²²

Epstein draws an analogy between the strict liability rules on defamation and the law on consumer warranties. Sellers are often eager to have a strict liability rule in relation to their products. The strict liability rule binds the defendant to his product while it encourages the buyer to purchase the product even where he lacks precise information about the seller or the manufacturing process. If the law shifted away from this position, sellers would have to devise other ways of convincing buyers of the quality of their product, and the public would lose because it would have to incur search and inspection costs in trying to find quality products.

Epstein argues that the common law defamation rules operate as a means of binding the defendants to the public. They know that if a statement is false, the injured person will have a means of redress. Therefore they gain confidence in what is published and not challenged, and believe that it is true. The introduction of an actual malice rule upsets this balance. "The actual malice rule, in effect, is a rule that the law regards bad information as favourably as good information so long as it was only produced with gross negligence. It is tantamount to a rule that a merchant can escape the consequences of selling contaminated goods so long as he does not mean to hurt his customers. Ex ante, consumers as a class tend to lose, as do producers."²³

Another American writer advocates this approach of viewing newspaper activity in particular from the industrial viewpoint:

"The much heralded and denounced "explosion" of tort law, whether seen as a greater propensity to sue or a propensity to award higher damages, has taught all of us that tort law is not purely private law that governs only the relations between private persons. It is also public law, an integral part of the regime of government regulation of private enterprise. Thus we may treat libel law as a problem of government regulation of industry and, for the moment, the media as an industry and journalism as a profession. If we do that, we can see why there is so much concern with libel. We live in an era of extensive government regulation of industry. The media are a large industry so we grapple for law to regulate that industry."²⁴

22 Barrett, *supra* page 158 n 10, at 862.

23 Epstein, *supra*, footnote 1, at 811.

24 Shapiro, Symposium: New Perspectives in the Law of Defamation, Libel Regulatory Process, 74 Calif L Rev 883.

If the *New York Times* rule is seen as a regulatory code for a professional and industrial sector, it is arguably a bad standard because it fails to encourage quality product -

"Let me focus upon the reckless disregard standard of *New York Times v Sullivan*. This standard would fail to provide a satisfactory regulatory framework because it creates perverse incentives. It provides incentives to the regulated industry to perform as badly as possible. If a newspaper is liable only if it has engaged in reckless disregard, a standard measured by normal journalistic practice, then there is a strong incentive, in an industry that already has other incentives in that direction, to do the worst possible work. The worst work you do, the less it can be shown that what you do on any given day is in reckless disregard. A standard that moves an industry toward bad practice is a bad regulatory standard. Thus leaving aside any question of freedom of the press, a regulatory analysis suggests reform of this standard".²⁵

The net result is that the wide protection afforded by the *New York Times* rule damages the public confidence in the media and is of detriment to defendants because of the effect on their reputation.

12. A final argument against the *New York Times* rule argues not for its abolition, but for its refinement. A number of amendments to the rule would meet many of the foregoing criticisms.

The first involves widening the definition of fault in relation to public figures so that negligence is included. This wider definition of fault would bring public figures in line with private figures. The essential difference between the two categories, following *New York Times v Sullivan* and *Gertz v Welch*, is that a defendant may negligently publish false statements about a public figure, but not about a private figure. A standard imposing liability where the defendant is negligent would also bring defamation in line with a larger bulk of tort law. An Australian writer favours this approach:

"[If] we cannot love our neighbour we should not unnecessarily injure him. It may be said that any injury is unnecessary if it can be avoided by the exercise of reasonable care. If that is a good principle, *Sullivan* is out of line with it. For while the majority in *Sullivan* implicitly recognized the need to interpret the first and fourteenth amendments in such a way as to impose some restriction upon a publishers freedom to speak or write about public officials, they declined to propound a criterion of

liability based upon a standard of reasonable care."²⁶

One American writer defends the *New York Times* position.

"This distinction between malicious and negligent speech is not arbitrary. A publisher of defamatory falsehoods may not necessarily know that the source of information is inaccurate. Rather than run the risk of being held liable for an inadvertent failure to exercise due care, the publisher may simply decide not to disseminate information pertaining to public officials or public figures, resulting in the self censorship the New York Times court feared. A publisher acting maliciously either knows that the defamatory statements are untrue, or is deemed to have acted maliciously because of conscious disregard of their falsehood. Knowingly publishing erroneous statements is not inevitable in free debate and therefore does not deserve the breathing space afforded by the Constitution to inaccuracies that are merely negligent".²⁷

We are not at present convinced of the merit of the assumption in this passage, namely that, in the situation where the publisher does not exercise reasonable care, allowing him to publish is better than forcing him to engage in self-censorship. It is at least arguable that where a publisher/writer has neglected to check his facts or exercise reasonable care, his best policy is silence. More importantly, no public good would appear to be served by publication of statements that are negligently prepared; the truth of such assertions would be a hit and miss affair.

The second amendment to the *Sullivan* rule would be to reverse the burden of proof. At present, the onus is on the plaintiff to show that the defendant was at fault. If the wider definition of fault above were adopted, it could then be required of the defendant that he meet a standard of reasonable care. The facts and documents surrounding the publication being in the defendant's possession, the difficulties and expense of discovery would thereby be avoided.

The third amendment would involve provision for the plaintiff to reply to or rebut the assertion made as a pre-requisite to invoking the defence. The final amendment would involve confining the category of defendants to whom the defence in respect of factual assertions applies to public officials and politicians and excluding public figures. If a wide latitude to factual assertions is necessitated, it must be on the basis of the role of a wide public debate in self-government. This rationale justifies the application of the defence where the speech concerns public

²⁶ Hughes, Defaming Public Figures, 59 Aust LJ 482, 484.

²⁷ Marder, Libel Proof Plaintiffs - Rabble Without a Cause, 67 BUL Rev 993, 1010. Footnotes omitted.

officials and politicians. It does not justify its application to other public figures. The United States Supreme Court justified the application of this defence to public figures on two grounds: (a) the fact that they have access to the media and (b) the fact that they voluntarily undertook to become public figures. We are not convinced by these arguments.

Many public figures do not have access to the media or if they do, are not necessarily quoted at the length they would wish. Second, many public figures do not voluntarily undertake this position. However, even where they do, a reduced protection under the law of defamation might provide a disincentive to others to take part in public life. More importantly, is it strictly necessary for a public figure to become the target of false factual assertions and if so, what does it achieve?

PART 3: PROPOSALS FOR REFORM

Introduction

176. In most tort actions, the interests of two parties are competing for priority and the issue must be resolved in favour of either the plaintiff or the defendant. The interest of the public in having the matter resolved is implicated usually only to the extent of society's desire to see justice done. A defamation action is unusual in that there are three interested parties. The plaintiff who perceives himself to be a victim of an attack upon his reputation wishes to assert his constitutional right to protection of his good name. The defendant who has made the statement at issue is appealing to a countervailing constitutional guarantee of free speech. The delicate balancing exercise necessitated by attempting to reconcile these important interests is complicated by the fact that expression of any kind plays a vital role in democracy and there is therefore also a large public interest at stake. Throughout this Paper we have attempted to give full consideration to each of these interests.

We believe that current Irish defamation law fails to serve each of these interests satisfactorily in many areas. We believe that many problems stem from lack of clarity and lack of certainty. Accordingly we attempt to define new principles in simple language and avoid the use of negative formulations where possible. We also feel that certain rules which at present exist would benefit from being set out in clear statutory form so that jurisprudence in defamation will develop based on a new Act rather than interpretation of cases decided in other jurisdictions. Finally we believe that in certain areas Irish law fails to give adequate protection to particular interests, which is a failure to give due respect to Constitutional provisions. Accordingly we make a number of important substantive recommendations.

We should like to note at this point the classification adopted in relation to defences - Parts II-IV. Traditional classification of defamation defences is as

follows: Justification, Fair Comment, Absolute Privilege, Qualified Privilege, Unintentional Defamation. In this part, we have chosen the different format of Privileged Statements, Opinion Statements, and Factual Statements for a number of reasons. First, we believe this classification emphasises the underlying rationale of the defences in each section. For example, privileged statements are deemed so because of the occasion on which they are uttered whereas opinion statements merit protection because of the nature of the statement. Second, particularly in the section on Factual Statements there are a number of defences to be considered and it makes for greater clarity to link these under a common heading of factual statements so as to emphasise the type of statement to which the defences are addressed. Finally, we have chosen the particular order of Parts II-IV in order to emphasise that the defences considered in part IV would apply exclusively to statements which are neither privileged nor constitute opinions. In order fully to appreciate the implications of the defences in Part IV it is necessary to think of these defences as "last resorts" in the sense that the failure or refusal to adopt the defence will result in the defendant being held liable.

CHAPTER 9: PRELIMINARY

A. THE DISTINCTION BETWEEN LIBEL AND SLANDER

177. Under existing law there is a division in defamation law based on the form in which the defamatory statement is communicated. The two types of defamatory statement are libel and slander. It was formerly said that libel consisted of a written statement while slander was oral, but this is inaccurate in the context of modern methods of communication. The more modern formulations of the distinction state that libel is in permanent form, while slander is transient.¹

The practical difference is that all libels are actionable *per se* i.e. without proof of special damage. Slanders, subject to the four established exceptions, are actionable only on proof of special damage.

The distinction between libel and slander has been criticised for failing to take into account modern methods of communication. Attempts have been made to meet this problem. The *Defamation Act 1961* provides that broadcasting by means of wireless telegraphy is treated as publication in permanent form.² Although this does not specifically say that such broadcasts if defamatory are libels, this is the effect of the section if the correct view to-day is that permanent publications are libels.³ A more important criticism is based on the practical distinction between the two forms of defamation, which may lead to odd results. A person could carry on a deliberate and sustained campaign of verbal attacks on another, and if that other were unable to bring himself within any of the four excepted categories of slander, he would be without redress unless he could show special damage. The assumption that verbal communication is less damaging is not true in every case. Yet, if the person

¹ See Part I.

² Section 15, Defamation Act 1961.

³ This view is supported by the remarks in the Explanatory Memorandum to the 1961 Act.

abused could show that he lost one dinner booking because of the campaign, he would have shown special damage and he could recover substantial and even punitive damages.

178. The basis of the distinction appears to be purely historical. The reason for its maintenance appears to be a fear of opening the floodgates to a host of petty and trivial claims. As far back as 1843, a Report on the Law of Defamation issued by a Select Committee of the House of Lords recommended the abolition of the distinction. However, the Porter Committee favoured the retention of the distinction, because they felt that "scope for trivial but costly litigation might be enormously increased" and this would "be likely to encourage frivolous actions". The Faulks Committee thought that the distinction between libel and slander was an area in which "the forms of the law continue to rule us from the grave". It thought that it rendered this part of the law "unreasonably and unnecessarily complicated and refined, carrying a host of rules and exceptions, derived partly from precedent and partly from statute, which are illogical, difficult to learn, and in certain applications, it must be added, unjust".⁴ It thought that the fear of a flood of new actions was unjustified in view of the fact that defamation actions played only a small part in English and Scottish litigation. Furthermore, even if such actions were commenced, there was no reason to suppose that they would not receive short shrift in the English courts. Firstly, by the defence that words were spoken by way of vulgar abuse or joke would remain. Secondly, the expense of litigation would deter all but the most serious plaintiff. Furthermore, it would be expected that would-be litigants would receive responsible legal advice, and that the judiciary would quickly develop a climate adverse to frivolous slander actions. (We should say that our impression is that in Ireland a significant proportion of potential defamation claims do not go beyond the first interview with a solicitor or the first opinion from counsel). The Faulks Committee therefore recommended the abolition of the distinction.

179. The distinction between libel and slander was abolished in New Zealand by s4 of the *Defamation Act 1954*. The New Zealand Committee on Defamation's Report noted that the abolition of the distinction had not produced any problems since its enactment in 1954.

The distinction between libel and slander was adopted in New South Wales in the *Injuries to Character Act 1847* and the abolition was preserved by virtue of s3(2) of the *Defamation Act 1901* (NSW). However, the New South Wales Law Reform Commission recommended a return to the theoretical common law distinction, while insisting that the *practical* effects of the distinction should not be resurrected.⁵ S8 of the *Defamation Act 1974* (NSW) resurrects the theoretical distinction without its practical effects, providing that -

⁴ *Faulks Committee Report*, Para 86.

⁵ NSW LRC, *Report on Defamation*, No. 11, (1971), App D, paras 33-34.

"Slander is actionable without special damage in the same way and to the same extent as libel is actionable without special damage."

The position obtaining in the Australian Code States is that both the theoretical and practical effects of the distinction have been done away with. The Australian Law Reform Commission felt that there was no advantage in maintaining any distinction between libel and slander, and recommended that it be abolished.

Similarly, the British Columbia *Report on Defamation* recommended the abolition of the distinction, stating that "whatever value there may be in distinguishing between libel and slander is outweighed by the disadvantages of maintaining an ancient distinction that no longer has any logical or rational justification".⁶

180. We provisionally recommend the abolition of the distinction between libel and slander. We further recommend that there be a new cause of action in "defamation" in which proof of special damage is not necessary. Following from this, we recommend the repeal of sections 15,⁷ 16 and 19 of the Defamation Act 1961. We will later provisionally recommend that the method of publication should be taken into account in assessing damages.

⁶ British Columbia *Report on Defamation*, p.14.

⁷ The repeal of s15 will necessitate an amendment to s20(2) of the Defamation Act 1961.

B. DEFINITION OF DEFAMATION⁸

181. The *Defamation Act 1961* contains no definition of a defamatory statement. Various definitions of defamation are found at common law:

1. A statement which tends to lower the plaintiff in the estimation of right-thinking people generally - *Sim v Stretch*.⁹
2. A false statement about a man to his discredit - *Scott v Sampson*.¹⁰
3. A publication without justification which is calculated to injure the reputation of another by exposing him to hatred, contempt, or ridicule - *Parmiter v Coupland*.¹¹
4. A statement about a person which tends to make others shun and avoid him - *Youssouf v MGM*.¹²
5. An imputation of conduct which would lower the plaintiff in the eyes of the average right-thinking man - *Quigley v Creation Ltd*.¹³

There is much to be said for a simple statutory definition which defines the subject-matter of defamation legislation and which defines the limits of defamation in modern phraseology. The press in Ireland feels that a statutory

8 Discussion by the reform bodies is located as follows - Australian Law Reform Commission Report, paras 77-84, New Zealand Committee Report, paras 58-67, Faulks Committee Report, paras 58-71.

9 (1936) 52 TLR 669, *per* Lord Atkin, p 671.

10 (1882) 8 QBD 491.

11 (1840) 6 M & W 105.

12 (1934) 50 TLR 581.

13 [1971] IR 269, *per* Walsh J at 272.

definition is desirable.¹⁴

The Reform Bodies

182. The New Zealand Committee refused to recommend a statutory definition. They felt that a statutory definition would face a number of difficulties:

- (a) A definition would have to embrace without extending all the existing definitions of defamatory statements at common law.
- (b) A statutory definition would introduce a rigidity into an area where flexibility was desired.
- (c) If the statutory definition tried to maintain the common law flexibility, it would have no advantage over judicial definitions.

The Faulks Committee thought that the tort of defamation was entitled to a statutory definition and decided to take and adapt the formulation of Lord Atkin in *Sim v Stretch*. However, it was felt that the word "right-thinking" could have a political flavour, and that "society" might have a social meaning as well as referring to an organisation of persons. Therefore, they adopted the following definition:

"Defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally."

The New Zealand Committee criticised this formulation on two grounds. It felt that the phrase "likely to affect a person adversely" was too wide, since many statements could adversely affect a person without amounting to defamation under the present law. It also thought that the "estimation of reasonable persons generally" was a phrase capable of being vague and ambiguous.

183. The Australian Law Reform Commission recommended a statutory definition in the following terms:

Defamatory matter is published matter concerning a person which tends:

- (a) to affect adversely the reputation of that person in the estimation of ordinary persons;
- (b) to deter ordinary persons from associating or dealing with that person;

¹⁴ *Report on Press Freedom and Libel*, para 5.2, National Newspapers of Ireland Submission.

- (c) to injure that person in his occupation, trade, office or financial credit.

Paragraph (a) follows Lord Atkin's formulation in covering situations where reputation is detracted from, whether or not through hatred, contempt or ridicule. Paragraph (b) puts the old formula of "shunning and avoiding" into modern terms. Paragraph (c) is based on the protection afforded in the Australian Code States for plaintiffs who have been caused financial loss. If a person makes an untrue statement about another which causes financial loss, it seems that such person should bear the loss. Halsbury states that such imputations are defamatory at common law.¹⁵ This definition is favoured by the Boyle-McGonagle Report and the submission to the Commission by the National Newspapers of Ireland.

The Annenburg Washington Programme

184. The simplest definition of all is put forward by this Report. It is stated in the following terms:

"A statement is defamatory if, as reasonably construed, it tends to injure the plaintiff's reputation".¹⁶

That Report also puts forward a definition of publication:

"Publication is the communication of defamatory matter, intentionally or by negligent act, to one other than the person defamed".

It will be recalled that at common law if the defendant publishes defamatory matter to the plaintiff but it becomes available to a third party, the defendant is liable only if he could reasonably anticipate such third party intervention. The Annenburg definition encompasses this situation by providing that there is publication if the defendant negligently communicates the matter to a person other than the plaintiff.

United States Restatement

185. The Restatement of Torts (Second) provides a definition of defamatory matter as follows:

"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him".

¹⁵ *Halsbury's Laws of England*, vol 28, para 42.

¹⁶ Annenburg Washington Programme Report, p.15, section 2(6) of the proposed Libel Reform Act.

Proposals

186. We suggest that a definition of defamation should encompass four matters:

- (1) publication to a third party;
- (2) the injury itself;
- (3) the standard by which injury or no injury is to be assessed and
- (4) identification of the plaintiff.

(1) Publication to a third party

187. This part of the definition is relatively unproblematic. One possibility is simply to place this requirement in a longer sentence e.g. "Defamation shall consist of publication to a third party of ... etc.". However since at common law a person is liable for an unintended publication only if he could reasonably foresee the possibility of publication to a third party, the Annenburg formulation is favoured. We suggest that the publication aspect of the definition be placed in a separate sentence: "Publication shall consist of the intentional or negligent communication of the defamatory matter to a person other than the plaintiff".

(2) The injury itself

188. We considered but rejected the *Parmiter v Coupland* definition because it instances one type of reputational injury only and is therefore too limited. A statement may be defamatory at common law without exposing a person to hatred, ridicule or contempt. We considered but rejected the *Youssoupoff* definition for the same reason.

We considered but rejected the Faulks Committee definition. The phrase "likely to affect a person adversely" has a potentially wider ambit than reputational injury. Furthermore we feel that the term "reputation" should be central to the definition. Moreover, the phrase "in all the circumstances" is felt to be superfluous. The internal rules of defamation determine to what extent context is relevant to a defamatory statement.

We found the Australian proposal attractive, but considered that on balance a simpler definition is to be preferred and that part (a) of that definition might well encompass (b) and (c) of the same definition. However this formulation was favoured by the Boyle-McGonagle Report and the NNI Submission.

We also found the United States Restatement definition attractive, but again felt that a simpler definition would capture the injury to reputation which is necessary to a defamation action.

We accordingly favoured the wording of (1) the Annenburg proposal (2) *Sim v Stretch* (3) *Scott v Sampson* and (4) *Quigley v Creation Ltd.* The following are the possibilities for this part of the definition -

- (a) "Defamation shall consist of matter which lowers the plaintiff's reputation ..." etc.
- (b) "Defamation shall consist of matter which detracts from the plaintiff's reputation ..." etc.
- (c) "Defamation shall consist of matter which discredits the plaintiff ... etc."
- (d) "Defamation shall consist of matter which tends to injure the plaintiff's reputation ...".

At present we favour a definition which defines the injury as simply "injury to reputation". We believe that this more general definition covers the more particular instances of injury described by the Australian proposal and the Restatement definition.

(3) *The standard by which injury or no injury is to be assessed*

189. (i) Objective standards

The traditional common law standard by which injury is measured is an objective one, represented by the "reasonable man", the "average person", "public esteem" "right-thinking people" or some other such phrase. In Part I we saw that these phrases presupposed a uniform community reaction on a particular topic, and that in response to the fact that community reaction is often diverse, recent Irish cases conceded that a statement would be defamatory if it injured reputation in the eyes of a class of the community or even one member of the community.

We believe that if an objective standard is the one by which reputational injury is to be measured, it should take account of differing views in the community.

While it is perhaps naive to suppose, as the Faulks Committee appear to have done, that the formulation "right thinking people" suggests some political bias, it is unquestionably somewhat dated. We are, accordingly, inclined towards a formulation which sets out the standard by which injury is to be assessed as (injury) "in the eyes of the community or a section thereof".

190. (ii) Other standards

We considered the possibility of abandoning an objective community standard and looked at certain other standards.

- (a) We considered but rejected the possibility of basing the action on falsehood alone. Apart from the obvious wide ramifications for the whole nature of defamation law, this would pose initial problems where the plaintiff complained of a false statement which actually operated to

his benefit.

- (b) We considered but rejected the possibility that the action could be based on "damaging falsehood". It was felt that this begged the question as to which standard should be applied to decide whether the falsehood was "damaging".
- (c) We considered but rejected the possibility that a subjective criterion be used. Under this the plaintiff could bring an action if "in his view" the statement caused injury. This would solve the problem where community response is split. However it would again cause doctrinal problems where the statement complained of actually benefitted the plaintiff.
- (d) We also considered a hybrid objective and subjective test. Under this a jury would be asked whether a reasonable plaintiff could have considered the statement to be injurious. The objective aspect of the test is represented by the jury's assessment of the "reasonable" plaintiff's reaction; however, it is subjective in that it allows room for statements to be actionable where community response is split. The jury can see that although everybody might not consider the plaintiff defamed, some people might, and the plaintiff is accordingly reasonable in supposing there has been injury.

We invite views on these alternative standards.

191. (iii) Upholding the law

In the current law section we saw that a statement which imputes that the plaintiff upheld the law may not in law be considered defamatory. This does not flow from the application of a community standard but rather stems from the view that the law cannot condemn acts which are beneficial to it and therefore statements which impute the performance of such acts to an individual. *We provisionally recommend that a provision be enacted stating that an allegation that the plaintiff upheld, complied with or assisted the law in any form shall not be considered defamatory.*

The following examples illustrate the operation of each test:

- (1) An article states that X is a murderer. X is not in fact a murderer.
- (2) An article states that Y has vast experience in preparing gourmet meals in reputed restaurants. Y in fact has no such experience, but has recently applied for a job as a chef.
- (3) An article states that A crossed a union picket. A did not do so.
- (4) An article states that B reported breaches of TV licensing requirements to the relevant authorities. B did not do so.

The statement in example (1) is both false and damaging to X. The statement in example (2) is false but not damaging to Y. If anything, his reputation will be enhanced. The statement in example (3) is false; it will damage A's reputation in some sections of society, and not in others. The statement in example (4) is false but is non-damaging as a matter of law.

We favour the adoption of the test in parts (i) and (iii), but invite views on the alternative tests in part (ii). *For the present, we recommend that injury be assessed according to damage "in the eyes of the community or a section thereof", and that an allegation that the plaintiff upheld, complied with or assisted the law in any form shall not be considered defamatory*".

(4) Identification of the plaintiff

192. The fourth issue which may be included in the definition of defamation is the issue of identification. Most definitions say that the statement must have been "of and concerning" the plaintiff.

In this respect we found the Restatement definition useful -

- *Applicability of defamatory communication to plaintiff.*
- A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer.

We would adopt this formulation in the following terms:

"Concerning" defined: Defamatory matter concerns the plaintiff if its recipient correctly or reasonably understood it to refer to the plaintiff.¹⁷

We accordingly provisionally recommend the following definition of defamation. However, we welcome views on this matter.

- (1) *Defamation consists of the publication by any means of defamatory matter concerning the plaintiff.*
- (2) *Defamatory matter defined: Defamatory matter consists of matter which tends to injure the plaintiff's reputation.*
- (3) *Publication defined: Publication consists of the intentional or negligent communication of defamatory matter to a person other than the plaintiff.*

¹⁷ We deal with identification of the plaintiff who is a group member separately, see below Group Plaintiffs, p401 We deal with identification of the plaintiff in the context of fiction separately, see below p349.

- (4) *Standard by which injury is measured:*
- (a) *Matter shall be considered injurious to the plaintiff's reputation if it tends to injure his reputation in the eyes of the community or a section of the community.*
 - (b) *Notwithstanding (a), matter shall not be considered injurious to the plaintiff's reputation where it consists of no more than a statement or implication that the plaintiff upheld, assisted or complied with the law.*
- (5) *Concerning defined: Defamatory matter concerns the plaintiff if its recipient would correctly or reasonably understand it to refer to the plaintiff.*
- (6) *Burden of Proof: The burden of proof is on the plaintiff to show that there was publication, that the matter contained in the publication was defamatory and that the defamatory matter concerned the plaintiff.*

C. THE MEANING OF WORDS

The Intention of the Author

193. The issue of defamatory meaning, in actions in the High Court, is one for the jury, whose view is supposed to represent how the ordinary man would understand the words in question. The judge first rules whether the words are capable of defamatory effect and then leaves it to the jury to decide if the words did in fact bear a defamatory meaning. The intention of the publisher in this context is not relevant.¹⁸

The Faulks Committee considered whether the intention of the publisher should be relevant to the issue of defamatory effect but rejected this conclusion. This would not only introduce a further complication for the jury, but would be a factor of which the original recipient of the statement would not be aware. If the defendant fails to convey what he meant by the words used, he has only himself to blame. While the Committee accepted that the same words may be understood differently by individual people, they felt that any change in this area would be more disadvantageous than the present system.

We feel that these considerations are appropriate. The author of a statement may choose the words he wishes to use. It would import an element of undesirable complexity and a potential for abuse to allow such a person to plead that the words were understood to convey a meaning different from the one he intended. The existing position encourages a publisher to choose his words carefully, so that defamatory imputations may not be read into them. *We would not recommend any change in the law which would make relevant the author's view as to whether the words were intended to be defamatory.*

¹⁸ See Part I, paras 6 and 7.

The Tribunal of Fact and the Defamatory Effect

194. Since the issue of defamatory effect is for the tribunal of fact - the jury in the High Court, the judge in the Circuit Court - it is a general rule that the plaintiff or his witnesses may not be questioned as to their understanding of the words and the effect the words produced on them. However, in cases where special damage is claimed, questioning of this kind is permitted to establish actual damage. RTE complain that juries are not, and in their view cannot, be adequately warned that such questioning should not influence the "libel or no libel" question. They suggest, accordingly, that the jury be sent out to determine whether the statement was defamatory before the plaintiff starts to testify. Our provisional view, however, is against this proposal. If it were adopted, the jury in every case would be considering the "libel or no libel" issue in an artificial context. No doubt in relatively simple cases such a proposal would be practicable. In lengthier actions, however, one could not say with sufficient certainty that nothing which subsequently came to light could not legitimately weigh with the jury in considering the issue of "libel or no libel". However, we invite views as to the merits of this proposal.

Composite Meanings

195. The terms (a) natural and ordinary meaning, (b) popular innuendo and (c) legal innuendo were explained above.¹⁹ To recapitulate briefly, the ordinary and natural meaning of words is the direct, literal meaning of words. The popular innuendo is a meaning inherent in the words complained of which may require some explanation or clarification. The legal innuendo is the meaning which may be inferred from the words only with the aid of extrinsic facts.

Causes of Action

196. A legal innuendo gives rise to a separate and distinct cause of action.²⁰ Thus, where words are defamatory in both their ordinary and natural meaning and in a legal innuendo sense, the plaintiff has two distinct causes of action. Technically, in such a case a plaintiff is entitled to two awards of damages. In practice only a single combined award of damages is made. The Faulks Committee recommended that a claim in defamation based on a single publication with or without a plea of legal innuendo should constitute a single cause of action giving rise to one award of damages only. The New South Wales Law Reform Commission thought the plaintiff should have a cause of action for each defamatory imputation published of him, but with a single award of damages in respect of all imputations. However, the Australian Law Reform Commission pointed out that as long as the plaintiff is required to draft his pleadings with sufficient particularity to inform a defendant of the case he has to meet, and all imputations are dealt with simultaneously by the selected remedies, the question whether there should

¹⁹ See Part I, paras 11 *et seq.*

²⁰ Part I, para 19.

be one or more causes of action is not of great practical significance. That Commission recommended for the sake of simplicity that the law should provide that a single publication should give rise to one cause of action irrespective of the number of imputations contained therein. However, a statement containing numerous imputations could attract higher damages. *We agree and provisionally recommend that a claim in defamation based on a single publication should give rise to a single cause of action, but invite views on this matter.*

Pleading of Meanings

197. Where the plaintiff intends to rely on a *legal innuendo* at trial, he must set out in his pleading the meaning which he attributes to the words. Usually, he will also set out the facts relied on to support this meaning. In England, this is a requirement of Order 82, rule 3(1) RSC. In Ireland, this appears to be a matter of practice. It is essential for him, however, to prove the extrinsic evidence at the trial.²¹

Where a *popular innuendo* is to be relied on at trial, it appears that in Ireland there is no obligation on the plaintiff to set out the meaning relied on. A series of cases in the Court of Appeal in England have altered the position there so that it appears to be necessary to set out such meaning if there is a doubt as to the meaning of which the plaintiff complains, or there is a need to crystallise the meaning in a long article.²² This is how the Faulks Committee understood the law as it stood in 1975.

In relation to the pleading of *legal innuendos*, the Faulks Committee noted that their Order 82 rule 3(1) did not require a plaintiff to specify the persons or class of persons to whom the extrinsic facts are alleged to be known. They felt that this should be made a requirement of the pleading. It would then be necessary for a plaintiff alleging that the words complained of were used in a defamatory sense other than their ordinary meaning, to give particulars of the facts and matter on which he relies in support of such sense and to give particulars of the persons or class of persons to whom these facts were known.

198. *We agree and provisionally recommend that there be a Rule of Court stating that where the plaintiff in a defamation action alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning,*

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

21 See Part I, para 15.

22 See Part I, para 18.

known.

199. The Faulks Committee noted that the precise limitations which the pleading of a *popular innuendo* imposed on the plaintiff's case were not settled, and accordingly made proposals for clarification. They recommended that where a popular innuendo was involved, the pleading of such a meaning should not be mandatory but that in doubtful cases it should be pleaded.

They felt, however, that where a suitable case for pleading a popular innuendo arose, it should be carefully controlled, for a number of reasons. Firstly, the introduction of a popular innuendo into the proceedings necessarily added a new complexity as to the meaning of words, and it was undesirable and expensive to allow popular innuendos to become elaborate and verbose. Secondly, since the purpose of the popular innuendo was to explain and not extend the meaning of the words, it would be fair to both parties that the popular innuendo should be construed within the scope of the publication which it seeks to interpret. The provision recommended by the Faulks Committee reads as follows:²³

"There should be a new rule of court providing that:

- (1) Whenever a plaintiff alleges that words or matter are defamatory in their natural and ordinary meaning -
 - (i) he shall succinctly specify the meaning or meanings which he alleges the words or matter bear, unless such meaning or meanings are clearly apparent from the words themselves;
 - (ii) such pleaded meaning shall explain but not extend the natural and ordinary meaning of the words or matter;
 - (iii) the plaintiff should be tied to his pleaded meanings."

200. *It is suggested that there be a new Irish Rule of Court incorporating the above recommendation with regard to popular innuendos.*

²³ Faulks Committee Report, para 119 (d).

D. PAYMENT INTO COURT

Admission of liability

201. There is a distinction drawn in Order 22 Rule 6 of the Rules of the Superior Courts between actions for death, damages or admiralty actions on the one hand, and actions for libel or slander, *inter alia*, on the other. In respect of the former, the defendant may make a payment into court whether or not liability is admitted. It must, however, be stated whether liability is admitted or denied.²⁴ In respect of libel and slander actions, money may not be paid into court at all *unless* liability is admitted in the defence.²⁵ There does not appear to be any obvious reason for this distinction.

When the Defamation Bill was being debated in the Dail, Deputy J.A. Costello expressed his approval of the rule -

"Personally, I think the High Court rules are right. I believe the defendant in a libel action should not be enabled to lodge money in court, without admitting the defamatory nature of the publication. This is my own personal view. I think it is a piece of manoeuvring to try and get away with the libel which is published. It is a manoeuvre because if a sum of money is lodged in court and the jury think the plaintiff has been libelled but that a smaller sum of money is adequate and that no special damages can be given, the defendant may get away with it. This is a piece of legal manoeuvring on the part of the person or newspaper which has published a defamatory statement and I think they should not be allowed to get away with it."²⁹

However this argument applies to all defendants, not merely those in libel

24 Order 22, rule 1(6).

25 Order 22, rule 1(3).

actions and therefore Mr Costello's view would seem to be more in the nature of a criticism of the payment into court rules in general. The argument, with respect, does not justify the distinction drawn between libel and other actions. The Boyle-McGonagle Report attacks the distinction in the following terms:

"Why liability has to be admitted in defamation actions, though not, for example, in personal injury cases, is unclear. If payment into court is to have any real benefit for the defendant, the admission of liability requirement should be dropped. At present the plaintiff has nothing to lose in proceeding with the action because liability has been admitted and the only matter that has to be decided is the amount of damages. The defendant, because he has admitted liability, is very limited in what can be pleaded in mitigation. If he tries to mitigate by referring to the plaintiff's behaviour, he runs a risk of inflating damages. On the other hand, payment into court without an admission of liability as occurs in most other suits for damages would provide a fairer balance between the interests of the plaintiff and the defendant."²⁶

One may compare the English position. Originally, the rule on defamation actions was the same as the current Irish position. Under Order 22, rule 1, RSC 1883, there could similarly be no payment into court in a defamation action if the defence denied liability. This was substituted by RSC, (No.1) 1933 and amended by RSC (No.1) 1934; the new Order 22, rule 1(1) allowed payment with a denial of liability in all actions but in subsection (3) required that the notice of payment state where the liability was denied or admitted. This was omitted when Order 22, rule 1(3) was substituted by RSC (No 1) 1938 and does not appear in the modern RSC Order 22, rule 1(2).²⁷ The current English position is therefore that money may be paid into court in actions for libel and slander regardless of whether liability is admitted or denied, and there is no requirement that the defendant state whether liability is admitted or denied.

202. We provisionally recommend that the rules on payment into court should be identical for defamation and other tort actions.

203. It was noted in Part I that the Circuit Court Rules appear to allow payment into court without admission of liability in all actions.²⁸ If the High Court rules are amended so as to allow payment into court with denial of liability in defamation actions, we recommend no change in the existing Circuit Court rules.

²⁶ *Report on Press Freedom and Libel*, p 30, para 5.43.

²⁷ *Halsbury's Laws of England*, vol 28, para 196, n 4.

²⁸ Part I para 144.

E. APOLOGY

204. Section 17 of the *Defamation Act 1961* provides that a defendant may give evidence in mitigation of damage 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. It has been repeatedly represented to us that this section has the effect of making apologies appear as admissions of liability. It is clear that an apology is quite distinct from a correction, retraction or any form of admission that the publisher was in error. It is simply a matter of courtesy and draws the reader's attention to the fact that matter concerning the plaintiff is somehow in dispute. We agree that it should not be regarded as constituting an admission of liability. We accordingly recommend the following provision to replace the existing s17.

Apology

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

evidence the fact of the apology to the plaintiff at the time of filing or delivering the plea in the action. Such notice shall not be construed as an admission of liability and when the issues of fact are being tried by a jury, they shall be directed accordingly."

F. PLEADING OF WORDS "FALSELY AND MALICIOUSLY"

205. The Faulks Committee recommended that the practice of pleading in the Statement of Claim the words "falsely and maliciously" should be treated as obsolete. As Winfield and Jolowicz point out these words in the Statement of Claim are a mere formality and are ignored, unless there is actual malice which is relevant to certain defences. *There would seem to be no reason for retaining the words "falsely and maliciously" in the Statement of Claim and we accordingly recommend that this practice be discontinued.*

CHAPTER 10: PRIVILEGED STATEMENTS

A. Absolute Privilege

206. Absolute privilege is a protection afforded by law to statements made on certain occasions which the law considers to be so important that no action in defamation should be allowed in respect of them, regardless of the truth of the statement or the motives of the speaker. The categories of absolute privilege are set out above.

We propose to consider the policy arguments affecting the more important of these categories in detail, but before we do so, a fundamental question of principle must be addressed, namely, whether the concept of absolute privilege itself is justifiable. The conflicting arguments are most clearly illustrated when one takes the particular case of statements made in the course of judicial proceedings as contrasted with statements made during proceedings of quasi-judicial and administrative bodies.

In the first case, i.e. judicial proceedings, given certain conditions, the privilege under the present law is absolute. In the second, i.e. quasi-judicial or administrative proceedings, the position is less clear. Gatley takes the view that absolute privilege attaches to proceedings of quasi-judicial tribunals to the same extent as proceedings in courts. It could be argued, however, that the proceedings of a wider range of bodies should be protected. The Faulks Committee, for example, recommended the extension of the principle to the proceedings of formal hospital inquiries. This is merely one example of the range of proceedings that could potentially merit protection. But resolving the issue as to whether administrative bodies should attract absolute or qualified privilege necessitates a critical assessment of the concept of absolute privilege itself.

Let us see how the argument operates in relation to administrative bodies.

207. An absolute immunity is conferred upon statements made in the course of judicial proceedings. It is but a short step to extend that immunity, by analogy, to statements made in the course of quasi-judicial proceedings. These bodies, the argument runs, operate in a manner similar to courts and they should accordingly benefit from the same privileges. It is when an extension to cover administrative bodies is proposed that we must pause and reconsider the reasons for extension. On one view, the reason for including quasi-judicial bodies within the privilege is because they are "like courts". On this view, no further extension should be made because administrative bodies are not "like courts". However, a prior question should be asked, namely, why the immunity was conferred on the courts in the first place. It is submitted that the rationale behind judicial immunity is that proceedings would be impeded if parties were unable to speak freely. If this is the real reason for the privilege, it can quickly be seen that many bodies, not quasi-judicial bodies exclusively, require such a privilege in order to function effectively.

If we accept this argument provisionally, how are we to list the bodies covered by the privilege? How is one to distinguish between the bodies that require the privilege and those that do not? It is suggested that any proposed formulation should have at its core the purpose of the privilege. Even if a list of bodies is drawn up, there should be an additional general formula stating, for example, that all bodies come within the privilege whose proceedings would be impeded by a lack of privilege.

208. The formula suggested is merely a crude version to show that the original purpose of the privilege should be central to the definition. There is little merit in moving gracefully from analogy to analogy if the original purpose of the privilege is not borne in mind. An example of such an exercise is provided by the *Hasselblad case*.¹ The Court of Appeal examined the attributes of the European Commission and skilfully deduced that it was not a quasi-judicial body and it therefore did not fall within the principle of absolute immunity. However, it barred a defamation action in respect of a letter produced before that Commission because there was a "public interest" in assisting the Commission to carry out its duties. It is difficult to resist the conclusion that the Court of Appeal, having "analogised" the Commission out of the judicial sphere, was dissatisfied with the conclusion and wished to prevent defamation actions in some way because a lack of immunity would hamper the Commission in its duties. This supports the view that the purpose of the privilege should always be foremost in mind when considering extensions, and that a responsible statutory provision should make the purpose of the privilege apparent.

However, the matter does not end here. It must be remembered that while the extension seems logical, the privilege being extended is absolute. This should not be lightly undertaken. In an ordinary case of qualified privilege the speaker forfeits his privilege if he abuses the privilege. Why should a

¹ Discussed at Part I, para 107.

statement made before an administrative body continue to have an immunity even though there has been what the average onlooker would call an abuse of the privilege? Indeed, pursuing this argument, why should a person speaking before a court, or in Parliament, continue to have an immunity when the average onlooker would feel there was an abuse? In short, it could be said that a privilege is there for a purpose, but that it should always be lost when the privilege is abused. There is something inherently disquieting about the notion of an absolute privilege which can never be defeated.

Looking at privilege from this point of view, the decision whether to place hospital enquiries, (Faulks Committee) or other enquiries set up by law or executive authority (ALRC Report) into the absolute privilege or the qualified privilege camp becomes an arbitrary decision. This is arguably because the notion of absolute privilege is unsatisfactory and clear abuses of privilege should be accounted for, irrespective of the location of their utterance. To put it crudely, there is an unfairness in the present situation, where one person can defame another in Parliament by abusing his privilege, and cannot do so before a county council, although the subject matter of the statement is identical.

209. So far, two arguments have been made. The first is that the same privilege should attach to all proceedings requiring a wide latitude of speech. The second is that this privilege should always be defeated if it is abused. From one point of view, absolute privilege should be reduced to a qualified privilege across the board i.e. in the Oireachtas, in court proceedings, between members of the Executive, before bodies exercising judicial and administrative functions. However, the theory runs into practical difficulties. The most likely place for defamatory accusations to be aired is in the Oireachtas, and with the advent of televised proceedings, the existence of an absolute privilege is possibly a cause for concern. But this privilege is the least assailable of the occasions of absolute privilege since it originates in the Constitution. The ideal might be a Constitutional amendment reducing the privilege accorded to statements made in either House of the Oireachtas, but this is an unlikely possibility. In any event, one should not lightly disregard the importance in a democracy of having at least one forum where freedom of speech is absolute.

Accepting then that this occasion of absolute privilege will remain, the options are

- (a) to reform the remaining instances of privilege so that they are all governed by clearly defined qualified privilege. This would result in a coherent law of privilege, parliamentary privilege remaining as an arguably anomalous exception.
- (b) to maintain the current distinction between absolute and qualified privilege, so that there is a coherence of treatment with regard to statements in the Oireachtas, before the Courts and in the Executive.

If one were to accept the second option, it could only be on the basis that it was thought desirable to retain the concept of absolute privilege. Whichever option is adopted, one would have to determine where quasi-judicial and administrative bodies fit into the picture. If it is thought desirable to end the category of absolute privilege, save in the case of parliamentary privilege, leaving abusers of the various privileges to be dealt with under the law of defamation, it could be argued that the remedy of a correction order or a defamatory judgment might be more appropriate than damages.

Our present preference is for option (a), i.e. restricting absolute privilege to parliamentary proceedings and replacing it by privilege in the existing categories now attracting absolute privilege. We welcome views, however, on the general issue as to whether absolute privilege should be retained.

210. We now proceed to examine the existing categories of absolute privilege which present special problems and we do so on the basis that our ultimate final recommendation may take the form of either option (a) or option (b).

(a) Utterances Made in Parliamentary Committees

Section 2(1) of the *Committees of the House of the Oireachtas (Privilege and Procedure) Act 1976* provides that a member of either House of the Oireachtas shall not, in respect of any utterance, before a Committee be amenable to any court or authority other than the House of the Oireachtas by which the Committee was appointed. Section 2(2) goes on to establish a privilege in respect of the documents of a Committee, the documents of its members connected with the Committee or its functions, the official reports and publications of a Committee, and utterances in a Committee of members, advisers, officials and agents of the Committee. One notable exclusion from the section is witnesses. Although McDonald² argues that witness statements are already absolutely privileged at common law, it might be advisable to clarify the law, as the common law position may not be settled. Deputy John Kelly said in a Dail debate:

"The status and function of these committees are very unclear and every time a crisis or difficulty arises we all look a little foolish and a lot of time is wasted before we can discover exactly what are our entitlements ... There is a great deal to be said for the committees having clearly defined powers ..."

Although this statement was made prior to the large measure of clarification achieved by the 1976 Act, we believe that the comments of Deputy Kelly are still relevant to the position of witnesses, who were not included in the 1976 Act. *We provisionally recommend that s2(2)(c) of the 1976 Act be amended by inserting the words "or witnesses before" after the words "agents".*

2 *Irish Law of Defamation*, p 124-5.

(b) Statements made by one State Official to Another

211. At present, these statements are said to be absolutely privileged at common law.³ It might be useful, however, to provide some guidance as to what communications are protected, and to what officials it extends. It may be noted that the Australian Law Reform Commission felt that such communications should attract qualified privilege only -

"Accepting that government officials should be encouraged to speak and write frankly on matters of mutual official interest, it is difficult to see that absolute privilege is necessary to ensure good and sound advice. The public interest in frankness among government officers does not differ from the public interest in the full and frank exchange of information between say, university officers, officers of a statutory Commission, or directors of a public company".⁴

However it is interesting to note that the United States Restatement of Torts (Second) provides in section 591 that an absolute privilege exists in respect of communications made in the performance of official duties by (a) any executive or administrative officer of the United States or (b) a governor or other superior executive officer of a state.

212. *We provisionally recommend that there be a provision setting out the limits of executive privilege in respect of defamatory communications. We invite views as to whether this should be absolute or qualified, and to whom it should apply.*

(c) Statements Made in the Course of Judicial Proceedings

213. It is normally stated categorically that statements made in the course of judicial proceedings are absolutely privileged.⁵ However, it seems, firstly, that where a judge acts ministerially, absolute privilege does not apply.⁶ Nor does it apply where he acts in excess of jurisdiction and where the judge was *aware* that he was acting in excess of jurisdiction.⁷

Secondly, it may be that irrelevancy or malice destroys the privilege of parties, witnesses and advocates.⁸ *Kennedy v Hilliard*,⁹ and *McCabe v Joynt*,¹⁰ held that the malice does not defeat the privilege for witnesses. McDonald¹¹ argues that that a number of older authorities which pointed the other way were ignored

3 *Dawkins v Lord Paulet*, (1869) LR 5 QB 95; *Chatterton v Secretary of State for India in Council*, [1895] 2 QB 198.

4 ALRC Report, para 136.

5 Gatley, *Libel and Slander*, 8ed, para 383; Winfield and Jolowicz, *Tort*, 11ed p 333-4; Faulks Committee Report para 183(a); New Zealand Report, para 167; Australian Law Reform Commission Report, para 132.

6 See Part 1, para 102.

7 *Ibid*.

8 See Part 1, paras 103-106.

9 (1859) 10 ICLR 195.

10 [1901] 2 IR 115.

11 *Irish Law of Defamation*, at p133.

for policy reasons in *Kennedy v Hilliard*, and that a recent dictum of O'Dalaigh CJ in *Re Haughey*¹² supports the view that irrelevancy destroys the privilege of a witness. As regards advocates, in *The Queen v Kiernan*¹³ the privilege was defined as with a lack of good faith or motivated by malice. In *The Queen v Hutchins*¹⁴ slanderous remarks made at the conclusion of a case were held to fall outside the privilege. However, the Court of Appeal in *Munster v Lamb*¹⁵ held that the privilege was absolute and this was adopted by the New Zealand courts in *Richardson v Harley*.¹⁶ *It would seem that some clarification in this area is necessary*

Judges

214. The Faulks Committee referred to the principle of judicial immunity without mentioning the exceptions set out above, namely acts in excess of jurisdiction or ministerial acts.¹⁹ They declined to propose any change to the existing law. It is unclear under this proposal whether the two exceptions are covered by the privilege or not. However it may be that ministerial acts and acts in excess of jurisdiction are not considered to be judicial statements at all so that the privilege does not apply to them. The Faulks Committee thought that in cases of abuse of the privilege, the judge in question could be satisfactorily dealt with by Parliament or the Lord Chancellor. They did, however, consider a proposal put forward by Mr LJ Blom-Cooper QC. This suggested that judicial privilege should be neither absolute nor qualified, but a generic privilege, which would be lost if there was express malice, proved clearly and conclusively. However, the Committee felt that the absence of complaints indicated that there was no real problem in this area and declined to adopt this proposal.

It would seem desirable that the law should make clear whether the principle of judicial immunity includes ministerial acts of the judge and acts in excess of jurisdiction. It is of interest to note that the United States second Restatement of Torts (1977) provides as follows in s585:-

"A judge or other officer performing a judicial function is absolutely privileged to publish defamatory matter in the performance of the function if the publication has some relation to the matter before him".

We believe that a provision of this general nature would probably be declaratory of the common law. Accordingly, *we provisionally recommend that there should be a provision that a judge or other officer performing a judicial function and who is not knowingly acting without jurisdiction or performing a purely ministerial function should be absolutely privileged to publish defamatory*

12 [1971] IR 217, 264.

13 (1855) 5 ICLR 171.

14 (1857) 7 ICLR 425.

15 (1883) 11 QBD 588.

16 (1911) 31 NZLR 464.

matter in the performance of that function if the publication has some relation to the matter before him.

(ii) *Parties, Witnesses, Advocates*

215. The Faulks Committee considered whether the privilege of *advocates* should be withdrawn in cases of abuse of privilege. It decided that the rule of public policy "that advocates in appearing for a party in legal proceedings should do so with his mind uninfluenced by the fear of an action for defamation"¹⁷ was still valid and should not be modified.

As seen above, there is some doubt created by the cases as to whether absolute privilege attaches to all statements of a party, witness, or advocate in Ireland. If a similar view to the Faulks Committee were taken, i.e. that the privilege should have no exceptions, this would benefit from being set out in a statutory provision. However, the dictum of O'Dalaigh CJ in *Re Haughey* should be borne in mind.

"The immunity of witnesses in the High Court does not exist for the benefit of witnesses, but for that of the public and the advancement of the administration of justice and to prevent witnesses from being deterred, by the fear of having actions brought against them, from coming forward and testifying to the truth. The interest of the individual is subordinated by the law to the higher interest, viz., that of public justice, for the administration of which it is necessary that witnesses should be free to give their evidence without fear of consequences. It is salutary to bear in mind that even in the High Court, *if a witness were to take advantage of his position to utter something defamatory having no reference to the cause or matter of enquiry but introduced maliciously for his own purpose, no privilege or immunity would attach and he might find himself sued in an action for defamation.*"¹⁸

216. If it is felt that this is the better view, it must be remembered that parties and witnesses will usually have little knowledge of what is relevant, or of the constraints of the law of defamation. Advocates might be expected to know somewhat more; on the other hand, a person might be representing himself. Perhaps the easiest way to deal with this would be to treat parties, witnesses and advocates all alike. The onus should be on the plaintiff alleging that defamatory words were spoken of him in the course of judicial proceedings to establish an abuse of the occasion. A defamation action should only be brought in clear cases.

It is noteworthy that the United States Restatement of Torts (Second) provides as follows in section 586 -

¹⁷ Faulks Committee Report, para 200.

¹⁸ [1971] IR 217, at 264. Emphasis added.

"An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding".

A similar provision in respect of "parties to judicial proceedings" is provided for in section 587, and for "jurors" in section 588. Accordingly the privilege would be forfeited if the publication bore no relation to the proceedings. However, malice would not defeat the privilege. *We favour these proposals and therefore recommend that statements made by parties, witnesses, advocates and jurors should be absolutely privileged provided the matter bears some relation to the legal proceedings in question.*

(d) Communications between Solicitor and Client

217. We noted in our discussion of the present law that it has been held in England that such communications are absolutely privileged, but that the correctness of the decision has been doubted. The New Zealand Committee noted that only qualified privilege attaches to such communications in Scotland and recommended that this should also be the law in New Zealand.

218. The law undoubtedly requires clarification in this area and our provisional recommendation is that *there should be a provision that communications between solicitors and clients should attract qualified privilege only. It would also seem reasonable that the same should apply to communications between counsel and client.*

B. QUALIFIED PRIVILEGE

219. The occasions which attract qualified privilege are set out in detail above. They may be broadly summarised as falling into three categories:

- (a) Statements made pursuant to a recognised duty or in furtherance or protection of a common interest;
- (b) fair and accurate reports of judicial and parliamentary proceedings;
- (c) reports of proceedings of or decisions by bodies specified in the Second Schedule of the Defamation Act 1961 (such as local authorities), which fall into two further sub-categories:-
 - (i) reports privileged without explanation or contradiction
 - (ii) reports privileged subject to explanation or contradiction

1. MALICE

220. A showing by the plaintiff that the defendant was actuated by malice will destroy the privilege. This means malice in publishing the defamatory words of the plaintiff. It is not sufficient to show that bad relations existed between the parties, because the defendant may still have published the words believing them to be true or without any improper motive. It was submitted earlier in this Paper that the judgment of Lord Diplock in *Horrocks v Lowe*¹⁹ accurately sets out the common law criteria governing the malice element in the defence of qualified privilege. These were identified as follows:

- (1) The plaintiff must show that the defendant was actuated by improper motive when making the publication and that this motive was the

19 [1974] 1 All ER 662, discussed at para 117 Part I above.

dominant motive of the defendant when publishing.

- (2) Improper motive is established by showing that the defendant did not believe the matter to be true, and recklessness or indifference to truth will establish improper motive in this context. However, mere irrationality or carelessness will not establish improper motive because a defendant may hold an honest belief although he leapt to a conclusion.
- (3) Exceptionally a lack of honest belief will not establish improper motive provided (a) the defendant had a duty to pass on the report and (b) he did not endorse it.
- (4) Improper motive may also be established by evidence of ill-will, spite, acting for personal gain. Judges and juries should be reluctant to find malice in such cases.

(i) Proposals to clarify the common law element of malice

221. The Faulks Committee recommended that the term "malice" be dropped and that a provision be enacted stating that the defence of qualified privilege shall be defeated "if the plaintiff proves that the defendant in making the publication complained of *took improper advantage* of the occasion giving rise to the privilege". The burden of proof was left on the plaintiff.

The New Zealand Committee recommended that the term "malice" be dropped, but that the provision should be slightly broader. The defence of qualified privilege would be defeated where it was shown that "the defendant was *actuated by spite or ill-will or where it is proved that the defendant took any other improper advantage of the occasion of publication giving rise to the privilege*". The burden of proof was left on the plaintiff.

A variant on each of these proposals would be to place the onus of proof on the defendant. These should be phrased in positive terms. Thus the first variant could require the defendant to show that he "used the occasion giving rise to the privilege for its proper purpose". The second variant could require the defendant to show that "he published in good faith and used the occasion for its proper purpose".

It will be remembered that at common law two other factors could destroy the defence of qualified privilege. Firstly, if the communication is made to persons without an interest in the subject matter the privilege is lost. This is known as excess of communication. Secondly, if the matter included irrelevant statements, this could destroy the privilege. It was observed in Part I that it was unclear whether irrelevancy destroyed the privilege in its own right or whether it destroyed the privilege because it was evidence of malice.

The view advocated by Duncan and Neill was that irrelevancy could destroy

the privilege on both grounds. Neither the Faulks nor the New Zealand Committee included either of these elements in their formulation. However, the next formulation considered does a number of things. It includes the elements of relevancy and excess of communication; it defines malice in a broader way than either of the two definitions examined so far; and it places the burden of proof on the defendant. This is the definition of the Australian Code States. It requires the publication to be in good faith and defines good faith as follows:

"[A] publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matters; if the manner and extent of the publication do not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any improper motive, and does not believe the defamatory matter to be untrue."

222. The Australian Law Reform Commission thought that this formulation suffered from "most of the defects" of the common law rules, but did not elaborate as to what these were. However, it went on to introduce another factor into the equation, namely the dilemma as to whether a person comes within the privilege where he passes on matter knowing it to be false but stating his opinion as to its accuracy. It was seen in Part I that there is some controversy as to whether such a communication should benefit from the privilege, although Lord Diplock's statement in *Horrocks v Lowe* would include such a communication within the privilege.²⁰ The Australian Law Reform Commission thought that such a communication should come within the privilege and offered the following definition:

"It is a defence to a defamation action that the publication of the defamatory matter was made only to a particular person or to a particular group of persons and ... either

- (c) the defendant-
 - (i) believed that the matter was true; or
 - (ii) in the case of matter consisting of comment, believed that the comment expressed the genuine opinion of the author of the comment; or
- (d) in all the circumstances, the conduct of the defendant in publishing the matter was reasonable."

The alternative of showing "reasonable conduct" is open to a defendant who feels he has a duty to pass on a statement which he knows to be untrue. The definition does not provide for the elements of excessive communication or

²⁰ See above, Part I, para 117.

irrelevancy.

223. The final definition offered is that of the Annenburg Washington Program Report on Libel:

"The privilege shall be deemed abused and forfeited if the defendant deliberately communicated the defamatory matter to persons other than those to whom communication was necessary to serve the interests giving rise to the privilege. If the communication was not made to persons other than those necessary to serve the interest giving rise to the privilege, then the privilege shall be deemed abused and forfeited only if the defendant published the defamatory statements with the knowledge of falsity or reckless disregard for truth or falsity."

This formulation covers the issue of excess of communication since the privilege is forfeited if the defendant *deliberately* publishes to persons without an interest in the communication. A variant on this would be to provide that the privilege is forfeited if the defendant *deliberately or recklessly* publishes to persons without an interest in the publication, for a defendant might communicate matter to a group not caring in the least whether or not it is constituted of interested parties only, but this would not be deliberate publication to disinterested parties. The issue of relevancy is not covered by the provision. Malice is replaced with a provision forfeiting the privilege if the defendant knows or is reckless as to the falsity of the statement. This has the merit of clarity and simplicity, but it might be considered too narrow as it excludes other types of improper motive such as spite or ill-will.

224. Having considered the various proposals on a provision replacing the common law term of "malice" in the context of qualified privilege, we wish to propose our own hybrid definition incorporating aspects of several of the above proposals. We have included the following issues in our definition of the circumstances in which a qualified privilege is deemed abused and forfeited: (1) replacement of the term "malice" itself; (2) inclusion of a provision stating that irrelevancy destroys the privilege, (3) inclusion of a provision stating that excess of communication destroys the privilege, (4) inclusion of a provision stating that a lack of belief in the truth of the statement will not destroy the defence if the defendant acted reasonably in making the publication, (5) inclusion of a provision stating where the burden of proof is to lie - in this respect we have opted for the common law position, leaving the burden of proof in the plaintiff to show that the privilege was abused. Our proposal is set out in full following some comments on "joint malice" in the context of qualified privilege.

(ii) *Qualified privilege and joint malice*

225. Under existing law the presence of malice defeats the defence of qualified privilege. Where there are two or more defendants, malice on the part of one does not destroy the defence of qualified privilege for another,

unless that other is vicariously liable for the malice of the first. This is provided under s11(4) of the *Defamation Act 1961*.

It was already suggested that the application of s11(4) should be extended to slanders as well as libels, or, if the two entities are merged into one tort, to "defamation".

226. We believe that s11(4) should be repealed and that a provision on joint malice relevant to qualified privilege should be included in an "abuse of privilege" section relevant to qualified privilege. It is clearer and simpler to have all the rules on abuse of qualified privilege alongside each other. We accordingly recommend the following provision on abuse of qualified privilege:

"Forfeiture of Qualified Privilege

- (1) *The privilege shall be deemed and forfeited abused in the following circumstances -*
- (a) *if the defendant did not believe the matter to be true.*
 - (b) *if the publication by the defendant was primarily actuated by spite, ill-will or any other improper motive,*
 - (c) *if the matter bore no relation to the purpose for which the privilege was accorded,*
 - (d) *if the manner and extent of publication exceeded what was reasonably sufficient for the occasion.*
- (2) *Notwithstanding (1)(a), a lack of belief in the truth of the matter will not result in forfeiture of the privilege if the defendant was reasonable in publishing the matter in all the circumstances.*
- (3) *The burden of proof is on the plaintiff to show that the defendant has forfeited the privilege.*
- (4) *Where there is a joint defamation in circumstances giving rise to an occasion of qualified privilege, forfeiture of the privilege by one defendant on any of the grounds set out in sub-section (1) shall result in forfeiture of the privilege by the other defendant only if that other was vicariously liable for the first.*
- (5) *Section 11(4) of the Civil Liability Act 1961 is hereby repealed."*

(iii) Abolition of the malice element in the defence of qualified privilege

227 The New Zealand Committee considered a suggestion that the defence of qualified privilege should not be defeated by motives of ill-will or spite at

all. It was argued that if the public interest is the rationale behind the privilege, the motive of the speaker is irrelevant. The New Zealand Committee rejected this argument without much consideration:

"If the occasion of the privilege is used for a different purpose such as the venting of spite or ill-will, we can see no reason why it should be protected. We believe that the exclusion of motives of ill-will and the meaning of malice would give a licence to persons to deliberately abuse occasions of qualified privilege."

While we agree with the conclusion of the New Zealand Committee, it is felt that the argument put to it was not met. An argument will be made to show how motive may be relevant even though the rationale of the defence is public interest. It is proposed to achieve this by contrasting the malice element in the defences of privilege and comment.

228. It will be argued that the malice element in relation to the defence of fair comment could be discarded.²¹ However, it is not felt that the same considerations are appropriate to the defence of qualified privilege. The defence of comment, it will be argued, is based on the content of the statement (an opinion), and should not necessarily be defeated where subject-matter is published by an author with malicious intent. However, the protection afforded by the defence of qualified privilege is not based on the content of the statement, but on the occasion of its making. In a sense, it is a protection afforded by the law so that everyday life may continue without being punctuated by defamation actions. This is why it is said that the privilege is for the "public interest". The privilege is a concession which should be properly availed of. Once it is abused, in a broad sense, the protection should be withdrawn. If the speaker introduces irrelevant material, or publishes to persons without an interest, or makes statements in bad faith and with the purpose of injuring the plaintiff, we see no reason for the law to protect him.

The presence of the malice element in relation to both defences of privilege and comment is deceptive in that it implies that they are similar. We feel that because of the different reasons for these defences, the extent of their protection should not be determined by the same factor. It is suggested that there should be a presumption in favour of freedom of speech in the case of opinion statements and the question is, "Should malice lose the defendant his defence?" With privileged statements, there is no such presumption, and the question is the reverse; "Why should a malicious defendant be protected?" Why is there a difference of presumption? The expression of a wide range of opinions is part and parcel of a democracy, and any restrictions on such statements should be carefully imposed and justified solely on the basis that statements forfeiting that protection do not contribute to the overall aim of free and useful speech in society. By contrast, there is nothing inherently

21 See below, Section III Opinion Statements at p278.

valuable in a privileged statement per se; the reason for its protection is to allow business, private life and public affairs to be conducted smoothly. The protection of the statement is contingent upon its advancing this aim, and accordingly the defence is strictly construed.

229. Accordingly, it is submitted that it would not be inconsistent to abolish the malice element in relation to the defence of comment and retain it in relation to the defence of privilege. We favour its retention in the defence of privilege. However, the term "malice" should be dropped and the various proposals for reform outlined should be considered.

2. THE COMMON LAW CATEGORIES OF QUALIFIED PRIVILEGE

230. The first issue to be considered in the context of the common law categories of qualified privilege is whether they should be codified, in other words whether there should be a provision defining the factors which must be present in order for an occasion of qualified privilege to be established. The New Zealand Committee did not favour such a proposal. It noted that the ambit of the common law defence of qualified privilege was broad and difficult to define or categorise with certainty, because the law defined the relationship of publisher and recipient in terms of common interest, duty and interest, corresponding interest, requests for information, remedies for grievances and replies to attacks. They felt that any attempt to codify this area of defamation would not only be difficult, but also undesirable.

231. We have already made proposals for the reform of the malice element in the defence of qualified privilege. We feel that it would be more coherent to place such a provision alongside a statutory definition of qualified privilege and further, that since all the other defences will be defined, we should recommend a definition of qualified privilege. We agree that the common law occasions of qualified privilege are numerous and diverse; however we feel that the elements of "duty" and "interest" are common to them all and that a broad definition focusing on these two factors would retain the flexibility of the common law while providing a framework within which these occasions may develop. The Australian Commission favoured codification. However as they were dissatisfied with certain aspects of the definition at common law, their definition was not merely declaratory of the common law. We will consider these changes below. For the moment we propose the following definition, loosely based on the Australian proposal, which is declaratory of the common law:

"(1) It shall be a defence to a defamation action that the publication of defamatory matter was made only to a particular person or to a particular group of persons and -

(a) the recipient(s) had an interest in receiving, or a duty to receive, information of the kind contained in the matter, and

- (b) *the publisher had an interest in communicating, or a duty to communicate, information of the kind contained in the matter.*
- (2) *In sub-section (1), "duty" includes a legal, social or moral duty, and "interest" includes a legal, moral or social interest.*
- (3) *Persons shall not be regarded as constituting a particular group by reason only of the fact that they received particular published matter."*

Sub-section 3 is declaratory of the common law rule that there is no media qualified privilege *per se* and that there is no "duty" on the part of the media to convey information on matters of public interest to its readers in the sense employed by the defence of qualified privilege.

232. The Australian Law Reform Commission looked at the requirement of *reciprocity* of interest or duty on the part of the speaker and recipient, and the requirement of *actual* interest or duty on the part of the speaker and recipient. It analysed these two components and recommended reform in the following terms:

"First, it has been argued that the requirement of reciprocity of duty and interest is artificial. Where, for example, a person [the recipient] proposes to enter into a relationship with another and believes that a third person [the speaker] has information which may be pertinent to the proposed relationship, the common law would ask whether the person with the information [the speaker] had, in the circumstances, a *duty* to answer an enquiry. This rule penalizes an over co-operative informant whose motive may be none the less entirely pure and even public spirited. The sole test, it is argued, should be whether the recipient had an interest or apparent interest in receiving the information. The conduct of the informant should be reasonable, if the defence is to be accorded to him, but he should not lose his protection simply because he had no duty or interest in respect of disclosure ... This is a salutary reform and should be adopted in any codification of the law".

233. This proposal is therefore that reciprocity of interest is not necessary, and that only the recipient should have an interest or apparent interest, but that they *speaker need not have any interest*. The speaker will not lose the defence by reason only that he had no duty or interest (unlike the common law). *However he must act reasonably in all the circumstances*.

The Australian Law Reform Commission continued:

"Secondly, it has been said that the absoluteness of the rule regarding the necessity of an interest on the part of the recipient may lead to

harsh results and should be modified. At common law, if the recipient does not have the requisite interest, the privilege fails, regardless of the defendant's knowledge, care or good faith Where the defendant acts reasonably and carefully to ascertain interest he should not be deprived of the defence if it subsequently transpires that the recipient had no interest. The common law has already been modified in New South Wales to achieve this result, making an apparent interest sufficient. In a new national law, the same position should apply - affording a protection to the careful and honest defendant."

234. This proposal is therefore that lack of *actual* interest on the part of the recipient alone will not defeat the defence. It is sufficient if the recipient had an interest or *apparent interest*, and the speaker had reasonable grounds for believing the recipient to have such interest or apparent interest.

235. The section on qualified privilege in the draft bill set out by the Australian Law Reform Commission embodies these reforms. It is a somewhat difficult provision, and for clarity, we will place at its head two provisions which might have made the effect of the provision clearer. These are indicated by the square brackets.

[A. The defence of limited privilege shall not fail by reason only of the fact that the *defendant* had no duty or interest in communicating information of the kind contained in the allegedly defamatory matter.

B. The defence of limited privilege shall not fail by reason only of the fact that the *recipient* had no *actual* interest in receiving information of the kind contained in the allegedly defamatory matter.]

"(1) It is a defence to a defamation action that the publication of the defamatory matter was made only to a particular person or to a particular group of persons and -

- (a) The defendant believed on reasonable grounds that the recipient or all intended recipients had an interest in receiving, or duty to receive, information of the kind contained in the matter; and
- (b) The publication was made in the course of giving to the recipient or recipients information of the kind which the recipient or recipients had an interest or duty to receive,

and either -

- (c) The defendant -
 - (i) believed that the matter was true; or
 - (ii) in the case of matter consisting of comment, believed that the comment expressed was the genuine opinion of the author of the comment; or

- (d) In all the circumstances, the conduct of the defendant in publishing the matter was reasonable.
- (2) In subsection (1) -
 - "Duty" includes a legal, moral or social duty or an apparent legal, moral or social duty;
 - "Interest" includes a legal, moral or social interest or an apparent legal, moral or social interest.
- (3) Persons shall not be regarded as constituting a particular group by reason only of the fact that they received particular published matter."

It must be carefully noted that "interest" and "duty" in subsection (1)(b) includes "apparent interest" and "apparent duty." Otherwise subsection (1) makes no sense.

236. At its simplest, the net result is that the following conditions must be met to establish an occasion of qualified privilege under the above proposal:

- (a) The defendant must believe on reasonable grounds that the recipient had an interest or apparent interest in receiving such matter
- and
- (b) the recipient must have had an interest or an apparent interest in receiving the matter
- and
- (c) either
 - (i) the defendant believed the matter was true or
 - (ii) the defendant believed the comment to be the genuine opinion of the author or
 - (iii) the conduct of the defendant in publishing was reasonable in all the circumstances.

237. The following illustrates how the defence might work.

Example 1 Solicitor A wishes to complain about Doctor B to the correct professional body (the facts of *Hynes - Sullivan v O'Driscoll*). Solicitor A complains to the wrong professional body. At common law, the communication is *not* privileged, because the recipient body had no actual interest in receiving the complaint. However, under the proposal this would not be fatal to Solicitor A's defence. If Solicitor A had reasonable grounds for believing that the body had an interest in the matter, and the body had an *apparent* interest in the matter, Solicitor A would have a defence if his

conduct was reasonable in all the circumstances.

Example 2 Solicitor A hears from Solicitor B about the misconduct of Doctor C in a case dealt with by Solicitor B. Solicitor A takes it upon himself to report the misconduct to the correct professional body. At common law, the communication would not be privileged, because Solicitor A has no interest or duty to make the communication. Under the proposal, this factor would not be fatal to the defence. Since he reported to the correct body, the interest of the recipient is not an issue. He could succeed in his defence if he convinced the court that he believed the matter to be true, or that his conduct was reasonable in all the circumstances. He might, for example, fulfil the latter requirement by showing that Solicitor B was away on holidays when Solicitor A realized that the time limit on the complaint which B intended to make would run out while B was away.

Example 3 Solicitor A hears from Solicitor B about the misconduct of Doctor C in a case dealt with by Solicitor B. Solicitor A complains to the *incorrect* professional body. Based on an amalgamation of the analysis of examples one and two above, Solicitor A could succeed in making out a defence.

238. We have seen that the Australian Law Reform Commission proposals concerned both (1) the *reciprocity* element of duty and interest in the defence and (2) the *actual* interest or duty required by the common law. In the significant case of *Hynes - Sullivan v O'Driscoll*, the Irish Supreme Court rejected an argument for a reform of the defence in relation to aspect (2) above i.e. the rule requiring *actual interest or duty* on the part of the recipient to receive information of the kind in question. A complaint concerning an individual was made to the incorrect professional body. The reform of the common law rule proposed was that *actual interest* on the part of the recipient body should not be necessary, and that it should suffice if the defendant "honestly and reasonably" believed the recipient to have an interest. The Supreme Court rejected the proposed reform and retained the common law test of actual interest. We will now examine the case in some detail.

The case arose out of the giving of evidence by the plaintiff psychiatrist in matrimonial proceedings. The plaintiff was unwilling to give evidence in these proceedings, and the defendant solicitor caused a sub-poena to be served on her. The plaintiff attended the court in Dublin, and returned home after the parties settled the action. She claimed £300 as payment of her fees for attending court, and refused to furnish particulars as to how she had calculated that sum when so requested by the defendant.

The plaintiff subsequently wrote to the Incorporated Law Society asking about guidelines on the issue of sub-poenas to professional people, complaining that the defendant had acted in a reprehensible manner and asking for their help in obtaining the payment of the fees. The Law Society sent a copy of this letter to the defendant and the defendant wrote a reply, in the course of which he accused the plaintiff of duplicity and described her as holding scant

regard for professional ethics and the solemnity of the law. He also stated that when he informed the plaintiff of his intention to serve her with a subpoena, she replied that she would send him a sick note. He stated that she had attempted to avoid service of the subpoena and that she was obsessed with payment of her fees. The defendant then sent a copy of this letter to the Irish Medical Association together with a cover letter stating that (a) the plaintiff was willing to falsify a medical certificate, (b) the plaintiff lacked integrity as demonstrated by her complaint against the defendant, and (c) that the plaintiff had demanded exorbitant fees for her attendance in court.

The IMA replied that they had no function in relation to the defendant's complaints and that they should be re-addressed to the Medical Council. The plaintiff subsequently wrote to the latter body in similar terms.

The plaintiff brought an action for libel in respect of (1) the letter written to the Law Society, (2) the letters sent to the IMA and (3) the letter sent to the Medical Council. The defendant pleaded justification, but this issue did not arise on appeal. The parties agreed that the sending of the letters to the Law Society and the Medical Council were occasions of qualified privilege, and the only question on appeal was whether there was evidence of malice in regard to these two communications. However, the Supreme Court had to decide whether the letter to the IMA attracted qualified privilege. Counsel for the defendant argued that although reciprocity of interest was absent, the occasion was still one of qualified privilege because the defendant honestly and reasonably believed that the IMA had such an interest.

Henchy J rejected this submission for a number of reasons. Firstly, the submission ran counter to two Supreme Court decisions; *Reilly v Gill*²² and *Kirkwood-Hackett v Tierney*.²³ Although the point was not specifically addressed in those cases, the court's decision in those cases was based on the assumption that a qualified privilege could not exist unless the person communicating the statement had a duty or interest to make it and the person to whom it is made had a corresponding duty or interest to receive it. Henchy J thought that such a "clearly held and repeatedly expressed opinion" should not be overruled.

Secondly, Henchy J was of the view that Article 40.3.1° of the Constitution would not be fulfilled if a right to defame were recognised on such a "purely subjective basis". He stated that "the constitutional priorities would be ignored if the law considered an occasion of qualified privilege to depend only on the honest opinion of the communicator as to the existence of a right or duty in the other person to receive the communication". In this part of his judgment, Henchy J was referring to a proposal that would allow qualified privilege if the defendant "honestly" (but not reasonably) believed the recipient of the statement had an interest to receive it. He went on to give arguments

22 [1951] 85 ILTR 165.

23 [1952] IR 185.

against a more objective test, namely, whether the defendant "honestly and reasonably" believed the recipient to have an interest in the statement.

Henchy J was not satisfied that this formulation would be suitable for the wide variety of relationships covered by the defence of qualified privilege. He accepted that while limited exceptions to the existing rule might be desirable, the "general rule suggested may prove to be unsuitable or unjust in certain cases". He also thought that it would be unsatisfactory to overrule a previous decision of the court, when the point at issue had merely been argued *ex parte* in the present case.

Furthermore, the proposed reform would be more suitably effected by statute and after consideration by the Law Reform Commission. Finally, the proposal would not benefit the defendant in the case before the court, because the defendant could not, on the facts, be said to have acted reasonably. In this context, Henchy J took into account the fact that the defendant was a solicitor of eleven years standing.

McCarthy J thought that the defendant's proposal was "attractive", but that it overlooked the plaintiff's constitutional right to his good name. As the defence of qualified privilege was in itself an infringement of this right, its existence should be clear to all parties. This would not be the case if the victim of a defamatory letter of complaint should have the determination of his course of action hinge on the honest and reasonable belief of the publisher, which could only be determined in court:

"It is more than desirable, in my view, that the existence of such immunity should be seen and determined objectively without having to have an examination in court. In principle, I do not find support for what in this jurisdiction would be a departure from existing practice. In short, an occasion of qualified privilege is a legal conclusion to be drawn from established facts; a mistaken belief cannot be the foundation to establish a fact. It is, therefore, contrary to principle that such a defence could be supported by a belief which is mistaken, however honest and reasonable."

Finlay CJ thought that if the principle urged by the defendant were adopted, "it would quite clearly be fundamental to any principle so developed that a person volunteering such a statement would take the utmost care in ascertaining as to whether the person to whom he was communicating it had an interest or duty to receive it".

239. This Supreme Court decision has been criticized by Marc McDonald.²⁴ One of the points of criticism is that the Supreme Court failed to address the defence as a whole, in particular the following issues:

24 Non Media Qualified Privilege, (1989) DULJ 94.

- (1) the appropriateness in themselves of the various social purposes which the law seeks to protect;
- (2) The nature of the defamer's interest in seeking to serve the social purpose;
- (3) The nature of the interest of the recipient in receiving the statement; and
- (4) the qualifications or conditions attaching to the defence which may result in it being lost.

It is disappointing that the author did not analyse (1) and (2). We suggest that the social purpose which the law seeks to protect through the defence of qualified privilege includes a contribution to the harmony of social relationships and the passive diffusion of confrontation and anger within such relationships. The rationale is that in the many relationships of every day life - social, familial, work related, disciplinary - people say unfriendly things about each other and friction arises. The law's response is that these matters should be resolved in an informal way, and that persons should have the elbow room to speak in an informal setting without ending up in a court of law. If every defamatory remark about another could end up as a court case, it is rather unlikely that we would have a world of golden tongued saints, but rather a minefield of legal disputes. Ordinary every day speech would become artificially stunted and the law would be promoting the degree of friction within such relationships. Therefore the law affords qualified privilege in such instances and possibly contributes to informal methods of resolving disputes and harmony in every day life.

240. These are the basic ideas behind the defence of qualified privilege. It can of course be argued that defamatory statements in a certain context - such as a complaint to a disciplinary body - are of a rather more formal nature and should not be within a privilege. This does not negate the underlying rationale of the defence but rather calls for tighter and better definition thereof.

However, the fact that McDonald does not detail some of the social purposes he has in mind may perhaps account for his view of the defence taken throughout the article, and reflected in his setting out of "the nature of the defamer's interest in seeking to serve the social purpose" as a matter to be considered. As he points out himself, the social purpose behind the defence "can obviously not, usually, be served merely by a freedom to speak defamatory untruths for their own sake. The speaker's need to speak must, therefore, be connected in some ways with the relevant social or whatever purpose is supposed to be served". The point apparently overlooked here, and firmly intertwined with the purposes of the defence, is that the defence of qualified privilege (and that indeed of absolute privilege) is rooted in the premise that what the defendant said was *untrue*. The basic attitude is: "You

said something nasty about Mr Smith, but given the context in which you said it, it is not the *type* of statement that should be litigated in court. So we don't really care if it was true or not". With absolute privilege, this is the basic idea of the defence, although the "context" is of a different type to the "context" of an occasion of qualified privilege. With qualified privilege the attitude would continue: "Although we don't really care if it's true or not, we do care if you said it maliciously".

This can be contrasted with McDonald's statement that "[The] speaker will usually think that what he says is connected with the social purpose. But, his belief that the statement is true cannot effect the objective question of whether the statement serves the social purpose or not. If the speaker knew the statement was untrue before he spoke, he would have to accept that speaking it would not serve the purpose". The weakness is that McDonald believes that the social purpose inherent in the defence of qualified privilege is the telling of the truth. This is surely incorrect. The social purpose of the defence of qualified privilege lies in keeping certain matters out of court. The only defence in defamation law which has for its purpose the promotion of truth is justification.

241. McDonald suggests that the rationale of the defence is that if the speaker did not have elbow room to speak untruths, he would not speak at all. We would suggest, however, that the idea is that if the speaker did not have elbow room to speak untruths, he would end up in court.

242. McDonald's assumption that the speaking of truth is the object of the defence again emerges where he says:

"[The] only way that the social purpose can be demonstrably served by the speaking of defamatory untruths is by establishing on an empirical basis that some connection or link exists between the instances of untruthful defamatory statements and the instances of truthful defamatory statements and thus between the instances of untruthful defamatory statements and the social purpose which it is sought to serve further. *The link has to be established in this way because, ultimately, a desirable social purpose can only function through truthful statements*".

We think that this illustrates an incorrect understanding of the defence of qualified privilege.

The proposal urged upon the Supreme Court was in respect of only one aspect of the defence of qualified privilege i.e. the requirement of actual interest on the part of the recipient. As we have seen, the Australian proposal extended a number of features of the defence. A middle ground is suggested by McDonald. He examines two proposals: (a) that the defence would be made out where the *recipient* has no actual interest but the speaker honestly and reasonably believes that he had, and (b) that the defence would be made out where the *speaker* had no actual interest but the speaker himself

honestly and reasonably believed that he had.

McDonald is not convinced that either proposal is fairer than the present "actual interest" (or "objective") test. However, he says, if a choice is to be made between the two, (b) would be a more equitable reform than (a), because "at least" in this situation, "there is the possibility that the recipient might otherwise have been legitimately interested in receiving the statement", whereas in situation (a) "there is the certainty that the statement has been made to someone who is not interested in receiving it".

In fact this analysis of (b) is inaccurate, because if (b) alone is enacted, there is a *certainty* that the statement was made to someone who is interested in receiving it. This is because if (b) only is enacted, the requirement that the recipient had an actual interest remains untouched.

Neither is McDonald's earlier statement entirely accurate, to the effect that the Australian Law Reform Commission recommended that a defence be afforded to a defendant who honestly but reasonably thought himself entitled to speak even though such was not the case. In fact the Australian Law Reform Commission dropped entirely any reference in the defence to the defendant's interest or duty to speak, and substituted instead the requirements that he believed the matter to be true *or* that his conduct was reasonable in all the circumstances. A defendant acting "reasonably in all the circumstances" is not quite the same as a defendant who "honestly and reasonably but mistakenly" believes he is entitled to speak.

243. *Conclusions*

1. We are not in favour of suggestion (b) referred to above. This favours defendants who are unconnected with the subject matter of the information and yet feel they are entitled to speak. The purpose of the defence of qualified privilege is to protect persons voicing complaints, or worries, or warnings to those with whom they are connected. We do not agree that it should be used to protect speakers who take it upon themselves, or are asked, to intermeddle in the affairs of those unconnected with them, even if such persons believe that they have an interest in doing so. This would be in essence a "busy-body" defence and despite the presence of the word "reasonableness" in the test would focus on a subjective state of mind.
2. We are not in favour of the removal of the *reciprocity* of interest requirement in the defence, even in the form advocated by the Australian Law Reform Commission. We are not convinced that there is much to be gained by replacing the requirement of interest or duty on the part of the speaker with a requirement of reasonableness in all the circumstances. We believe that such a move would again open up the defence to busy-bodies.

3. We are provisionally in favour of a proposal to amend the existing strict position in relation to the requirement of *actual* interest on the part of the recipient. We believe that where a reasonable person would believe the recipient had an interest in the information, the defendant should have a defence (providing of course the actual interest on his part is also present). We do not favour, however, the subjective formulation put to the Supreme Court in *Hynes-Sullivan v O'Driscoll*. Nor do we favour the Australian Law Reform Commission formulation of "belief on reasonable grounds". Instead we suggest that the proposal should be as follows:

"A defence of qualified privilege shall not fail by reason only of the fact that the recipient of the communication had no actual interest or duty to receive information of the type contained in the communication."

244. Our proposed enactment in relation to qualified privilege would be as follows-

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

The common law rule denies privilege to publication for reward, which would otherwise attract the defence. The Australian Law Reform Commission criticised this for being at odds with modern commercial practices and

recommended that credit bureaus should have this protection. The primary consideration should be the legitimate interest of the recipient in the information, not whether the statement was made for reward. The Faulks Committee recommended that the "publication to the subscribers by a credit bureau or agency (whether commercial or non-profit making) of matter issued in the ordinary course of business of the agency should be protected by qualified privilege."²⁵ The Australian Law Reform Commission preferred to make the basis of its proposal clearer: "The defence under this section does not fail by reason of the fact that the matter was published for fee or reward." *We favour the view that the presence of a fee or reward should not destroy the defence and favour the provision of the Australian Law Reform Commission.*

3. *CREATING A DEFENCE OF FAIR REPORT*

245. Attention should be drawn to one important feature of the Australian Law Reform Commission's proposal on qualified privilege. Having considered and rejected the arguments for a media qualified privilege, they excluded the media altogether from the defence of qualified privilege.²⁶

The Australian Law Reform Commission then went on to create a separate defence of Fair Report. The media would therefore be excluded from the defence of qualified privilege, but would be entitled to avail of the defences of Fair Report, Comment and Justification. The essence of the defence of Fair Report is to pull together all the proceedings and statements which may be reported by the media. In Ireland, the media's rights of reporting are scattered throughout the Defamation Act,²⁷ the Constitution²⁸ and the common law.²⁹ Most of the reporting rights are seen as instances of qualified privilege. We provisionally recommend the adoption of a similar defence in order to give clarity and coherence to the Irish law on press freedom.

Firstly, it is difficult for a reporter to know the exact limits of his reporting rights without a thorough knowledge of defamation law. Secondly, there are inconsistencies in that some reporting rights are absolute e.g. reports of Parliamentary utterances and perhaps s18, while others are qualified. Thirdly, reporting of matters of public interest is an exercise which should be controlled by considerations which are not necessarily the same as the considerations governing other instances of qualified privilege. For example, reports of the matters contained in the Second Schedule to the *Defamation Act 1961* lose their privilege if they are made with malice. However, malice

25 Para 242(m).

26 In order to draw a distinction between the media and other publishers, the defence was limited to publications made to a particular person or particular group of persons. Lest there be an argument that all the readers of a newspaper constitute a "group", the proposal provided that persons were not to be regarded as constituting a particular group by reason only of the fact that they received particular published matter.

27 Sections 18 and 24.

28 Reports of Parliamentary utterances.

29 Reports of court proceedings, which overlaps with s18.

may not be the most appropriate criterion where the reporting by a newspaper of a Minister's statement is concerned, whereas it may be more relevant where one employee complains to his employer about a fellow employee. It is therefore proposed to examine the approach of the Australian Law Reform Commission in relation to its defence of Fair Report.

The Australian Law Reform Commission considered that although a list of proceedings which may be reported was useful, no list could cover all proceedings and statements which are of legitimate public concern. Accordingly, they set out a list of such proceedings and statements and provided in addition a more general provision catching all remaining matters. Crucial to this provision is the idea of an "attributed" statement i.e. a statement made by another published by the defendant. We may ultimately make a recommendation to the same effect. We shall therefore examine the existing list of matters which may be reported. Accordingly, it is proposed to postpone the examination of the Australian list and its general provision, and examine as a prior matter the list of matters contained in the Second Schedule of our Act in order to see how it might be improved upon. This will have to be undertaken whether or not a defence of Fair Report is favoured.

4. STATUTORY QUALIFIED PRIVILEGE

246. Under existing Irish law, fair and accurate reports of certain matters are protected by privilege under Section 24 of the *Defamation Act 1961*. The privilege may be defeated by a showing of malice, and there is a further requirement that the matters be of public concern and the public benefit, and not prohibited by law. The matters of which reports are protected are set out in Schedule II to the Act; those contained in Part I of the Schedule are privileged without any explanation or contradiction, those in Part II are privileged subject only to an explanation or contradiction.³⁰

A number of reforms to the list of matters contained in Schedule II have been suggested as follows-³¹

1. The protection in Part I, paragraph 1 should be extended to reports of public enquiries set up under Constitutional or judicial authority.
2. The protection in Part 1 para 2 should extend to reports of proceedings of international bodies of which Ireland is not a member but whose proceedings would nonetheless be of public interest in this jurisdiction. Furthermore, the requirement that the body whose proceedings in question be an "official" international organisation excludes proceedings of bodies such as Amnesty International and the Red Cross, and the

³⁰ These matters are set out in full at Part I, para 116.

³¹ The reforms suggested were put forward by the Faulks and New Zealand Committees; McDonald pp 181-190; McHugh, *Libel Law* p 36, and RTE in their submission to this Commission.

protection should be amended to allow for coverage of reports of the proceedings of such bodies. Thirdly the requirement that Ireland have a "representative" at the proceedings being reported should be dropped so as to allow reports of proceedings within the paragraph which Ireland only sends an "observer".

3. The protection in Part I paragraph 3 should be extended to include reports of cases before the European Commission and Court of Human Rights, and the Courts of Justice of the European Communities where the cases involve individuals as opposed to inter-state disputes.
4. Part I paragraph 4 should include reference to a court exercising jurisdiction "under a Constitution" as well as jurisdiction "under the law of any legislature".
5. It should be clarified whether information from court papers (Summons, Statement of Claim, Defence and affidavits) come within the definition of extracts "from any register ... open to inspection by the public", in Part 1, para. 5.
6. Part II paragraph 1 should include reference to "proceedings" of the bodies listed as well as to "findings or decisions" thereof.
7. It should be clarified whether Part II, paragraph 2 which extends the privilege to public meetings includes statements made in a studio before an audience.
8. The protection in Part II para 4, which extends to reports of general meetings of companies of a specified type, should be extended to cover (i) reports of documents issued to shareholders by boards of directors, (ii) reports of documents circulated to shareholders concerning the appointment, resignation, retirement or dismissal of directors, and (iii) auditors' reports circulated to shareholders. This proposal was recommended by the Faulks Committee. The New Zealand Committee felt the provision was too wide, stating -

"The form which the Faulks Committee recommended the provision should take makes no provision for prior authorisation by the board. It would allow a document to be issued privately, perhaps by a disgruntled director, which could be grossly defamatory of an outsider e.g. a professional consultant".

They proposed instead that the protection extend only to reports of "documents, not being designated or restricted communications, circulated by or with the authority of the board", and reports of documents circulated by the auditors.

9. The reference in Part II para 3 to "the press" should be extended to all the media.
10. Part II paragraph 1 should include private companies because of their economic impact.
11. Part II, paragraph 5 should be clearer as to whether it applies to statements given reluctantly and without authority by a government press officer.
12. The requirements in s 24 that the publication be (i) not prohibited by law, (ii) of public concern, (iii) and for public benefit is overly restrictive and reference should be made only to matters of "public interest".
13. The protection in Part II (statements privileged subject to explanation or contradiction) should be extended to press conferences concerned to inform the media of matters of public concern. This proposal was recommended by the Faulks Committee. The New Zealand Committee declined to make such a far-reaching proposal because, it felt, anyone could call a press conference. They recommended instead a protection for reports of press conferences made by or on behalf of a person or body already included in the schedule.
14. The protection in Schedule II should be extended to reports in technical and scientific journals provided such journals are approved and registered with appropriate authorities. This proposal was put forward by the Faulks Committee.
15. There should be some provision for reports of statements by politicians or public servants during interviews or in general, when speaking on a matter of public interest.
16. Some provision should be made for reports of written statements in either House of the Oireachtas since the reference in Article 15.12 of the Constitution to "utterances" appears to leave reports of written statements unprotected. This will be particularly important in the event of televising of parliamentary proceedings.
17. Reference to Eire and Northern Ireland should be made consistent throughout the schedule.
18. Treatment of notices should be made consistent. Notices or copies thereof published under *judicial* authority are subject to the condition of explanation, while notices or copies thereof issued under *executive* authority are not. Notices issued by the *legislature* are not included under the schedule at all. Notices issued by *parliamentary committees*

are absolutely privileged by statute.³²

We invite views on all of the above suggestions.

The Australian Proposal of Fair Report

247. Having examined the internal changes of detail that might be made to s24 of our Defamation Act, it is now proposed to examine the Australian defence of Fair Report. It will be remembered that the Australian Commission proposed a list of matters whose proceedings would be subject to privilege, together with a more general provision designed to capture remaining matters not encompassed by the list. This general provision also sets out the restrictions upon the right. If the amendments to s24 suggested are adopted, this would obviously serve as a list for this purpose.

The Australian list is as follows:

1. Proceedings and documents referred to in section 14, section 14 being a list of the instances of absolute privilege.
2. Proceedings of a parliament outside Australia.
3. Proceedings in public of any international organisation of -
 - (a) Countries or representatives of countries;
 - (b) Parliaments or representatives of parliaments; or
 - (c) Governments or representatives of governments.
4. Proceedings of any international conference at which governments of any countries are represented or of any international court or international arbitral tribunal.
5. Proceedings in public of a local government authority.
6. Proceedings of an association or of a committee or governing body of an association, whether incorporated or otherwise, relating to a member of the association or to a person subject, by contract or otherwise, to control by the association.
7. Proceedings at a general meeting of a body corporate or of an incorporated society, association or other body which may sue or be sued or hold property in its name or in the name of a specified officer.

32 Committees of the Houses of the Oireachtas (Privilege and Procedure) Act 1976, section 2(2)(g).

8. Statements on a topic of public interest made at a public meeting (that is to say, a meeting that is open to the public whether with or without a restriction).
9. A record or document kept by the government, a statutory authority, or a court of a State or of the Commonwealth or kept under the authority of a law, being a record or document open to public inspection.

The reporting of these matters was made subject to two conditions. Firstly, the report should be fair and accurate. Secondly, in all but three cases, the publisher should afford the defamed person a right of reply.

248. The additional general provision incorporates the following features:

- (1) *Attributed Statement*; The publisher must use the defence to report the allegations of others, but not to publish his own allegations.
- (2) *Topic of Public Interest*; If this were left undefined, problems could arise for the publisher in deciding what would fall under it. Therefore, the Bill contains a list of subjects falling within the definition, and to guard against accidental omissions, it adds matters otherwise of 'legitimate concern to the public'.
- (3) *Fairness and Accuracy, and Reasonably Contemporaneous*; 'Contemporaneously' depends on the periodical in question, whether it is a daily, weekly or monthly. However, the idea is to guard against old accusations being raked up.³³
- (4) *The Author Must be Named*; The purpose of the defence is to give greater information to the public, and this is not achieved unless there is identification of the source. It also prevents abuse of the defence involving the use of unattributed statements.
- (5) *Reasonableness*; The publication of the matter having regard to the nature of the circumstances surrounding its making should be reasonable. Although the Australian Commission was loath to introduce this indeterminate quality into the defence, it felt it was a necessary element to avoid the use of the defence where the author was joking, drunk, ignorant of the matters on which he spoke and so on. On balance, we do not support this element in the defence. Although the Commission may intend it to be used sparingly, it has the potential to restrict the defence to an undesirable extent.

³³ It may be, however, that this requirement of contemporaneity is unnecessary - this argument will be made below in relation to the requirement of contemporaneity under section 18 of the 1961 Act, relating to the reporting of judicial proceedings.

- (6) *Non-Adoption of the Report*; This is to maintain the essence of the "attributed" statement. If the defendant himself adopts the report, this makes the charge his own.
- (7) *Non-influence of the Statement*; This is similar to number (6). If the reporter influences the statement, it is partly his own charge. This prevents conniving by reporters with others to make statements which they wish to make and have protected by attributing them to others.
- (8) *Reply*; This right is fundamental to the entire defence of fair report. The rationale of the defence is informing the public, but the public is better informed by two sides of the story than one. The reply requirement does place a burden on the media, because they are obliged to carry a news item setting out the reply. However, they are not obliged to carry the story in the first place, and if they do so, they should be prepared to present both sides of the matter. Rights of reply have been available in France and Germany for a century which are more extensive than the one proposed. However, the Australian Law Reform Commission propose three exceptions to the right of reply: (a) in the case of reports of court proceedings, (b) in relation to imputations against dead persons³⁴ and (c) where the defendant had already published a reply by the plaintiff.

249. The entire defence of fair report proposed by the Australian Commission is as follows:

"Section (16) It is a defence to a defamation action that the defamatory matter was published by the defendant without any adoption by him of the substance of the matter and -

- (a) the defamatory matter was contained in a fair and accurate report of any of the proceedings set out in Schedule I or in a document referred to in that Schedule;³⁵ or
 - (b) the defamatory matter was contained in an attributed statement by a person other than the defendant or a servant or agent of the defendant, its publication by the defendant, having regard to its nature and the circumstances surrounding its making, was reasonable, and the defendant, his servants or agent, did not influence in any way the substance of the attributed statement.
- (2) The defence under subsection (1) in respect of a publication to which the plaintiff has a right of reply under subsection (3) fails where -

³⁴ Difficulties of verifying title, and choosing between replies, would arise if the right were given to the representatives of a deceased person.

³⁵ Schedule I contains the list of matters set out immediately above.

- (a) the plaintiff proves that he requested the defendant to publish or cause to be published a reply by the plaintiff to the defamatory matter; and
 - (b) the defendant does not prove that he published or caused to be published the reply at the earliest opportunity reasonably available after the request of the plaintiff and in such form and manner as would be likely to reach the same general audience as the report or attributed statement reached.
- (3) A plaintiff, other than a plaintiff in proceedings under section 11 has a right of reply to any report or attributed statement referred to in subsection (1) except a report or attributed statement -
- (a) in relation to which the defendant has already published a reply by the plaintiff; or
 - (b) relating to the proceedings of a court.
- (4) In determining what is the earliest opportunity reasonably available for the purposes of this section, regard should be had to the nature, form, extent and manner of the publication of the report or the attributed statement and to the damage that the plaintiff is likely to suffer by reason of any delay on the part of the defendant.
- (5) In this section "attributed statement" means a statement or comment by a person identified by name on a topic of public interest that was fairly, accurately and reasonably contemporaneously reported or reproduced in any form, or was broadcasted or televised".

Section 11 referred to in the section concerns defamation of a deceased person. Schedule I referred to in the section was set out earlier in full.

Notably, the list of proceedings given by the Australian Commission is very similar to that contained in our Schedule II. We could broaden some of our provisions slightly, and add the general provision. The defence of Fair Report would be a defence in its own right, rather than a form of qualified privilege. It would be subject to internal restrictions appropriate to the media, and it would be clear and easy for the media to know what may be published.

250. There is one further complication. The matters which may be reported under s24 of our Defamation Act are supplemented by the Constitutional privilege of reporting parliamentary utterances, and the privilege of reporting court proceedings, which is governed by s18 of the Defamation Act. If the defence of Fair Report is adopted, it is suggested that the reporting of court

proceedings should be included within it, rendering s18 redundant.³⁶ As a Constitutional amendment would be highly unlikely and indeed is of no urgency, the fact that the reporting of Parliamentary utterances would remain absolute would be an anomaly within an otherwise coherent framework on media reporting.

251. It is noteworthy that the Annenburg Washington Programme Report made a recommendation which is broadly similar to the Australian defence of Fair Report. Section 5 of the Draft Bill provides:

"Neutral Reportage

No cause of action for either a declaratory judgment or damages may be maintained for the reporting of false and defamatory statements involving matters of public interest or concern made by persons or entities other than the defendant if the persons or entities who made the statements are identified and the statements are accurately reported."

The Report explains the effect of this section as follows:³⁷

"This section adopts the emerging absolute privilege for neutral reportage. The common law employed a fiction that in republishing a defamatory statement the republisher 'adopted' the statement as his own. Thus, a defendant could be successfully sued for defamation for merely quoting some other person's defamatory statement, even when the original speaker's very making of the defamatory statement was itself newsworthy.

This section absolutely bars any liability for merely reporting the defamatory statements of others, when the statements involve issues of public interest or concern. The plaintiff's recourse in such event is to pursue the remedies provided in this Act against the person who made the defamatory statements that were reported. Statements made by others include statements accurately reported and identified in documents such as correspondence or the complaint or pleadings filed in litigation. To qualify as neutral reportage, the publication must disclose the identity of the persons or entities that actually made the defamatory statement and those statements must be accurately reported. The phrase 'persons or entities' is used to make clear that in addition to statements directly made by neutral persons, the privilege encompasses statements made in identified documents such as committee reports, law enforcement records, exhibits in administrative, legislative or judicial proceedings, and the like. The statement need not be quoted verbatim to satisfy the accuracy requirement; a

36 This could be achieved, as was done by the Australian Law Reform Commission, by referring to the reporting of matters contained in the list of absolute privilege.

37 Annenburg Washington Program Report, p 22.

paraphrase or summary is sufficient. In all cases, however, the report must correctly characterize the gist or sting of the other person's defamatory statement.

The neutral reportage privilege does not encompass statements that do not merely report the defamatory statements of others, but instead incorporate such statements into an independent defamatory accusation by the defendant. If the defendant states, for example, that the police chief took a bribe, and that the proof comes from a public statement by the chief's secretary that the chief took a bribe, the neutral reportage would cover the publication of the secretary's statement (assuming it was accurately reported), but not the defendant's separate assertion that the chief took a bribe."

252. The main features of the Annenburg proposal are identical to the Australian proposal. However, it omits several elements. The first is that there is no requirement that the report be reasonably contemporaneous with original publication. The second difference between the two proposals is that the Australian provision requires the publication to have been "reasonable" in all the circumstances. It was already pointed out that the Australian Commission was itself reluctant to introduce this element into the defence. The third difference is only apparent. The Australian proposal requires the defendant to afford the plaintiff an opportunity of reply (in all but three cases). However the Act drafted by the Annenburg Program provides for such a right elsewhere among its provisions, although not specifically included in the section on Neutral Reportage.

We feel that the rights of reporting statements made by others should be brought under an umbrella defence of fair report governed by its own restrictions. We invite views as to whether this should be achieved by means of a list of matters alone (the approach of s14 of the Defamation Act 1961), or by means of a list of matters supplemented by a catch-all general provision. We tend to favour the latter approach. However we feel that providing the identity of the speaker may afford too wide a protection and suggest that it might be limited to statements attributed to "the proceedings of legally constituted bodies", "persons speaking in an official capacity" or some other such formulation.

We invite views on the creation of an umbrella defence of Fair Report.

5. FAIR AND ACCURATE REPORTS OF JUDICIAL PROCEEDINGS

253. At common law, there is a privilege accorded to fair and accurate reports of judicial proceedings, which is defeated upon a showing of malice. It is irrelevant by whom the matter was published, and when it published. Gatley describes the common law privilege as follows:

"At common law, the publication without malice of a fair and accurate

report of proceedings before a judicial tribunal exercising its jurisdiction in open court is privileged. This (qualified) privilege at common law extends to all persons who desire for any legitimate reason to make known to the outside public what happened within the walls of the court. In this respect a newspaper has at common law no greater privilege than an ordinary man. Nor is the common law privilege confined to reports that are published contemporaneously with such proceedings.³⁸

Although the Irish Constitution specifically confers protection on reports of parliamentary proceedings, it confers no immunity on reports of judicial proceedings. These are governed by section 18 of our Defamation Act. This accords a privilege to fair and accurate reports of judicial proceedings by newspapers and the broadcast media provided the reports are published contemporaneously with such proceedings. Section 18 is not merely declaratory of the common law privilege. It differs from it in a number of respects; (a) it extends to court proceedings in Northern Ireland as well as the Republic, whereas the common law privilege applied only to reports of court proceedings held in the domestic country;³⁹ (b) it imposes a requirement that the publication be contemporaneous, which was not imposed at common law; (c) it is restricted to media defendants, whereas at common law it was never so confined; (d) it may also differ in nature. It is not clear whether this statutory privilege is absolute or qualified. McDonald⁴⁰ sets out the arguments for both sides. The net result appears to be that although it was intended that this privilege be absolute, the failure to include the word "absolute" has resulted in the privilege being a qualified one.

254. We recommend at least four reforms to s18 of the Defamation Act. First, there appears to be no reason for limiting the range of defendants who may avail of the defence. In practice, media organs are the primary reporters of court cases. However, other important users of the privilege include legal text writers, who at present apparently rely on the common law privilege. *We therefore recommend the extension of the privilege to all defendants.* Second, we see no reason for requiring the report to be "contemporaneous". Although it may be argued that it is unfair to take up old court cases against people, no such principle applies generally to "old" truths raked up against people. *We therefore recommend the abolition of the requirement of contemporaneity.* Third, *we recommend that the nature of the privilege be clarified.* Fourth, s18 refers to reports "publicly heard" before a court. This prevents the reporting of the judgement of *in camera* proceedings even though the judgment itself is made public. *We recommend that s18 be reworded to include reports of "proceedings publicly heard or judgment made public by" any court within the*

38 Gatley, *Libel and Slander*, 8ed para 428.

39 Except where the proceedings of the foreign court are closely connected with the administration of justice in the domestic country - *Webb v Times Publishing Co* [1960] 2 QB 535.

40 *Irish Law of Defamation*, at p 171-3.

section.

255. In the course of our examination of s18, we envisaged one problem of interpretation that might arise in relation to the words "fair and accurate". Is it an "accurate" report if a journalist correctly records matters which occurred on the first day of trial (such as the bringing of three charges against the accused) but neglects to report matters which occurred on subsequent days (such as the dropping of two of the charges)? Arguably he gave a "fair and accurate" report of the proceedings on the day in question. We believe that if this is the case, it is unfair. If the trial had lasted only a day, it would not have been "accurate" if the journalist had failed to record that two of the charges were dropped. We see no reason for allowing him to do so merely because the "proceedings" in the fullest sense of the word continued for a longer period. While media organs may argue that they cannot check the outcome of every case of which it commenced reportage, we would reply that one should not commence reporting a case unless one is prepared to follow it through to the end. Otherwise serious libels may occur. *We therefore provisionally recommend that s18 be reworded to make it clear that "proceedings" mean the full proceedings in any given case.*

256. We should finally like to note a proposal made to us in the course of our visit to the offices of one national newspaper. It was observed that many simple errors of identity and fact in the reporting of court proceedings could be avoided if copies of the charge sheet were supplied to media reporters. At present, the making available of charge sheets to journalists appears to be discretionary, whereas it seems that in Northern Ireland the practice is to make them available as a matter of course. *We believe that charge sheets should be made available to journalists present in court at judicial proceedings and invite views as to whether any problems would arise from this change in practice.*

Recapitulation on Qualified Privilege

257. The area of qualified privilege is in many ways the most difficult area in defamation law. While the defences of justification and comment focus on the content of the statement, qualified privilege attempts to capture all the occasions where the defendant author should have some, but not too much, latitude of speech. With such an ambitious aim, small wonder then that it is at present a patchwork of duty-interest relationships and statutory interventions, with the malice element overshadowing every defendant, whether a newspaper reporting a statement made at a county council meeting or a father commenting on his daughter's future husband.

A large number of reforms have been considered. However, the area of qualified privilege can be seen as straining in three directions. Firstly, it is attempting to cover media reportage of events of public interest. The defence of fair report would pull out all these situations into a coherent, internally controlled defence. Secondly, it is catering for the common law type situation,

the employer-employee, father-daughter, complainant-complaine relationship; in short the multiplicity of situations that arise in everyday life where one person asks for or offers an opinion about another. The category of qualified privilege should be retained for this purpose and its limits clarified. Thirdly, a further confusion is caused by the media who wish to use this category as a foundation on which to build a defence to solve their problems of proving truth, which suggestion is considered below.⁴¹ We will put forward the view that such a defence would strain the concept of qualified privilege and if adopted, should be a separate defence centred on public interest and not viewed as a category of qualified privilege. It will be remembered that public interest is not crucial to the initial concept of qualified privilege.

41 See section IV, Factual Statements, p311-6.

CHAPTER 12: STATEMENTS OF OPINION

Introduction

258. Most theories of freedom of speech recognise the importance of the distinction between factual assertions and expressions of opinion. The essential theoretical point of difference between the two forms of expression is that facts are capable of objective proof while opinions, comments, value judgements and criticisms are not. Although the jurisdictions discussed in this report - common law, European and United States - varied widely in their treatment of freedom of speech, one uniform principle emerged from each country, namely that the defences in respect of factual statements were invariably more stringent than the defences for opinion statements.

259. In the United States, for example, where factual statements on matters of public interest are accorded a wide protection, particularly in relation to public figures, the protection for opinions is wider again; the prevailing view is that expressions of opinion are non-actionable. In common law jurisdictions the privilege accorded to opinions under the defence of fair comment may be contrasted with the stringent requirement of proving truth in respect of factual statements. In the European countries discussed by an Interights Study¹ (France, Germany, Netherlands, Belgium, Norway, Sweden, Denmark, Greece) defamatory statements of fact were protected by either absolute or qualified privileges, none of which required the proof of truth. Indeed, given the nature of this form of expression, such a requirement would be impossible to fulfil. This principle is stated succinctly in the celebrated case of *Gertz v*

¹ European Court of Human Rights, *Lingens v Austria*, Third Party Intervention of the International Press Institute in Application No. 12/1984/84/131 of Counsel: The International Centre for the Legal Protection of Human Rights (Interights). Interights is located at 5-15 Cromer St, London WC1 8LS.

Welch² -

"... there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas".

A similar statement was made by the European Court of Human Rights in *Lingens v Austria* -

"In the Court's view, a careful distinction needs to be made between facts and value judgements. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof."³

The wide freedom given to expressions of opinion is justified on a number of grounds. We consider it useful to examine these briefly in order to place our defence of fair comment in context. We believe that a re-examination of the reasons for protecting opinions will be helpful in determining the limits of fair comment and deciding whether reforms of this defence should be recommended.

260. The first justification for a wide-ranging protection for opinion statement is based on freedom of opinion as an individual liberty. Accordingly we find Professor Rodney Smolla stating that -

"[The] achievement of self-realisation makes free expression valuable even when the speaker has no realistic hope that an audience will be persuaded to his or her viewpoint, for it nonetheless provides the speaker with an inner satisfaction and realisation of self-identity essential to individual human autonomy and dignity".⁴

261. The second theory focuses not on the individual but on society and the role of opinions in a democracy. Self-governance is meaningful only if the citizen has a range of viewpoints from which to choose. Official limitations on opinions limit the citizen's access to information and therefore his choice, and to this extent his role in self-governance is diminished and that of official organs is increased. Perhaps the most famous exponent of this view is Meiklejohn, who explained that freedom of speech was -

"to give every voting member of the body politic the fullest possible participation in the understanding of these problems with which the citizens of a self-governing society must deal."⁵

2 [1974] 418 US 323.

3 Series A No. 103, 8 EHRR 407.

4 Smolla, *Dun & Bradstreet, Hepps and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, (1987) 75 Geo LJ 1519, 1539.

5 A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948), p. 88.

This basis for freedom of expression has been repeatedly adopted by the United States Supreme Court e.g.

"freedom to think as you will and to speak as you think are indispensable to the discovery and spread of political truth."⁶

"whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of the Amendment was to protect the free discussion of governmental affairs."⁷

The German Constitutional Court has also recognised this justification for wide freedom of speech, stating that freedom of expression is -

"the main constituent element of a free and democratic system of government since it is the necessary condition for the permanent intellectual battle of opinions which is vital to a democracy."⁸

A Danish writer expresses this rationale in similar terms -

"Public debate constitutes an efficient control of those in power. The more light is shed on their actions, the less the abuse of power"⁹

262. The third rationale for the wide protection given to opinions is that society is engaged in a pursuit of truth, to which the competition of ideas is essential. Christenson, the Danish writer cited above, refers to this aim -

[An] extensive public debate with a confrontation of points of view is necessary if one is to find the truth ... progress in a dynamic society pre-supposes public debate."

The United States Supreme Court is also a proponent of this view, employing the "marketplace" metaphor to describe an intellectual centre for exchanging ideas so that a long-term process of evaluation and re-evaluation will produce more truth. That a short-term clash and competition of ideas and opinions is necessary to more long-term goals is well-expressed by the US Supreme Court in *Cohen v California* -

"To many, the immediate consequences of this freedom may often appear to be only verbal tumult, discord and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate

6 *Whitney v California*, 274 US 357, 375 per Brandeis J. (1927).

7 *Landmark Communications v Virginia*, 435 US 829, 838 (1978).

8 *Luth case*, Bveuf GE 7, 198, 208 (1958).

9 Christenson, *Bent. Free Speech for Public Employees in Denmark*, 26 *Scandinavian Studies in Law*, 39-75 (1982) at 64.

permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated."¹⁰

It may be noted that the tradition of using the "marketplace" metaphor was initiated by Holmes J. in *Abrams v US*¹¹ and is generally attributed to the writings of John Stuart Mill.

263. These, then, are the justifications for the wide protection afforded to opinions; the role of opinions in self-governance, the role of opinions in pursuit of truth, and the role of opinions as an expression of individual liberty. All of these emphasise that the content of the statement is what gives the statement its value. This may be contrasted with privileged statements, which are afforded protection not on the basis of their content, but due to the occasion on which they were published. It is also to be contrasted with factual assertions, whose content is not *necessarily* of value; rather certain types of factual statement are of value, namely truthful ones. We believe that the fact that the *content* of an opinion is what gives it value is important to bear in mind when considering the limits of a defence such as fair comment.

10 403 US 15, 14-5 (1971).

11 250 US 616, 630 (1919).

A. FAIR COMMENT¹²

264. The defence of fair comment is open to any individual and protects freedom of expression on matters of public interest, where the statement complained of by the plaintiff is a comment. At common law, the conditions of the defence were fulfilled if it were established that;

- (a) the statement consisted of a comment,
- (b) the facts supporting the comment were shown to be true,
- (c) the comment was one that an honest man, holding strong, exaggerated or even prejudiced views, could have made, (although the comment need not be fair in the sense of reasonable),
- (d) the matter commented on was one of public interest.

The defence protects defamatory statements of opinion and not defamatory statements of fact. Defamatory statements of fact must be defended by the defence of justification or privilege.

265. Reform of the defence of fair comment is discussed under the following headings:

(1) Title (2) Supporting Facts (3) *Mangena v Wright* (4) Malice (5) Joint Malice (6) Fairness (7) Base and Dishonourable Motives (8) Rolled Up Plea (9) Aggravated Damages (10) Abolition of Action for Comments (11) Matters of Public Interest.

12 Discussion by the reform bodies may be found as follows: ALRC Report paras 127-131, NZ Committee Report paras 137-165, Faulks Committee Report paras 147-177.

(1) Title

266. The Faulks Committee, the New Zealand Law Reform Commission and the Australian Law Reform Commission all recommended that the defence be renamed simply "Comment". The adjective "fair" was considered misleading considering the nature of the defence, which may actually protect unfair comments, given that an honest but prejudiced opinion may be considered unfair by an objective standard. As long as the comment is published honestly and is not inspired by malicious motives the comment will be regarded as fair. As the New Zealand Law Reform Commission stated:

"The title 'fair comment' is misleading because the word 'fair' may be equated with 'reasonable'. The notion that the opinion or comment must be in any sense fair or reasonable is an incorrect interpretation of the defence. The defence of fair comment protects even the unfair or unreasonable opinions of a writer. The only requirement of the defence in this respect is that the opinion is the honest opinion of the person who gave it."

It is thought, however, that the title "Comment" might give the misleading impression that all comments are protected. In fact, there is a major restriction on the types of comment that will be protected, because of the requirement that it be based on fact. A more accurate title would be "Comment based on Fact". This immediately calls to mind the main elements of the defence and emphasises the restriction of factual basis. When other elements of the defence are retained, removed or modified, there is a tendency to forget that the comment must always be based on fact. It is therefore suggested that the defence of Fair Comment be renamed Comment or Comment based on fact.

(2) Truth of Supporting Facts

267. At common law, the facts supporting the comment must be stated or indicated in the matter complained of. The general rule is that the facts supporting the comment must be true.¹³ A distinction appears to have arisen at common law between facts contained in the defamatory matter and facts located outside the defamatory matter. A rigid rule was applied to facts contained in the defamatory matter so that the failure of the defendant to prove any of these facts would be fatal to the defence. A more relaxed rule was applied to facts located outside the defamatory matter, so that the defence could succeed even if some of the facts were untrue. It appears that proof of even one of the facts would be sufficient in this case, provided the comment was supported by this fact.¹⁴

The Porter Committee, examining the law in 1948, did not refer to any such

13 This rule is subject to one exception known as the rule in *Mangena v Wright* on which see below, para 277.

14 *Kemsley v Foot* [1952] AC 345. See also para 84, Part I above.

distinction. It criticised the rigidity of the rule requiring each and every fact supporting the comment to be proved true. It wanted to achieve a position under which the defence would succeed if the gist or sting of the facts supporting the comment were proved true.¹⁵ It made its recommendation in the following terms:

"We accordingly recommend an amendment of the existing law analogous to that which we have recommended in relation to the defence of 'justification', namely, that a defence of 'fair comment upon a matter of public interest' should be entitled to succeed if (a) the defendant proves that so much of the defamatory statements of fact contained in the alleged libel is true as to justify the Court in thinking that any remaining statement which has not been proved to be true does not add materially to the injury to the plaintiff's reputation, and (b) the Court is also of opinion that the facts upon which the comment is based are matters of public interest and the comment contained in the alleged libel was honestly made by the defendant."¹⁶

It seems that this reform was to be limited to cases where the facts were contained in the defamatory matter, due to the reference in (a) to "statements of fact contained in the alleged libel". However, it is possible that the Porter Committee did not take cognizance of the distinction at common law at all.

It is also important to note that the wording of part (a) of the provision envisages a weighing-type operation. If the unproved statement of fact adds materially to the reputational injury, the defence will not succeed; if it does not add materially to the injury, the defence will succeed (subject, of course, to the defendant also complying with the requirements of part (b)).

268. Following this, there appeared in the English and Irish Defamation Acts an identical provision, which reads as follows:

"In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved, if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."¹⁷

This section did not, however, give precise effect to the Porter Committee recommendation. Most importantly, it is thought, no weighing operation appears to be envisaged by the section. If the comment is fair comment having regard to the facts proved, the defence should not fail merely because all the other facts have not been proved. Yet this is not made conditional

15 Porter Committee Report, para 89.

16 *Ibid*, para 90.

17 Section 23 of *Defamation Act 1961 (Ireland)*, section 6 of *Defamation Act 1952 (England)*.

upon the unproved facts adding no further material injury to reputation. It would seem that even if the remaining unproved facts do materially injure the plaintiff's reputation, the defence of fair comment will still succeed. This is clearly a departure from the intent of the Porter Committee. It also represents a contrast with a similar provision introduced in the context of justification, namely s22.

269. Secondly, part (b) of the Porter Committee provision referred to the honesty of the defendant in making the comment. The common law cases had given such a wide latitude to the term fair that unfairness would only be found where there was dishonesty. Presumably the Porter Committee wished to solidify this position by use of the term "honestly". However, s 23 requires the expression of opinion to be "fair comment" having regard to the proven facts. This leaves room for doubt. Perhaps the common law interpretation of "fairness" should be read into the section. On the other hand, it is possible to argue that this introduces a new statutory standard of objective fairness, which would restrict the defence considerably.

Section 23 suffers from another ambiguity, indeed the same doubt inherent in the Porter Committee provision. How does the section square with the distinction set out in *Kemsley v Foot* between facts located within and without the defamatory material? Does the section apply to facts within the material only (supported by the first two lines of the section) or does it embrace facts wherever located (supported by the phrase "facts alleged or referred to")? The answer is open to argument.

Surprisingly, when the Faulks Committee examined the provision in 1975, it assumed that it did give effect to the Porter Committee proposal in the sense that it allowed the defendant to prove the substance of the facts:

"This section was inserted as a result of the recommendation of the Porter Committee, and it is unquestionably a useful provision, since it preserves the validity of the defence of fair comment in cases where the defendant is able to prove the substantial statements of fact, but unable to prove unimportant or perhaps even trivial statements of fact in publication consisting purely of statements of fact and partly of expressions of opinion."¹⁸

It has been argued already that a correct reading of the section allows the defendant much more latitude. The defendant may succeed if he proves *some* of the substantial facts to be true, even if the remaining unproved facts are equally substantial.

The Faulks Committee did recognise, however, that the section might be understood to be limited in application to the case where the facts were contained in the matter complained of. For this reason, they recommended

18 Porter Committee Report, para 172.

a new section which would allow the defendant to rely on any facts in support of the comment. The proposal reads as follows:

"In an action for defamation in respect of words including or consisting of expression of opinion, a defence of comment shall not fail by reason only that the defendant has failed to prove the truth of every relevant assertion of fact relied on by him as a foundation for the opinion, provided that such of the said assertions as are proved to be true are relevant and afford a foundation therefor."¹⁹

It will be noted that this formulation avoids the problem posed by the phrase "fair comment" in s23, namely whether honesty is to be equated with fairness, or whether some other test is used. Here the necessary connection between the proven facts and the comment is that the facts are "relevant and afforded a good foundation" for the comment. This confines the section to the issue of supporting facts and does not involve the issue of fairness at all, which is presumably left to the common law.

270. However, the proposal does not address what seems to us to be the primary difficulty with the section. If the defendant proves facts which are relevant and provide a foundation for the comment, it does not matter that other relevant, and perhaps, important facts have been left unproved. The Porter Committee wished the defendant to prove the substance or sting of the facts. Under the Faulks proposal, the defendant may succeed without proving the substance of the facts. Suppose the defendant lists a series of grave charges against the plaintiff and makes a derogatory comment. Under the Faulks proposal, if he proves only some, or possibly even one, of these charges and the necessary connection between the charge and the comment, his defence will succeed. Yet because of the unproved charges he can in no way be said to have proved the substance of the facts. In this respect the Faulks proposal does not give effect to the intent of the Porter Committee.

NEW ZEALAND

271. The New Zealand Law Reform Commission recommended a similar amendment to their existing equivalent section, but worded it differently -

"In an action for defamation in respect of words that consist partly of allegations of fact and partly of expression of opinion, a defence of comment shall not fail by reason only that the truth of every allegation of fact is not proved, as long as the expression of opinion is shown to be comment having regard to -

- (a) those facts alleged or referred to in the matter in respect of which the action has been brought, that are proved to be true; or

¹⁹ Faulks Committee Report, para 173.

- (b) any other facts that are proved to be true, being facts that do not differ from the facts alleged or referred to in the matter in respect of which the action has been brought to a degree that is material so far as any question of injury to the reputation of the plaintiff is concerned."²⁰

The wording in part (b) may cause confusion because breaking down the section, the result is a two-fold rule:

- (1) The defendant need not prove the truth of every fact asserted as long as the comment is a comment with regard to such of the facts as are proved true.
- (2) The defendant need not prove the truth of every fact asserted as long as the comment is a comment with regard to any other facts proved true, provided these facts resemble the facts alleged sufficiently as to make no difference in terms of reputational injury.

This achieves the same result as the Faulks proposal. It solves the problem concerning the location of facts. However, the defendant may still succeed in his defence, although he has left some facts unproved. These facts may be substantial, they may cause material injury or not; the section appears indifferent to such unproved words.

AUSTRALIA

272. The Australian Law Reform Commission adopted a different formulation. It will be recalled that in relation to the defence of justification, the Australian Law Reform Commission recommended that the truth of facts should be considered proven if the defendant showed that the facts "were in substance true or in substance were not materially different from the truth".

The same formulation was adopted for the proof of the truth of facts in support of the defence of fair comment, and in addition it was stated that the comment should be based on -

- | | |
|-------|---|
| "(i) | Facts expressly or impliedly referred to in the matter; |
| (ii) | Facts known to the publisher and each recipient of the matter; |
| (iii) | Facts expressly or impliedly referred to in the defamatory matter and facts known to the publisher and each recipient of the matter." |

These are alternatives, it shall be emphasised.

20 New Zealand Committee Report, para 146.

273. This proposal operates in a clear and simple way. Firstly, it is clear that it applies to supporting facts wherever located. Secondly, it requires the defendant to prove the substantial truth of these supporting facts. We believe that this proposal gives effect to the intent of the Porter Committee to the extent that it requires the defendant to prove the substantial truth of supporting facts.

Conclusions

274. We believe that a provision on supporting facts in the context of fair comment should be clear on two points:

- (1) Whether it covers facts set out in the same publication as the comment only, or facts located elsewhere also;
- (2) To what extent the defendant must prove the truth i.e. (i) each and every fact, (ii) sufficient facts to justify the comment, or (iii) the substantial truth of the facts.

It is quite possible for a provision to apply one rule on the extent of proof required to facts within the publication, and another rule with regard to facts outside the publication.

275. Let us summarise the response of other reform bodies. The Porter Committee wished the defendant to prove substantial truth, but did not clarify whether its proposal applied to facts wherever located. The Faulks Committee made clear that its proposal applied to facts wherever located and required the defendant to prove sufficient facts to support the comment. This is surprising because it thought that it was giving effect to the Porter Committee's intent. The New Zealand proposal applied one rule to facts within the publication and another to facts outside the publication. Where the facts were within the publication, the defendant was required to prove only sufficient facts to support the comment; where the facts were outside the publication, the defendant was required to prove substantial truth. The Australian Commission required the defendant to prove the substantial truth of facts wherever located.

Our view is that in relation to facts located outside the publication containing the comment, the defendant should be required to prove only sufficient facts to support the comment. It is unrealistic to hold him to a higher degree of truth.

In relation to facts set out in the publication containing the comment, we reject the view that the defendant be required to prove each and every fact, as he did at common law. We considered both remaining options i.e. proof of substantial truth, and proof of sufficient facts to support the comment. We feel that the latter requirement is more in harmony with the ratio of the defence of fair comment.

276. Concluding that section 23 of the Defamation Act 1961 is ambiguous and unsatisfactory, we provisionally recommend its replacement by the following provision:

"In order to avail of the defence of (fair) comment, the defendant must show

- (a) that the comment was supported by facts either*
 - (i) set out in the publication containing the comment, or*
 - (ii) expressly or impliedly referred to in the publication containing the comment, provided such facts are known to the recipients of the publication; and*
- (b) the truth of sufficient facts to support the comment".*

277. We have deliberately used the phrase "publication containing the comment" so that the section applies even if the plaintiff sues on foot of only a part of the publication. We have used the phrase "expressly or impliedly referred to" in part (a)(ii) because the defendant may have referred to facts in a most indirect manner, but in a case where there is no doubt that the facts alluded to are known to the recipients of the matter. We have abandoned the more stringent requirement of proving substantial truth and opted for the proof of sufficient facts to support the comment. We have deliberately excluded any issue of "fairness" as this is a separate issue and will confuse the matter if dealt with under "proof of supporting facts". We emphasise that the provision recommended covers truth of supporting facts only and would be part of a general provision on (fair) comment.

(3) *Mangena v Wright*

278. There is one common law exception to the rule that the truth of supporting facts must be proved in order to succeed in the defence of fair comment. In *Mangena v Wright*,²¹ Phillimore J. defined the exception as applying to facts contained in a privileged document. More recently the exception was stated to apply where the facts were previously published on a "privileged occasion".²²

The Australian Law Reform Commission proposed that this rule be embodied in legislative form. Clause 13 of the proposed legislation set out the requirements that (a) the matter be comment, (b) the facts be referred to in specified ways, (c) that the facts be true in substance or "(ii) had previously been published by some person mentioned in the circumstances mentioned in section 14". Section 14 of the proposed Bill consists of a list of the

21 [1909] 2 KB 958 and see *supra* paras 83 and 84 of Part I.

22 *London Artists v Lintler* [1969] 2 QB 375, 395 per Edmund Davies L.J.

instances of *absolute privilege*. The Australian Law Reform Commission commented:

"A requirement that a publisher prove the correctness of such facts, before being entitled to comment adversely to another person, would introduce a serious new limitation on freedom of speech."

It had been noted in Part I that the ambit of the rule in *Mangena v Wright* was unsettled at common law. The Australian recommendation solves this problem by equating statements which do not require proof of truth in the defence of fair comment with statements which attract absolute privilege.

279. The rule in *Mangena v Wright* may be seen as a limited recognition of a corollary to the rights of reportage. If a defendant is entitled to report privileged statements without having to prove their truth, he must be allowed to comment on such reported statements. The Australian proposal has the merit that it allows a defendant to comment on any statement which is made on an occasion of absolute privilege: it therefore settles the contours of the protection which at common law are uncertain, and provides an easy method of identifying these contours. *We provisionally recommend a statutory provision based on the rule in Mangena v Wright. At the minimum this should allow the defendant to avail of the defence of fair comment where the comment was supported by facts published on an occasion of absolute privilege.*

280. However we feel that if our interpretation of *Mangena v Wright* is correct i.e. that a person is entitled to comment on what he reports, this principle applies to all privileged reports and not merely reports that are absolutely privileged. We appreciate that a general right to report is not recognised in Irish law and that such a right is assembled in rather a piecemeal way from sections 18 and 24 of the Defamation Act, and the Constitutional provisions. Elsewhere in this report we consider the possibility of putting these reporting rights together under an umbrella defence of fair report governed by its own considerations and not necessarily defeated by malice, as the qualified privilege reporting rights under s24 currently are. *We invite views as to whether the exemption from proving the truth of supporting facts should be extended to all cases where the facts were published on an occasion in respect of which the defendant has a right of fair report or in the absence of a generalised defence of fair report, all cases where the facts were published on an occasion of absolute or qualified privilege. We feel that if reporting rights are left in their current forms, such an exemption would be difficult to operate; but favour such an exemption if an umbrella defence of fair report is created.*

(4) Malice

281. The element of malice is a factor which adds complexity to the defence of fair comment. Where malice is alleged, a two-stage enquiry unfolds. First, the court must establish whether the comment was fair, according to an objective standard. Here the burden of proof is on the defendant. If it is

satisfied that the comment was fair, it goes on to consider whether the defendant was actuated by malice, involving a subjective enquiry to the state of mind of the defendant. Here the burden of proof is on the plaintiff. Malice in this context is wider than its lay meaning. In the words of the Faulks Committee, it covers "any indirect or improper motive which may have actuated the defendant in making the comment complained of, so that as a result the comment is not a genuine expression of his opinion but a counterfeit". The defendant must have been actuated by malice when making the statement; it is not sufficient for the plaintiff to show there was bad blood previously existing between them.

282. It has been seen that the House of Lords in *Horrocks v Lowe*²³ clarified the meaning of the term "malice" in relation to qualified privilege. If the view of Duncan and O'Neill that the rules set out by Lord Diplock in that case are equally applicable to fair comment is correct, the governing criteria may be set out as follows:

- (1) The plaintiff must show that the defendant was actuated by improper motive and that this was the dominant motive at the time of publication.
- (2) If the comment does not represent the genuine opinion of the writer this will constitute improper motive.
- (3) Genuine opinion is necessary but not sufficient to complete the defence. If the defendant was actuated by spite or ill will or for personal gain in making the publication, the defence will be forfeited.

(i) Reform of the Malice Element

(a) Where the defendant is the author

283. The reform bodies recommended the retention and clarification of the malice element in the defence of fair comment. As the Faulks Committee stated;

"Some of our number inclined to favour the abolition of the concept of malice in relation to fair comment, but they do not in the end dissent from the view of the majority that, under so wide a defence, it is not unjust to malicious critics that they should be unable to avail themselves of the defence available to honest critics".

The New South Wales *Defamation Act 1974*, following upon a recommendation by the New South Wales Law Reform Commission on Defamation in 1971, contains a provision which focuses on the honesty of the defendant. The Act provides, in section 32(2), that the defence of fair

23 [1974] 1 All ER 662.

comment shall be defeated if it is shown that at the time when the comment was made, the comment did not represent the opinion of the defendant.

The Faulks Committee adopted an almost identical wording, inserting the word "genuine" into the formulation in order to emphasise the essential issue at stake. It will be remembered that at common law the plaintiff was required to prove malice on the part of the defendant. Consistent with this, the Faulks Committee recommendation left the burden of proof on the plaintiff to show that the opinion expressed was not the defendant's genuine opinion.

284. The New Zealand Law Reform Commission felt that the burden should be reversed for two reasons; firstly, because if a defendant pleads fair comment, he should be prepared to testify as to his honest belief; and secondly, because it was preferable that a statutory provision be drafted in a positive rather than a negative form. The resulting provision read:

"In an action for defamation in respect of matter that includes or consists of an expression of opinion - (a) a defence of comment by a defendant who is the author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was his genuine opinion."

285. Placing the burden of proof on the defendant has the merits of logic and simplicity. As the Australian Law Reform Commission says:

"The defendant has knowledge of his opinion or belief. He should be required to depose to it and be cross-examined, if need be. In practice it would rarely be possible for a plaintiff to prove that an opinion was not held".²⁴

The Australian Law Reform Commission similarly advocated that "genuine expression of opinion" should replace malice as the criterion for testing the motive of the author. "Genuineness of opinion" is not synonymous with the motive of the author. The following passage may be quoted -

"The rule that malice defeats a defence of comment not only leads to some odd results but has contributed to complexity. The motive of the critic is essentially irrelevant. Assume two critics review a book, each making similar defamatory comments about the author and identifying the factual basis of the criticism. In each case the opinion was factually held; in each case the readers knew the material upon which it was based and had an opportunity to make their own judgments. One critic is liable in law because the plaintiff can show that he was actuated by malice. The other is not because he was not so motivated. Moreover 'malice' is an unfortunate term. In defamation law it means that the comment was actuated by an improper motive. Malice is not limited

24 ALRC Report, p 69, n 39.

to its dictionary meaning of ill will. The better course is to substitute the words which, in their ordinary meaning, are actually intended. For this reason the Draft uses the expressions 'genuine opinion'."

This passage refers to a footnote which contains the following statement -

"The term 'genuine' has an advantage over the word 'honest' in emphasising that motive is irrelevant."

286. It is interesting that although the Australian Commission and the Faulks Committee recommended similar provisions on malice, they differ as to the effect of such a provision. Let us distinguish between three types of case; (1) the genuine opinion simpliciter, (2) the genuine opinion where the defendant was actuated by spite or ill-will, (3) the genuine opinion where the defendant was not actuated by spite or ill-will, but there is evidence of ill-will between the parties generally.

From the passage quoted above, it is clear that the Australian proposal was intended to protect all three categories of genuine opinion. However the following passage from the Faulks Report shows that this Committee thought that the defendant in category (2) would *not* be able to avail of the defence:

"For example, if four theatre critics write substantially identical reviews of a play fully within the scope of the defence of fair comment, but one of them is actuated by malice, is it right that he should fail where the other three succeed?... It is most important to recognise that the test is whether the defendant was *actuated* by malice in making the comment complained of. It is not sufficient to show that the defendant bore ill-will against the plaintiff... Consequently, we do not recommend any change of substance in this respect..."

It may be that the Faulks proposal went further than was intended by that committee. If 'genuine opinion' is the sole test, a defendant in category (2) will be protected as the Australian Commission recognised, since a defendant may hold a genuine opinion and still be actuated by spite.

287. If it were thought that a malice-type element in the defence of fair comment should be retained, the formulations discussed have the advantage of clarity and simplicity and are recommended. If the best course appeared to be to exclude from the defence the defendant within category (2), it should probably include a phrase such as "any other improper motive." However, it might also be thought desirable to abolish this element of the defence altogether. This option is discussed below.²⁵

25 At p278.

(b) *Malice where the publisher is not the author*

288. Where the publisher is not the author, he may be placed in a delicate position if he publishes a statement of opinion with which he disagrees. Under existing law, this may result in a finding of malice on his part. In *Cherneskey v Armadale Publishers*²⁶ a majority of the Supreme Court of Canada held that a newspaper and its editor could not sustain a defence of fair comment, where it had been proved that the words used in a letter to the paper were not an honest expression of their opinion and there was no evidence as to the honest belief of the writers.²⁷

289. RTE highlight the difficulties of the present position in their submission.

"In order for us to exclude the possibility of malice, RTE, depending on the view taken by the law, may be put in the position of having to itself adopt the contributor's comment as a matter of its own genuine belief or opinion. RTE may, however, be precluded from adopting any contributor's opinion as its own opinion because of its impartiality, obligations under the Broadcasting Act. This places us in an impossible position in attempting to negative any evidence of malice raised by the plaintiff. In our view it is fundamentally wrong that the operation of a defence of contributor comment should depend on RTE being forced to agree or disagree with the view expressed by the contributor."²⁸

290. The Faulks Committee recommended that book publishers, newspaper proprietors and others who publish the opinions of authors with which they may disagree should be safeguarded. The onus of proof was again left on the plaintiff to show that the opinion was not believed by the defendant to be the genuine opinion of the author. Section 5(2)(b)(ii) of the Draft Bill provided that where the defendant is someone other than the author, the defence of comment would be defeated -

"if the plaintiff proves that the opinion was not, and was not believed by the defendant to be, the genuine opinion of the author".

291. The New Zealand Law Reform Commission recommended a similar type of provision, but reversed the burden of proof, so that the onus is on the defendant to bring himself within the scope of the defence;

"A defence of comment by a defendant who is not the author of the matter containing the opinion shall fail unless the defendant proves that he believed that the opinion expressed was the genuine opinion of the author."²⁹

26 [1978] 90 DLR (3d) 321.

27 This case is set out in detail at para 149 Part I.

28 Part of an RTE submission to this Commission.

29 New Zealand Report, para 152.

292. Both of these provisions make the defence hinge on the belief of the defendant as to the genuineness of the author's opinion. However, a more objective standard was adopted by the Ontario Legislature.

"Where the defendant publishes defamatory matter that is an opinion expressed by another person, a defence of fair comment by the defendant shall not fail for the reason only that the defendant or the person who expressed the opinion, or both, did not hold the opinion, if a person could honestly hold the opinion."³⁰

293. The British Columbia Report on Defamation noted that in Canada response to *Cherneskey* has been overwhelmingly critical. In its Annual Report in 1979 the Law Reform Commission stated - "It seemed totally wrong in principle that the law should stifle freedom of expression and debate on important issues by encouraging the media to publish only opinions with which they agree." The Uniform Law Conference swiftly amended the *Uniform Defamation Act* in 1979 to overrule the decision. The British Columbia Commission examined the various legislative models of the various provinces and that of the Uniform Act. It recommended the following provision -

"Where the defendant published alleged defamatory matter that is an opinion expressed by another person, a defence of fair comment shall not fail for the reason only that the defendant did not hold the opinion if

- (a) the defendant did not know that the person expressing the opinion did not hold the opinion;
- (b) a person could honestly hold the opinion; and
- (c) the person expressing the opinion was correctly identified by name and address in the publication, provided that the defence shall not fail by reason only that the person was not correctly identified if the defendant took reasonable care to verify the identity of the person expressing the opinion.

(2) For the purposes of this section, the defendant is not under a duty to inquire into whether the person expressing the opinion does or does not hold the opinion.

Which of these provisions is the most appropriate to solve the problems posed by *Cherneskey*? The Ontario model, which allows the defendant to succeed if "a person could honestly hold the opinion" presents difficulties. This was probably meant to exclude outrageous opinions that no-one could possibly honestly hold. However, on another view, a person could honestly hold any

30 SO 1980, c 35, s 2, now s 25 *Libel and Slander Act*, RSO 1980, c 237.

opinion. If so, the provision is so wide as to impose no restriction at all, and if this is desired, it should be stated in plainer terms. Alternatively, the requirement that a "person could honestly hold the opinion", being an objective standard, could be used to impose the court's view of reasonableness by the back door. This matter should be dealt with, if at all, under the "fairness" element of fair comment, rather than the "malice" element. For the same reasons paragraph (b) of British Columbia provision is not favoured.

294. The Faulks and New Zealand Committee proposals are identical except for the burden of proof. This particular issue will be resolved according to the placing of the onus of proof of 'malice' or rather, honesty, generally in the defence of fair comment. The test hinges on whether the defendant believes the opinion to be the genuine opinion of the writer. As far as such tests go, it is satisfactory. However, on one view it merely emphasises the artificiality of enquiring into the honest belief of the writer. Where a newspaper or other person published the opinion of another, does the law really care whether it is a genuine opinion? Arguably the merit of the opinion is that it contributes to public discussion and the belief of the defendant is really irrelevant. The British Columbia provision is similar in that it focuses on the defendant's knowledge in relation to the writer's opinion, but its wording makes it easier for the defendant publisher to avail of the defence because it is quite clear that he does not have to make enquiries as to the writer's belief. Indeed, under that provision it is hard to see the defendant being liable unless he actually knows the opinion is not honestly held by the writer and deliberately publishes despite this knowledge.

295. The British Columbia provision also imports the interesting requirement that the writer be identified. It accepted that this would deny the protection of the provision to those who publish anonymous opinions. Some debate centred around the fairness of this result in relation to "NWBR" (name withheld by request) publications. However the Commission thought that to protect such statements would require further refinements of procedure in an already complicated area and declined to do so.

If a criterion of "genuine belief" is adopted as a replacement for malice, it is thought that the Faulks, New Zealand and British Columbia proposals are the most useful in relation to the present situation. However if the malice element were abolished altogether, such a provision would of course be unnecessary.

(ii) Abolition of the Malice Element

296. None of the reform bodies cited discussed at any length the possibility of removing the element of "malice" or "genuine opinion" from the defence altogether. Some of the members of the Faulks Committee were inclined to favour the abolition of the concept of malice (as opposed to the word malice) from the defence, but in the end agreed with the majority that malicious critics should be unable to avail of the defence which is available to honest

critics. It is a matter worth considering whether the defence of comment should depend at all on the presence or absence of genuine opinion on the part of the defendant. The idea that malice destroys the defence of fair comment has become so firmly entrenched that this point seems to have been overlooked.³¹

At the outset of our section on opinions, we set out a number of theories justifying a wide protection for expressions of opinion. We emphasised that unlike the defences of justification and privilege, the defence of fair comment is based on the value of an opinion *per se*, because of the contribution of the content of the opinion to democratic debate and public discussion. It is arguable that malice should not defeat this defence because the state of mind of the defendant is an irrelevant inquiry where the protection of the statement is based on its content.

297. It must be remembered that removal of this restriction would not enlarge this defence to any great extent, due to the existence of the other major restriction, the requirement that the comment be based on true facts. The present position under which malice plays a role means that if A and B put forward the same opinion based on true facts, one will fail to obtain the protection of fair comment if he was inspired by malicious motives. This is not necessarily desirable if the justification for the protection is based on the content of the statement, in other words that it contributes to public debate. Furthermore, difficulties are encountered in attempting to illustrate malice, and, particularly where the defendant is not the author, this becomes a somewhat artificial enquiry. For example, if A, a newspaper, publishes an opinion expressed by B, a contributor, in its letter columns, on the basis that the opinion puts forward a view interesting to public debate, it may seem arbitrary to render A liable simply because B was malicious; this is particularly so when one bears in mind that another contributor, C, might have submitted the same opinion without malice. We accept that some people might find distasteful a theory of law that gives protection to statements made in order to inflict injury. On the other hand, it is not necessarily inconsistent to protect malicious statements if the justification for protecting such statements in the first place is due to its content: for example, a true statement of fact made maliciously will not render the publisher liable. In this case, the reason for protecting truthful statements is based on their content and malice is not considered relevant. In the same way it is arguable that because of the rationale underlying the defence of fair comment, the state of mind of the publisher is not a relevant enquiry. *We therefore at present currently favour the view that malice in any form should not defeat the defence of fair comment, and recommend the abolition of the common law rule that "malice" defeats the defence of fair comment. However we welcome views on this issue.*

31 The European Court in the *Lingens* case considered that a wide latitude should be given to statements of opinion. The distinction based on malice at common law might not allow sufficient latitude - See below, para 323 et seq..

(5) Fair Comment and Joint Malice.

298. Under existing law, the defence of fair comment may be defeated by a showing of malice on the part of the defendant. A problem arises where two or more parties are responsible for the publication, and only one of them was actuated by malice. Does malice on the part of one publisher destroy the defence for the others? The answer is provided by section 11(4) of the *Civil Liability Act 1961*, which provides that where there is a joint libel in circumstances normally protected by fair comment, *inter alia*, the malice of one person shall not defeat the defence of the other, unless that other is vicariously liable for the malice of the first.

299. One problem with the wording of this section is that it excludes slanders. These are therefore left to be governed by the common law under which the malice of one party to the publication automatically destroys the defence for the others responsible for the publication.³² *The section should be reworded at least to the extent that slanders and libels are treated alike. If the distinction between libel and slander is abolished, the section could be re-worded so as to refer to a "joint defamation".*

300. A more difficult problem with the section is in relation to the word "malice". At this stage it is not clear whether the concept of malice will be retained in any form, or if it is, what form it will take. *Clearly if the concept of malice itself is abolished, there will be no need for a provision on joint malice in relation to fair comment at all. If the concept of malice is retained, but in a different form, the wording in section 11(4) would require to be re-worded.*

301. For example, the Faulks Committee proposal was that the defence of fair comment should be defeated if it is shown that the comment did not represent the genuine opinion of the defendant. Section 11(4) would need to be re-written along the following lines:

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

or

"Where there is a joint defamation, the defence of fair comment in relation to each defendant shall be treated on its own merits. The fact that the comment does not represent the genuine opinion of one defendant shall defeat the defence of the other only if that other is vicariously liable for the first".

³² Although the common law position was altered in England in *Egger v Viscount Chelmsford* [1965] 1 QB 248. The statement of Lord Denning MR at p.265 appears wide enough to cover slanders, although the facts of the case involved a libel. See above, Present law, para 146.

It may be noted that section 11(4) applies also to the defence of qualified privilege. It has been discussed separately in that context above.³³

(6) Fairness of Comment

302. The restriction on protected comment represented by the malice element exists because fair comment developed originally as an offshoot of privilege. Once this restriction is questioned it becomes appropriate to examine the other restriction on comment not yet considered, namely the fairness of the comment. If it is felt that some restriction upon comment is desirable, it is felt that a more logical way to achieve this is to focus on the content of the statement, since this is the basis of the defence. The law's protection could be made contingent upon the comment being "fair" in the eyes of the court. This would inject new life into the original title "Fair Comment". The new criterion would be reasonableness. It will be recalled that at common law the word "fair" in the title "fair comment" is not equated with "reasonable".³⁴ "Fair" has been given a much wider latitude. The test is whether "a fair man, no matter how prejudiced he may be, however exaggerated, or obstinate his views" would have said what was said.³⁵ This test may be confusing to a jury. A fair man is by definition not prejudiced or obstinate.

303. However, the Faulks Committee took the definition one step further and adopted the statement of Lord Porter in *Turner v MGM* to the effect that the word "honest" should be substituted for "fair".³⁶ The definition then states that a comment is protected by the defence if it is one that an honest man could have made, no matter how obstinate, prejudiced or exaggerated his views. This may be regarded as even more confused. If it is an attempt to restrict certain types of comments, it fails. Any comment in the world could be attributed to an honest man if he is allowed to be exaggerated, obstinate and prejudiced. If on the contrary, the definition is merely meant to emphasise the latitude available to comments, its message would be more clearly conveyed by its absence than its presence.

33 See above, p237.

34 Faulks Committee Report para 152:

"The adjective 'Fair' in the phrase 'Fair Comment' is seriously misleading having regard to the actual nature of the defence, which in reality protects unfair comments, since manifestly the opinion of a man with prejudiced or exaggerated views may be extremely unfair if viewed objectively by a balanced person."

New Zealand Committee Report para 141:

"The title 'fair comment' is misleading because the word 'fair' may be equated with the word 'reasonable'. The notion that the opinion or comment must be in any way fair or reasonable is an incorrect interpretation of the defence."

35 *Merivale v Carson* (1887) 20 QBD 275, 291, per Lord Esher MR.

36 Faulks Committee Report para 148 and footnote 86, citing Lord Porter at [1950] 1 AER p 461.

If the element of fairness is to be made redundant such a test should not be adopted. It would be sufficient simply to define the other requirements of the defence. If, on the other hand, it were thought better to impose an element of fairness (in the sense of reasonableness), this should be done in clear terms.

"The defence of fair comment will succeed unless the defendant fails to show that the comment was not wholly unreasonable in light of the supporting facts."

304. However, it is felt that a negative formulation should be avoided, partly for linguistic reasons, but primarily because it does not give adequate guidance. Therefore, an alternative formulation is suggested -

"The defence of fair comment will succeed if the defendant shows that the comment was *reasonable* having regard to the supporting facts."

305. We do not favour on the whole, however, the introduction of "fairness" or "reasonableness" to the defence of comment. Firstly, a court pronouncing upon the reasonableness of an opinion comes close to pronouncing upon its correctness. This danger is expressed by the British Columbia Law Reform Commission commenting on the existing law -

"The question for the jury is not whether the comment was one that they would have made or that the hypothetical, reasonable, informed critic would have made. Such a rule would come perilously close to confining the defence to critics who express the majority opinion".³⁷

(One could indeed go further than the writer of that passage, who appears to fear that a jury might tend to reflect the majority opinion in society on a particular issue. This is not necessarily the case: still less is this necessarily the case where the issues of fact are being tried by a judge alone).

306. Secondly, the risk a publisher faces in anticipating whether an opinion will be deemed reasonable would probably result in excessive self-censorship. Nonetheless, there are arguments in favour of such a restriction. It might be said that if publishers are forced to make comments reasonable, this is a good thing. It could also be said that this is a more logical basis on which to build a restriction than the element of malice currently reigning at common law. *However on balance we are opposed to injecting new life into this restriction. We believe that a statutory provision should make it clear that a comment, in order to be protected, need not be fair, and that the defence be renamed either "Comment" or "Comment based on Fact".*

³⁷ BC LRC Report, p 46.

(7) Base and Dishonourable Motives

307. If the distinction between fact and comment is often difficult, there is one type of allegation that has brought home this problem acutely, and the result has been a confusion as to whether the defence of fair comment or justification applies. Some cases have leaned one way, some the other, and a third strain of cases has formed a hybrid category, so that the defence of fair comment applies, but the defendant is required to meet the more stringent test of "reasonableness".³⁸ This has occurred where the allegation is that the plaintiff was inspired by base and dishonourable motives.

The Faulks Committee examined this area and recommended that allegations of base and dishonourable conduct be treated under the defence of fair comment and moreover, that the straightforward elements of the defence should be applicable. It thought that the imposition of a standard of reasonableness added an unnecessary complexity to the defence and that existing principles are adequate to cater for this type of case. This position could be adopted in Irish law in the form of a provision that imputations of base, dishonourable or similar conduct are to be treated in the same way as any other comment.

308. *A second approach is based on the view of Duncan and Neill who, it was seen, thought that it should be a question in each case as to whether the statement was a fact or a comment and the appropriate defences for each should apply. This approach is provisionally recommended, and the guidelines for distinguishing fact from comment set out elsewhere in this Paper³⁹ should be considered. It could then be provided that if the statement is deemed to be a comment, the principles applicable to other types of comment should apply.*

(8) Rolled-up Plea

309. At present, a defendant pleading fair comment has the choice between two forms of plea, the fair comment plea *simpliciter* and the rolled-up plea. In relation to the former, he must give particulars of the facts on which the comment is based. In pleading the rolled-up plea, the defendant must give particulars stating which of the words are asserted to be statements of fact, and the facts he relies on to prove their truth. The particulars stating which of the words are asserted to be statements of facts are not very helpful as the pleader may state that the words are either comment or fact in the alternative.

310. The Faulks Committee and the British Columbia Law Reform Commission thought that the rolled-up plea added nothing to the defence and that it constituted a trap for the unwary pleader. It recommended its abolition. *In Ireland the rolled-up plea would seem to serve no useful purpose either and it is suggested that it be abolished. Accordingly, in a defence of fair comment, the defendant would be required to give particulars of facts in which*

38 See Part I, para 90, p72 above.

39 See below, p290.

the comment was based. It will be recalled that in Cooney v Browne & Others,⁴⁰ the Supreme Court held that the defendant is required to state which of the statements are factual and which are comment, and further that he should give particulars of the facts relied on to prove the truth of the factual statements. We provisionally recommend that a rule of court be formulated along these lines.

(9) Aggravated Damages

311. At common law, a failure to prove the truth of supporting facts may result in an award of aggravated damages.⁴¹ The discussion of this rule in relation to the defence of justification above is applicable here also.⁴²

(10) Abolition of Actions for Comments

312. The defence of fair comment is established at present if the following four requirements are met: (1) the subject matter is one of public interest, (2) the comment is supported by fact, (3) the comment is fair, (4) the comment was made without malice. We have suggested that the first two requirements are sufficient and that a reform of the defence might involve abolishing the need to show the latter two. However the question that now arises is whether all the requirements should be abolished, resulting in a position of non-actionability in respect of opinions.

It will be seen that prevailing American opinion is that, following a dictum in *Gertz v Welch*,⁴³ actionability for opinion statements has been abolished in that jurisdiction. Although the United States Supreme Court has yet to face this issue squarely, the lower courts appear convinced that this is the result of the statement of Powell J in *Gertz* and are currently applying various tests to implement the consequences of this move. Two arguments may be made in favour of the abolition of actionability for opinions. The first argues from the theories outlined above that the value of opinion statements lies in their contribution to society's search for truth and the self-governing core of democracy. The widest possible range of opinion should be allowed to issue free of judicial intervention in order for public debate to be as free as possible. The second argument is that the most significant restriction on comments at common law currently consists of the requirement that the facts supporting the comment be proved true; it might therefore be more logical to deal with such facts on the basis of justification rather than under the mantle of fair comment.

313. There appear to be two main ways of dealing with opinions in the United States at present. These may serve as models for abolishing actionability of opinion.

40 [1985] ILRM 673.

41 See Part I para 83.

42 See below, p305-7.

43 418 US 323 (1974).

1. Complete Abolition of Opinions - Once a statement is characterised as an opinion, there is a complete bar on actionability. Various tests are used to distinguish fact from opinion:
 - (i) the verifiability test - whether the statement is capable of objective proof;
 - (ii) the totality of circumstances test - whether the statement construed in all its contexts is opinion or fact;
 - (iii) a combination of both the above e.g. the *Ollman v Evans* four-factor test; the *Annenburg Washington* three factor test.
2. Restatement Test - Once a statement is characterised as an opinion, this is not the end of the matter. A distinction is drawn between "pure" and "mixed" opinions. A pure opinion is one which sets out facts or refers to facts known to the audience (i.e. a supported opinion). A mixed opinion is one which does neither (i.e. an unsupported opinion). The Restatement (s566) test provides that mixed opinions are still actionable. The rationale is that the reader may infer that the writer knows of some undisclosed facts which support his opinion and will treat it more as an allegation of fact than opinion.

314. It will be recalled that at common law, a pure opinion is also protected (assuming the matter is one of public interest and there is no malice) and a mixed opinion is not. However the essential difference between the common law and the Restatement in this regard is that at common law the proof of the facts set out or referred to must be proved; under s566 of the Restatement there appears to be no such requirement.

315. Leaving aside the factors of malice, fairness and public interest for a moment, the options appear to be as follows:

- (1) To retain the defence of fair comment with respect to opinions which are supported by facts set out or referred to, provided the truth of such facts is shown. (The present position).
- (2) To retain the defence of fair comment with respect to opinions which are supported by facts set out or referred to, without the necessity of proving truth. (The Restatement position).
- (3) To retain the defence of fair comment for all opinions, once a statement has been shown to be an opinion.

316. We are provisionally in favour of the first option, namely maintenance of a position under which the truth of supporting facts must be shown. We believe that abolition of this requirement would allow defendants to receive a protection even where they had mis-stated or invented facts on which to

base their comments.

317. We draw attention to the fact that a number of European Countries employ a defence similar to the defence of fair comment (Belgium, Norway, France), and that in Belgium at least, the truth of supporting facts is an element of the defence. *We therefore provisionally recommend the retention of the rule that truth of the supporting facts must be proved as an element of the defence of fair comment.*

(11) Matter of Public Interest

318. We consider the reform and possible repeal of this element of the defence of fair comment below, at Section IX on Privacy Law and Defamation Law.

B. DISTINCTION BETWEEN FACT AND COMMENT

319. The distinction between fact and comment is a critical enquiry in the law of defamation. At common law it determines whether the defence of justification or fair comment applies. In America, the distinction has become even more crucial because prevailing opinion says that an action in respect of pure opinion statements cannot be maintained. It may be noted that a distinction between fact and comment is also drawn in the laws of France, the Federal Republic of Germany, Denmark, Norway, Sweden, Belgium, the Netherlands and Greece. In all of these countries, the defences in respect of facts are more stringent than those in relation to comments. As the exercise of distinguishing the two types of speech is peculiarly difficult in certain cases, it is surprising that case law has failed to provide criteria by which to measure the content of speech. We suggest that a test for making this distinction should be introduced.

320. Due to the crucial importance of the distinction between fact and opinion in current United States law, guidance may be drawn from the various tests used in that jurisdiction.⁴⁴

1. *The Verifiability Test* - First the court must decide whether the language used is so imprecise or vague as to be incapable of an accepted core of meaning. If so, the statement is opinion. If not, the court must then look to the objective provability of the statement. If it cannot be proven objectively, the statement is one of opinion.
2. *The Totality of Circumstances Test* - The court must look at all the contexts of the statement i.e. the surrounding language, the medium

44 Most of these tests are discussed fully by Thomas, *Statements of Opinion, Statements of Fact and the First Amendment*, 74 Calif L Rev 1001.

used, whether there is a convention attached to a particular type of column or article, whether cautionary language or a disclaimer was used.

3. *Combination* - A popular alternative is to combine the two tests. This was effected in *Ollman v Evans*, where Judge Starr formulated a four-factor test as follows:

"First we will analyze the common usage or meaning of the specific language of the challenged statement... [to determine] whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous ... Second, we will consider the statement's verifiability - is the statement capable of being objectively characterized as true or false? ... Third, moving from the challenged language itself, we will consider the full context of the statement - the entire article or column, for example - inasmuch as other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content. Finally, we will consider the broader context or setting in which the statement appears. Different types of writing have ... widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion".

321. Another excellent example of a combination test is that adopted by the Annenburg Washington Report:

"(d) *Factors to be Considered*

In determining whether the statements giving rise to the litigation are defamatory statements of fact or statements of opinion, the court and trier-of-fact shall consider

- (1) The extent to which the statements are objectively verifiable or provable;
- (2) The extent to which the statements were made in a context in which they were likely to be reasonably understood as opinion or rhetorical hyperbole and not as statements of fact;
- (3) The language used, including its common meaning, and the extent to which qualifying or cautionary language, or a disclaimer, was employed."⁴⁵

Explaining this section, the Report states at a later point:⁴⁶

⁴⁵ Annenburg Washington Programme Report, p15.

⁴⁶ *Ibid*, p20.

"The first factor is the extent to which the statements are objectively verifiable or provable. If they cannot be objectively proved they are not statements of fact. The second factor emphasises the general context of the communication: statements made in a work of fiction, as part of satire or parody, or in the context of artistic, aesthetic, literary, academic, culinary, theatrical, religious or political review or commentary should be presumptively construed as opinion. Statements made in a straight news story should be presumptively construed as factual, unless qualifying language is employed to indicate otherwise. Mere colourful exaggeration, rhetorical hyperbole, verbal abuse, name-calling, ridicule or jest should be presumptively construed as opinion. In all instances, however, the emphasis must be on the overall context of the communication and on how the statements were reasonably understood in that context. The final factor emphasises the nature of the language giving rise to the communication, including the extent to which qualifying, cautionary or disclaiming language was employed. In a work of fiction, the use of a disclaimer should presumptively establish that the statements giving rise to the action were reasonably understood as imaginary and not factual".

322. However a straightforward combination test may lead to problems where the factors are equally weighted. This apparently was the problem in *Mr Chow of New York v Ste Jour Azur SA*.⁴⁷ The plaintiff complained of the following statements in a restaurant review:

- "It is impossible to have the basic condiments ... on the table".
- "The sweet and sour pork contained more dough ... than meat".
- "The rice was soaking in oil".
- "The pancakes were the thickness of a finger".
- "The green peppers ... remained frozen on the plate".

Despite the fact that each of these statements would be objectively verifiable, the court laid emphasis on the context of writing, namely that in a restaurant review the average reader would expect to find statements of opinion. The American writer examining this case concluded that the four fold test was inconclusive because context could pull one way, while the "objectively verifiable" test could pull another.

The test, however, is not necessarily ineffective. Perhaps the problem could be solved by weighting the factors so that if all things are equal, the verifiability factor will prevail. Furthermore, we are not convinced that the result in the Mr Chow case is correct. It is by no means evident that the reader of a restaurant review expects to find only statements of opinion. One could equally argue that a reader of such material expects the opposite i.e. statements of fact leading to a conclusion or opinion.

47 759 F 2d (2d Cir. 1985), Discussed by Berritt, 52 Brooklyn L.Rev. 879.

4. *Restatement test.* S566 of the Restatement provides that a "mixed" opinion is not protected i.e. an opinion which implies but in no way discloses underlying facts. Essentially this is a test for distinguishing fact from opinion because where a statement implies underlying but undisclosed facts (e.g. "X is corrupt", with no facts set out) it is treated as a statement of fact. Although this does not appear to have been done, this test could be added to the other factors in a combination test. We believe that the degree to which the statement is supported by facts to a large extent determines whether it is a fact or opinion. For example, if an article sets out the events at a public meeting in detail and concludes that a person present at the meeting was "corrupt", or "used blackmail" or "is dishonest", the reader is more likely to treat the statement as one of opinion. At the other extreme, a bald unsupported statement that X is "corrupt" or "dishonest" is more in the nature of a statement of fact. Between these two extremes, the presence of supporting facts to a greater or lesser degree will weight the scales towards a statement of fact or a statement of opinion.

323. *We therefore provisionally recommend the following scheme for distinguishing fact and opinion as follows:*

DISTINCTION BETWEEN FACT AND COMMENT

- (1) *In distinguishing between fact and comment, the court shall have regard to the following factors:*
 - (a) *The extent to which the statement is objectively verifiable;*
 - (b) *The language surrounding the statement, in particular cautionary or qualifying language;*
 - (c) *The context of the statement, in particular whether particular types of language are associated with the type of publication in question.*
- (2) *A statement unsupported by facts (i) set out in the publication containing the comment or (ii) expressly or impliedly referred to in the publication containing the comment and known to the recipient(s) of the publication, shall be treated as a statement of fact.*

C. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE LINGENS CASE

324. Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms enshrines the right to freedom of expression, subject to such qualifications as are permitted under subsection (2). In the recent case of *Lingens v Austria*⁴⁸ the European Court of Human Rights held that a conviction under the Austrian Criminal Code for libel contravened Article 10 of the Convention. This case may have implications for Irish libel law, and it is proposed to set out its facts and judgment in detail. It may be noted at the outset that while libel law in Ireland is primarily within the civil law sphere, the conviction in the Lingens Case was under a Criminal Code. However, to draw an analogy between our law of criminal libel and the Austrian law on libel would be inaccurate. There is a general pattern as between common law and civil law countries; "[Most] of the serious violations of the personality are primarily considered from the aspect of tort law in the common law countries whereas the criminal aspect prevails in the other systems of law".⁴⁹ It is thought that the Lingens judgment cannot be simply distinguished on the ground that it deals with criminal libel. Article 10 of the Convention is concerned with restrictions of any kind on free speech, the Lingens judgment is delivered on the basis of Article 10, and there is nothing in that judgment that turns on the fact that a criminal offence was in question. Moreover, the Austrian Criminal Code defines defamation in very similar terms to our definitions of defamation.

⁴⁸ Series A no.103, 8 EHRR 407.

⁴⁹ *International Encyclopedia of Comparative Law, Torts*, 10.70. This statement is borne out by the analysis of the law of European countries undertaken by Interights for the *Lingens* case.

LINGENS V AUSTRIA

The Background

325. The material which resulted in the applicant's criminal conviction under the Austrian Criminal Code consisted of two articles written in the course of a political controversy following an Austrian General Election in 1975. The subject matter on which the articles were based consisted of a number of events shortly after the elections. The three central figures in the controversy were Mr Simon Wiesenthal, President of the Jewish Documentation Centre, Mr Friedrich Peter, President of the Austrian Liberal Party, and Mr Bruno Kreisky, retiring Chancellor and President of the Austrian Socialist Party. In the course of a television interview, Mr Wiesenthal accused Mr Peter of having served in the First SS Infantry Brigade during the Second World War. This Unit had on several occasions massacred civilians behind German lines in Russia. Mr Peter admitted membership of the unit, but denied participation in the atrocities.

The following day, Mr Kreisky was questioned on television about these accusations. Prior to the election, the possibility of a Peter-Kreisky coalition had been canvassed, and shortly before this second interview, Mr Kreisky had in fact held a meeting with Mr Peter, which had aroused great public interest. At the interview, Mr Kreisky excluded the possibility of a coalition because his party had won by an absolute majority. However, he strongly supported Mr Peter and referred to Mr Wiesenthal's organisation and activities as a "political mafia" and "mafia methods". Similar remarks by Mr Kreisky were reported the next day in a Vienna newspaper to which he gave an interview. At this point, the applicant published two articles in the Vienna magazine "Profil", one entitled "The Peter Case" and the other, "Reconciliation with the Nazis, but how?" In the course of the discussion in these articles, the author made certain pejorative remarks concerning Mr Kreisky. Mr Kreisky then successfully brought two private prosecutions against the applicant, Mr Lingens, under the Austrian Criminal Code.

The Articles

326. It is worth setting out the contents of the two articles so that the reader may compare how the material might have been dealt with under Irish law. The First Article, "The Peter Case", related the post-election events and described the activities of the first SS infantry brigade. It drew attention to Mr Peter's role in the criminal proceedings instituted against members of that brigade, and drew the conclusion that although Mr Peter was entitled to the presumption of innocence, his past nonetheless rendered him unacceptable as an Austrian politician. The article went on to criticise Mr Kreisky, and with regard to the latter's criticisms of Wiesenthal, the applicant wrote that if the remarks had been made by somebody else, it would have been described as the "basest opportunism". However, he added that the position was more complicated because Mr Kreisky believed what he was saying.

The second article, "Reconciliation with the Nazis, but how?", began by recalling the facts and stressing Mr Kreisky's influence on public opinion. Mr Kreisky was then criticised for supporting Mr Peter and also for his accommodating attitude to former Nazis who had recently taken part in Austrian politics. This was followed by six sections, covering, among others, the following views and themes:

- (i) Austria had produced numerous war criminals, but rather than dealing with its past, it had ignored it.
- (ii) Mr Kreisky's behaviour could not be criticised on rational grounds, but it was nonetheless immoral and undignified, and evidenced a lack of tact in his dealings with victims of Nazi treatment.
- (iii) Collective guilt and innocence; types of responsibility; the difference between those who commit offences and those who may be regarded in moral terms as accomplices.
- (iv) The ordinary forces in the Third Reich versus the special units, for which one volunteered.
- (v) Defence of Mr Wiesenthal.
- (vi) Comparison between Mr Kreisky's reaction in the Peter case and his reaction in an affair of a more economic nature. The circumstances of the first made Mr Kreisky unfit to be a politician.
- (vii) Criticism of political parties in general due to the presence of former Nazis in their ranks.

The Article finished with the comment that Mr Peter ought to resign, not to admit guilt, but to prove that he possessed a quality unknown to Mr Kreisky, namely tact.

The Austrian Criminal Code

327. Mr Lingens was prosecuted under Article 111 of the Austrian Criminal Code. This article defines libellous material and broadly speaking, provides truth as the only defence. Article 111 reads as follows:

"(1) Anyone who in such way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honour or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine.

(2) Anyone who commits this offence in a printed document, by

broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine.

(3) The person making the statement shall not be punished if it is proved to be true. As regard the offence defined in para 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true."

A number of points of difference between this and the common law may at once be noted. Firstly, as mentioned above, a libel is dealt with as a criminal offence instead of as a tort. However, the definition of a libel is essentially the same. Secondly, a defence of truth is the only one available. There is no defence similar to our defences of fair comment or privilege. In particular, there is no defence at all for statements of opinion. Thirdly, the defence of truth is slightly more lenient for the defendant than at common law. With the exception of media defendants, an important exception, the defendant may establish a defence by showing that the circumstances gave him sufficient reason to assume that the statement was true.

It is strongly arguable that the articles written by Mr Lingens would have been protected at common law. Provided the facts on which his comments were based were true, he was entitled to make statements of opinion. Even if these were required to be fair, it is likely that Mr Lingens could have availed of the defence. The wide margin given in court to the word "fair" means that even exaggerated, prejudiced or controversial views come within the defence. Reform bodies have deemed the word "fair" to be redundant and have recommended its abolition. Under this reform, Mr Lingens would probably have had a defence under Irish law because he had expressed an opinion based on fact.

The European Court Judgment

328. The European Court of Human Rights took note of the wording of Article 10 of the Convention. Article 10 of the Convention reads as follows:

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity of public safety, for the protection of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others*, for preventing the disclosure of information received in

confidence, or for maintaining the authority and impartiality of the judiciary."

The question at issue was whether Article 111 of the Austrian Criminal Code, undoubtedly a restriction on free speech imposed by law, was a restriction "necessary in a democratic society", within the meaning of Article 10 subsection 2. In order to satisfy this condition, a restriction would have to be "proportionate to the legitimate aim pursued" and the reasons adduced by the Austrian Court would have to be "relevant and sufficient".⁵⁰

329. The Court began by restating a commitment to open discussion and with a reminder that this often entails the voicing of opinions which many find disagreeable and uncomfortable.

"In this connection, the Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self fulfilment. Subject to paragraph 2, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society ..."⁵¹

330. An extremely important aspect of the Court's judgment is the emphasis laid on the discussion of public figures.

"Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 §2 enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues".⁵²

50 Judgment of the Court at 25-6.

51 Judgment of the Court, para 41.

52 Judgment of the Court, para 42.

Arguably, the court was pointing in the direction of the developments in the United States. On the other hand, a wide latitude of discussion of politicians may be achieved in ways other than by use of the "public figure" concept.

331. The court proceeded to examine the articles which had led to the applicant's convictions. It noted the heated political background to the remarks, the fact that the comments concerned Mr Kreisky's reputation as a politician, and concluded that "impugned expressions are therefore to be seen against the background of a post-election political controversy ..., in this struggle each used the weapons at his disposal; and these were in no way unusual in the hard-fought tussles of politics".

Perhaps the most crucial aspect of the court's judgment, and probably the ratio of the case, is the position taken on facts versus opinions:

"In the Court's view, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The Court notes in this connection that the facts on which Mr Lingens founded his value judgment were undisputed, as was also his good faith ..."⁵³

332. Examining Article 111 of the Austrian Criminal Code in light of these observations, the Court noted that a journalist could escape conviction only by showing the truth of his statement and said:

"As regards value judgments, this requirement is impossible to fulfil and it infringes freedom of opinion itself, which is a fundamental part of the rights secured by Article 10 of the Convention."

Accordingly, the restriction on free speech represented by Article 111 of the Austrian Criminal Code was not "necessary in a democratic society" and was not proportionate to the legitimate aim pursued, and was, therefore, in breach of Article 10 of the Convention.

Implications for Ireland

333. There are three possible readings of the ratio in the *Lingens* case. The narrowest ratio in the *Lingens* case is that Article 111 of the Austrian Criminal Code was in breach of Article 10 of the Convention because the defence of truth, the sole defence available, gave insufficient room for freedom of expression. A slightly wider ratio could be that Austrian law was in breach of the Convention as it failed to distinguish between fact and comment. It is arguable that there is another basis for the decision i.e. that Austrian law failed to give a wider latitude to criticism of politicians than to private figures. The Boyle -McGonagle Report placed great emphasis on the latter aspect of

⁵³ Judgment of the Court, para 46.

the European Court Judgment.⁵⁴ It may be, however, that the comments of the European Court in relation to politicians were not necessary to its judgment.

334. It may even be that there were two alternative grounds for the decision, namely (1) that Austrian law failed to distinguish between fact and comment, and (2) that Austrian law failed to give a wider margin of protection to statements concerning public figures. In its study of the law of ten European countries on defamation for the *Lingens* case, Interights emphasised that all the European countries examined both (1) distinguished between fact and comment and (2) allowed a wider range in practice to comment pertaining to public figures, unlike Austrian law. It is notable that Ireland was considered to provide a wider latitude in practice to statements concerning public officials, because the "public interest" limb of the defence of fair comment would be easier to satisfy where the conduct of a public official was at issue.

335. Is Ireland in breach of Article 10 of the Convention? On the basis of the first two *rationes* set out, it is strongly arguable that Ireland is not in breach of Article 10. The defence of truth is not the sole defence provided for in the Irish law of defamation. Irish law does distinguish between statements of fact and comment, specifically by means of the defence of fair comment. The *Lingens* case gives added weight to the case for clarifying the defence of fair comment, so that it is apparent that as long as the supporting facts are true, the margin of comment permissible is wide, perhaps infinite. This could be achieved by dropping the requirement of "fair" in the defence (bearing in mind that the comment must still be supported by true facts) and abolishing the element of malice, which currently destroys the defence of fair comment.

336. It is also arguable that even under existing Irish law, the defence of fair comment would have protected the remarks made by Mr Lingens. This is strongly supported by the observations of the European Court that the facts supporting the opinions set out were true.⁵⁵ It may also be noted that Interights supported the view that under the defence of fair comment, Mr Lingens would not have been held liable in Ireland.

337. The main point of attack in relation to Irish law would be that it does not differentiate between private figures and politicians. The European Court envisaged that a wider protection be given to statements concerning politicians. Irish law does not make a theoretical differentiation on this basis. However, as noted above, it may be that a wider latitude of opinion with respect to public figures is allowed in practice. On this view there would be no need to provide expressly for such a distinction.

Furthermore, we have suggested in this report that the defence of fair

54 *Report on Press Freedom and Libel*, para 4.4.

55 Para 46 of judgment.

comment be widened in a number of respects. A wider range of opinion on any matter would be protected as a result, and therefore no special category for public figures would be necessary.

It is unlikely that the *Lingens* case could be read as advocating a wider protection for *factual* assertions concerning public figures. However if this is proposed, we would feel that such a distinction is undesirable on the basis of reasons set out in a later chapter.⁵⁶

⁵⁶ See below p396.

IV. FACTUAL STATEMENTS

Introduction

338. We have deliberately dealt with privileged statements and statements of opinion in advance of statements of fact. If a defendant makes a statement which can be defended on grounds of privilege or comment, or want of publication or other such ground, he will usually defend it on these grounds rather than attempt to defend it on grounds of truth. We wish to emphasise that the statements of fact discussed in this section are statements of fact to which no other defence applies. Therefore if the defendant fails to make out the defence discussed in this section, he will be liable in defamation. We therefore define the range of factual statements covered in section IV as factual statements to which no other defence applies.

A. JUSTIFICATION¹

1. TITLE

339. The title "justification" was originally used to describe all the defences available to a defamation action, but when the defences of qualified privilege and fair comment developed in their own right, the term ceased to apply to them and continued to apply only to the defence of truth.² For this reason, the title "truth" has been suggested as being more appropriate and simple and its use has been recommended by the Australian Law Reform Commission, the New Zealand Law Reform Commission, the English Faulks Committee on Defamation and the Boyle-McGonagle Report. We are not entirely convinced that this is a desirable change. When it is borne in mind that the defence is available where the statements complained of consist partly of truth and partly of untruth, to describe the defence as "truth" rather than "justification" may not represent an improvement. However, *we invite suggestions as to whether the name of the defence should be altered as suggested.*

2. SUBSTANCE OR STING

340. It is usually stated that the defendant who pleads justification must prove that the imputation was true in substance. To do so he need not establish the literal accuracy of every charge, but must extract the "sting" from the matter complained of.³ However, Gatlley threw some doubt as to how strict this rule was by saying:

1 In order to avoid excessive footnoting, it will be noted that discussion by reform bodies of Justification is located as follows - Australian Law Reform Commission Report, paras 120-131, New Zealand Committee Report, paras 104-136, Faulks Committee Report, paras 127-146.

2 McDonald, *Irish Law of Defamation*, p 98.

3 See above under Present Law.

"If the words impute a specific offence e.g. stealing a watch, it is not enough to prove that the plaintiff was guilty of another offence though of the same character, e.g. stealing a clock. If the words impute that a plaintiff stole a watch from A it is not enough to prove that the plaintiff stole a watch from B. If the words impute that the plaintiff stole a watch on a particular day, it is not enough to prove that the plaintiff stole on some other day"⁴

This would appear to run counter to the comments of Lord Shaw in *Sutherland v Stopes*, quoted at paragraph 59 of Part I. Lord Shaw stated that the defence of justification would not fail if the defendant alleged that a saddle had been stolen and sold the next day, where in fact it was sold a week later. In other words, the failure to prove the truth of a minor detail would not be fatal to the defence.

341. The New Zealand Law Reform Commission felt it necessary to dispel any confusion in this area and recommended the enactment of the following provision:

"In an action for defamation, a defence of truth shall not fail by reason only that the facts proved to be true differ from the charge against the plaintiff in the words published, if the degree to which they differ is not material so far as any question of injury to the reputation of the plaintiff is concerned."

The Australian Law Reform Commission formulation was that matter should be regarded as being true if the matter, and the imputation in the matter, was in substance true or in substance was not materially different from the truth.

342. We agree that the defence of truth in this context should be as clear as possible. It has been represented to us by journalists that in practice the failure to prove minor details becomes fatal to their defence of truth. On balance we feel the Australian formulation is clearest. *We therefore provisionally recommend the enactment of a provision that an imputation shall be proved to be true if it is in substance true or in substance was not materially different from the truth.*

3. SECTION 22 AND PARTIAL JUSTIFICATION

343. At common law, if the defendant made four severable defamatory statements of fact he was obliged to prove the truth of each statement in order to achieve a full justification. If he proved the truth of three out of four allegations, he achieved a partial justification only and was liable in damages for the fourth allegation.

Following a recommendation of the Porter Committee in 1948, the

⁴ Gatley, *Libel & Slander*, 6ed, para 354. Footnotes omitted.

Defamation Acts in England and Ireland contain a provision altering this position. This is contained in section 22 of our Defamation Act 1961:

"In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

Essentially this meant that the defendant could "convert" a plea of partial justification to a full justification and thereby have a complete defence. He could only do this where the unproved statement or statements did not add material injury to reputation having regard to the injury caused by the statements proved to be true. Using the example above, if the defendant proved the truth of three out of four allegations, the question then became whether the remaining statement added material injury. If it did not, he had a complete defence; if it did, he was liable in damages in respect of that statement.

344. Although this result is straightforward, s22 is in some ways a curious provision. The rationale may have been to prevent a plaintiff from recovering damages in respect of some statements when the proof of the truth of other statements showed that he really was not entitled to any. From this point of view, the section was striking at damage awards. Unfortunately, the mechanism used i.e. conversion of a partial justification to a full justification, left the section open to the interpretation that the truth of the proven statements in some ways made the untruth of the remaining statement immaterial, or worse, made the remaining statement true.

A new problem then emerged. At common law, if the imputations are severable, the plaintiff is entitled to choose the statements on which he sues. This was evidenced in the celebrated case of *Plato Films v Speidel*.⁵ The plaintiff chose to ignore a number of unsavoury accusations and sued only on a part of the publication. Understandably, the defendants wished to bring in the statements which they had made but which the plaintiff had ignored, so that the court would have a more balanced view of the type of plaintiff they were dealing with. The House of Lords firmly rejected the defendant's attempts to bring the unsued-on parts of the publication into the fray. Yet if the plaintiff had sued on foot of the whole publication the court could have been entitled to look at the whole publication under the section and perhaps deduce that the statements not proved to be true did not add material injury to the plaintiff's reputation, thus exempting the defendant from damages.

345. This leads to an anomalous situation. If a defendant makes four statements, three true and one false, there are two possible outcomes depending on the way the plaintiff conducts his case:

⁵ [1961] AC 1090; discussed above para 63.

(i) If the plaintiff sues on foot of all four, and the defendant can prove the truth of three, the court may then look at the injury caused by the remaining statement under s22 and decide whether the defendant is exonerated from all liability. (ii) If the plaintiff sues on foot of the last statement only, the defendant cannot introduce other parts of the publication and will be liable for the statement complained of (assuming he cannot prove its truth).

346. Some law reform bodies considered that it was unjust that the outcome in such a situation should remain totally at the whim of the plaintiff's manner of conducting his case. They were not, however, agreed as to the manner in which this should be remedied. The first approach is that of the Faulks and New Zealand Committees, who recommended re-wording S22 (or rather its equivalent in their jurisdictions) as follows:

"Where an action for defamation has been brought in respect of the whole or *any part of matter* published, the defendant may allege and prove the truth of *any charges* contained in such matter and the defence of truth shall be held to be established if such matter, *taken as a whole*, does not materially injure the plaintiff's reputation having regard to any such charges which are proved to be true in whole or in part."⁶

347. By contrast, the Australian Law Reform Commission considered the issue as one pertinent to damages. They thought that it was "illogical to say that the truth of other imputations has the effect of making the false imputations sued upon true" (which is what is implied by converting a partial justification into a full one). The real purpose of introducing the unchallenged imputations was to show that the false allegation did not materially affect the reputation of the plaintiff, a matter which was more appropriate for consideration under the heading of damages. It therefore recommended

- (i) maintenance of the common law rules of severance (under which the plaintiff may choose the statements on which he sues) and of partial justification (under which proof of three out of four allegations is always a partial justification only); and
- (ii) a provision enabling the court to look at the whole of the publication whether sued upon or not for the purpose of assessing damages. This was worded as follows:

"In determining the effect of the publication of defamatory matter, regard shall be had to the whole of the publication and the extent to which the defendant proves the truth of the matter concerning the plaintiff in the publication".

6 Faulks Committee Report, Draft Bill, section 4(2). The New Zealand provision in section 10(3) of their Draft Bill is in similar terms.

348. We are of the view that the first approach suffers from two defects. First, it is conceptually unsound. To allow a defendant to convert a partial justification to a full one may be read as implying the unproved statements are *true*, although the intention may have been merely to imply that the unproved statements are *immaterial*, which is quite a different thing. Second, this approach is inflexible. The court must decide whether the unproved statements add material injury or not; the defence hinges on this factor. This is all very well if the statement clearly adds material injury or clearly does not, but in the cases falling into the grey area between these extremes, the court has no way of expressing its view that there was some, but not extensive injury.

349. By contrast, the second approach does not encounter these problems. A partial justification is always that. Unproved statements emerge clearly as such, and even if the plaintiff obtains only nominal damages, the falsity of the statement, as distinct from the injury caused by it, will emerge from such an award. Furthermore, damages may be flexibly assessed, catering for differing degrees of injury caused by the remaining unproved statement or statements. Furthermore, it is an approach better equipped to deal with cases where the unproved statement reflects a totally different aspect of the plaintiff's reputation than that touched only by the proven statements e.g. the first three statements concern fraud, and the fourth alleges the plaintiff was a drunken driver. In such cases, it is particularly inappropriate that the truth of some statements should enable the defendant to construct a complete defence. *We therefore provisionally recommend*

- (i) *the repeal of section 22,*
- (ii) *a return to the common law rules on partial justification,*
- (iii) *the maintenance of the common law rules of severance,*
- (iv) *the enactment of a provision stating that in assessing damages, the court shall have regard to the whole of the publication and the extent to which the defendant proves the truth of matters contained in the publication, irrespective of whether the plaintiff sues on foot of the publication in whole or in part.*

4. PREVIOUS CONVICTIONS OR ACQUITTALS AND JUSTIFICATION

350. At common law, the rule established by *Hollington v Hewthorn*⁷ was that evidence of a previous criminal conviction was not admissible in subsequent civil proceedings, where the same issue was raised for determination. In its application to defamation actions, it meant that if a publisher stated that X was guilty of an offence, he was not entitled to adduce evidence of the prior criminal conviction of X for that offence to justify.

⁷ [1943] KB 587.

351. The English position was altered by the *Civil Evidence Act 1968*, s13 of which provides that in an action for libel or slander in which the question of whether a person committed a criminal offence is relevant, proof that he stands convicted of the offence is "conclusive evidence" that he committed it. In New Zealand, the change has been effected judicially and the weight given to the conviction is different. The test laid down by *Jorgensen v News Media*⁸ is that the previous criminal conviction is "some evidence" of the plaintiff's guilt.

There may already be some basis in Irish law for saying that the rule in *Hollington v Hewthorn* would not be applied by our courts. If evidence of the previous conviction is inadmissible, the court must then go on to consider the issue once again in the civil case. However, it has recently been stated that this may be seen as an abuse of court process, or may constitute evidential estoppel.⁹ If the Irish courts do not wish the issue to be retried, they will presumably be in favour of admitting evidence of the previous conviction.

The status of a conviction of a person not party to the defamation proceedings is also worthy of consideration. For example, suppose in the course of a libel action concerning an allegation of rape brought by the victim of the alleged rape, an issue arises as to the guilt of the alleged rapist, who was previously convicted for the rape in question, but is not a party to the libel action. The argument that it should not be possible to reopen the merits of a criminal conviction by suing for defamation does not apply to situations where the conviction is not that of the person suing.

352. Finally, there is the question of the status to be attached to acquittals. The Law Reform Commission in England recommended that in defamation proceedings an acquittal should be conclusive evidence of the innocence of the person acquitted. While conceding that there could be exceptional cases in which the public interest could be served by a challenge to the correctness of an acquittal, they felt that on balance, the "great public interest" lay in inhibiting attempts to use defamation actions as a means of challenging the findings of criminal courts. However, this recommendation was not adopted in the *Civil Evidence Act 1968* and has not been followed by other law reform agencies. On balance, we take the same view: while a person acquitted of a criminal offence may not under our law be charged with the same offence at any time thereafter, it does not follow that public discussions of the case should be effectively suppressed by rendering acquittals conclusive evidence of innocence in a defamation case in which the innocence of the persons acquitted is an issue.

Our provisional view is that it would be advisable to clarify the law in this area. In the case of a conviction, it is suggested that this should be treated not merely as evidence of the guilt of the person, but conclusive evidence.

8 [1969] NZLR 961.

9 *Kelly v Ireland*, [1986] ILRM 318.

If it is treated merely as "some evidence", it is hard to see how the court can avoid going into a retrial of the issue to some degree. The guilt of the person has been established in a criminal trial beyond all reasonable doubt and this should be sufficient for the defendant in a defamation action to justify his reference to the plaintiff's guilt.

353. *We provisionally recommend that the law should provide that:*

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

354. *We further provisionally recommend that there shall be no change in the present position in respect of the evidential value of acquittals.*

5. AGGRAVATED DAMAGES

355. Under existing law, aggravated damages may be awarded where the defendant has persisted in an unsuccessful plea of justification.¹⁰ The New Zealand Law Reform Commission considered whether this rule should be altered, but decided that since aggravated damages were awarded only where the defendant by persisting in the defence has caused further damage to the reputation and feelings of the plaintiff, there was no need to effect any change.

Two arguments are put forward by McDonald against this rule.¹¹ Firstly, he says that it is offensive to inflate damages for the exercise of a right which the law confers. Secondly, such a course of action may conflict with the immunity accorded to relevant statements made in the course of legal proceedings. McDonald notes that the New South Wales Law Reform Commission recommended that no inflation of damages should be allowed in respect of the way proceedings are conducted.

356. In answer to these arguments, it may be said firstly, that the law does not in this case automatically inflate damages for the right which it confers. Whether or not aggravated damages will be awarded will be a matter of discretion. The court will be reluctant to do so if the defence was conducted honestly, for as Sellers LJ stated in *Broadway Approval v Odhams Press* (No 2):

"The failure to apologise or retract and persistence in a plea of

¹⁰ See above under Present Law, para 68.

¹¹ *Irish Law of Defamation*, p 112.

justification are in themselves not evidence of malice. They may be in certain circumstances but more frequently they would show sincerity and belief in what has been said and establish the best reason for the publication."¹²

The fact that the rule is discretionary dilutes the first argument somewhat. The fact remains that where aggravated damages are awarded, the defendant is penalised for the exercise of a legal right. In answer to this it may be said that the tort of defamation is very different from most other torts and the defence of tort claims would not normally be seen as an attempt to repeat the tort. As to McDonald's second argument, based on the immunity accorded to statements in the course of judicial proceedings, it may be argued that this immunity is too wide as it stands. An exception in an appropriate case of justification may have much to commend it, in view of the fact that the original injury is being repeated and probably increased, by its utterance in a public setting. *Our provisional suggestion is that the rule that aggravated damages may be awarded where there is an unsuccessful defence of justification shall be retained but we invite views.*

357. A different solution is put forward by RTE in their submission to the Law Reform Commission.¹³ Based on the practice in France, RTE suggest that a ban could be created on the reporting of defamation cases by the media, excepting the judgment itself. Accordingly, the raising of truth by a defendant would not increase the circulation of the libel and the issue of aggravated damages would not arise. This could be limited to a ban on reporting anything other than the judgment in defamation cases only where truth is raised as a defence. We consider the possibility of in camera proceedings for a different reason elsewhere in this Consultation Paper.¹⁴ We are not yet convinced of the merit of this suggestion.

6. REASONABLE BELIEF IN TRUTH

358. The Australian Law Reform Commission raised the possibility in its Discussion Paper of a defence of "reasonable belief in truth." This is to be contrasted with the current position under which only actual truth is a defence. The proposed defence would protect the defendant if he could prove that after making reasonable enquiries and on reasonable grounds he believed the matter to be true, provided also that he afforded the defamed person a full and adequate right of reply. The defendant would still be obliged to make a correction and pay for actual loss, but the fear of a high damage award would be removed.

A number of objections were raised to this suggestion. Firstly, it was said that where a loss must be borne between an active and a passive party, the

¹² [1965] 1 WLR 805, 814.

¹³ Part of an RTE submission to this Commission.

¹⁴ See below p341 et seq.

active party should bear the loss. Secondly, the state of mind of the defendant does not affect the actual loss by the plaintiff and he should not be denied redress simply because the defendant believed in the truth of the statement. As against this the defendant is obliged to print a correction and so the plaintiff is not totally without redress. Thirdly, it was said that harmful acts without legal justification should bear the consequences. To this it may perhaps be replied that this begs the question, for the question at issue is whether reasonable belief should constitute a lawful justification. Finally, it was argued that the surrounding circumstances, including the reasonable belief of the publisher, would lie better as a means of reducing damages, rather than as a complete defence.

359. Accordingly, the Australian Law Reform Commission decided not to recommend reasonable belief in truth as a defence, and instead included it among the surrounding circumstances which may affect damages. In their model Bill, they provided as follows in Section 28:

- (1) Subject to sub-sections (3) and (4), in assessing damages in a defamation action, regard should be had to:
 - (a) the nature of the defamatory matter and the *circumstances in which it was published* including the extent and manner of publication; ...
 - (f) the nature, extent, form, manner and time of publication of any *correction, retraction or apology* by the defendant;
 - (g) the nature, extent, form, manner and time of publication by the defendant of any reply to the original publication;...

The example of *Cassidy v Daily Mirror Newspapers*¹⁵ might be cited as an example of where such mitigation of damages would be appropriate. In that case, Mr Cassidy had told the journalist that he was engaged to Miss X, and allowed their photograph to be taken together. The photograph and an announcement of their engagement were published. In fact, Mr Cassidy was already married and Mrs Cassidy brought an action in defamation.

Understandably, the publisher should not have a complete defence because the injury to Mrs Cassidy's reputation was the same, irrespective of the defendant's state of mind. However, a correction order would have gone some way to vindicating Mrs Cassidy's reputation, combined with damages. But it seems just that lesser damages would be awarded in such a case than one in which the defendant had published the material without any checking of the facts.

360. It may be noted that the Austrian Criminal Code contains a defence to a libel action based on proof by the defendant that he had sufficient reason

¹⁵ [1929] 2 KB 331.

to assume that the statement was true. In Austria, defamation is dealt with under the criminal branch of the law, but it would be inaccurate to compare it to our law of criminal libel. Defamation in most civil law countries is dealt with as a crime rather than a tort. The definition of defamation under Article 111 of the Criminal Code is very similar to that at common law; the offence is committed if:

"anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honour or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem".

361. In addition to the defence of truth, a defendant is also exempted from liability "if circumstances are established which gave him sufficient reason to assume that the statement was true".¹⁶ However, this defence is not available to media defendants.¹⁷ Unlike the Australian proposal, this is a complete defence rather than a matter which may mitigate damages.¹⁸

362. We believe that "reasonable belief in truth" should not be isolated as a factor which would either (i) bar liability (ii) bar liability subject to the requirement of making a correction or (iii) mitigate damages. We feel that "reasonable belief in truth" is but one example of conduct involving a lack of fault on the part of the defendant. Accordingly it is relevant to a discussion of whether a fault standard should be introduced into Irish law, whether in the form of (i) barring liability, (ii) barring liability provided the defendant complies with other conditions, (iii) mitigating damages. The issue of fault is dealt with elsewhere in this Report. Accordingly *we do not recommend any provision in relation to "reasonable belief in truth" alone.*

16 Article 111(3).

17 Combined effect of Article 111(2) and (3).

18 See *Lingens v Austria*, Series A, no 103, 8 EHRR 407.

B. WIDER DEFENCES FOR FACTUAL STATEMENTS

363. This section explores a variety of defences advocated in respect of factual statements. Some of these defences would be confined to the media. Others would be available to any speaker provided the subject matter concerns either a matter of public interest or a particular type of plaintiff, whether public figure, public official or both. Most of the defences incorporate alternative remedies such as apology, correction, opportunity to reply or explanation. The feature common to all of these defences is that they share the premise that the defence of truth is too stringent where the subject matter concerns issues necessary to public debate.

364. The defences examined are those recommended, considered by, or governing in, the following jurisdictions or bodies: (1) the United States (2) New Zealand Committee (3) the Faulks Committee (4) the National Newspapers of Ireland. We confine our discussion to the applicability of these defences to factual statements only. Accordingly where a particular defence deals with opinions we omit such reference. We conclude by examining the reaction of the Australian Commission to such defences, which we feel is useful in the light of the fact that Australia has experience of such a defence.

1. The United States

365. There is a defence in the United States for a publisher who makes a factual statement concerning a public figure or a public official. This defence may be defeated by a proof by the plaintiff that the defendant published with "malice", defined as actual knowledge of falsity or reckless disregard of falsity. The defence is not confined to the media. There is no requirement that the

matter be one of public interest.¹⁹

366. It is not in dispute that there is a public interest in the exposure of official misconduct. We emphasize that by "official misconduct" we mean the actions of public officials purportedly carried out in the performance of the official's duties. We are not of the view that every thought, word or deed of a public official is a matter which should be exposed to the public. The United States defence outlined carries the clear advantage over the common law position that official misconduct may be exposed and the defendant will not be penalised on the basis of failure to meet a legal standard of proof unless he was actually aware of, or reckless as to, the falsity of the statement. We accept the value of exposure of such conduct as a contribution to public debate and the process of self-government.

367. In our section on United States law we made a number of criticisms of this defence and we summarise these as follows. *First*, the defence is open to negligent defendants and we think that it would allow, if not encourage, low standards of journalism and other means of criticising public figures' conduct. *Second*, the public interest is not served by this defence. As we have stated, it is not in dispute that there is a high public interest in the exposure of official misconduct. However we do not agree that this public interest is well served by false accusations of official misconduct. Indeed, it might be argued that since the stakes are so high in a case involving a public figure, it is all the more reason for requiring high standards in relation to truth. The defence under examination does not allow the truth to come out. Careless and negligent false factual assertions are protected. We question the assertion that such forms of expression make a valuable contribution to public debate, and therefore the assertion that a defence which protects such forms of expression serves the public interest. *Third*, we suggested that the defence under consideration was permissible under the American Constitution where the right of free speech is given explicit guarantee without being accompanied by a guarantee of reputation, but that it might be impermissible under the Irish Constitution which specifically guarantees the protection of both rights. *Fourth*, we are not convinced that a dichotomy between public and private figures would be in keeping with the Irish Constitutional guarantee of equality before the law, even though this equality may take into account the different social function of individuals. We are not convinced that the central social function of a public figure or official justifies allowing negligent false factual assertions to be made about such a person and remain uncorrected. *Fifth*, we drew attention to the increased costs in defamation actions where the plaintiff is required to illustrate the defendant's state of mind and concluded, on the basis of American legal writing, that such costs could result in censorship of true material as chilling to free speech as the original common law position. *Finally*, we suggested that a legal framework that does not provide redress for false factual statements *per se* damaged the credibility of media generally.

19 However, where the matter is one of public interest the onus is on the plaintiff to show falsity, under *Hepps v Philadelphia Newspapers* (1986) 475 US 767.

368. We accept that a number of alterations to the defence examined would render it more acceptable, namely:-

- (1) provision for alternative remedies such as reply, explanation or correction,
- (2) the widening of the fault standard to include negligent preparation of a factual assertion,
- (3) confining the category of plaintiffs to whom the defence is applicable to public officials and politicians, but excluding public figures and
- (4) reversing the burden of showing fault so that the onus is on the defendant to show he met a specified standard.

These amendments are incorporated into the following defences and will be considered individually.

2. *Faulks Committee*

369. The Faulks Committee considered but rejected a defence proposed to them. The proposal provided a defence if the following conditions were satisfied:

- (1) the matter was one of public interest,
- (2) the publisher believed the statement of fact to be true,
- (3) the publisher exercised reasonable care in relation to such facts.

We will set out the Faulks Committee arguments against this proposal and our counter-arguments to those, followed by our own objections to the proposal.

- (1) *Although the privilege would in theory benefit all classes of publishers, it would in practice place the media in a special position, which was undesirable.*

The proposal makes no distinction between media and other defendants and it is difficult to see how it would place the media in a "special position", unless this is a reference to the "public interest" limb of the proposal. However the effect of the "public interest" element is that media defendants will more *often* be able to avail of the defence, which is not the same as placing them in a special position. Furthermore, if the rationale of the defence is to increase reporting of matters of public interest, and the result is that the media avail of it, then so be it. This is merely the inevitable result of the fact that the media report matters of public interest and is not the creation of a special category for them

alone. Finally, due to the explicit recognition of media rights in the Irish Constitution, there may be strong arguments for creating a special position for media defendants.

- (2) *There was a lack of evidence illustrating that the current law handicapped publishers -*

"... the frequent assertion that newspapers have in their archives hundreds of files which would reveal dreadful goings on has never been established to the satisfaction of any conscientious witnesses."

We are not in agreement as to what the position in Ireland may be. Some of us feel that it has been amply established that the Irish media are hampered by the laws of libel and that they are engaging to some degree in blanket self-censorship i.e. censorship of all defamatory material irrespective of whether it is true or not. the term "self-censorship" is favoured in the United States, but we prefer the forms "non-selective censorship" or "blanket censorship". Those of us holding this view start from the premise that the media serve a vital function in a democracy by providing the citizen with access to the information he needs in order to make informed decisions about self government. There appears to us to be little doubt that the difficulties of meeting the legal standards of truth are restricting this flow of information at present. However, although we would wish to unblock the channels of full and accurate information, we would also wish to withdraw false and misleading material from the public arena. If we reject the media qualified privilege, it will be because we feel that it is inadequate in failing to distinguish between high quality and low quality information. They are not to be rejected, on this view, on the basis that current media blanket-censorship is a myth.

However, others among us feel that, while blanket-censorship may not be a myth, the scale of the problem is exaggerated. Those of us holding this view think that many of the difficulties at present experienced by the media are the result of lack of care in checking facts and reliance on questionable sources rather than the alleged rigidity of the law of defamation.

- (3) *The media qualified privilege would seriously alter the present balance in the law of defamation.*

Our views are divided as to whether the present law is just. Some of us question the assumption that the current law is just and feel that the balance at present is unduly weighted against the media. Others among us feel that the present balance is about right and that the alteration under scrutiny would not be desirable.

- (4) *The media qualified privilege would introduce further complexity, length and*

costs into defamation actions.

This may be true in England, but complexity and length are not features of Irish defamation cases. Accordingly this factor would not justify rejecting the proposed defence in this jurisdiction. In any event, we feel that even if increased costs were the result of the introduction of the defence under scrutiny, this factor should be determinative only if all other factors are equal. We consider that substantive arguments should take priority over questions of costs.

- (5) *The defence would not work so long as the media hold to their principles of non-disclosure.*

We believe that the merit of this argument depends upon how the defence would work in practice. "Reasonable care" might be established without referring to sources except to the extent of mentioning that there were sources, and that they had been used on previous occasions and so on. It would presumably be for the court to deduce whether the defendant had in fact exercised reasonable care. However if the courts developed a principle, as did some American courts, that failure to disclose sources raises a "no-source" presumption, the defence might remain a dead letter. *We invite views as to this aspect of the defence.*

370. Our principle objections to the defence were not outlined by the Faulks Committee and are as follows:

- (1) *No provision is made to rectify the damage done to the plaintiff.* Although the exercise of reasonable care by the defendant may justify failing to award damages against him, it does not necessarily justify leaving the plaintiff remediless.
- (2) *The truth or otherwise of the statement complained of will remain unknown.* The most we can know is that the publisher exercised reasonable care in relation to the assertion and believed it to be true. This is unsatisfactory from everybody's point of view. The plaintiff may have been the victim of a false statement and yet cannot correct it. The public do not know who to believe and the public flow of information is left more confused than enhanced. Following from this, the media suffer a deterioration in credibility.

To sum up we do not favour the defence under examination because it fails to provide any redress to the victim of a false statement of fact and it makes no provision for ascertaining the truth where the statement is false, which detracts from the degree of public interest which the defence should serve.

3. *New Zealand*

371. The New Zealand Committee devoted a chapter to a consideration of a statutory defence of qualified privilege for the media. In that jurisdiction, the courts had refused to recognise that the media in modern society has a duty to provide information on matters of public interest and to publish such information to the public.²⁰ It should be noted that in Ireland the courts have declined to recognise that journalists enjoy any right to refuse to reveal confidences or disclose sources of confidential information where the court requires such revelation or disclosure; *Re O'Kelly*.²¹ In this context, the Irish courts have adopted a more rigid approach than that adopted in England as to the circumstances in which such revelations or disclosures should be compelled by the court. In that jurisdiction, the law has also been liberalised in favour of the media by the *Contempt of Court Act 1981*.

The New Zealand Committee noted that the Faulks Committee had rejected the contention that the absence of this added protection had a chilling effect on the media. However, it drew attention to what it considered an important point of difference between the UK and New Zealand, a point which is of direct interest to the Irish media:

"Although the law of defamation in England and New Zealand may be the same, the publishing environment is not. The national press in Great Britain is much larger and wealthier and has greater resources for obtaining and verifying information in a manner which cannot be achieved in New Zealand. As a result the national press in Great Britain is better able to resist the threats of actions, to afford the defence of proceedings, and to pay the damages if found liable. The New Zealand press with fewer resources tends to be overcautious in its approach to publishing material. Even the major newspapers in New Zealand publish in an atmosphere less favourable than their British counterparts."²²

372. The New Zealand Committee recommended a new defence, the central elements of which were a requirement that the publisher had acted with reasonable care and that he gave the defamed person an opportunity to publish a statement explaining or refuting the original argument. The proposal was as follows:

- "(1) Subject to the provisions of this section, matter published in a news medium shall be protected by qualified privilege if:
 - (a) The subject-matter of the publication was one of public interest at the time of publication; and

20 *Truth (New Zealand) Ltd v Holloway* [1960] NZLR 69.
21 (108 ILTR 997).
22 Para 223.

- (b) So far as the matter consists of statements of fact, the person by whom it was published at the time of publication acted with reasonable care in all the circumstances and believed on reasonable grounds that the statements of fact were true; and
 - (c) So far as the matter is an expression of opinion-
 - (i) The opinion was at the time of publication the genuine opinion of the person by whom it was published; and
 - (ii) The opinion was at the time of publication capable of being supported by any statements of fact to which paragraph (b) of this subsection applies, either by themselves or in conjunction with any other facts known at the time of publication to the person to whom the publication was made; and
 - (d) The defendant has given the person who claims to be defamed by the publication an opportunity to have a reasonable statement of explanation or of rebuttal, or both explanation and rebuttal, published in the same medium as the publication complained of, with adequate prominence and without undue delay.
- (2) A defence of qualified privilege under this section by a defendant shall fail unless he proves:
- (a) Where he has received a written complaint from the aggrieved person, that within 30 days of receiving the complaint, the defendant supplied to that person a statement in writing specifying-
 - (i) The grounds on which the defendant believed that the statements of fact in the publication were true; and
 - (ii) The steps, if any, that the defendant had taken to verify the accuracy of those statements of fact; and
 - (b) That in giving the aggrieved person the opportunity to have a statement published under subsection 1(d) of this section the defendant offered to pay-
 - (i) The costs of publication; and

- (ii) The solicitor and client costs of the aggrieved person claiming to have been defamed; and
 - (iii) All other expenses reasonably incurred in the matter by the person claiming to have been defamed.
- (3) In an action for defamation that is tried before a judge and jury, where a defence of qualified privilege under this section is raised, it shall be for the judge alone to determine whether the defence is established.

373. The proposal is similar to the proposal put to the Faulks Committee, except that it incorporates a right of explanation or contradiction. RTE have expressed their approval of the New Zealand proposal in relation to the qualified privilege defence for the media.²³

The main features of this proposal are therefore:

- (1) that the matter was one of public interest,
- (2) that the defendant granted the plaintiff an opportunity to reply,
- (3) in relation to facts, that the defendant acted with reasonable care and believed the matter to be true on reasonable grounds.

374. *We prefer this defence to that suggested by the Faulks Committee.* By providing the plaintiff with an opportunity of reply, the proposal at least addresses the problem of leaving the victim remediless where the defendant can fulfil the conditions of the defence. Therefore although no damages may be awarded in respect of a false statement of fact (provided the conditions of the defence are complied with), the plaintiff would have an opportunity to air his viewpoint. This might not address the argument that there is no way of determining the truth. However perhaps this is not necessary where the subject matter is one of public interest. It might be sufficient to allow the plaintiff the opportunity to reply.

375. A variant on this defence would be to base it not on "public interest" but on public officials and politicians. Under this defence it would be a defence to an action in respect of a factual assertion to show that -

- (1) the plaintiff was a public official or a person active in public affairs
- (2) that the defendant acted with reasonable care and believed the matter to be true on reasonable grounds, and

²³ Part of an RTE submission to this Commission

(3) that the plaintiff was afforded an opportunity of reply.

376. *We prefer the emphasis on public officials and politicians rather than "public interest".* As with the "public figure" definition, the focus on "public interest" would reduce protection for many people caught up in events of public interest who were not acting in any representative or official capacity.

377. A broadly similar proposal was put forward by *Justice*, namely that a qualified privilege should attach to statements based on information which might reasonably be believed to be true, provided that the defendant published a reasonable statement from the plaintiff by way of explanation on request and, if necessary, an apology. Some pertinent comments made by R.F.V. Heuston with respect to this proposal are worth quoting and considering in this context more generally -

"The recommendation loses sight of the fact that there is an important difference between two quite distinct functions of the Press in a free society. One function is to provide its readers with fair and accurate reports of proceedings before courts and tribunals and at public meetings. The common law always protected such reports of qualified privilege, and the gaps which appeared in this umbrella were repaired by the Defamation Act, which greatly extended the list of tribunals and other bodies whose proceedings could be safely reported ... A second function of the modern newspaper is to provide its readers with news, and gossip and comment and criticism founded on that news, concerning public events and people in the public eye occupying positions of public importance ... Now the *Justice* proposal clearly relates to statements which fall into the second and not the first category. It deserves very careful examination before it is adopted ... *First*, one cannot help wondering how the plaintiff will in practice be able to discharge the task of proving lack of reasonable care on the part of the defendant newspaper ... [E]ven the most academic lawyer is entitled to notice that for many years interrogatories as to a newspaper's sources of information or belief have not been permitted and that in 1949, on the recommendation of the Porter Committee, the Rules of the Supreme Court were amended so as to extend this privilege to all defendants, when fair comment or qualified privilege is pleaded ..."²⁴ *Secondly*, the journalists may choose to go to prison for contempt of court rather than answer a question as to sources or grounds of belief ..."²⁵

Later in the same article, Heuston comments -

"Not much weight can be placed on the conclusion of the Working Party set up by *Justice*. For the fact that it took evidence only from the Press, and in private, entitles its conclusion to as much weight as if it

²⁴ There is no such rule in the Irish R.S.C. (1986).

²⁵ "Recent Developments in the Law of Defamation" (1966) IrJur.247 at 262-3.

had consulted only Broadway Approvals Limited and Messrs Lewis and McCarey and concluded that the only flaw in the present law was the tendency of appellate courts to interfere with awards of juries".²⁶

4. *National Newspapers of Ireland*

378. The NNI proposed a defence which was a hybrid of the United States defence and the New Zealand proposal. No action in respect of a defamatory statement of fact could be taken unless the plaintiff showed (1) that the matter was of public interest and either (2) that the defendant refused to publish a reply or an apology, or (3) that the defendant published with actual knowledge of falsity or in reckless disregard of falsity. Because (2) and (3) are read disjunctively, the effect is to bar all actions where a reply or apology is published (assuming it is a matter of public interest) except where the plaintiff can show malice. There is no requirement that the defendant meets a standard of reasonable care. It may also be noted that a reply or an apology is sufficient to bar the action in the absence of actual knowledge or recklessness as to falsity. Therefore a defendant could make a false assertion of fact which was negligently prepared and escape liability simply by publishing an apology.

The only major difference between this defence and the United States defence is that provision is made for reply or apology. Our argument that the United States defence leaves the plaintiff entirely remediless is therefore addressed to some extent. There is one other difference which we feel is apparent only; the United States defence is based around "public figures" while the NNI defence is based around "public interest". In general, the same type of speech is subject of the change. *We feel that the arguments against the United States defence apply equally to the NNI proposal and would not recommend its adoption.*

Australia

379. The Australian experience has been different from the common law position. The Codes gave a conditional privilege in respect of matter published "in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit". Initially, this was not seen as widening the common law position, but a series of decisions involving the Code provision in the New South Wales Act culminated in the High Court of Australia decision in *Calwell v Ipec Australia Ltd*,²⁷ where the application of the conditional privilege to the media was firmly recognised. The *Calwell* decision has been replaced in New South Wales by a 1974 Act, but still applies in Queensland and Tasmania. The

26 The reference is to three cases named *Broadway Approvals v Odhams Press* [1965] 1 WLR 805, *McCarey v Associated Newspapers* [1965] 2 QB 86 *Lewis v Daily Telegraph* [1964] A.C.334.

27 (1975) 135 CLR 321.

Australian Law Reform Commission received submissions that a qualified privilege be extended to the media under the new uniform Act. The arguments in favour of such a provision were that it would allow the media to expose misconduct and fault in matters of public interest without the necessity of proving the truth of the matter asserted, so long as the matter is one of public interest and the publisher is not motivated by improper motive. Matter, it was argued, is often true but impossible to prove, and a new qualified privilege for the media would encourage investigative journalism. The question was asked whether abuses of office involved in the US Watergate affair would ever have been exposed if the Washington Post had been obliged to prove the truth of its defamatory assertions.

380. The Australian Law Reform Commission found that there appeared to be no relationship between the existence of the media qualified privilege defence and the level of investigative journalism in any jurisdiction. They found that the factor most affecting investigative journalism was costs. In relation to the Watergate issue, the Australian Law Reform Commission observed that the reporters for the Washington Post did not rely on qualified privilege, but rather on the truth of their statements; the material was constantly checked, and with one exception, all of the defamatory stories could have been proven true in court, with appropriate subpoena powers. The Australian Law Reform Commission concluded wryly:

"If any Australian newspaper had reason to suspect a Watergate-type scandal its problem would be the wisdom of devoting the substantial resources needed for a detailed investigation rather than the law of defamation."²⁸

381. The Australian Law Reform Commission also adverted to one of our primary objections -

"To grant a defence of qualified privilege in respect of media publications necessarily denies to persons publicly defamed all redress. They would have neither correction order nor declaration, nor damages, even for actual money loss, not even a right of reply; this, without obligation upon the defendant to disclose the source of the information upon which the attack was based. The defence opens the way for generalised smears, particularly against persons in public life. To build such a provision into a national Act would visit grave injustice upon persons whose reputation is falsely assailed and who would be without redress simply because their activities are of public importance."²⁹

This argument may be met to some degree by incorporating a right of reply to the defence, as did the New Zealand Committee.

28 Para 145.

29 Para 146.

The Australian Law Reform Commission concluded that while there was indeed a need to encourage public discussion on matters of legitimate public interest, this should be done by according a wider right of reporting material originating from others, who are identified and accurately reported. While we agree that reporting rights should be wider and clearer than at present we feel that this is not helpful where the media organ itself has discovered facts of public interest.

Conclusion

382. Of the defences in respect of false factual statements examined, we believe that the proposal of the New Zealand Committee affords the best balance between the rights of both parties involved and the need to serve public debate. However we will proceed to examine the case for introducing a fault criterion in defamation law generally. Furthermore in our Remedies section we will recommend the introduction of proceedings for a declaratory judgment, and the additional remedy of the correction order which may be used in addition to damages in the action for damages. Accordingly we will defer any recommendation on the New Zealand proposal examined in this chapter until these issues have been considered.

We should also point out that the inhibitions, whatever their extent, which at present exist on the investigation of matter of public concern are not, on any view, solely the consequence of the law of defamation and contempt of court which is the subject of our enquiry. The provisions of the Official Secrets Act 1961 have been frequently criticised as being too restrictive. There have been calls for the introduction of freedom of information legislation of the type in force in other jurisdictions. However, as it is not within our terms of reference, we confine ourselves to pointing out its relevance to the general topic of freedom of expression.

C. DEFENCE OF REASONABLE CARE

383. In Part I we observed that since the tort of defamation was a composite tort, the issue of fault could arise in a variety of ways e.g. Was the defendant at fault in failing to anticipate publication? Was the defendant at fault in failing to see that the statement might be understood to refer to the plaintiff? Was the defendant at fault in failing to realize the statement was false? The discussion which follows centres on the last question i.e. fault in relation to the issue of truth. It is limited to defamatory statements of fact in relation to which no defence other than the defence of justification currently applies.

Under present Irish law, the rule is one of strict liability so that the defendant's state of mind in relation to the truth of the statement of fact is not relevant. The best that a defendant can do is raise the defence of justification and prove the actual truth of the statement (assuming that no other defence applies). However, if the statement is actually a false statement of fact, no distinction is made between defendants who are malicious, reckless or negligent in making the statement, and those who checked out their facts and had reasonable grounds for believing in its truth, or defendants who made a genuine mistake in publishing the statement.³⁰

The most obvious contrast with the common law position of strict liability in relation to falsity is United States law under which the plaintiff must establish fault on the part of the defendant, i.e. actual knowledge or recklessness as to falsity if he is a public plaintiff, or negligence if he is a private plaintiff. It is more difficult to compare European jurisdictions since defamation is more usually dealt with under the criminal law, where fault criteria are to be expected. It is interesting to note, however, that the Dutch Civil Code

30 Except, perhaps, that malice will inflate damages. It is not clear that an honest mistake, for example, will reduce damages.

specifically provides that in a civil lawsuit for defamation an "intention to offend" must be shown. (Article 1412.1).

We have seen that fault in the form of "reasonable care" is central to the defence under section 21 of the Defamation Act 1961. Fault or the state of mind of the defendant is also relevant at least to some degree to the question of damages when the defendant has been found liable.

We have already expressed our views opposing the operation of the American fault standard of actual knowledge of or reckless disregard as to falsity (where the plaintiff is a public figure).³¹ We now suggest that even the lower standard of negligence is unacceptable when the only remedy is an award of damages, because the constitutional guarantee of protection of reputation requires that injury to the plaintiff be righted in some manner. Bearing in mind that we will be proposing the introduction of the new remedies of the correction order and the declaratory judgment, we feel there is, however, a case to be made for a defence of reasonable care. In other words, the introduction of these two new remedies allows us to compromise between the two relevant interests (freedom of expression and vindication of reputation) without having to protect one to the exclusion of the other.

384. We emphasise that two main situations must be distinguished;

(1) Where the plaintiff has suffered injury to reputation and seeks general damages:

e.g. A newspaper has alleged that Mr. O'Brien embezzled company funds and he is being shunned by friends, acquaintances and fellow employees.

(2) Where the plaintiff has suffered injury to reputation and financial damage and seeks both general and special damages:

e.g. A newspaper alleges that Miss O'Reilly, a doctor, performed an illegal operation and she is now being shunned by friends and acquaintances, has lost her job in a major hospital, and claims that it will be difficult for her to set up in private practice because patients no longer trust her.

With respect to the first situation, we feel that the guarantee of freedom of expression requires that some distinction should be made between defendants who exercise reasonable care and defendants who do not. We also feel that the guarantee of protection of reputation requires that some remedy should be available to a plaintiff who has suffered injury as a result of a defamatory publication irrespective of the defendant's conduct. We feel that the balance between freedom of expression and protection of reputation would be better struck by allowing plaintiffs always to obtain a correction order and/or declaratory judgment when a false defamatory statement is published, but by

31 See Part II.

also providing that damages should not be recoverable if the defendant can establish that he exercised reasonable care. However, general damages should be recoverable if the defendant either fails to plead or fails to make out a defence of reasonable care.

To take the first example above, Mr. O'Brien would bring an action in defamation seeking general damages, a correction order and/or a declaratory judgment. Assuming the defendant cannot prove actual truth, the plaintiff will in all events be entitled to a correction order and/or declaratory judgment. If the defendant newspaper can make out a defence of reasonable care, the plaintiff will obtain the correction order and/or declaratory judgment only. If the defendant does not raise the defence of reasonable care, or raises the defence but fails to satisfy the Court that its conduct amounted to reasonable care, the plaintiff can additionally recover general damages.

With respect to the second situation, the balance is somewhat different. If the plaintiff has sustained financial loss, there appears to be no good reason why she and not the defendants, should bear that loss. We are therefore of the view that where the plaintiff can establish financial loss clearly linked with the defamatory publication, he should be entitled to damages in respect of that loss. Examples of the type of financial loss envisaged would include loss of earnings through dismissal from a post, loss of profits such as through the cancellation of a restaurant's dinner bookings, or hospital expenses where the plaintiff has suffered a nervous breakdown in consequence of the publication.

To take the second example above, Miss O'Reilly would bring an action in defamation seeking a correction order and/or declaratory judgment, general damages and special damages. Assuming the defendant fails to prove actual truth, she will be entitled in all events to the correction order and/or declaratory judgment. Assuming she can prove that she suffered financial loss clearly linked with the defamatory publication, she will also be awarded special damages. If the defendant establishes that it exercised reasonable care, she will be entitled to no further remedy. However if the defendant fails to plead the defence of reasonable care, or it raises the defence but fails to satisfy the court that it did in fact exercise reasonable care, the plaintiff will additionally be awarded general damages.

385. *Our provisional recommendations are therefore as follows:*

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

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

386. *What will constitute reasonable care?* Although it will be for the tribunals of fact to decide whether the defendant has convinced them that he exercised reasonable care, we suggest that the following would constitute reasonable care:

- (a) Where the defendant telephones or confronts the plaintiff and asks him to confirm a fact and the plaintiff says "X is true" and subsequently brings a defamation action in respect of an allegation that "X is true". i.e. where the source of the defendant's belief that the matter was true is the plaintiff himself.
- (b) Where the defendant is a reporter of court cases to whom the charge sheet was refused and although he sat as close to the front of the court as he could, misheard the name of the accused and reported it incorrectly, thus defaming another (the plaintiff).
- (c) Where the defendant is a writer of fiction and invented what he thought was a ridiculous name for one of his characters and checked out the telephone directory to see no one of that name existed, and a plaintiff of that name appears and brings a defamation action.
- (d) Where the defendant is informed by persons that they were victims of unfairness by a company e.g. they were thrown off a CIE bus even though they had paid their fares and conducted themselves reasonably, and when he contacts the company he is met with persistent refusals to answer his questions.
- (e) Where the defendant is a historian who has advanced a controversial theory and has plenty of facts to support his allegation against a commander of an army, but the plaintiff commander has in his possession facts which show that the historian's view is wrong; in other words situations where the facts may lend themselves to various interpretations and on the basis of all the facts which the defendant could have got hold of, his allegation was a reasonable one.
- (f) Where a media commentator at a football game says after watching a nasty and controversial tackle that one of the players deliberately fouled another player, when it was judged not to be a foul.

387. It is envisaged that the defence of reasonable care would *not* be available in the following examples:

- (a) Where there are clearly two sides to the story, and the defendant has only investigated one side thereof. e.g. in the above example, the

defendant reporter failed to contact CIE at all and relied only on the statements of the aggrieved persons. Or where the defendant reporter hears from an aggrieved hotel manager that a well-known singer failed to turn up for a booked engagement and publishes this, without talking to the singer in question.

- (b) Where the defendant, a reporter of court cases for a newspaper, did not attend the court proceedings and merely asked the name of the accused of a person coming out the door.
- (c) Where the allegation, if true, would probably result in criminal proceedings against the plaintiff; for example, if a media organ had accused a politician of gun-running on the basis of facts within its possession, which allegation would have to be proved beyond reasonable doubt in a criminal prosecution.
- (d) Where the defendant failed to get hold of all the facts that he could have; for example, if he found out that a person had been accused of embezzling and that a company investigation was under way, and he published that the person was guilty of the charge without waiting to hear the outcome of the investigation.
- (e) Where the defendant claims that certain witnesses can substantiate his story, which witnesses are not prepared to come forward and testify.

D. PRESUMPTION OF FALSITY

388. Under the present law, once the plaintiff has shown the matter complained of to be defamatory, the law presumes the statement to be false. Thus the burden of proof is on the defendant to establish the truth of the statement if he raises the defence of justification.

The Boyle/McGonagle Report suggested that this was the main reason that the defence of justification was pleaded as a separate defence in only a small number of cases (5% of the High Court cases studied). It was suggested that the burden of proof should be reversed, so that the plaintiff would have to show the falsity of the statement. A major problem for media defendants is that their sources are reluctant to disclose themselves in court. Accordingly, it is suggested, it is extremely difficult for a media defendant to prove truth.³² We should say at the outset that we think it is unlikely that the presumption of falsity is the main reason for the failure to plead justification. Equally important in practice, in our view, is the fact that in many cases the statement complained of is not true and the possibility of aggravated damages where there is an unsuccessful plea of justification.

It will be recalled that the Irish position combines the presumption of falsity with a strict liability criterion. This may be contrasted with the United States. The United States Supreme Court has recently reversed the common law presumption in relation to falsity in cases where the speech is of public concern. This was the result of *Philadelphia Newspapers v Hepps*,³³ where a majority of the court held that the plaintiff must bear the burden of showing

32 Focusing on the presumption of falsity is only one way of addressing this root problem. An alternative is suggested later.

33 (1986) 475 US 767.

falsity.³⁴

389. This reversal must be placed in context. The Supreme Court had already, in a series of decisions, imposed a burden on the plaintiff to show fault on the part of the defendant, the degree of fault depending on the type of plaintiff in question.³⁵ Delivering the opinion of the court in the *Hepps* case, O'Connor J stated that the reversal would be of little practical significance because in most cases the plaintiff would demonstrate falsity as part of his case that the defendant was at fault. Accordingly, the reversal of the burden of proof would be crucial only in those rare cases where the evidence was so ambiguous that the presumption itself would be conclusive. The dissenting opinion, written by Stevens J, disagreed with the allocation of risk between the plaintiff and defendant, which is essentially the issue at stake. He argued that even if the re-allocation of the burden of proof made little practical difference in most cases, this was no answer to the cases in which it would be decisive. However, Stevens J also contested the assumption that the majority decision would be of little significance in the ordinary case. In showing fault, it was not necessarily a part of the plaintiff's case to demonstrate falsity. Fault could be illustrated by showing a careless method of collecting material and publishing on the part of the defendant, without focusing on the issue of falsity at all. On this view, the reversal of the burden of proof would be significant in all but the simplest of cases. If the question is therefore one of allocation of risk between the plaintiff and the defendant, Stevens J thought that the burden should fall on the defendant, bearing in mind that only negligent and reckless defendants were involved due to the requirement of fault.³⁶

390. It may be noted that the Annenburg Washington Programme Report on Libel approved of the course adopted by the United States Supreme Court, namely that the burden of showing falsity with clear and convincing evidence be placed upon the plaintiff. Moreover, it recommends the extension of this burden to plaintiffs in all defamation cases. Section 6 of the Draft Act provides -

"(a) Burden of Proof

In any action for defamation, whether for declaratory judgement or damages, the plaintiff shall bear the burden of proving by clear and convincing evidence that the defamatory statements of and concerning the plaintiff are false".

34 For a full discussion of this case, see above, para 168.

35 See paras 162 *et seq.*

36 This is because if a non-negligent defendant is involved, the plaintiff will fail to satisfy the fault requirement which is an essential part of his case in the United States. Therefore the only class of defendants to whom the presumption of falsity is important in that jurisdiction consists of defendants who are at fault.

The comment upon this section says -

"Constitutional decisions already place the burden of proof on the plaintiff in many defamation cases. This section establishes that rule as a uniform requirement in all defamation actions. Putting the burden of proof on the plaintiff serves the compelling interest of providing breathing space for the free flow of information. It brings defamation into line with most other tort actions, in which the plaintiff normally has the initial burden of proving all elements of the *prima facie* case".³⁷

391. *Arguments in favour of a reversal of the common law presumption of falsity:*

1. A reversal of the current presumption would make it easier for media defendants to succeed in cases where what they have published is true but they are unable to prove this to the satisfaction of the court.
2. The present presumption of falsity is inconsistent with other areas of tort law dealing with untrue statements. McDonald puts forward this argument,³⁸ asking why a differentiation on this basis should be made between statements which damage health or financial interests and those which damage reputation. At present, the former type of statement is presumed true, while the latter is presumed untrue.
3. In a significant number of cases, a reversal of the present presumption might make no practical difference to the plaintiff. In most cases, the plaintiff is asked by his counsel whether the allegations against him are true since, apart from any other consideration, avoidance of this question would clearly influence the jury in the assessment of damages. Again, in most cases, an answer by the plaintiff that the allegations are untrue of itself shifts the burden of proof to the defendant. It is only in rare cases that the burden will not shift to the defendant. It can be argued, however, that it is in precisely those cases, where the burden of proof is either difficult or impossible to discharge, that the plaintiff should not be placed in the position of having to prove the untruth of a defamatory statement about him.
4. The current position resulting from the presumption of falsity may fail to serve the plaintiff's purpose. If the defendant does not raise the defence of justification, the issue of truth may not arise at all. The defendant may succeed on a defence such as privilege, although the statement is false. Even if the plaintiff succeeds in the action, it may appear to be on a technicality rather than because the statement was untrue. As the plaintiff's primary aim in bringing the action is - or should be - to assert the falsity of the statement and vindicate his

37 Annenburg Washington Program Report on Libel, p 23.

38 McDonald, *Irish Law of Defamation*, p 113.

reputation, this is hardly a satisfactory situation. A reversal of the presumption of falsity would bring the issue of truth to the forefront of the case.

5. The dual burden in Irish law represented by the presumption of falsity and the imposition of strict liability is unduly harsh on the defendant and may fail to give effect to the constitutional guarantee of free speech.
6. Another argument criticises the present position on a theoretical and logical basis. Epstein puts this in the following terms:

"[One] could argue, even as a constitutional matter, that the burden of proof should be on the plaintiff, as has finally been held in the recent case of *Philadelphia Newspapers v Hepps*.³⁹ Again this requires the court to go beyond the common law, but there are strong reasons for the warrant, at least in a world with the strict liability rule. Initially the idea of truth as *justification* strikes a discordant note in the law. In the usual case justifications are never absolute, but are themselves defeasible if their appropriate limits have been exceeded ... But truth is said to be absolute, which suggests that it is an error to regard it as a defense to defamation at all. Indeed the real staying power of defamation ... is that it falls neatly within the general libertarian prohibition against the use of force and misrepresentation in human affairs. That is just what is at stake when defamation is rightly understood as false statements made to a third party to the discredit of the plaintiff ... It follows therefore that a proper understanding of falsehood would make truth a necessary requirement of the *prima facie* case, in which instance the ordinary burden of proof should fall upon the plaintiff to show falsity."⁴⁰

391. *Arguments in favour of the existing presumption of falsity*

1. The current position encourages a spirit of caution in publishers so that they check the accuracy of their facts before publishing. This argument was put forward by the Faulks Committee.⁴¹
2. It is difficult for a plaintiff to prove a negative i.e. that the facts asserted are not true. The New Zealand Committee based their refusal to alter the law on this point.⁴²

39 106 S Ct 1558 (1986).

40 Epstein, Was *New York Times v Sullivan* Wrong? U Chicago L Rev 782, 794-5. Footnote omitted.

41 Faulks Committee Report, para 141.

42 New Zealand Committee Report, para 130.

3. Where the allocation of risk is to be between an active party - the speaker - and a passive party - the plaintiff - the risk should be borne by the person who chose to act. This is particularly apt in the context of media defendants. The traditional idea of freedom of speech envisages an individual struggling to be heard and whose right to comment upon governmental action should not be curtailed. However, the reality is that a newspaper is a large corporation in the business of producing written material for profit. It wields enormous power in influencing public opinion. If it takes upon itself to make statements about an individual, it should be prepared to verify the quality of its facts before publication. The analogy to the seller of a consumer product, outlined in the previous chapter, might be borne in mind here.⁴³
4. Defamation is not the only area of the law in which the law insists that a person asserting that a particular state of affairs exists, should bear the burden of proving his assertion. This is a sound general principle to which exceptions should not be created, except where clearly required by the interests of justice.
5. The "dual presumption" referred to at number 5 of the arguments in favour of a reversal of the present presumption of falsity would be mitigated if our recommendations on the defence of reasonable care are introduced.

In view of our earlier recommendation that it should be a defence to a claim for general damages in respect of a defamatory allegation of fact that the defendant exercised reasonable care, we do not feel it necessary to interfere with the present presumption of falsity. The Court should continue to presume that the allegation is false. If the defendant fails to displace this presumption but can show that he exercised reasonable care in attempting to ascertain the truth of the allegation, no damages should be awarded (unless financial damages is shown). The plaintiff will instead obtain a correction order and/or declaratory judgment. Therefore a reversal of the present presumption of falsity would benefit only two categories of defendants:

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

393. We do not feel that the benefit of the presumption as to falsity should favour, in the first instance, negligent defendants. Secondly, we feel that

43 See above under Social Cost.

where there has been a defamatory allegation and the sole issue is whether a correction order and/or declaratory judgment should be awarded, in other words that the truth of the allegation is the only issue, it is preferable that the benefit of the presumption should go to the injured plaintiff.

394. We therefore provisionally recommend that the presumption of falsity existing under the present law should be retained.

E. SECTION 21 AND UNINTENTIONAL DEFAMATION

395. Two types of defendants come within the category of the innocent or unintentional defamer as envisaged by s21 of the Defamation Act 1961. The first is the defendant who makes an innocent statement which becomes defamatory by virtue of circumstances unknown to him; the second is the defendant who does not intend to refer to the plaintiff and is unaware of the circumstances which have the effect of making the publication refer to the plaintiff. In the first category, a statement referring to the plaintiff may become defamatory due to circumstances unknown to the defendant either (a) because there were certain facts of which he was not aware or, (b) because he intended the character to be fictitious.

The common law treated such defendants harshly. The fact that he was innocent in the sense defined above did not affect his defence at all. The defendant was treated in the same way as a defendant who knew he was making a defamatory statement, or a defendant who fully intended to refer to the plaintiff. The *Defamation Act 1961* attempted to alleviate this position by means of section 21. This provides the defendant with an opportunity to prevent a case being brought against him by making an offer of amends. The section is available only to defendants who are innocent in the sense defined above, and who additionally exercise a standard of reasonable care in relation to the publication. A defendant who is ignorant of the circumstances that alter the quality of his statement due to his own neglect or default does not come within the protection afforded by the section.

396. The main features of the offer of amends are the requirement of the publication of an apology and a correction, and the provision that if the offer is accepted by the party aggrieved and is duly performed, no action in defamation may be taken or continued. If the offer is not accepted, proof by the defendant in a subsequent action that he published the words

innocently in relation to the plaintiff and that an offer was made as soon as practicable after the defendant received notice that the words were or might be defamatory of the plaintiff is a complete defence.

Criticisms of Section 21

397. A number of criticisms have been levelled at the section in its present form. The Faulks Committee found that the procedure under their equivalent section was unsatisfactory because.

- (1) It was laborious, time-consuming and expensive.
- (2) The affidavit requirement presented the publisher with a dilemma. If he failed to collect all the available evidence, he was precluded from using evidence subsequently obtained, but if he collected all the evidence, this might take some time and he could be held not to have made the offer as soon as was practicable.
- (3) The aspect of the procedure under which the publisher who is not the author is under a burden to prove that the author acted without malice was exceedingly onerous.⁴⁴ The Boyle -McGonagle Report also levelled a series of objections against the section:-⁴⁵
 1. It is unfair to differentiate between the victim of an unintentional defamation and the victim of intentional or negligent defamation "Looked at from the point of view of the plaintiff, it is unfair that the victim of unintentional defamation should be required either to accept an offer of amends or have it used against him as a defence in subsequent proceedings, while the victim of intentional or negligent defamation can proceed directly to court to claim damages."⁴⁶
 2. Conversely, it was unfair to limit a simpler, speedier and less costly means of vindicating one's good name to the victim of unintentional defamation and not extend it to all defamation victims.
 3. The Irish Defamation Act, unlike its English counterpart, provides that the offer of amends is not available where the party aggrieved proves that he has suffered special damage (s21.6). It is suggested that there is no logical basis for this provision. If, however, the plaintiff has in fact sustained special damages, then it seems to us reasonable that he should not be

⁴⁴ Faulks Committee Report, para 281.

⁴⁵ The Press Council Report treatment of Unintentional Defamation is located at paras 5.4-5.9.

⁴⁶ Press Council Report, para 5.5.

compelled to pay out of his own pocket loss which is solely the result of the defendant's act, simply because the defendant is prepared to publish an apology.

4. The requirement that publishers who are not authors must show that the author was not actuated by malice imposed an excessive burden on the press, because they are in the business of publishing non-commissioned freelance material, letters, advertisements or other notices.

The Report then set out the procedural aspects of section 21 and commented; "The offer of amends as contained in the *Defamation Act, 1961* is therefore, totally impractical and it is not to be wondered that it has never been used, to our knowledge, in this jurisdiction and only very rarely in England". They recommended that the offer of amends be abolished and replaced by an order for correction, with very simple procedures, available irrespective of whether publication was intentional or otherwise. As a less popular alternative, they recommended that the existing offer of amends be widened in scope and the procedures be greatly simplified.

The Reform Bodies

398. The reform bodies are divided in their responses to this situation. The New Zealand and Faulks Committees have recommended making detailed changes to the section, retaining its main features but rendering it more workable. The Australian Law Reform Commission thought that there was no need for such a provision in the light of their recommendation on corrections. If the defendant in such a case published a full and speedy correction, the court would take this into account in its assessment of damages.

The New Zealand and Faulks Committees examined the individual features of the section in order to see how it could be made more simple and more practicable.

399. *The Affidavit:* The Faulks Committee recommended that the affidavit requirement be omitted. It should be sufficient for the defendant to set out as a matter of course the matters he relied on in support of his innocence in the letter accompanying his offer of amends. He would then be entitled to rely on other matters at trial, if these were particularised in the defence. The New Zealand Committee, however, felt that something more should be required of the defendant and recommended that the word "statement" should replace the word "affidavit" in the section. They recommended further that no evidence other than evidence of facts specified in the statement should be admissible in subsequent proceedings, because the facts surrounding the innocent publication would be known to the defendant at once and it would be possible for him to put them into his "statement". They felt that some statement of facts should be provided to the plaintiff, so that before accepting

the offer of amends he should be in a position to assess whether or not the defendant did publish innocently. However, the replacement of the affidavit procedure by a statement of explanation would allow the media to make an offer of apology without having to consult a solicitor first.

It is not clear that either of the solutions proposed would meet the problem. The plaintiff should be in a position to assess whether the defendant has a case to make in support of his innocence. Therefore, a "statement" by the defendant should at least be required. However, when a media defendant is involved, investigations as to whether the statement was made innocently may take time. It may be impossible to accommodate the necessity for speed required by the section while allowing both sides to consider their position thoroughly. The Australian Law Reform Commission supports this view, stating that -

"There is an inherent conflict between the requirement of full disclosure to the plaintiff and a speedy offer of apology".⁴⁷

400. Malice: The Faulks Committee felt that the requirement that the publisher who is not the author must prove that the author was not guilty of malice, was not only onerous, but also unsound in principle. Since the decision in *Egger v Chelmsford*,⁴⁸ a publisher in England is not infected by the malice of the author in cases outside s21 unless he is vicariously liable for the acts of the author. This is also the position in Ireland because of s11(4) of the *Civil Liability Act, 1961*. Therefore, there appeared to be no reason for this requirement of proving lack of malice under s21. *We agree that if s21 is retained, this element of the procedure should be abolished.*

401. Title: The New Zealand Committee pointed out that the offer of amends did not anticipate the payment of money, but rather a publication of a correction and an apology to the party aggrieved. They felt that the title "offer of apology" was more appropriate. We feel that the title "offer of apology and correction" is more appropriate.

402. A number of other matters were examined by the Faulks and New Zealand Committees in relation to the section. At present, under s21(4)(a), where an offer of amends is accepted by the party aggrieved, any question as to the steps to be taken in fulfilment of the offer as so accepted must, in default of agreement between the parties, be referred to and determined by the High Court, or, if proceedings in respect of the publication have been taken in the Circuit Court, by the Circuit Court. The Faulks Committee recommended that such references should be made to the Judge in Chambers. The New Zealand Committee recommended that where the parties fail to agree on the form of the correction or apology they should be encouraged to refer the question to an independent third person. Where either party refused

⁴⁷ ALRC Report para 88.

⁴⁸ [1965] 1 QB 248.

to refer the matter to the third person, the offer of apology would be deemed not to be accepted, and in any subsequent action the question whether a party was acting reasonably would be determined by looking at the willingness of that party to refer the matter to an independent person.

Under s21(4)(b) of our Act, the power of the court to make orders as to costs in an action includes the power to order the payment by the person making the offer to the party aggrieved of costs on an indemnity basis and any expenses reasonably incurred or to be incurred by that party in consequence of the publication in question; and if no such proceedings are taken, the High Court may, upon application made by the party aggrieved, make any such order for the payment of such costs and expenses as aforesaid as could be made in such proceedings. The Faulks Committee recommended a provision to this effect. The New Zealand Committee considered that in any case all the costs of publishing the apology, all the solicitor and client costs of the aggrieved person, and all other expenses reasonably incurred by the aggrieved person should be borne by the publisher. They suggested that it be a requirement of the publisher's offer of apology that he offer to pay these costs.

The Faulks Committee made a further recommendation that where an offer of amends is accepted, the court should also have power to make such order with regard to unsold copies of a publication containing the words complained of as seems appropriate to the circumstances. In its discretion the court may in the order provide for the continuation or resumption of the distribution of such unsold copies unamended or for the inclusion in all such copies of a suitable statement, or alternatively may provide for the withdrawal of all unsold copies of the publication concerned. No such provision is currently contained in our s21.

The Faulks Committee recommended that where an aggrieved person refuses an offer of amends and brings or continues proceedings, the court may, if it is satisfied *prima facie* that an aggrieved party's complaint relates to insubstantial matters, order that security for costs be given by the aggrieved party. No such provision currently exists in our Act.

The Faulks Committee recommended that it should be set out that an unaccepted offer of amends should not constitute an admission of liability and should not be referred to in evidence in the proceedings, without the consent of the defendant who made the offer. There is no such provision in the Irish Act.

403. Retention of Section 21

If section 21 is to be retained, we invite views as to whether any or all of the reforms discussed should be adopted, namely;

- (i) *Whether the requirement of an affidavit should be retained, entirely*

omitted, or replaced by a "statement";

- (ii) Whether evidence other than that contained in the affidavit or statement, whichever the case may be, may be relied on at a subsequent trial;*
- (iii) Whether the title should be altered to "offer of apology and correction";*
- (iv) Whether, if there is any question as to the steps to be taken in fulfilment of the offer, this should be referred to (a) the High Court or Circuit Court (as at present), (b) a judge in chambers, (c) an independent third party.*
- (v) Whether the court should have a power to make an order with regard to the unsold copies of the publication;*
- (vi) Whether the court should have a power to order that security for costs be given by an aggrieved party if it is satisfied prima facie that the party's complaint relates to insubstantial matters.*

We provisionally recommend that the provision in section 21 requiring the publisher who is not the author to prove that the author was not guilty of malice be repealed.

Repeal and Replacement of Section 21

404. The basic idea behind section 21 is to prevent defamation actions in respect of defamatory statements which were innocently published but were actually false. It has been seen that in its present form the procedure is rarely availed of and it is arguable that no measure of reform would salvage its operation. However we agree with its basic premise, namely that negotiations between the parties at an early stage should be encouraged. We also agree that in certain circumstances the publication of a full correction and apology by the defendant should be a complete defence in a subsequent action in defamation. We therefore wish to recommend a provision providing for negotiation and settlement by the parties at an early stage. We would, however, extend the ambit of the provision to cover all defendants who exercise reasonable care. We have tailored this proposal to fit with the defence of reasonable care advocated above.

It is of interest to us that the Annenburg Report canvassed a somewhat similar proposal. Under its recommendation, every plaintiff would be obliged to seek a retraction or an opportunity of reply before commencing suit. If the defendant complies with the plaintiff's request, all subsequent actions involving the particular publication and defendant are barred. The provision goes further than section 21 in making negotiations a pre-requisite to suit, and in applying this approach to all cases of defamation, not merely those in which

the defendant has failed to exercise reasonable care.

405. We are not in agreement with some of the details of the Annenburg proposal. Our main objection is that actions in respect of all defamatory statements could be barred by the publication of a correction or a reply (depending on the plaintiff's request), even where these statements were made with malice or knowledge of falsity.

406. We will set out our proposal on negotiation below, but first draw attention to one particular issue. Under section 21, it is the defendant who chooses to avail of the procedure. Under the Annenburg proposal, the plaintiff must make a request. Not only is there a difference between the party who initiates the procedure, there is a further difference in that section 21 is optional whereas a request for correction under the Annenburg proposal is a pre-requisite to suit. We favour the Annenburg approach in this respect because it prevents the plaintiff from proceeding to trial against the defendant's wishes, and if our proposal on the defence of reasonable care is implemented, the plaintiff who sues a defendant who exercises reasonable care will not be entitled at trial to more than a declaratory judgment or a correction order. It seems wrong to allow such a plaintiff to proceed to trial where the defendant is willing to apologise and make a full correction in the first place. The only plaintiffs who would be allowed to proceed would be -

- (1) Plaintiffs seeking a retraction who have been refused a retraction by the defendant before the trial
- (2) Plaintiffs who are suing for damages in respect of financial loss clearly linked with the publication
- (3) Plaintiffs who are suing for general damages and are unlikely to be met with the defence of reasonable care.

Our proposal on enforced negotiation is as follows:

- (a) It should be a defence to a claim for a correction order and/or declaratory judgment in a defamation action in respect of a defamatory allegation of fact that the defendant made a timely and conspicuous retraction of the allegedly defamatory allegation.
- (b) It should not be a defence to a claim for general damages in a defamation action in respect of a defamatory allegation of fact that the defendant made a timely and conspicuous retraction of the allegedly defamatory allegation.
- (c) It should not be a defence to a claim for special damages in a defamation action in respect of a defamatory allegation of fact that the defendant made a timely and conspicuous retraction of the allegedly

defamatory allegation.

- (d) A retraction is a statement withdrawing and repudiating the allegedly defamatory allegations.
- (e) A retraction is conspicuous if it is published in substantially the same place, is of equal prominence and is of the same length as the original matter. Where a press organ customarily designates a particular space for retractions, notice of the retraction should be placed in substantially the same place as the original matter. (Alternatively the placing of the retraction in a customarily designated spot could be deemed insufficient).
- (f) A retraction is timely if it is published within 30 days of the original publication or the first request of the plaintiff for retraction.

407. *Provisions for referring questions to the Circuit or High Court concerning the steps to be taken in fulfilment of the request could be included.* Such a provision is currently included in section 21, and the Court has a power to make an order with respect to the costs incurred.

We believe that this proposal is a better alternative to the existing s21. However it hinges to a large extent on the acceptance of our recommendation that *general damages* should only be awarded where the defendant failed to exercise reasonable care. To take an example, let us assume that Mr. A alleges that he has been defamed by a local newspaper and wishes (a) to have the truth of the matter published in the same newspaper, (b) to obtain general damages in respect of the injury to his reputation, and (c) to obtain damages in respect of financial loss clearly linked with the publication.

His first step is to contact the newspaper and ask for a retraction. If the newspaper obliges and publishes a conspicuous retraction within thirty days, this disposes of (a). Obviously he will not go on to claim a correction order and/or declaratory judgment in court because he has already obtained it. The newspaper will be more inclined to retract promptly because this will be a defence to a claim for a correction order and/or declaratory judgment and it saves the costs of a trial to do it early. In many cases, this will be the end of the matter. This is the purpose of recommendation (a) above.

408. Now look at (b), his claim for general damages. The fact that the newspaper published a retraction is not a defence to a claim for general damages. However, the defence of reasonable care will be a defence to a claim for general damages. So, the advantage in publishing a retraction for a newspaper which feels it has exercised reasonable care is that the retraction will probably end the matter, because if the plaintiff persists in bringing a claim for general damages, the defendant will meet this claim with the defence of reasonable care. So, the apparent rigour of recommendation (b) above is lessened when it is considered in conjunction with the defence of reasonable

care. However, if the defendant will be unable to avail of this defence, the plaintiff will be entitled to go ahead and seek general damages at trial, even after the retraction.

409. The next consideration is (c), his claim for damages in respect of financial loss. Our recommendation was that the defence of reasonable care would be no defence to such a claim. Clearly neither should the publication of a retraction be sufficient to dispose of the plaintiff's grievance. With his retraction already obtained the plaintiff goes to court and makes out his case for damages in respect of financial loss.

Of course, if the newspaper really believes that it was correct or that the allegation was not defamatory, or that some defence such as privilege applies, or that it was a statement of opinion not an allegation of fact, it can ignore the plaintiff's request for retraction and contest all the relevant issues at trial.

The procedure no more than formalises what would be expected to occur in any event. However it has a number of advantages for the plaintiff. It sets out certain requirements in respect of the retraction, for example the time limit, and that the retraction must be conspicuous, probably the most important matter for the plaintiff. From the defendant's point of view, it is useful because the publication of the retraction may well lead the plaintiff to abandon any further claim, since he may not be prepared to bring a case for general damages if he is likely to meet a defence of reasonable care. Also, it makes clear to defendants in defamation actions that the publication of a retraction does not constitute an admission of liability and is a practice favoured by the law.

410. *We provisionally recommend that the publication of a timely and conspicuous retraction as defined above should be a defence to a claim for a correction order and/or declaratory judgment.*

F. THE CASE FOR PROTECTION OF SOURCES

411. A major complaint of the media is that they are prevented from reporting matters which are in the public interest and which they know to be true but cannot prove in court. The main reason for their being unable to prove the truth of their statements is a reluctance to disclose their sources. The position is a stale-mate; in theory they may publish what they like as long as it is true, but they cannot prove truth in practice. The basis of this reluctance to disclose sources is not entirely clear. One suggestion is that the reporter in question knows that if the source is revealed, no vital information will be passed on to the source in the future or, indeed, his job may be threatened. A second suggestion is that it is simply a matter of journalistic ethics: if a source gives information with the stipulation that his identity is not to be revealed, this should be respected. A clarification from the media as to the reasons for the reluctance to disclose sources would be welcomed. The importance of the distinction will emerge later in the present discussion. However, our impression is that in many cases in Ireland the sources are either other journalists or persons in the public service, including members of the Gardai. In the case of the second category, assuming that our impression is correct, it has to be borne in mind that affording protection to journalists against disclosure of their sources may effectively involve the law in condoning breaches of the Official Secrets Act. It may well be argued that the Act in question is both illiberal in spirit and badly drafted, but in that case the proper path for reform of the law is amendment of the Act which is outside our present terms of reference. Different considerations undoubtedly arise if the journalist's reluctance to disclose his source is on the sole ground that the information was given to him in confidence and no question of a breach of the Official Secrets Act is involved. We think that this distinction must be borne in mind in any discussion of the general problem.

The customary response to the stalemate outlined above has been to consider new defences for the media so that they do not have to prove truth. Thus there are calls for a media-qualified privilege or a defence modelled on the United States position so that there is a higher burden on the plaintiff if he is a public figure. The merits of these approaches are considered elsewhere.

However a different approach might be to specifically address the root problem. The problem is disclosure of sources. The solution may be to protect sources. There may be ways of enabling witnesses to give evidence without the fear of publicity. Two ways of achieving this are suggested. One is to give the court a power to prohibit the reporting of the identity of the source. The second is to give the court a power to exclude the public, including the media, from the trial.

The Constitutional Problem

412. Before considering the merits of these suggestions, there is a constitutional hurdle to be overcome. Article 34.1 of the Constitution provides that justice shall be administered in public save in such special and limited cases as may be prescribed by law. A strong case would have to be made to bring this particular type of case within the "special and limited" bracket.

If one examines, by way of comparison, the matters that currently fall within the category of "special and limited" cases, it appears that in each of them, there is a strong reason for excluding the public or restricting the matters which may be reported. This may relate to protection of identity because of the private nature of the dispute (family law matters), protection of identity because of the embarrassing and unwanted publicity attached to the position of the person in question (rape proceedings) and protection of the entire subject matter because the disclosure would be prejudicial to persons dealing with the public (company disputes).

The question then is whether such a good reason exists in relation to witness statements in defamation actions. It is submitted that there are two plausible arguments in favour of this view. There is a significant public interest in the communication of truthful statements about a multitude of matters, especially those matters which concern the national economy, the activities of public figures and national security. It may well be argued that the media is currently prevented from supplying all of the information it possesses to the public, because of the problem of sources. The public interest is therefore the first reason for creating a "special and limited" case. Secondly, the provision of a new defence (such as a media-qualified privilege) may encroach on the constitutional rights of the individual, whose reputation is supposed to be protected. Conversely, failure to provide a new defence and retention of the existing law may be an encroachment on the constitutional rights of the media to express their convictions and opinions. Most people would agree that true statements should be protected, whereas false statements should not; but while

the defence of justification remains a dead letter, there may not be any workable solution which balances the constitutional rights of the individual and the media fairly. Retention or alteration of defences would seem inevitably to tip the balance either way.

This stalemate because of conflicting constitutional interests could be a good reason for bringing the proposed reform within a "special and limited" case within the meaning of Article 34.1 of the Constitution. It may even be stronger than some of the reasons for the existing "special and limited" categories. For example, the discretion to exclude the public under section 205(7) of the Companies Act is so that the interests of the company will not be seriously prejudiced. This is not necessarily a better reason for secrecy than those outlined in relation to the proposed reform.

Assuming that there are sufficiently persuasive reasons for bringing witness statements in defamation actions within the "special and limited" exception to the principle that justice be administered in public, the next question is whether either of the provisions suggested would achieve any improvement in practice. On this point, the response of the media would be particularly welcome.

413. The first suggestion is that the court should have a power in cases in which justification is pleaded to prohibit the reporting of the identity of witnesses specified by the court. Two objections to this proposal are envisaged. Firstly, the identity of the witness may be revealed by the content of his testimony and the prohibition would be valueless. Secondly, there may be present in the court the very people from whom the source wishes to conceal his identity. However in one American case at least, a court held that it could order that identification of the source be made to counsel only and that it be used for the purposes of litigation only.⁴⁹ In *Miller*, the action for libel was brought in respect of an allegation that Miller, who had been Trustee of the Central States Pension Fund from 1955 to 1968, had swindled the pension fund out of \$1.6 million through a fraudulent loan. The plaintiff discovered that the author had relied on confidential sources to write the article. The court denied three motions to compel disclosure of the identity of the confidential information on the basis that the plaintiff had not exhausted alternative means of proving that the defendant was reckless. After the plaintiff pursued other ways of proving this issue, the district court ordered the defendants to produce summaries of non-privileged parts of the file used to prepare the article which should be for use of counsel only and for litigation purposes only. In addition to the summaries, some non-privileged documents were released to plaintiff's counsel. The plaintiff moved a fourth time for disclosure and this time the district judge ordered disclosure, concluding that the informant's identity went to the heart of the matter. At the request of the defendants, the district judge certified the order for an interlocutory appeal.

49 *Miller v Transamerican Press Inc.* 621 F.2d 721 (5th Cir. 1980).

414. The Court of Appeals for the Fifth Circuit held

- (1) that the plaintiff was a public figure and would therefore have to meet the *New York Times*' burden of actual knowledge or recklessness with regard to falsity,
- (2) on the basis of authority and because of the fact that the sole source of the article was the informant, disclosure of the identity of the informant should be compelled. It affirmed the district court's order compelling disclosure of the informant's identity in the following terms:

"We affirm the district court's order compelling disclosure of the informant's identity. On remand, the district court should protect the informant by restricting the information about the informant's identity to counsel and requiring that it be used strictly for the litigation."⁵⁰

415. A more far-reaching suggestion is to give the court a power in cases in which justification is pleaded to exclude the public, including the media, from the court while a specific witness is giving evidence. This would prevent people unconnected with the presentation of the case from knowing not only the identity, but also the evidence, of the source. The judge and jury would decide whether the plea of justification were made out, but the public would never know on what basis their decision rested. Despite the advantage of this proposal, there are a number of objections to it:

- (1) The plaintiff and his counsel would clearly have to remain in court, and in some cases these may be the people from whom the source wishes to hide his identity. While it is difficult to say how frequently this would arise, it might be considered important enough to undermine the impact of the proposal significantly.
- (2) There is a certain irony in the fact that the aim of the proposal is to encourage public information on matters of public interest, and the result is to prohibit the public from knowing the evidence on which the result is reached. However, if the alternative is self-censorship by the media in not publishing such stories at all, the proposal may be seen as the lesser of two evils.
- (3) Judges and counsel would be prohibited from disclosing the evidence given at *in camera* proceedings on the basis of professional ethics. However no such restriction would apply to jurors. Once the case is over, they would apparently be free to tell the world at large the identity of the witness and the evidence given. Although this does appear to undermine the proposal, it must be remembered that the

50 It is not clear from the judgment whether the district court order to compel disclosure was subject to these restrictions.

same is true in existing cases where there is a power to hold proceedings in camera and before a jury e.g. rape trials, and proceedings under the *Criminal Justice Act 1951*. Again, opinions are welcome as to whether this would be a significant loophole in the proposal or whether it is a risk worth undertaking.

- (4) It may be argued that if the press' reluctance to disclose sources is based on ethics and confidentiality, rather than a fear of the source drying up or prejudicing the source's job, then the proposal would have no effect at all. In other words, if the source has given his information on the basis that he will not be required to give evidence, this is to be respected, and the proposed power will not alter this. As against this, it may be argued that sources make such stipulations in the climate of the present law, but that if the law were changed so as to protect their identity and evidence in court, they might be prepared to waive such stipulations. There is a real problem with this if the reporter requesting the information cannot guarantee secrecy; in other words, if the power given to the court is discretionary. This is a strong argument for making the power mandatory. For example, it could be provided that the court shall exclude the public
- (1) in all cases where justification is pleaded and the defendant requests that the public be excluded, or
 - (2) in all cases where justification is pleaded and the court is of the opinion that the evidence of the witness in question is crucial to the defendant's case and there is a need for confidentiality.

The latter option leaves an indeterminate quality in the power and lessens its efficacy for the press. The more a defendant is required to anticipate a court ruling, the greater the risk of self-censorship.

- (5) Journalists have made oral representations to us that this proposal would be impracticable simply because of the size of this country and that it would be easy for a person to find out who the source is by simply sending someone to sit outside the courthouse on the day in question and identify the source as he leaves. We believe that the size of this country is a strong factor arguing against the protection suggested.

If the the proposal suggested is adopted, the question arises as to whether a "public interest" element should be included. In other words, should the power to exclude the public be contingent upon the case involving a "matter of public interest"? On one view, this is a necessary facet of the power because the constitutional basis of the power argued for was grounded on the fact that such cases were in the public interest. On the other hand, this element would introduce a further indeterminate aspect to the power. Publishers would have to anticipate whether the court will deem the matter

one of public concern, and the courts will have to be relied on to read this requirement liberally. Omitting a public interest requirement avoids this problem but may detract from the constitutionality of the power.

416. *We think that the proposals considered would be ineffective in this country by reason of its size. However, we welcome views to the contrary.*

American Law and Sources

417. The issue of disclosure of sources has become an important and controversial one in the United States since the *New York Times* decision. This is a result of the different burden of proof on an American public figure plaintiff and an Irish plaintiff. For the purposes of comparison, let it be assumed that in a particular case the defendant newspaper has no defence of privilege or comment and does not come within section 21 of the Defamation Act 1961. In other words the sole issue to be contested is the truth of a factual statement made by the defendant. In Ireland if the defendant does not wish to disclose a confidential source, and this is the evidence on which his statement was based, he knows that a defence of justification is pointless. Once the plaintiff has proved publication and defamatory effect, falsity is presumed and essentially the case is over. The defendant's best option is to settle. By contrast in America, the public plaintiff has no hope of succeeding unless he can show that the statement was made with actual knowledge or in reckless disregard of its falsity. It is therefore crucial for him to know of the sources on which the defendant based his information. He may show recklessness by showing either "that there were obvious reasons to doubt the accuracy or truthfulness of the informant, or that there was in fact no informant and therefore the article lacked foundation."⁵¹ Some courts have held that a failure to disclose sources leads to an irrebuttable presumption in law that there is no source. If there is no source, the article lacks foundation, and the plaintiff will be able to overcome the New York hurdle of showing recklessness. Therefore American cases have necessitated enquiry into two issues:

- (1) whether a journalist has a privilege to refuse to disclose confidential sources, and
- (2) if he refuses to disclose, whether under such a privilege or in contravention of an order for disclosure, what presumption from such failure to disclose should be drawn.⁵²

1. *Do American journalists have a privilege under the First Amendment to*

51 *Berger*, The No-Source Presumption: The Harshes Remedy, 36 Am. U.L. Rev. 603, at 615.

52 In the Irish case of *Re O'Kelly* (C.C.A) 108 ILTR 97, a journalist was held to be in contempt of court when he refused to disclose the identity of a source which was essential evidence in a criminal trial.

protect confidential sources?

The leading case on this issue is *Branzburg v Hayes*.⁵³ The United States Supreme Court held in that case that there was no First Amendment privilege excusing journalists from testifying before a grand jury. However it recognised the power of individual States to craft their own standards within First Amendment limits. Twenty five States have "shield" laws in operation i.e. laws protecting newspeople from the obligation to disclose sources, while eight others have formulated a privilege under the common law or as a matter of constitutional interpretation.

2. *What is the effect of failure to disclose?*

One view is that failure to disclose sources justifies the court in ruling that as a matter of law no source exists. Three major cases support this view - *Downing v Monitor Publishing Co.*⁵⁴, *De Roburt v Gannett Co.*⁵⁵ and *Plotkin v Van Nuys Publishing Co.*⁵⁶ In none of these cases did a state shield law apply and the court ordered disclosure. It may be noted that the court in the *De Roburt* case formulated a three-part test for justifying compulsory disclosure:

- (a) whether the requested information goes to the heart of the plaintiff's case;
- (b) whether there is a demonstrated specific need for the information;
- (c) whether the plaintiff has demonstrated that his claim is not without merit.

A second view is that refusal to disclose sources leads only to a rebuttable factual inference that the defendant has no source. This was the line taken in *Maressa v New Jersey Monthly*.⁵⁷ In that case, the court held that the presence of a state shield law gave the reporter an absolute protection from disclosure in the absence of a countervailing constitutional right. It distinguished this holding from other cases of a criminal nature where the privilege was held not to be absolute where disclosure was necessary in order to preserve the defendant's right to a fair criminal trial. The court went on to hold that the presence of this absolute privilege in a civil action did not entirely prevent a plaintiff from overcoming the *New York Times* hurdle. Recklessness might be established by inferential evidence, especially where the

⁵³ 408 US 665 (1972).

⁵⁴ 120 N.H. 383, 415 A.2d 683 (1980).

⁵⁵ 507 F. Supp. 880 (D. Haw. 1981).

⁵⁶ Discussed by *Berger*, *supra* footnote 26, without citation.

⁵⁷ 89 N.J. 176, 445 A.2d 376.

defendant relies solely on the confidential source as the basis of his statement.

It appears that this controversy is inapplicable to Ireland because the different allocation of proof means that the defendant will simply avoid the defence of justification if he is not prepared to disclose sources. It might however become important if a concept of fault were introduced.

Meanwhile, it is interesting to note that a compromise solution has been employed by one American court to date and approved by at least one commentator. Where disclosure of sources is crucial to the plaintiff's case, the court can order the sources to be identified only to counsel and that this information be used for litigation purposes only.⁵⁸ It is encouraging that although the United States system is structured differently, the problem of disclosure of sources has been identified as a central issue and compromise approaches based on disclosure while concealing identity have at least been addressed.

Of interest also are the recent restrictions on reporting imposed by the editor of the American newspaper, *The Washington Post*, Mr Ben Bradlee. The new code of ethics introduced provides, inter alia, that all sources for facts cited must be mentioned in the text of stories.⁵⁹ Phrases such as "well-informed sources", "Government sources", and "sources close to the investigation" would become redundant. This self imposed restriction on journalism is interesting. It leads us to question our assumption that current journalistic practice is acceptable and should be protected. Dr A J F O'Reilly, chairman of Irish Independent Newspapers and a director of the *Washington Post*, recently adverted to the new code introduced by the *Washington Post* and urged Irish newspapers to adopt similar standards. Referring to the practice of using anonymous sources, Dr O'Reilly stated:

"The public is not served by this device, by and large. Its usage should, in my opinion, be carefully monitored by editors and avoided unless absolutely essential".⁶⁰

58 *Berger, supra footnote 26, and Miller v Transamerican Press Inc, supra footnote 24, and accompanying text.*

59 *See Magill, October 1989, p18.*

60 *See Irish Times, Tues Nov 7 1989.*

G. STATEMENTS OF FACT IN THE CONTEXT OF SATIRE AND FICTION

419. Two particular types of factual statements are governed by peculiar considerations. The first is the fictional statement. The second is the satirical or sarcastic statement. RTE have raised concerns about the application of defamation law to fictional statements. While it can be argued in court that the context of the matter complained of was fictional and hence non-defamatory, there is a danger that the jury will ignore or downplay the fictitious context. RTE suggest a complete ban on defamation proceedings in respect of fictional works, unless the person can point to special circumstances which would cause the recipient to suspend his or her belief that the work was fictitious. We believe that the problems in relation to works of fiction would be better dealt with under the issue of identification. The real problem with a work of fiction is that defamatory statements may have been intentionally made about a character but the character is intended to be fictitious. It is arguable that a more stringent test of identification should be met where defamatory matter appears in a fictional context. Two American writers have put forward the following test for such cases:

- (1) that the matter identified the plaintiff, under the ordinary test, but also that,
- (2) the portrayal could reasonably be understood as describing actual qualities or events involving the plaintiff.⁶¹

420. *We welcome views as to whether, in cases involving defamatory matter contained in a fictional context, the ordinary requirement of identification should be supplemented by a requirement that the matter be reasonably understood as*

⁶¹ Rich and Brilliant, *Defamation-In-Fiction*, 52 Brooklyn L.Rev. 1.

referring to "actual qualities or events involving the plaintiff."

Satirical statements present a different problem. The plaintiff is clearly identified but the object of this form of expression is to exaggerate or ridicule his qualities or acts. Satire is a well-established form of criticism directed at public officials and public figures. It will be remembered that our recommended definition of defamation defined defamatory matter as matter which "tends to injure the plaintiff's reputation". An additional provision could be incorporated stating that "matter which would reasonably be understood as satire is not defamatory".

421. In view of the obvious difficulty in securing agreement as to what constitutes "satire" as distinct from scurrility, we doubt whether such a proposal is really practicable. However, we welcome views on the suggestion.

V. REMEDIES

A. DAMAGES

INTRODUCTION

422. The central role of damages in respect of defamation is a notable feature of common law jurisdictions. The reason for the pre-eminence of this remedy is historical. Throughout the Middle Ages, jurisdiction over defamation actions was exercised by the ecclesiastical courts. However, over the fifteenth century these courts lost this form of jurisdiction to the secular courts, particularly the Court of Kings Bench. The latter court expanded jurisdiction by permitting the "action on the case", for words. At this time, most defamation cases were oral and the cases were therefore ones of slander. The cases of slander actionable *per se* were then developed to cater for other types of slander, which are now the instances of slander actionable on proof of special damage.

423. Meanwhile the Star Chamber assumed jurisdiction over printing in the interests of public peace and introduced into English law a type of defamation based on form rather than damage. Following the abolition of the Star Chamber in 1641, the common law courts succeeded to its jurisdiction in defamation. The offence became a common law misdemeanour and the wrong became a tort. It seems that the principles developed by the Star Chamber in relation to breaches of the peace influenced a general doctrine of libels fixing libel as a wrong for which damage would be presumed. The result was that the torts of slander and libel, of quite different origins, became subsumed under the common law jurisdiction, in which the remedy of damages was the sole remedy available.

The influence of a legal structure dominated by this remedy cannot be underestimated. It has influenced the defences available and induced a feeling that liability necessitates payment of money, and that compensation is effected only by receipt of cash. In this Paper we question these assumptions and explore

the extent to which other remedies have a role to play in defamation cases. However we accept that damages will continue to play some role in defamation and accordingly examine possible reforms of this topic.

424. Under existing law, the central remedy in the law of defamation is therefore the power to award damages. There are four heads of damages - compensatory, punitive, nominal and contemptuous. The latter two may be quickly disposed of as they are of lesser significance. A plaintiff may seek only nominal damages where his motive is solely to clear his name of the defamatory imputation. Contemptuous damages may be awarded where the jury considers that although the plaintiff is technically entitled to succeed, he should not have brought the action and they record their disapproval by awarding a trivial sum of damages.¹

Compensatory Damages

425. Compensatory damages serve two functions:

- (a) To compensate the plaintiff for the injury to his reputation caused by the publication of the defamation;
- (b) To compensate the plaintiff for the injury to his feelings and sense of indignation, caused by the publication of the defamation. These hurt feelings may be aggravated by high-handed or oppressive conduct by the defendant. Regard may be had in this context to conduct of the defendant at the time of publication or at any time between publication and judgment, including conduct during the trial itself. Nonetheless, the object of such damages is still to compensate the plaintiff and not to punish the defendant.

The jury takes into account both (a) and (b) in order to arrive at a single sum which constitutes the compensatory damage award.

Punitive Damages

426. Punitive damages are awarded to punish the defendant for his conduct where this has been particularly oppressive, and to deter others from acting in a similar manner in the future. The role of punitive damages in England was re-assessed by the House of Lord in *Rookes v Barnard*.² It was held that punitive damages could only be awarded where the case fell into one of three categories:

- (1) Where there is oppressive, arbitrary or unconstitutional action by

¹ It has been observed, however, that the role of nominal damages is ambiguous because such an award may be confused with an award of contemptuous damages - Encyclopedia of Comparative Law, Torts, 10.95.

² [1964] AC 1129.

servants of the government;

- (2) where the defendant's conduct was calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff;
- (3) where punitive damages are expressly authorised by statute.

This decision was affirmed in *Broome v Cassell & Co.*³

The existing Irish position on punitive damages is unclear, but it has been persuasively argued by at least one Irish commentator, on the basis of cases decided since 1964 and the *Civil Liability Act 1961*, that punitive damages continue to have a place in Irish law; and further that they are not currently subject to the restrictive categories of *Rookes v Barnard*.⁴ If this is so, it is suggested that the basis on which punitive damages may be awarded in defamation cases should at least be clarified. However, as it is still open to the Legislature to abolish punitive damages in defamation law, it is proposed to examine the arguments for and against the retention of punitive damages in Irish law at a later stage. First, however, we consider the operation of the remedy of damages in defamation cases in general terms.

Reforms in Relation to Damages Awards

427. There is a general feeling among the media and booksellers that the current level of damages is unwarrantedly high. It is also felt that this is due in some part to the influence of certain large awards made to plaintiffs in English cases, such as Jeffrey Archer who received £500,000, Koo Stark who received £300,000, and Sonia Sutcliffe whose award of £600,000 was reduced to £60,000 on appeal. The highest award to date is the most recent - a sum of £1.5 million to Lord Aldington in the Repatriation of Cossacks case.⁵ Whether such cases in a neighbouring jurisdiction do in fact influence Irish juries is debatable. Nonetheless it is also felt that some awards by Irish juries themselves are unreasonably high and that, as a result, when settling a case, the Irish plaintiff will forego a trial and settle only in return for a substantial sum. Until recently, no awards on the scale of recent English awards have been in evidence in this jurisdiction. The larger awards include £25,000 to Joe Lynch, the actor, and £30,000 to Patrick Madigan, a solicitor; while the £60,000 awarded to the plaintiff, a Dail deputy, in *Barrett v Independent*

3 [1972] AC 1027.

4 *Exemplary Damages in Irish Tort Law*, White, 1987 ILT & SJ, Vol 5 (NS) No 3, 60. It appears from the newspaper report of the recent INTO case that the Supreme Court, in upholding an award of exemplary damages, justified the award by reference to the infringement of the plaintiffs' constitutional rights. Thus it would seem that the categories set out in *Rookes v Barnard* do not apply in this jurisdiction: See *Irish Times*, Friday 15 February 1991.

5 Reported *Irish Times*, 1 Dec 1989.

*Newspapers*⁶ was set aside on appeal and a new trial ordered. More recently, however, the awards have been rising. In the *Cusack* case⁷ the plaintiff was awarded £40,000; in the *Dineen* case⁸ the sum awarded was £77,000. The latest award is the highest; a sum of £135,000 was awarded in favour of the plaintiff, Francis McNamee, against the Daily Mail.⁹

It will be observed that, while awards in such actions in Ireland are undoubtedly increasing, the highest are still appreciably lower than the highest awards in England. It should also be borne in mind that one of the criticisms frequently advanced against the English awards - that they are grossly disproportionate to awards made by judges in personal injuries actions - can hardly be advanced in this country with anything like the same force. Not only are defamation awards somewhat lower; awards for personal injuries are also significantly higher in most cases than in England. (It remains to be seen, however, whether this latter feature will persist once the practice of trying personal injuries cases without a jury has become well established).

428. In the absence of grossly excessive damage awards, the question of whether damages are unreasonably high and disproportionate to injury in this jurisdiction is largely a matter of opinion, particularly depending on what link the speaker represents in the defamation chain - author, publisher, victim, observer. Nonetheless we feel that a just system of awarding damages would try to ensure as far as possible that the damages were in proportion to the injury. It may be that the risk of disproportion may be increased where there is a jury; it might be decreased where there is guidance as to the factors which would affect damages. We propose to examine a number of possible alterations in the law which are intended to ensure that damages in such cases are reasonably proportionate to the injury suffered.

429. In view of our recommendation that the defence of reasonable care should be available in respect of a claim for general damages, our consideration of reforms in the area of damages is of necessity directed to awards of damages in cases where the defendant has either failed to raise the defence of reasonable care, or has raised this defence and failed to make it out to the satisfaction of the court. An award of punitive damages, if this category is to be retained, would also arise in this context.

We deal with reforms in the area of damages under the following headings:

- (1) Reforms of the Present Role of the Jury in Defamation Cases.
- (2) Statutory Guidance on Factors affecting Damages.

6 [1986] ILRM 601.

7 Reported *Irish Times* 16 Nov 1989.

8 Reported *Irish Times*, 30 Nov 1989.

9 Reported *Irish Times*, 2 Dec 1989.

(3) Abolition of Punitive Damages.

(4) The Role of the Appellate Court.

Abolition of the jury would arguably have a strong impact on damages. We discuss this topic separately below.¹⁰

(1) **REFORMS OF THE PRESENT ROLE OF THE JURY IN DEFAMATION CASES.**

(a) Discretion as to whether there should be a jury trial

430. The court could be given a general discretion to decide in each case whether it is in the interests of justice that the trial should be by jury, in default of agreement between the parties. This was one of the proposals of the Faulks Committee.

This is to some degree implemented in the English Supreme Court Act 1981, section 69, under which a trial of a slander or libel action is tried by jury upon the application of either party, unless the court is "of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury".¹¹

(b) Retention of jury for questions of fact only

431. The jury could be retained to decide such matters as whether the words are in fact defamatory, or whether publication was reasonably foreseeable. The power to award damages could be reserved to the judge alone.

This suggestion has a number of advantages. The jury make a valuable contribution to defamation cases in that they alone are in a position to assess what the ordinary man would understand the words to mean and what the ordinary man would anticipate. The standard of the "reasonable man" loses artificiality and gains flesh when a jury is present in the courtroom. However, giving the power to award damages to the judge leaves this exercise to a person who has a wide range of experience in this matter and who may be expected to operate in a less arbitrary fashion. Furthermore it would presumably be easier to appeal a judge's award of damages than that of a jury.

(c) Combined role of judge and jury with regard to damages

432. (i) The jury could be required to set out a description of the damages to be awarded under the following heads -
(i) substantial, (ii) moderate, (iii) nominal, (iv) contemptuous. The

¹⁰ See VII Juries in Actions for Defamation.

¹¹ Section 69 (1)(b) Supreme Court Act 1981.

judge would then set the actual sum. This was another proposal of the Faulks Committee.³ This proposal has the advantages of the previous proposal, but retains a role for the jury in the assessment of damages.

- (ii) The judge could be given the power to substitute his own award of damages where the sum fixed by the jury appears unreasonable.

This gives the jury a somewhat more important function in the assessment of damages. Indeed, the jury decision would stand unless the judge deemed it to be unreasonable. There would seem to be little difference between this approach and that where the judge assesses the damages although perhaps public confidence is increased where the jury role is greater. One objection would be that the courts might develop a reluctance to interfere with jury awards, in the same way as appellate courts are at present reluctant to overturn a jury verdict. This would defeat the purpose of the proposal.

(d) Retention of jury for questions of fact and damages, subject to judicial instructions on damages

433. If it was thought that the present jury role should be interfered with as little as possible, this suggestion might be welcomed. Again the public confidence might be increased by giving the core power to the jury, while fears of arbitrary awards would be reduced by the presence of judicial instructions. It is submitted that if no other option is considered attractive, judicial instructions at least should be recommended. A number of variants are possible.

- (i) *The judge could be given power to set the maximum and minimum limits to the award.*

Again this makes use of the judge's expertise gathered from the experience of many cases.

- (ii) *A maximum figure could be set for High Court jury awards.*

This, however, is problematical. It is always difficult for a set figure to keep abreast of inflation, and there are always cases to which the application of a rigid figure may appear unjust.

- (iii) *The jury could be required to provide a breakdown of the damages under the following headings - presumed damage; special damage; future damage; emotional distress; aggravated damages; punitive damages. This proposal is favoured by RTE.¹²*

¹² Part of an RTE submission to this Commission.

- (iv) *A maximum limit could be fixed to the proportion of damages awarded under each heading e.g. 80% under reputation. This proposal is also contained in the RTE submission.*

434. These two suggestions from RTE are attractive. They enable the defendant to know the precise basis of the award, which is crucial if he wishes to appeal on this ground. Furthermore, it forces a jury to be careful in arriving at figures. Finally, it addresses a problem mentioned by RTE, namely that there is a tendency at present to over-emphasise the "hurt feelings" aspect of the case to the virtual exclusion of the reputational injury part of it.¹³

(2) **STATUTORY GUIDANCE AS TO FACTORS WHICH SHOULD AFFECT DAMAGES**

435. We believe that a statutory provision should set out the factors to be considered in the assessment of damages, whether or not the jury is to play a role in this area. We note that the Australian Commission included a provision in their draft Bill listing the factors to be considered in assessing damages.

The next question is what these factors should include. In *Barrett v Independent Newspapers*¹⁴ factors were set out which the judges felt should affect the damages awarded - the nature of the libel, the standing of the plaintiff, the extent of the publication, the conduct of the defendant at all stages of the case, social disadvantages to the plaintiff, and injury to feelings.

The factors chosen by the Australian Commission were as follows:¹⁵

- (a) The nature of the defamatory matter and the circumstances in which it was published including the extent and manner of publication;
- (b) the extent to which the publication of the defamatory matter and the conduct of the defendant tended:
 - (i) to affect adversely the reputation of the plaintiff;
 - (ii) to injure the feelings or health of the plaintiff;
 - (iii) to injure the plaintiff in his occupation, trade, office or financial credit; or
 - (iv) to deter other persons from associating or dealing with the plaintiff;

¹³ This is discussed above in Part 1, Present Law.

¹⁴ [1986] ILRM 601.

¹⁵ ALRC Report, Appendix C, Draft Bill, Section 28.

- (c) the extent to which the publication of the defamatory matter was privileged;
- (d) the extent to which the publication or any damage caused by it was caused or contributed to by the plaintiff;
- (e) any pecuniary loss suffered or likely to be suffered by the plaintiff;
- (f) the nature, extent, form, manner and time of publication of any correction, retraction or apology by the defendant;
- (g) the nature, extent, form, manner and time of publication by the defendant of any reply to the original publication;
- (h) the terms of any declaratory order or order for correction or injunction that the court has granted, proposes to grant or would have granted if the plaintiff had sought such an order or injunction;
- (i) any delay between the publication of the defamatory matter and the decision of the court for which the plaintiff has been responsible;
- (j) any delay between the commencement of the action and the decision of the court for which the defendant has been responsible.

Other Factors

436. In addition to the above factors, we believe that a number of reforms recommended in the Australian Report necessitate the inclusion of certain other factors. For example, if the distinction between libel and slander is abolished, regard should be had in assessing damages to the permanence or transiency of the publication. We have also recommended the repeal of s22 of the *Defamation Act 1961* which allowed the conversion of a partial justification to a full justification and recommended its replacement by a return to the common law rule on partial justification, provided the extent to which the truth of the whole publication is proved is considered by the court when assessing damages. This would be another factor in the provision on assessment of damages.

Circulation

437. We also believe that the *circulation* of the libel should be considered by the court when assessing damages. There is English authority to the effect that this factor is extremely material to the calculation of damages.¹⁶ Logic would dictate that this factor could determine to a large extent the impact of the defamation and should be a crucial element in any assessment of damages. We would therefore include a provision stating that the court should have regard to the circulation of the libel. However, in a case of words innocent

16 See above Part 1, Present Law.

on their face but which become defamatory by reason of extrinsic facts known to some of the recipients of the matter, it may well be that the circulation of the *publication* would far exceed the circulation of the *libel* strictly speaking. For example, a newspaper read by thousands of people might state that Mrs. X had a child in 1955, but only a handful of those readers would be aware that Mrs X was unmarried until 1960, thereby rendering a statement innocuous on its face potentially defamatory. We believe that a provision should state that where words innocent on their face become defamatory by reason of facts known only to particular recipients, the circulation of the libel should be deemed co-extensive with an estimate of the people who had knowledge of these facts.

Importance of Recipients

438. We also believe that the importance of the circulation of the libel in some cases should not lessen in significance the fact that in other cases serious damage may be caused although the circulation of the libel is minimal. For example, if there is only one recipient of the defamatory communication but that recipient is the plaintiff's potential employer, serious injury may well have been caused. *We would therefore provisionally recommend a statutory provision stating that the Court should have regard to the importance to the plaintiff of his reputation in the eyes of the recipient(s) in question.*

State of Mind of Defendant

439. We believe that the *state of mind* of the defendant is a factor which merits some consideration. We have provisionally recommended in this Paper that a claim for general damages be barred where the defendant shows that he met a standard of reasonable care. Therefore a defendant who is faced with the prospect of a damages award is necessarily a defendant who has failed to exercise reasonable care. To this extent the state of mind of the defendant has been incorporated into the substantive law and is no longer a crucial enquiry at the damages stage. However, some distinction could be made in terms of damages between a defendant who was negligent and one who was malicious. Therefore the state of mind of the defendant could be included as a factor relevant to damages.

440. *More importantly, if our defence of reasonable care is rejected, we feel that it is imperative that the court should take into account the state of mind of the defendant in assessing damages.* Otherwise similar sums may be awarded in respect of the most accidental and the most malicious libel. *We would therefore provisionally recommend that the state of mind of the defendant should be a factor affecting damages particularly if our defence of reasonable care is rejected.*

Plaintiff's Reputation

441. We also believe that one of the factors listed should include the

plaintiff's reputation. In this context the rule in *Scott v Sampson*¹⁷ requires discussion. The general rule is that the defendant may lead evidence of the plaintiff's bad reputation in order to mitigate damages. In England, however, under the rule in *Scott v Sampson*, only evidence of general bad reputation may be admitted. The defendant is not entitled to lead evidence of particular acts of misconduct of the plaintiff, even though these might show that he deserved a bad reputation. In short, the defendant may prove that the plaintiff *in fact* had a general bad reputation, but not that he *ought* to have had such a reputation. It is not clear whether this strict position was ever in fact adopted by the Irish courts. In England, the rule has been relaxed to some degree by decisions which hold that a defendant may prove in mitigation of damages certain previous convictions of the plaintiff, or holdings in civil cases involving the plaintiff, on the grounds that such convictions or judgments are evidence that the plaintiff actually has a bad reputation. The Porter Committee noted that the main reason for the limiting by Cave J in *Scott v Sampson* of admissible evidence to evidence of general bad reputation alone, was that in practice to allow otherwise would impose a burden on the plaintiff to show "a uniform propriety of conduct during his whole life", and would give rise to interminable issues only bearing remotely on the issue in dispute. However, the Porter Committee found that the theoretical soundness of the rule in *Scott v Sampson* led to curious and inequitable results in practice. It is worth setting out their comments at length:

"In the first place, it is, in practice, almost impossible to find witnesses prepared to go into the witness box to give evidence that the plaintiff is of general bad reputation. The task of such a witness, who will be subjected to cross-examination by the plaintiff, is so invidious that, however bad the general reputation of the plaintiff may be, it is seldom, if ever, that this kind of evidence can be called. Subject to what is said below as to cross-examination to credit, the rule in *Scott v Sampson* may operate in practice so as to enable a notorious rogue to recover damages for defamation upon the basis that he is a man of unblemished reputation.

In the second place, the rule in *Scott v Sampson* does not affect the ordinary rule that any witness may be cross-examined as to 'credit' - or, more accurately, 'credibility' - with a view to showing that he is not to be believed upon his oath. If the plaintiff gives evidence in an action of defamation he - like any other witness - can be cross-examined as to 'credibility' and may be asked questions as to any particular acts of his conduct in his past life, with the ostensible object not of mitigating damages, but of showing that he is not to be believed on his oath. If he denies any matter put to him in cross-examination as to credibility, evidence in chief to contradict his denial cannot be called by the defendant. In practice, therefore, if the plaintiff elects to give evidence

17 (1882) 8 QBD 491.

in chief, he can be asked questions as to particular incidents in his past life not charged in the libel, and, although the jury should be directed by the Judge that any admission by the plaintiff ought not to be taken into consideration in mitigation of damages, it is inevitable that, if the jury believes the plaintiff to have been guilty of acts of misconduct, which have been disclosed as a result of cross-examination as to credibility, such belief will be reflected in the amount of damages which they award.

On the other hand, since these questions are only admissible as to credibility, they cannot be put if the plaintiff elects not to go into the box; or if he goes into the box but gives no evidence in chief and merely submits himself for cross-examination. In the latter case, since he has given no evidence in chief to be impeached, cross-examination as to credibility is inadmissible. In the result, a libel action may resolve itself into a tactical battle in which the defendant adopts such manoeuvres as are likely to force the plaintiff into a position in which he is compelled to go into the box and give some evidence - however little - in chief, so that there may be put to him in cross-examination as to credibility the very questions which are inadmissible in cross-examination in mitigation of damages under the rule in *Scott v Sampson*.

It is, we think, plainly undesirable that matters which are of great importance to both parties in an action for defamation, should depend not upon any question of merits, but upon mere tactical manoeuvres in the course of the proceedings; and we consider that the present rule as to evidence in mitigation of damages, when taken in conjunction with the rule as to cross-examination to credibility, does, in some cases, cause serious injustice to one party or the other."¹⁸

442. In Ireland at least some of the reasoning of this passage must be regarded as of dubious relevance. It is a rare event indeed for a plaintiff not to go into the box and, in the event of his taking that unusual course, it is most unlikely that the jury would be disposed to award him very much in the way of damages. Be that as it may, the Porter Committee recommended the abolition of the rule in *Scott v Sampson* to the extent that it excludes the giving of evidence of specific instances of misconduct on the part of the plaintiff. They recommended that the defendant, provided he gives due notice to the plaintiff, should be allowed to rely on mitigation of damages upon specific instances of misconduct and be entitled to call evidence in chief and to cross-examine the plaintiff in support of those allegations. However, the defendant should not be entitled, in the absence of a plea of justification, to rely on the facts in the publication complained of - for this would be an attempt to justify under the disguise of giving evidence in mitigation of damages.

¹⁸ Porter Committee Report, paras 149-152.

This recommendation of the Porter Committee failed to become part of the Defamation Act in England simply because it would not have been possible to complete the Third Reading of the Bill on the relevant day if the clause had been put to the House. The Faulks Committee in turn recommended the same change to the existing law, recognising that although it might in some, and it hoped rare, cases increase the length of the trial, it would reduce the abuse of procedure to which such trials were now subject. However, it qualified the matters, including specific acts of misconduct, that might be raised to matters relevant only to that *aspect of the plaintiff's reputation* with which the defamation is concerned. For example, if the defamation concerns the business integrity of an individual, the defendant may not adduce evidence of specific acts of sexual impropriety to show that he had a bad reputation, since this has no bearing on the defamation at issue. The Porter Committee recommendation had contained no such limitation.

The Faulks Committee recommendation reads as follows:

"In all the circumstances we recommend that there should be admissible in mitigation of damages evidence of any matter, general or particular, relevant at the date of the trial to that aspect of the plaintiff's reputation with which the defamation is concerned. Rules of Court should provide that notice should be given of any matter on which a party intends to rely."¹⁹

The New Zealand Committee and the Australian Law Reform Commission agreed that the rule in *Scott v Sampson* was too restrictive and recommended that the defendant be entitled to rely on specific instances of misconduct in order to mitigate damages, provided that these acts were relevant to that aspect of the plaintiff's reputation with which the defamation was concerned. The New Zealand Committee recommended that a provision be enacted requiring a proper form of notice to be given to the plaintiff if the defendant intends to adduce evidence of the plaintiff's bad character. Our Order 36, Rule 36 would appear to cover the situation already.

443. Although Irish law may never in fact have adopted the restrictive rule in *Scott v Sampson*, it would be advisable to clarify this area. Accordingly, we provisionally recommend a provision similar to that proposed by the Faulks Committee. This would allow the defendant to introduce in mitigation of damages any matter, general or particular, relevant at the date of trial to that aspect of the plaintiff's reputation with which the defamation is concerned.

Financial loss

444. A further issue for consideration in this context is the role of financial loss in defamation actions. At present damages in respect of financial loss resulting from a defamation may be awarded. We accept that recovery for

19 Faulks Committee Report, para 372.

financial loss should be allowed but feel that it should be specifically pleaded and proved, and subject to restrictions. Damages in respect of reputational injury are assessed by the court without the plaintiff having to show actual damage precisely because of the difficulties of such proof. No such difficulty obtains in the area of financial loss and we find it unsatisfactory that damages for financial loss should be at large. *We would provisionally recommend that damages in respect of financial loss may be awarded in a defamation action only where the plaintiff shows*

- (1) *the extent of such damage; and*
- (2) *that the loss was clearly limited with the publication. We have already stated our view that the defence of reasonable care should not be available to meet a claim for damages for financial loss clearly linked with the publication.*

Emotional Distress

445. Finally we believe that the position in relation to emotional distress should be examined. It may be that this factor is being given increasing prominence on influencing damage awards. RTE have complained that counsel in libel actions tend to base their presentation on the emotional distress caused. Furthermore, in an English case in 1967 the plaintiffs were awarded compensation for feelings of "anxiety and annoyance" although it was expressly stated that the injury to reputation was negligible.²⁰ We believe that this development in particular is undesirable. If damages are awarded in respect of something quite distinct from injury to reputation, where there is no injury to reputation, this would seem to be straining the concept of the action in defamation.

It is a different matter if injury to reputation is involved and damages for injury to feelings are classed as a head of damages. We accept that damages for hurt feelings are acceptable in this case. However, *we invite views on methods of controlling this factor so that it neither dominates the presentation of the case nor the award of damages.*

Having considered all the factors which we consider relevant to the Court's assessment of damages, we now set our provisional recommendations on factors which should be taken into account by the Court when assessing damages.

- (1) *In making an award of general damages, the Court should have regard to the following factors -*
 - (a) *the nature and gravity of the defamatory words*

²⁰ Fielding v. Variety Inc. [1967] 2QB 841.

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

(3) ABOLITION OF PUNITIVE DAMAGES

The Reform Bodies on Punitive Damages

446. The Faulks Committee regarded the categories of *Rookes v Barnard* with disfavour and recommended the abolition of punitive damages in defamation

law for a number of reasons.²¹ First, it seemed illogical that a person who committed a tort calculating to make more money out of it than the damages and costs that might be awarded would be regarded less favourably than a person who committed a tort out of sheer malice in order to break an innocent neighbour regardless of the cost. Secondly, they disliked the fact that punitive damages are given to a private individual as opposed to the State, as in the case of a fine. Thirdly, they felt that in a proper case, aggravated compensatory damages might be very substantial and justice would be satisfactorily achieved by abolishing the fine and resting damages for defamation purely on compensatory grounds. Fourthly, the safeguards of a criminal trial were absent: the basis on which punitive damages were awarded was vague, the award was made by a jury rather than a judge with experience and training, and there was no appeal. The best that an appellate court could do would be to quash the verdict and order a retrial.

The New Zealand Committee thought by contrast that there was a place in defamation law for punitive damages. However, they endeavoured to meet some of the criticisms of the Faulks Committee. First, they recommended that such awards be left to the judge and not to the jury. Secondly, they thought that the categories set out in *Rookes v Barnard* were too restrictive. They preferred the formulation of the High Court of Australia in *Uren v John Fairfax & Sons Ltd*²² under which punitive damages may be awarded if there is evidence that the defendant's conduct was high-handed, insolent, vindictive or malicious, or in some other way exhibited contumelious disregard of the plaintiff's rights. This met the problem of illogicality complained of by the Faulks Committee. The New Zealand Committee also recommended that a judge be given an express power, in a case in which punitive damages are warranted, to direct instead, or in addition, that the defendant pay the plaintiff's solicitor and client costs.

The Australian Law Reform Commission opted for the abolition of punitive damages and gave three short reasons for its proposal. First, it was felt undesirable that one person should profit by the punishment of another. Secondly, it was felt that punishment should not be inflicted in civil proceedings, without the safeguards of a criminal trial. Finally, it was inconsistent with Australian practice to permit a jury not only to decide liability but also to assign punishment.

The Annenburg Washington Program Report on Libel recommended the abolition of punitive damages, saying²³

"Punitive damages act as an excessive chill on free expression and may be devastating to the defendant. In addition, such awards often bear no relation to reality, sometimes serving to vent distaste for the nature

²¹ Faulks Committee Report, paras 355-6.

²² (1966) 117 CLR 118.

²³ At p 25 of the Report.

or character of the defendant instead of fulfilling any rational interest in deterrence. Compensatory damages for defamation are already highly subjective and may even contain a hidden punitive component. To permit additional punitive damages, therefore, may punish the defendant twice and provide the plaintiff with a windfall grossly out of proportion to actual injury".

447. By way of summary, then, it may be stated that three of the reform bodies recommended the abolition of punitive damages in defamation law, while one body recommended its retention. The body recommending its retention did not base the category of case in which punitive damages could be awarded on the categories set out in *Rookes v Barnard*, but rather on a more general test formulated in *Uren v John Fairfax*, and further recommended that such awards be made only by a judge.

448. Arguments in Relation to Punitive Damages

1. The first objection to the power to award punitive damages is that this confuses the functions of the civil and criminal law. Punitive damages, it is said, should not be awarded in what are essentially compensatory proceedings.

By way of counter-argument it might be said that although damages in tort cases are usually said to fulfil a compensatory function, deterrence is nonetheless a factor simultaneously at work. The purpose of an award is not only to make good the injury done to the plaintiff but also to serve as a disincentive to publishers from engaging in similar conduct in the future. On this line of reasoning, an award of punitive damages, merely pushes to the forefront a factor which is already present in most cases. Professor White supports this view:

"Deterrence is not the function of the criminal law to the exclusion of tort law and there is nothing incongruous in an award of exemplary damages for tort where the deterrent function is emphasised to the exclusion of the reparative function."²⁴

2. The second objection is that the defendant should not be liable for punishment where he does not have the procedural safeguards of a criminal prosecution. This refers to (a) the burden of proof, which is more stringent in a criminal prosecution, and (b) the fact that the judge determines the penalty in a criminal prosecution, whereas exemplary damages may be assessed by a jury in the defamation action.

To (a) it might be replied that the consequences of a criminal prosecution and a civil action are different. A criminal prosecution may

²⁴ White, *Exemplary Damages in Irish Tort Law*, 1987 ILT and SJ, Vol 5 (NS) No 3, p 60.

carry with it the risk of deprivation of liberty for the defendant. A criminal conviction also contains the stigma of criminality and resulting social consequences, which are different from the consequences of an award of punitive damages in a civil action. Therefore, a defendant does not suffer in the same way from the absence of procedural safeguards.

In relation to (b) this objection might be simply countered by giving the power to award punitive damages in a defamation action to the judge alone. This is more an argument for reforming the existing power to award punitive damages, than for their abolition.

3. The third objection is that the money benefits a private individual rather than the State.

As against this, it may be argued that if the conduct for which the defendant is being punished was directed specifically at the plaintiff, it is appropriate that the money should go into his pocket. It is an incentive for plaintiffs to bring actions in respect of punishable conduct, which might otherwise be left unpunished to the detriment of the common good.²⁵

449. In addition to these counter-arguments a number of positive points may be made in favour of punitive damages.

1. Although tort law serves the narrow aim of compensating the plaintiff in the individual case, it also fulfils the more general aim of laying down standards of behaviour for the community. On this view, punishing the offender for deviating from these standards is quite in line with the function of tort law. A purely compensatory award may indeed redress the harm done to the plaintiff but it fails to respond to the quality of the defendant's conduct. The punitive damage award achieves the latter effect and so furthers the aim of tort law.²⁶
2. If punitive damages are abolished in name, they may continue to exist unidentified. Many apparently compensatory damage awards smack strongly of a punitive flavour. If juries continue to act on the instinct that the defendant should be punished, it is better that they do so overtly and subject to precise guidelines.

We invite views as to whether punitive damages should be retained in Irish defamation law. However we believe that if the power to award punitive damages is retained, it should be made subject to clear guidelines. One example of such a basis is the formulation given by the High Court of

²⁵ The counter-arguments are adapted from Professor White's article, *supra*.

²⁶ This argument is put forward by Fridman, *Punitive Damages in Tort*, (1970) 48 Can. Bar Rev 373, and cited by White, *supra* footnote 21.

Australia in *Uren v John Fairfax*, namely, where the defendant has acted in a high-handed, insolent, vindictive or malicious way, or has in some other way exhibited a contumelious disregard for the plaintiff's rights. Another suggestion is that of Professor White who argues that punitive damages should be limited to cases where "the defendant has intentionally or recklessly injured the plaintiff ... in circumstances where the misconduct is so gross as to warrant the punishment of the defendant over and above that which is necessarily inflicted upon him by the award of compensatory damages which he suffers". A third suggestion is made by an American writer, Epstein, who puts forward the view that punitive damages should be awarded where the defendant has continued with repeated and systematic defamatory attacks even after its falsehood has been communicated to him.²⁷ It is felt that the last formulation is too narrow; and that the reference in the second proposal to "intention" and "recklessness" may lead to enquiries which are too technical.

450. We suggest that a test modelled on the Australian provision should be considered. However, we do not favour the use of the word "malice" given its ambiguous history in defamation law. The following is an example of the type of provision envisaged -

"Punitive damages may be awarded where the conduct of the defendant has been high-handed, insolent, vindictive, or has exhibited a disregard for the plaintiff's rights so gross as clearly to warrant punishment over and above that which is inflicted upon him by an award of compensatory damages."

In view of the recent award of exemplary damages upheld by the Supreme Court in the INTO case,²⁸ a further possibility would be to allow awards of exemplary damages where there has been an infringement of the plaintiff's constitutional rights.

(4) ROLE OF THE APPELLATE COURT

451. Since *Holohan v. Donohue*,²⁹ the Supreme Court has recognized its jurisdiction under Article 34.4.3 of the Constitution to substitute its own figure for a jury's award of damages on appeal in a civil case. No exception in relation to defamation actions was envisaged by the Supreme Court in that case. However, it should perhaps be made clear in statutory form that the Supreme Court does have this jurisdiction in defamation cases. This power clearly lessens the fear of unreasonable damage awards being allowed to stand.

We therefore provisionally recommend for the removal of doubt a statutory

27 Epstein, Was *New York Times v Sullivan* Wrong?, 53 U. Chicago L.Rev. 782, 814.

28 Reported *Irish Times*, Friday 15 February 1991.

29 [1986] ILRM 205.

provision stating that the Supreme Court has the power to substitute its own figure for an award of damages in an action for defamation which has been found by it to be unreasonable.

B. INJUNCTIONS

Interlocutory Injunctions

452. The granting of an interlocutory injunction in a defamation case is rare. The courts do not wish to impose prior restraints on free speech and they are also reluctant to usurp in advance the function of the tribunal which will eventually try the case. As a result an interlocutory injunction will not be granted if (a) there is any doubt that the words are defamatory, or (b) the defendant intends to plead justification,³⁰ and probably any other recognised defence,³¹ and it is not manifest that such defence is bound to fail.

The Faulks Committee, New Zealand Committee and the Australian Law Reform Commission all refused to alter these principles and agreed that the power to grant interlocutory injunctions in defamation cases should continue to be exercised with caution.

Nonetheless, there are two matters which might be clarified in this area. The first concerns the rule in *Bonnard v Perryman*. It was noted above that in some cases where the defendant said that he would plead justification, fair comment or privilege, this was held automatically to preclude the granting of an interlocutory injunction³² whereas in other cases, the affidavits were examined in order to see if there were any grounds for the defence.³³ It is submitted that the latter course is preferable. An automatic refusal of an injunction merely because the defendant has stated his intention to plead one of these defences at trial might lead to abuses of the rule. The court should examine the affidavits in order to see whether a case for consideration by the jury has been made out. *We recommend a provision along the following lines:*

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

- (1) *The Court should grant such injunction only if the matter is clearly defamatory and the defence raised is bound to fail;*
- (2) *The Court may not grant an injunction if the affidavit of the defendant discloses a case for consideration at trial.*

453. The second clarification that might be made is in response to the ACC

30 Under the rule in *Bonnard v Perryman* [1891] 2 Ch. 269.

31 *Halsbury's Laws of England*, 4ed, vol.28, para. 168.

32 *Gallagher v Touhy* (1924) 58 ILTR 134.

33 *Cullen v Stanley* [1926] IR 73. See para 144, Current Law, at p 133-4.

case, discussed in detail in Part I.³⁴ It appears that in this case an *ex parte* injunction was ordered and that a prohibition was imposed upon the reporting of the fact of the injunction itself. It was suggested³⁵ that such a ruling might not have been competent under s 45 of the *Courts (Supplemental Provisions) Act 1961*. The media have expressed their anxiety about the prohibition imposed in this case. It may be that no statutory provision is required to respond to what appears to have been a deviation from the normal manner of granting injunctions. However, the media have suggested that this has occurred on more than one occasion. *Accordingly, it is suggested there be a provision making it clear that, where an injunction is issued to restrain a publication, the court has no power to prohibit the reporting of the fact of the injunction.*

C. PROCEEDINGS FOR DECLARATORY JUDGEMENT

454. Under Order 19, rule 29 of the Irish Rules of the Superior Courts and Order 15, rule 16 of the English Rules of the Superior Courts, there is a general power in the Court to make a declaratory judgment or order whether or not consequential relief is claimed.

The Faulks Committee noted that this power had not been invoked in practice in defamation actions, because it was normally assumed that there must be a claim for damages. They recommended for the avoidance of doubt that a Rule of Court should clarify that an action for a declaration alone can be brought in defamation proceedings. Plaintiffs who wished to clear their reputations without claiming damages might wish to avail of this procedure.³⁶

The Boyle/McGonagle Report pointed out the advantage of the declaratory order to a plaintiff who wishes speedily to redress the harm done to his reputation and does not wish to obtain damages. However it observed that a declaratory order would have no great attraction for a plaintiff unless it were promptly available. It noted that under Order 3(20)(21)(22), a special procedure was available, which allowed for proceedings to be commenced by a special summons and dealt with speedily (Order 38). The Report recommended that this procedure be better publicised and its status as an alternative remedy to a suit for damages be expressly set out in a new Defamation Act.³⁷

455. We should distinguish at this point between what we term "proceedings for a declaratory judgment" and the remedy of "the declaratory judgment". We recommend elsewhere the introduction of the new remedies of the correction order and the declaratory judgment. These would be available to the judge in the ordinary action in defamation, set down for trial in the ordinary way

³⁴ See above under Present Law.

³⁵ By Casey, *Constitutional Law in Ireland*, p455.

³⁶ Faulks Committee Report, para 378.

³⁷ *Report on Press Freedom and Libel*, paras. 5.38-5.39.

and in which all the normal defences are available. We envisage proceedings for declaratory judgment to be a different type of proceeding altogether, the main features being that it would be set down for early trial, it would be limited to the issue of falsity of the statement, and that the declaratory judgment would be the only remedy available.

The declaratory judgment has increasingly become the focus of attention in the United States. It is particularly fortunate that a detailed discussion of two separate Bills providing for the remedy of the declaratory judgment was undertaken by two American writers, supplying us with the arguments for and against different aspects of this remedy. The two articles are written by Professor Franklin of Stanford University and Associate Professor Barrett of Rutgers University and the two Bills discussed are one put forward by Professor Franklin, and one introduced by Congressman Charles Schumer.³⁸ We propose to examine these Bills as a foundation for the introduction of proceedings for declaratory judgment.

The Franklin Bill

456. The following is a summary of the essential parts of the Franklin Bill -

Section 1 - *ACTION FOR DECLARATORY JUDGMENT THAT STATEMENT IS FALSE AND DEFAMATORY*

- | | |
|----------------------|---|
| (a) Cause of Action: | (1) Any person who is the subject of any defamation may bring an action for a declaratory judgment that such publication was false and defamatory. |
| | (2) Proof of the defendant's state of mind is not required. |
| | (3) No damages may be awarded in such an action. |
| (b) Burden of proof: | The plaintiff shall bear the burden of proving by clear and convincing evidence each of the elements described in (a). A report of a statement made by an identified source shall not be deemed false if it is accurately reported. |
| (c) Defences: | Privileges existing at common law or by statute shall apply to this section. |

³⁸ See Franklin, A Declaratory Judgment Alternative to Current Libel Law, 74 Calif L Rev 809 and Barrett, Declaratory Judgments to Libel: A Better Alternative, 74 Calif L Rev 847.

- (d) Bar to certain claims: A plaintiff who brings an action for a declaratory judgment under (a) shall be barred from asserting any other claim or cause of action arising out of the same publication.

Section 2 - *LIMITATION OF ACTION*

- (a) The action must be commenced within one year of the date of publication.
- (b) It is a complete defence to an action under section 1(a) that the defendant published an appropriate retraction before the action was commenced.
- (c) No pre-trial discovery of any sort is permissible in any action brought under section 1(a).
- (d) When setting trial dates, the courts shall give actions under section 1 priority over other civil actions.

457. Section 3 deals with proof and recovery in actions for damages; while section 4 deals with costs, providing incentives to use the declaratory judgment remedy. It must be recalled that in the United States each party bears his own costs.

Attention may be drawn to a number of features in this Bill:

- In the action for declaratory judgment, proof of the defendant's state of mind is not required. Therefore it is a no-fault or strict liability trial. In the United States, this is a departure from the position in damages actions where the plaintiff must show fault, and it is therefore an advantage of the procedure. In Ireland this represents no departure from the existing strict liability position in actions for damages. However if our recommendation on the defence of reasonable care is accepted, the irrelevance of the defendant's state of mind in declaratory proceedings would be a difference in these proceedings from proceedings in which damages are claimed.
- The plaintiff bears the burden of showing falsity. This would not be consistent with the existing presumption in Ireland. However the provision could be easily amended in this respect.
- Section 1(b) refers to reports from identified sources. The idea is to prevent the defendant from having to prove the truth of statements he did not make. This is a broader privilege of report than those rights of reportage already existing in Irish law, which would be covered by section 1(c) of the Bill. However the suggestion has been made

elsewhere in this Report that a broad defence of fair report would be desirable in Irish law. If this view is favoured, no amendment to section 1(b) would be necessary.

- A plaintiff who brings an action for a declaratory judgment is barred from bringing a subsequent action for damages.

This is a central part of the proposed reform. The plaintiff must therefore choose whether to bring proceedings for a declaratory judgment or bring an action for damages. The apparent harshness of this situation is removed when it is noted that we propose the new remedies of correction orders in actions for damages. Essentially the plaintiff's choice would be as follows: (1) avail of the speedy declaratory proceedings, or (2) wait longer for an action for damages, in which if he fails to obtain damages he will still obtain a correction order.

- Where the defendant has published an "appropriate retraction" prior to the commencement of the action, the plaintiff may not obtain a declaratory judgment. However the retraction must be "appropriate" i.e. as full and as satisfactory as the declaratory judgment would have been. This is simply because a plaintiff in declaratory proceedings will obtain no more than a declaratory judgment, which is essentially the same as a retraction. It makes no sense to allow him to obtain both.
- The priority of declaratory judgments over other civil actions in terms of trial dates gives the remedy the speed which is crucial to its effectiveness as an alternative to actions for damages.

As Franklin points out, the "crucial question" is whether plaintiffs will avail of the proposal in practice. His proposal offers a number of advantages to U.S. plaintiffs which would not apply to Irish plaintiffs, such as the fee shifting provisions and the fact that the trial is a no-fault one. It is submitted that the remedy is nonetheless an attractive one for Irish plaintiffs because (1) it is speedy (2) it is less costly, and (3) it specifically addresses the issue most important to the plaintiff, namely the falsity of the statement.

Since falsity is the only issue litigated in such a case, it might be unfair to leave the current presumption of falsity in actions for declaratory judgment. An Irish defendant might well be unable to contest a declaratory judgment action at all, unless he comes within a statutory or common law privilege. It might be more just to place the burden of proof of falsity in actions for declaratory judgments on the plaintiff.

The Schumer Bill

458. The Schumer Bill embodies many of the features in the Franklin Bill, such as the burden of proof, the effect of opting for a declaratory judgment,

the limitation period and the importance of fee-shifting provisions. There are four major differences in the Schumer Bill however:

- (1) *The range of plaintiffs* - Only public figures and public officials are defined to come within the class of plaintiffs who may choose the declaratory options route. This is a direct response to the difficulties facing such plaintiffs in American libel actions. In Ireland it would be more appropriate to allow all plaintiffs to avail of the remedy.
- (2) *The Range of Defendants* - The Schumer Bill applies only to publications or broadcasts in the "print or electronic media". However there appears to be no good reason for so confining the range of defendants against whom a declaratory action may be sought.
- (3) *Election by Defendant* The most crucial difference between the two Bills is that Franklin confers the right to elect for the declaratory action on the plaintiff alone, whereas the Schumer Bill allows the defendant to convert an action for damages into a declaratory action. The relevant provision reads -

"(1) A defendant in an action brought by a public official or public figure arising out of a publication or broadcast in the print or electronic media which is alleged to be false and defamatory shall have the right, at the time of filing its answer or within 90 days from the commencement of the action, whichever comes first, to designate the action as an action for a declaratory judgment ...

(2) Any action designated as an action for a declaratory judgment pursuant to paragraph (i) shall be treated for all purposes as if it had been filed originally as an action for a declaratory judgment under subsection (a), and the plaintiff shall be forever barred from asserting or recovering for any other claim or cause of action arising out of a publication or broadcast which is the subject of such action."

- (4) *Discovery* - There is no provision in the Schumer Bill prohibiting discovery in actions for declaratory judgments.

Election by the Defendant - The Pros and Cons

459. Although the point may seem to be a simple one as to whether the plaintiff alone, or both plaintiff and defendant, may choose the declaratory option, the issue is much wider. If the plaintiff only is allowed to elect, the declaratory route merely becomes an alternative to damage actions. If the defendant also may elect, we are looking at the potential demise of damage

actions. As Professor Franklin states -

"The only plausible situation in which media defendants might willingly expose themselves to damage liability and extensive defence costs is when the defendant perceives only a minimal risk of liability and would rather accept that chance than admit error or have falsity adjudged in the declaratory action."³⁹

460. Accordingly it is to be expected that damage actions would be allowed to continue in only a small number of cases if the defendant is permitted to convert an action for damages into proceedings for declaratory judgment.

1. Franklin thought it was unjust for plaintiffs who had suffered harm to be barred from suing for damages because of the likelihood that the defendant would exercise the power of conversion.

Barrett responds by questioning whether a plaintiff should ever be entitled to damages. He relies on the findings of the Iowa Libel Research Project that the dominant interest of most plaintiffs is correction of falsity. To the extent that a desire for damages plays a role in plaintiff's minds, it stems from two sources: (a) a desire to punish the publisher and "get even", (b) to secure publicity and provide a sense of vindication. Barrett suggests that purpose (a) is an illegitimate aim in compensatory proceedings and that it should not be encouraged. He also states that purpose (b) is equally fulfilled by the declaratory action.

Despite these points, Franklin maintains his position.

"The self-serving assertion of many plaintiffs that they sue for non-monetary relief does not support a conclusion that no plaintiff should be permitted a non-trumpable election to seek damages. Even the press itself appears concerned about the fairness of this approach. Unless one denies the existence of harm in libel cases, something that most journalists are unwilling to do, it is hard to justify the de facto elimination of damage awards in virtually all cases".⁴⁰

We agree with Franklin that abolition of damages in all actions is not a goal worth striving for.

2. Franklin suggests that the prospect of a declaratory judgment without the possibility of an action for damages is insufficient to encourage high standards of journalism. A publisher is more likely to verify the accuracy of facts if there is a possibility of an action for damages;

39 Franklin, *supra* footnote 38, at 837.

40 Franklin, *supra* footnote 38, at 837-8.

however if the choice of action is in his hands he is less likely to be deterred from sloppiness and carelessness.

Barrett argues that damage awards are not necessary to enforce high standards of journalism, because defendants know that it is in their own self interest to publish accurate material. Otherwise their credibility is impaired and the resulting loss of public esteem stings more than a damage award. "Part of the attractiveness of the declaratory remedy is its reliance on the defendant's self-interest in reputation ... A responsible publisher, believing that its reputation for accuracy attracts customers, measures the total 'cost' of any judgment against it not just by the out-of-pocket expense, but also by the costs resulting from injured reputation and future lost sales. These 'costs' are likely to reach a greater total under the more certain punishment of the declaratory remedy than under traditional damage actions".⁴¹

461. It is arguable that at least some newspapers do not rely on a reputation for accuracy to boost sales, as Barrett suggests, but rather on the sensational nature of their content. This undermines Barrett's argument.

462. A number of final points may be made. The Franklin Bill does not include a provision mandating publication by the defendant of the judgment in a declaratory action. Franklin acknowledged this omission and thought that it was sufficient that the plaintiff emerged with a judicial declaration which he could show to employers, creditors, acquaintances and others. Furthermore, it would be expected that other media would report the fact of the judgment. However, he thought that a mandatory publication of judgment involved meddling with editorial process -

"On balance, the overall danger of governmental coercion of the press involved in mandating retraction outweighs the marginal benefit lost by not requiring publication of the result of a declaratory judgment action".

We are not satisfied that this should necessarily be the case in Ireland in the light of the practice in other countries of ordering publication of judgment.⁴²

463. The second point is that Franklin leaves all common law and statutory privileges in place for the declaratory judgment action, thereby including qualified privilege. Barrett suggests that since qualified privilege protects interests which are less important than those served by absolute privilege, a plaintiff in the former case should arguably be entitled to set the record straight in a declaratory action.

In our discussion of absolute privilege, we questioned the fairness of affording a complete immunity to certain statements. One advantage of introducing the

41 Barrett, *supra* footnote 38, 871.

42 e.g. France, see below.

declaratory judgments would be that it would be possible to allow a person injured by a defamatory statement in circumstances to which absolute, or indeed qualified privilege, applies to seek redress in a form other than damages. Since the defences of absolute and qualified privilege were introduced in a legal context in which damages were the only remedy, some re-thinking of these defences is necessary if new remedies or new types of proceedings are introduced. We feel that the balance between freedom of expression and protection of reputation requires that *damages* should not be recovered in respect of statements in circumstances to which absolute and qualified privilege traditionally applied, but that the balance might require that *declaratory judgment proceedings* should be available to persons injured in such circumstances.

464. *We provisionally recommend the introduction of proceedings for declaratory judgment. We set out a skeleton of a provision on such proceedings and invite views on a number of topics -*

Action for Declaratory Judgment that Statement was False and Defamatory.

- (a) *Cause of Action:*(1) *Any person who is the subject of any allegedly defamatory publication may bring an action for declaratory judgment that the statement was false and defamatory.*
- (2) *No damages may be awarded in such an action.*
- (b) *Burden of proof:* *The plaintiff shall bear the burden of proving there was publication and that the statement was defamatory.*
- (c) *Defences:* *Privileges existing at common law and by statute, and the defence of truth, shall apply to this section.*
- (d) *Bar to certain claims:* *A plaintiff who brings an action for a declaratory judgment shall be barred from asserting any other claim or cause of action arising out of the same publication.*
- (e) *Limitation of Action:*(1) *The action must be commenced within one year of the date of publication*
- (2) *It is a complete defence to an action under this section that the defendant published a timely and conspicuous correction before the action was commenced.*
- (3) *The procedure should be of a summary nature.*

(f) (i) Correction defined: A correction is a good faith publication of the facts, withdrawing and repudiating the prior defamatory statements.

(ii) Timely correction: A timely correction is a correction published within 30 days of being so requested by the plaintiff.

(iii) Conspicuous Corrections:

A conspicuous correction is a correction published in substantially the same place and manner as the original defamatory statement. The placement and timing of the correction must be reasonably calculated to reach the same audience as the prior defamatory statements being corrected.

(iv) Location of Correction:

The Correction should be given equal prominence to the matter complained of and it should be of equal length. Where a press organisation customarily designates a particular space for corrections, notice of the correction should be placed in substantially the same place as the original matter. (Alternatively, the placing of a correction in a customarily designated spot could be deemed insufficient).

465. Some of these provisions are linked with our recommendations in a previous chapter on Request as a Pre-requisite to Suit. This required the plaintiff to request a timely and conspicuous retraction prior to bringing an action and proceedings were barred if the defendant obliged. The plaintiff could only proceed with an action if (1) he was refused a retraction, or the retraction was not timely or was not conspicuous, or (2) the plaintiff alleged a lack of reasonable care. This in turn is interwoven with our recommendation on the defence of reasonable care. If both of these recommendations are adopted, there would be no need to define the terms used in the section on declaratory proceedings. Instead, paragraph (e)(2) of the provision on declaratory proceedings could state:

"It shall be a complete defence to an action under this section that the defendant published a retraction in accordance with the terms of the section (on request as pre-requisite to suit)".

466. *We invite views on the following possible additions or alterations to the proposed provision -*

- (1) *Whether in proceedings for declaratory judgment the burden of proving falsity should be in the plaintiff;*
- (2) *Whether privilege (absolute or qualified) should be a defence to such an action. It is arguable that injury caused by abuses of privilege should be redressed by means of a declaratory judgment;*
- (3) *Whether the limitation period of one year is satisfactory;*
- (4) *Whether the declaratory judgment should be backed by a court order for publication of judgment.*
- (5) *Whether notice of a correction in a customarily designated place in the same place as the original statement is sufficient. Perhaps the correction itself should always be published in the same place as the original material.*

D. CORRECTION ORDERS

467. At present the court has no power to order a defendant to publish a correction of the mistaken impression caused by his publication. Considerable attention was devoted by the Australian Law Reform Commission to this new remedy.⁴³ They recommended that the Court be given the power to make such an order. This suggestion commanded overwhelming support, including all of the major media interests in Australia.

One major concern expressed, however, was whether these orders would replace damages. The Commission recommended that the correction order would be available *in addition* to damages; however, in awarding damages, the court should be required to take into account the likely effect of the correction and compensate the plaintiff for any residual damage to his reputation only. In many cases this residual damage would be small as the correction order would go far to reducing the damage done. In other cases, as where there was delay, the correction order would not significantly reduce the injury done, and the residual damage would accordingly be higher. In some cases, the correction order might be of no assistance at all, in which case it should not be granted. The damages award and the correction order would be like opposite ends of a see-saw. The court starts by asking how much the correction order will reduce the injury, and the more it does so, the less damages are awarded; the less it does so, the higher damages are awarded. The Australian Law Reform Commission hoped that this additional weapon for the courts would release them from their inhibitions regarding defences.

The Australian Law Reform Commission proposals on correction orders were set out in their draft Bill in the following terms:

"Section 25(1) In an action under this Act, the Court may, subject to

43 ALRC Report paras 251-2 and 257-9.

subsection 11(2),⁴⁴ grant all or any of the following remedies:

- (a) an order for correction
- (b) an award of damages
- (c) a declaratory order
- (d) an injunction.

Section 26(1) Where the Court makes an order for the correction of matter, the Court may specify the content of the correction and may give directions concerning the time, form, extent and manner of publication of the correction.

(2) Unless the plaintiff otherwise requests, directions given by the Court under subsection (1) shall be such as will ensure that, as far as is practicable, the correction will reach those persons who were recipients of the matter to which the correction relates.

Section 27 In a defamation action arising out of the publication of defamatory matter being a comment, the Court may make an order for correction of any allegation of fact expressly or impliedly referred to in the published matter as a basis for the comment the truth of which is not established by the defendant or admitted by the plaintiff⁴⁵.

468. We are in favour of the introduction of the correction order as an additional remedy in Court. It should be available to the plaintiff in *all cases* where the defendant has failed to establish the actual truth of a defamatory allegation of fact. If introduced in conjunction with the defence of reasonable care to a claim for general damages, the correction order would therefore be available:

- (a) On its own, where the defendant meets a claim for general damages with a successful defence of reasonable care;
- (b) With general damages, where the defendant fails to raise or is unsuccessful in a defence of reasonable care;
- (c) With damages in respect of financial loss, where the plaintiff shows financial loss clearly linked with the defamatory publication;
- (d) With general damages and damages in respect of financial loss, combining the eventualities of (b) and (c) above.

We note in respect of (a) above that we consider that a correction order

⁴⁴ Section 11 relates to defamation of the dead.

should issue even where the defendant has established reasonable care because by failing to prove actual truth, he has accepted in law that the statement is false. This is in harmony with our view that a correction order should issue in all cases where the truth of a defamatory allegation of fact has not been established by the defendant. We note also that a correction order may not be awarded in respect of a statement of opinion, since there is no such thing as a true or false opinion.

We provisionally recommend that the Court should have the power to award a correction order where the defendant has failed to establish the truth of a defamatory allegation of fact.

E. DECLARATORY JUDGMENT

469. The essence of a correction order is that it is directed at a particular defendant and directs that defendant to publish particular material i.e. a retraction and a correction of the defamatory matter. We realize that in certain cases a correction order may not be appropriate, because it assumed that the defendant is a press or media organ. We propose the remedy of the declaratory judgment for situations where the plaintiff wishes to obtain a more general order of the court stating simply that the matter is false. For example, an employee who has been defamed by a fellow employee could present this judgment to his employer, or to a prospective employer, or could use it in proceedings in respect of unfair dismissal. We therefore see the declaratory judgment as a necessary counterpart of the correction order.

We provisionally recommend that the Court should have the power to issue a declaratory judgment stating the defamatory matter to be false where the defendant has failed to establish the actual truth of a defamatory allegation of fact.

F. RIGHT OF REPLY

470. Under existing Irish law, there is no legally enforceable right of reply. Some newspapers offer it as one of their services. In France and Germany, however, the right of reply is a legally enforceable right.⁴⁵

France

The right of reply was introduced into French law by article 13 of the Act of 29 July 1881 on press freedom. Under article 13, the director of a written publication is obliged to insert the reply of any person, physical or legal, who has been named or designated in the publication free of charge and within a specified time period. A crucial point to note is that the individual requesting the right of reply need not show that the original statement was false or that

45 The following summary of the French and German Rights of Reply is based on the ALRC Report, p 95, fn 138 and material provided by Marie McGonagle, co-author of the Boyle/McGonagle Report on Press Freedom and Libel.

it caused harm. The mere mention of his name is sufficient to ground the right. Interestingly, the potential for far-reaching effects on the content of newspapers has not been fulfilled:

"Although the right is far-reaching, clearly open to abuse, and capable of greatly hampering editorial freedom and investigative journalism, it is in fact used sparingly and abuses are rare. The attitude of French journalists would seem to be, on the whole, that the right works well and forms a desirable, even necessary part of press freedom."⁴⁶

The time periods in which the reply must be printed are different with respect to daily newspapers and other periodicals. In the case of dailies, the reply must be printed within three days of receipt, except during election periods where the period is reduced to 24 hours. With regard to other publications, the reply must appear in the first issue to appear more than 2 days after receipt of the reply.

The reply must be given equal prominence to the article which was complained of, and must generally be of the same length, with minimum and maximum limits of 50 lines and 200 lines respectively. The reply must be printed free of charge. If the individual wishes to pay for additional lines, this does not entitle him to insist on a reply longer than the maximum 200 lines or the original article.

If the individual is met with a refusal to publish his reply, he may resort to a court action. Refusal to publish is a criminal offence punishable by fine or imprisonment of the director. The court must give judgment within 10 days, as speed is the aspect of the remedy which promotes its efficacy.

The broadcast media are governed by different legislation concerning the right of reply. The Act of 29 July 1982 replaces the provisions governing the right of reply contained in the Act of 3 July 1972 (as amended by a Decree of 13 May 1975). Under the 1972 Act, the remedy was limited to the state broadcasting system and was administered by a specially composed commission instead of the ordinary courts. It was not available to legal persons and it was necessary for the individual concerned to prove harm resulting from the statement. These features have now been altered so that (i) the right of reply extends to private broadcasting stations, (ii) it extends to legal persons, (iii) it is administered by the president of the Tribunal de Grande Instance acting in his capacity as referee (an urgent and speedy procedure) and (iv) it is necessary to show only that the statement was *capable* of causing harm.

Despite the reduced requirement that the individual need only show that the statement was capable of causing harm, it is still a major point of difference between the rights of reply in relation to the press and the broadcast media respectively. It will be recalled that the right of reply in relation to a press

46 Article 19, Freedom of Information and Expression in France, 1989, p15.

statement is exercisable where the individual was merely mentioned or indicated. It has been found that the right of reply in relation to the broadcast media has been of little practical value, since all demands for reply are contested on the ground that the original statement was not capable of causing harm and the resulting delay denies the remedy of the speed which is crucial to its efficacy.

Election periods - All rights of reply are affected during election periods. In the case of dailies, the obligation to publish a reply within three days is reduced to a 24 hour time period. The director must declare to the public at the commencement of an electoral campaign the time at which printing occurs. The time period of eight days applicable to the broadcast media is reduced to 24 hours also.

*The Federal Republic of Germany*⁴⁷

471. In Germany the right to reply or the "right of counter-statement" is governed by the press laws of the individual states. The counter-statement may be demanded in respect of factual statements only: no reply will issue in respect of statements of opinion or value judgements. The most important yardstick of a factual assertion is whether the statement can be objectively proven. The statement of fact need not be detrimental to the individual concerned; he must merely be mentioned. The counter-statement is required to fulfil the following conditions.

- (a) It must be in writing;
- (b) It must be signed by the individual concerned;
- (c) Its content must be factual;
- (d) It must be demanded without delay, not later than three months after the original publication;
- (e) Its length must correspond roughly to the original publication complained of.

There is no right to demand a counter-statement against reports of Parliament or the courts, business advertisements, or a previous counter-statement. There are certain restrictions upon the publication of the counter-statement which are applicable to the publisher. The counter-statement must be printed in the same part of publication as the original matter was placed. The publication of a counter-statement as a letter to the editor is not admissible. No arbitrary changes to the counter-statement are permitted, the printing thereof is free of charge. The truth of the counter-statement is not relevant, unless it is

⁴⁷ The source of the following material is matter supplied by Marie McGonagle, co-author of the Boyle/McGonagle Report on Press Freedom and Libel.

manifestly untrue. A demand for a counter-statement in court is admissible if such a demand against a press organisation has failed, and the demand must be by way of application for a provisional injunction.

England

472. The Committee on Privacy and Related Matters (1990) in England recently examined the introduction of a statutory right of reply. It noted that a Private Member's Bill on Right of Reply had been introduced by Tony Worthington MP, the main provisions of which included;

- a. There should be a statutory right of reply to factual inaccuracies damaging to the character, reputation and good standing of an individual or body of persons. The reply should appear in the next possible edition of the paper or periodical with similar prominence to the offending article.
- b. There should be a Press Commission appointed by the Home Secretary to hear complaints and enforce the right of reply. Compliance should be enforceable by the courts.
- c. There should be a Right of Reply Adviser to provide advice to complainants seeking a right of reply.

The Committee noted that there had been strong opposition to the Bill from the Press.

The Committee outlined two arguments of principle in this area. One argument was that any requirement that the press publish any matter at the instance of another party restricted its freedom and opened the door to abuse.⁴⁸ The second argument was that any person who is inaccurately described or criticised (sic) in the press should be entitled to have the inaccuracy corrected. The Committee also observed that a limited right of reply existed under s7 of the Defamation Act 1952, the Irish equivalent of which is s24 of the Defamation Act 1961.

The Committee thought that much of the opposition to the right of reply stemmed from a misconception of its scope. As set out in the Bill, it would "strictly speaking not be a right of reply by the complainant but a right to have a correction published as a statement of fact".⁴⁹ The Bill's proposed remedy would not apply to subjective questions of balance, distortion, misrepresentation or omission.

The Committee thought that the first main problem of definition was that of "factual inaccuracies" because "while certain facts may be demonstrably either true or false, the choice in a newspaper report is seldom so stark". It noted that in West Germany sometimes lengthy negotiation was required between

48 Para. 11.4.

49 Para. 11.8.

lawyers over the terms of reply. A related problem was that of defining how serious the factual inaccuracy would have to be, since:

"There would be little purpose in providing a detailed machinery for correction of trivial mistakes when these did not alter the thrust of otherwise accurate reports".

The Committee observed that the 1977 Royal Commission on the Press recommended against creating a mechanism for ensuring a right of reply on the ground that the press should not be subjected to a special regime of law nor labour under special disadvantages compared with the ordinary citizen. The Royal Commission recommended that the Press Council should actively involve itself, after publication, in obtaining counter-statements on behalf of those who had been criticized unfairly, on inaccurate information. However, the Private Members' Bill included the provision of a Press Commission to overcome two perceived weaknesses of the Press Council, its dependence on the press and the lack of powers of enforcement. The proposed Commission was criticised for failing to provide adequate legal mechanisms or safeguards, such as the right to an oral hearing, to demand evidence on oath, to cross-examination, to legal representation, discovery of documents, and appeal. The Committee said it could not see "how truth could be ascertained in cases of dispute, quickly or otherwise, without such safeguards".⁵⁰

The Committee recommended that *no* statutory right of reply should be introduced because it was not persuaded that the factual inaccuracy of a story could be ascertained under a speedy and informal procedure.⁵¹ Instead, it recommended that the Press Complaints Commission (proposed by it) should consider complaints "both of inaccuracy and unfairness" and should, where appropriate, recommend the publication of a correction and apology.⁵²

473. Some points may be made with regard to the above. Firstly, we believe that it is unhelpful to speak of correcting "criticisms", since criticism is a subjective matter not capable of being proved true and is therefore not susceptible to correction. Similarly, we would disagree with the Committee's recommendations that the Press Complaints Commission deal with complaints of "unfairness" with a view to their correction. We believe corrections should be confined to factual statements, difficult as the nature of certain statements may be to establish.

474. Secondly, we believe there is a confusion in the Bill and in the Calcutt Committee's Report as to the distinction between corrections and replies. The Bill proposed a "right of reply" which was in essence a correction. The Committee approves the argument that the establishment of truth cannot be achieved through an informal and speedy procedure. However, rights of reply

50 Para. 11.13.

51 Para. 11.15.

52 Para. 11.6.

do not seek to achieve this, because this is essentially a court function. Rather, rights of reply in essence allow the individual defamed to present his side of the story, with no authoritative statement that this is the correct version. The whole point about the right of reply procedure is that the public is left to make up its own mind after hearing both sides of the story. Therefore the arguments pressing for full legal safeguards are probably misplaced, since this would create procedures merely parallel to the court system.

475. Thirdly, in response to the argument that the enforced publication of replies interferes with editorial freedom (which incidentally is a popular argument in the United States) it may be said that this presupposes an editorial right to print untruths, which probably reads too much into the right to freedom of expression. It also takes a simplistic, one-sided view of the right to freedom of expression, which in view of the constitutional guarantee of the right to a good name would be weak, if not eliminated in this jurisdiction.

476. Fourthly, the Royal Commission on the Press referred to the proposed obligation to publish replies as a "disadvantage", and one which should not be imposed on the media since this would place it in a weaker position than the rest of society. If one of the aims of the media is that of disseminating truthful information, it is difficult to see how the publication of either a correction or a reply is a "disadvantage".

At present, some Irish newspapers allocate a section of their publication to replies to articles previously written. A legally enforceable right of reply would ensure that all media organs provide such a facility, and further, that the reply be given equal prominence to the original article.

In certain limited situations there is a right of reply in Irish statutory law. Reports of matters contained in Part II of the Second Schedule to the Defamation Act are privileged only if the defendant provides the plaintiff with the opportunity to make a reasonable statement by way of explanation or contradiction upon being so requested by the plaintiff. The privilege for reporters of such matters is therefore conditional upon the request for a right of reply being satisfied. However no provisions lay down the form or manner of publication of the explanation or contradiction. If a general right of reply were introduced into Irish law, the above provision in s24 would be superfluous.

477. *We invite views as to whether there should be a statutory right of reply in this jurisdiction. We provisionally suggest that such a right could embody the following features:*

1. The right of reply could be available to a person named or designated in a publication. There would be no requirement that the reference to the person be defamatory. The inclusion of this requirement in relation

to the broadcast media in France was found to render the section virtually unworkable.

2. The right to reply could be available in respect of statements by the media only.
3. In the case of daily newspapers, the reply would require to be printed within three days after receipt; in the case of other periodicals the reply would require to be printed in the first issue of the periodical to appear more than 3 days of receipt of the reply. In the case of the broadcast media, the reply could require to be read out within three days of its receipt.
4. The right of reply would be suspended during elections, whether parliamentary, local or presidential. Even with the reduced 24 hour time limit applicable in France, it would seem impracticable to maintain the right at such times.
5. The reply should be given equal prominence to the matter complained of and it should be of equal length. Where a press organ customarily designates a particular space for such replies, notice of the reply should be placed in substantially the same place as the original matter. (Alternatively, the placing of the reply in a customarily designated spot could be deemed insufficient.)
6. The reply should be printed free of charge.
7. There should be no right of reply in respect of a previous counter-statement. However, we would allow the right in respect of statements in the Oireachtas. We would also allow it in respect of statements concerning the dead, the rights, however, to be subject to the restrictions proposal set out under that heading below.
8. The publisher should not be allowed to meddle with the content of the reply in any way.
9. The author of the reply should be answerable to defamation proceedings in the same way as the author of any other statement. This will prevent persons from availing of the right to defame others. However the organ carrying the reply should not be liable for a statement which it is obliged to publish.
10. We invite views as to what sanctions should apply to a refusal to publish a reply, bearing in mind that French law prescribes fine and imprisonment of the director.
11. We would allow the right in respect of opinion statements as well as factual statements, unlike the German right of reply.

G. PUBLICATION OF JUDGMENT

478. One of the remedies provided for in France is the court-backed publication of judgment.⁵³ It is a remedy which appears to have been developed by the courts. This must be done at the cost of the defendant in newspapers chosen by the plaintiff and the offending newspaper itself. The judgment must appear in the same place or in the same size print as the original article. Immediate execution of publication is often ordered, despite the lodgment of an appeal. In order to ensure prompt publication, the courts may impose a fine for each day's delay. The publication of judgment is a discretionary remedy, and the court may feel that the publicity attending the trial renders such publication unnecessary. The main objection voiced against this remedy is that it interferes with editorial freedom and therefore freedom of expression. However we would argue that the exercise of a right carries with it duties and obligations and that there is a strong case to be made in favour of regarding publication of adverse judgments as a duty or obligation in respect of the right of expression. This appears to be the view taken by publishers in other countries in relation to the right of expression. *We feel that the use of correction orders would render this remedy unnecessary, but we welcome views on this.*

53 See Encyclopedia of Comparative Law, Torts, at 10.99.

VI. JURIES IN ACTIONS FOR DEFAMATION

479. Trial by jury in civil cases was at one time the norm. As a result of recent legislation, it has now become the exception. However, the jury trial in defamation actions has been retained. Under Section 94 of the *Courts of Justice Act 1924*, a party had a right to have questions of fact tried by jury in any action in the High Court or the Circuit Court, excepting actions for liquidated sums and actions for the enforcement of or breach of contract. The *Courts Act 1971* abolished jury trials in the Circuit Court entirely. Until 1988, jury trials in civil actions in the High Court would therefore have been the rule rather than the exception. However, the *Courts Act 1988* abolished juries in the following civil actions:

- (a) Actions for damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty;
- (b) actions under section 48 of the *Civil Liability Act 1961* i.e. actions for damages in respect of the death of a person;
- (c) actions under section 18 of the *Air Navigation and Transport Act 1936*⁵⁴ i.e. actions against carriers in the event of the death of a passenger⁵⁵;
- (d) actions in which damages are claimed in respect of both personal injuries or death and another matter;
- (e) actions in which the damages claimed consist of damages in respect of a matter other than personal injuries or death, provided the claim arises

54 As amended by the *Air Navigation and Transport Act 1965*.

55 (a) (b) (c) all provided for under section 1(1) of the 1988 Act.

directly or indirectly from an act or omission that has also resulted in personal injuries or death.⁵⁶

The tort of defamation was not included in this list. Accordingly, a party still enjoys the right to have a defamation action tried by a jury in the High Court. It should be noted that jurisdiction in actions in tort in the Circuit Court is limited to cases in which the damages claimed do not exceed £15,000.

480. In defamation actions, the most valuable role of the jury has probably been in determining whether or not words should be considered defamatory. There is a large divergence between the way words and language are used in everyday situations and the way they are used by lawyers. As the tort of defamation involves the unusual exercise of bringing words spoken in the public arena into a court of law, where words are more carefully used and therefore scrutinized, the jury has always been seen as an important way of retaining the ordinary man's perception of what the words complained of mean and what they convey. The judge retains a measure of control in that he may withdraw the issue from the jury on the ground that the words are incapable of defamatory meaning. At present he cannot, however, do the converse i.e. direct the jury that they are incapable of innocent meaning.⁵⁷ Mr Justice Henchy stated in the Barrett case that:

"[the] law reports provide many examples of cases where the jury were held entitled to find that the words were not defamatory when the ruling of a judge of this point would have led to the opposite conclusion."

This emphasises that in the vast majority of cases the crucial decision as to whether the words are defamatory of the plaintiff is in the hands of the jury, representing the standard of opinion of the community at large.

481. In recent times, however, criticisms of the jury role have become more frequent, and on a different ground. This is a reaction to the large awards of damages being made at present by juries in defamation actions. All the reform bodies devoted a considerable amount of space to the role of the jury in this area. In their meetings with the Commission, all of the media and bookseller's representatives felt that the current level of damages awards was a problem which needed to be urgently addressed. One of the reasons identified for such large awards was the tendency to reflect developments in the United Kingdom, where a very different publishing climate prevailed, companies being more cavalier in their allegations and having far greater resources to contest defamation actions. The booksellers at their meeting pointed out that, due to the size of many Irish book-selling firms, their very existence was threatened by the prospect of a large damages award.

⁵⁶ (d) and (e) are provided for under section 1(2) of the 1988 Act.
⁵⁷ *Barrett v Independent Newspapers* [1980] ILRM 601.

482. In their submission to the Commission, RTE observe that libel damages and costs represent a significant part of their expenditure. They also recommended that the Commission consider the less-often mentioned topic of costs. The general rule is that the costs go with the event, unless the judge otherwise directs. Costs could easily reach a sum far greater than the award of damages.

483. It can be argued that in a significant number of cases, damages awards are excessive. Complaints about the high level of cost present a problem which can be addressed in a variety of ways. A number of methods of limiting damages were considered above.⁵⁸ Some of the options included a reduced role for the jury, or its entire abolition in defamation actions. The discussion of the abolition of the jury was postponed to this section.

484. The following is a list of arguments for and against the entire abolition of the jury.⁵⁹ The arguments are not of equal weight and the order is not of any significance.

Arguments in Favour of Juries

- (i) A jury is in a better position than a judge to decide what the ordinary person would understand the words complained of to mean.
- (ii) A jury is a more suitable tribunal to decide a case which involves the reputation and honour of an individual. It is not comparable to a personal injuries case, for example, where estimates of the harm done will not vary widely.
- (iii) The public has confidence in the verdict of a jury. Judges are seen as coming from a small section of the community and to be to a certain extent, insulated in their profession. The jury brings a flavour of the outside world into the courtroom.
- (iv) Many defendants in libel cases consist of media organs, which have a powerful influence in moulding public opinion. The presence of a jury helps to redress the balance in favour of the individual.
- (v) A jury verdict is that of the public and not of people seen as representing the establishment.
- (vi) Defamation cases may involve political and religious issues, and these are matters which should not be dealt with by judges.
- (vii) Fewer appeals result from trial by jury. First, the losing party is more willing to accept a jury verdict. Secondly, the fact that the jury does not

58 Above at p354 - 368.

59 These are adapted from the Faulks Committee and the New Zealand Committee Reports.

give reasons makes an appeal more difficult.

Before setting out positive arguments in favour of jury abolition, it is proposed to set out a number of counter-arguments to the above points.

485. The points (i) - (iv) are felt to be good points. Argument (v) assumes that there is public resentment of judicial decision-making as part of the establishment. This is not a premise from which to argue, as it calls into question the role and perception of judges in other cases generally. Argument (vi) overlooks the fact that judges are entrusted with sensitive religious and political issues in other cases, such as, for example, where a plaintiff invokes the anti-discrimination provisions of the Constitution (*State (Quinn) v Ryan*⁶⁰) or it is asserted that a political party is being denied its constitutional rights of free speech (*State (Lynch) v Cooney*.⁶¹) Argument (vii) ignores the fact that media defendants often feel that they are in the right but will not contest the case at Supreme Court level because of the costs involved and not because they feel the jury is right in some sort of moral sense. The second limb of the argument is even more dubious. The failure of juries to give reasons for decision is something that is perhaps inevitable because twelve people chosen at random are unlikely to reach a consensus for precisely the same reasons and it would be difficult in practice to provide facilities for the preparation and publication of such reasons. However, this is, if anything, a necessary evil which must be borne so that the other benefits of jury trial can be availed of: it is not one of the merits of jury trial. It turns appeals into something of a lottery and may even erode to some extent the would-be appellant's right of access to the courts.

486. *Arguments Against Juries*

- (i) Defamation cases are often complex and juries cannot be expected to follow the difficult legal issues that may arise. The result is that they may reach their decision largely based on hunches, emotional factors, the demeanour of the plaintiff, or a vague view of the overall merits. For example, if a plaintiff has been cross-examined as to credibility and comes off the worse for it, it may be difficult for the jury to erase this from their minds when deciding how much injury to reputation was actually involved. The legal term 'malice' is another pitfall for juries, who may see antagonism between the parties as malice which destroys certain defences.

The simplification of the elements of the defences would go a long way towards solving this last problem.

- (ii) The parties and the public benefit from the reasoned judgment of a judge sitting alone. Furthermore decisions whether to appeal are based

60 [1965] IR 70.

61 [1982] IR 337.

on more rational grounds and not the size of the defendant's pocket alone.

- (iii) The jury's award of damages in its present form is more likely to be unrestrained, unpredictable and higher than that of a judge who has experience of previous awards. This argument could equally be used for retention of juries but with controls on the damages awarded.
- (iv) A jury trial is considerably more expensive than a trial by judge alone, owing to its greater length. However, this is an argument which should tip the balance only if all other things are equal. Justice should not be sacrificed to financial considerations.
- (v) Defamation trials without jury are the norm in the Circuit Court and are considered satisfactory. (We should say that it would be desirable in this context to have more information as to what proportion of defamation actions are brought in that content).

487. *Proposals of Other Reform Bodies*

1. The Faulks Committee recommended that the question as to whether there should be a jury trial in a specific defamation action should be left to the discretion of the court in each case. In a case where a jury was empanelled, the judge and jury would play a combined role in the assessment of damages. The jury would indicate whether damages were substantial, moderate, nominal or contemptuous, and the judge would set the actual figure.⁶²

The present position in England is that an action for libel or slander in the Queen's Bench Division is tried by jury, unless the court is of the opinion that the trial requires the prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury. This is the result of the introduction of s69 of the *Supreme Court Act 1981* which does not give full effect to the Faulks proposal but does give the Court some discretion as to whether there should be a jury trial.

The operation of the exception to the norm of jury trial in defamation actions can be seen in the recent case of *Beta Construction Ltd v Channel Four TV Co. Ltd*⁶³. The alleged libel was contained in a Channel Four television broadcast concerning the activities of contractors who stripped asbestos from buildings and the plaintiff alleged that the individual imputations were (i) that they lacked the skill, qualifications and integrity to do the job and thereby exposed other persons to risk, (ii) that they had failed to exhibit warning notices in the course of work at a school and thereby exposed children to risk of cancer

62 Faulks Committee Report, para 516.5

63 Reported in *The Independent*, Tuesday 7 November 1989.

from asbestos dust and (iii) that they had failed to remove dust contaminated with asbestos from a classroom. The defendants admitted liability before the trial and applied for damages to be assessed by a master or judge alone on the basis that the claim for damages would require prolonged examinations of documents and accounts which could not conveniently be made by a jury. The trial judge ordered that damages be assessed by a judge alone. On appeal, the Court of Appeal noted the relevant points for consideration set out by May LJ in *Viscount de l'Isle v Times Newspapers Ltd*,⁶⁴ namely (1) the physical problems of handling large bundles of documents where a jury is involved, (2) the prolongation of a trial where a jury was required to examine numerous documents, (3) the increased cost of litigation, and (4) the increased risk that the jury might not understand the issues sufficiently to resolve them correctly. The Court of Appeal affirmed the decision of the trial judge that the trial should be by judge alone.

2. The New Zealand Committee could not come to a unanimous conclusion and split three ways. Three members were in favour of the complete abolition of the jury. However, they compromised by agreeing with the Faulks Committee proposal that the jury select only the category of damages. Three members favoured the retention of the jury in its present role. The remaining member was opposed to juries in civil actions generally, but felt that as long as they were available in other civil actions, there should be no special exception for defamation.⁶⁵
3. Australia had the experience of both forms of trial. In South Australia, Australian Capital Territory and the Northern Territory, defamation actions were tried by judge alone. In Queensland, New South Wales and Victoria, jury trials in civil cases were the norm, although the parties were entitled to consent to trial by judge alone. In Western Australia and Tasmania the practice varied, so that trial was sometimes by judge and sometimes by jury. The Australian Law Reform Commission found that it was impossible to demonstrate that one method was better than the other. It noted that each jurisdiction would be reluctant to depart from its own practice. Therefore it declined to make any recommendation altering local practice, except to the extent required by other procedural recommendations.⁶⁶

Conclusions

488. *Our provisional conclusion is that the case for ending completely the role of the jury in defamation actions has not been established.* It seems to us a valuable feature of the present system that the ultimate decision as to whether the words are in fact defamatory is decided by a number of lay people rather

⁶⁴ [1988] 1 WLR 49.

⁶⁵ New Zealand Committee Report, para 468.

⁶⁶ ALRC Report, paras 288-9.

than a judge. At this stage, we do not think that it has been shown that, in this context at least, the system has operated unfairly against defendants. Any risk that it might so operate is, in our view, sufficiently met by the existing law which reserves to the judge the decision as to whether the words complained of are reasonably capable of a defamatory meaning. This, in our view, is a sufficient protection to defendants against perverse jury verdicts, particularly when coupled with the ultimate power of the Supreme Court to reverse a judge's ruling on the matter.

We also feel at this stage of our deliberations that there is a more general argument in favour of the retention of at least some role for the jury. While there have been doubts expressed as to the value of the jury in civil, and even in criminal cases, we do not think that the case for a further erosion of its role in our law has been satisfactorily established. Retaining the jury in actions for defamation - and actions of a similar nature, such as assault and malicious prosecution, where more intangible aspects of human behaviour require to be evaluated - is a valuable institution in a democratic society and one that should not be too readily abandoned.

At the same time, we recognise the justifiable concern which has been caused by some awards in recent years. The inhibiting effect of expensive libel actions on the free discussion of matters of public concern is a factor to which weight must be attached. Many of the other proposals in this paper would go some way towards meeting the legitimate concerns of the media in this area. However, we think in addition that if juries are to be retained in defamation actions the present system can be modified in some important respects so as to reduce the danger of grossly excessive awards. (Nor should it be forgotten that juries, in this as in other areas, are also capable of awarding excessively mean damages). The major change we are provisionally inclined to favour is reserving to the judge the function of assessing damages, while giving the jury the right to determine their general legal level, i.e. whether they should be nominal, compensatory or punitive.

489. We would, accordingly, provisionally recommend that

- (1) in the High Court, the parties to defamation actions should continue to have the right to have the issues of fact other than the assessment of damages determined by a jury;*
- (2) the similar right formerly enjoyed by parties in the Circuit Court should be restored, subject to some qualifications;*
- (3) the damages in such actions should be assessed by the judge, but the jury should determine the nature of the damages that should be awarded, i.e. nominal, compensatory or punitive;*
- (4) for the removal of doubt, it should be expressly provided that the Supreme Court may in defamation as in other civil actions assess the damages*

themselves in the event of an appeal.

VII IDENTITY OF PARTIES

A. PUBLIC FIGURE PLAINTIFFS

490. Current Irish law does not draw a distinction between different categories of plaintiff. Regardless of his or her public or private status, the plaintiff must meet the uniform requirements of the *prima facie* case. Similarly, the defendant does not have any greater or lesser protection in theory if the plaintiff is a public official or a public figure. However in practice it may be easier for the defendant to avail of the defence of fair comment, where a comment is involved, because it will be slightly easier for him to fulfil the "public interest" limb of the defence.

As we have seen, United States law stands in stark contrast to this position since the "public figure" (which includes public officials) must overcome a difficult hurdle in order to establish a case, i.e. the requirement that the material be published with actual knowledge of, or recklessness as to, falsity. A "private figure" plaintiff meets a lower burden of proof; he will succeed if he shows the publisher was negligent in failing to ascertain the falsity of the statement.

The question for consideration is whether the Irish law of defamation should expressly provide greater or lesser protection for public figures. The United States is the only jurisdiction which has expressly provided for less protection of public figures than other individuals. We will now examine the European countries, which provide greater, equal or less protection to public officials, or make no express distinctions in this regard.⁶⁷

⁶⁷ Analysis of European law of Defamation is drawn from a study undertaken by Interights for *Lingens v Austria*.

1. Countries providing greater protection for public officials

491. The countries which provide for greater protection of public officials are France, Greece and the Federal Republic of Germany. France and Greece both single out the President as deserving special protection. French law provides a special offence with harsher sanctions under article 26 of the Press Law of 1881. Although the offence is a criminal one, we believe that it is relevant to the particular point at issue i.e. whether public officials should have increased or decreased protection under the law of defamation as a matter of principle. In Greece, the Constitution authorises the seizure of publications which offend the reputation of the President (Article 14.3), while the Penal Code makes damage to the reputation of the President a criminal offence to which truth is *not* a defence (Article 168).

Greece and the Federal Republic of Germany afford increased protection to public officials other than the President, in theory at least. In Germany, section 187 of the Penal Code imposes more stringent penalties if untrue factual statements have been made against a person active in the political life of the nation, where the statements are directed at the public status of the person and tend to hamper the exercise of his public functions. In Greece, Article 181 of the Penal Code makes it a criminal offence to insult public, municipal or communal authorities, or leaders of political parties recognised by the Rules of the Greek Parliament. The Prime Minister and Ministers of the Government have been held to be "public authorities" for this purpose. However Article 181 has been so narrowly construed in practice that public officials rely on the general law of defamation in preference to this provision.

2. Countries providing equal protection for public officials

492. Denmark introduced a specific provision into its Penal Code in the 1930's providing that defamation of those in public office was not to be treated more leniently than defamation of other individuals (Section 267a). This was introduced following a libel action in which the plaintiff, a government minister, had been defeated on the grounds that defamatory statements against politician should be treated more leniently than those against other individuals. However it appears that this provision has not yet been relied on in practice. In England, Belgium, the Netherlands, Sweden and Norway no distinction is made in theory between public figure and private figure plaintiffs.

LESS PROTECTION IN FACT

493. It appears that in all the countries discussed, the practice under the law of defamation is that public officials in fact receive less protection. This is so whether the country makes no distinction at all in theory, or indeed if it makes a distinction according public officials increased protection. In some countries (Ireland, England, Belgium, Norway and France) this is the result of the defence of fair comment; in others it is due to a defence known as "justified interests" (Denmark, Federal Republic of Germany, Greece, the

Netherlands and Sweden), and in the remaining countries it is due to the broad interpretation of the constitutional guarantee of freedom of expression (Germany, Greece and United States).

(a) **"Justified Interest" Type Defences**

The essence of the defence of "justified interests" is that a statement published to serve a public interest is not punishable as defamation. In *Denmark* this defence is provided by §269 of the Penal Code and is constituted where either the truth has been shown or the author was under an obligation to act in justification of an obvious public interest. This defence is equally applicable to civil proceedings. Although there has been little Danish case law on this point, the legal literature is of the view that the result is to lessen protection for public officials because of the public interest in wide-ranging debate on the action of such officials. In the *Federal Republic of Germany*, the defence under section 193 of the Penal Code provides that critical judgments may be made in the perception of "justified interests", provided they were not made with intent to defame. The case law establishes that it is easier to show that the conduct of a public official or politician is a matter of public interest than would be the conduct of other individuals. This defence is also available in civil proceedings. The *Greek* Penal Code similarly provides in Article 367 that insulting or defamatory opinions are not punishable if they are made, inter alia, in the perception of "justified interests" and it is again established in the case law that it is easier to fulfil this defence where the conduct of a public official is in question. In *Sweden*, the freedom of the Press Act 1949, which has constitutional status, provides a defence in Chapter 7, Article 4.9 where it was "justifiable" to publish the information in question, which has been interpreted to afford less protection for officials in practice. Although in the *Netherlands* the statutory defence to both civil and criminal actions refers to a need of serving the "public interest", this defence has been interpreted in a similar way to the above defences of "justified interests".

(b) **"Fair Comment" Type Defences**

England and Ireland use this defence and since one of the requirements thereof is that the matter be of public interest, this is generally easier to satisfy where the conduct of a public figure is in question. In *Belgium* the case law has developed a similar defence in respect of opinions. The court will afford a protection if the opinion was based on true facts and related to a public issue, provided the statement was not "unnecessarily harmful".⁶⁸

68 Criminal prosecutions for defamation in Belgium are rare, and therefore this defence applies in civil actions.

The courts take into account that public officials by virtue of their function are expected to endure more vigorous attacks. In *Norway*, although the Penal Code contains no special provisions concerning public officials, the case law and legal literature recognise a privilege for comment on public affairs. Again in practice a public official is expected to endure harsher criticism than a private individual under this defence. In *France* there has developed a defence known as the right of "critique", which has been consistently held to be applicable to criticisms of public officials and politicians, provided the criticism pertains to their acts and not to their person. It may be noted, however, that in all these cases, public officials receive lesser protection in respect of comment, but not in respect of defamatory statements of facts.

(c) *Lesser protection for public officials due to interpretation of constitutional guarantees*

In the last category of countries, lesser protection for public officials is the practice due to interpretation of constitutional guarantees of free speech; and not due to specific defences. In *Germany*, the jurisprudence on Article 5 of the Basic law, which contains the guarantee of free speech, establishes that freedom of expression is central to the operation of a democracy and therefore the greater the public interest in an issue, the less the protection afforded to an individual. In *Greece*, the Supreme Court has held that the guarantee of freedom of expression in Article 14 of the Constitution necessitates tolerance of harsh criticisms of the authorities.

It has already been noted that the United States Supreme Court has interpreted its guarantee of freedom of expression as necessitating a rule making actions by "public figure" plaintiffs more difficult. Therefore in the United States lesser protection is afforded to public figures both in theory and in practice.

Conclusions

494. Ireland is in a broadly similar position to most European jurisdictions in that it provides equal protection for all plaintiffs in theory, but, due to the interpretation of the fair comment defence, arguably affords less protection for public officials in practice. United States law is unusual in expressly crafting a more difficult standard for public officials to meet. Indeed, some European countries (namely France, Greece and the Federal Republic of Germany) afford *greater* protection for specific public officials in theory, although this does not appear to represent the practical position.

We believe that wide and robust debate on the conduct of public officials is essential to maintain the essence of a democracy.

However we are careful to distinguish between the role of statements of fact and statements of opinion in such debate.⁶⁹

(a) Statements of Fact

495. Where facts about a public official are known, the widest possible range of criticism or opinion thereon is desirable. By contrast, we believe that statements of fact contribute meaningfully to public debate only if they are true. As one writer puts it -

"If it is important for the public to know that Jones has been a faithless public official, it is equally important for the public to know that Jones has been a diligent public official falsely accused by the press."⁷⁰

One of the aims of the changes suggested in this Paper is to achieve a law of defamation which encourages truthful statements. We believe strongly that this applies to public figures as well as to other plaintiffs. In respect of statements of fact, we believe that truth should be the decisive criterion. If we were to allow a wider protection to defendants where they publish factual assertions about public figures, we would accord them a license to make false statements which we believe is undesirable. Therefore we conclude that there should be no distinction drawn in the law on factual assertions between "public figure" plaintiffs and other plaintiffs. We note that this is not inconsistent with our recommendation that the exercise of reasonable care by the defendant should bar damages. The overall result is that a false assertion of fact about a public figure (as with any other) will be required to be *corrected* by the defendant, but that damages may only be recovered if the defendant additionally failed to exercise reasonable care. In no sense does this imply that defendants have a wider latitude than previously in respect of false factual assertions. They will continue to be liable, but their liability will be enforced in a different way; in all cases the misstatements will be corrected, and in cases where a standard of reasonable care is not met damages will be awarded.

(b) Statements of Opinion

496. We believe, however, that a wide latitude of opinion is desirable, both in respect of public figures and other plaintiffs. At present the defence of fair comment is probably more easily availed of where the plaintiff is a public figure because it is expected that his or her conduct will entail closer scrutiny. We have made a number of recommendations to widen this defence generally.

69 Mr. Hugh J.O'Flaherty, S.C. has commented as follows:- "A distinction should be drawn between those in private life and those holding public office. Those who live by the media must expect occasionally to suffer at the hands of the media ... There should be an extension of the freedom to comment on persons holding public office, including politicians and, indeed, all public officials". References to "comment on" or "criticisms of" public officials is misleading because they fail to delineate the form of expression involved.

70 Epstein, *Was New York Times v Sullivan Wrong?* 53 U. Chicago L. Rev. 782,813.

If these reforms are implemented, we do not feel that additional protection for comment in respect of public figures would be necessary. *Accordingly we provisionally recommend no change in the law based on a distinction between "public" and "private" figures, either in respect of factual or opinion statements. We believe that other reforms in this Report will allow sufficient latitude for discussion of all persons.*

B. GROUP PLAINTIFFS

497. Under existing law, a member of a group which has been defamed cannot bring an action unless he can show that he was specifically referred to.⁷¹ A specific reference to the plaintiff may emerge from the circumstances of the case or from the size of the group; where the group is small, every member may be deemed to have a cause of action.

McDonald⁷² suggests that there may be constitutional reasons for granting a cause of action to the member of a group which has been defamed. The present prohibition may infringe on the constitutional right of access to the courts and the right to a good name by denying a cause of action simply because a defamer chose to attack a large group. Problems of multiplicity of actions could be addressed by deploying different remedies such as the declaratory judgment, correction order, or nominal damages. At present, it appears illogical to distinguish between plaintiffs merely on the basis that one belongs to a large group and the other to a small one.⁷³

The Australian Law Reform Commission appears to be the only reform body which considered this topic.⁷⁴ It identified three reasons underlying the rule on group defamation: (1) a fear of inhibiting political discussion and criticism which it was felt might result from granting sanctions for statements about classes of persons distinguished by race, creed, colour or calling; (2) a fear

71 See Part I para 28.

72 *Irish Law of Defamation*, p58.

73 Although this is not the theoretical position - see *Knuppfer v London Express Newspapers Ltd* [1944] AC 196, and the comments of Lord Atkin to the effect that the test is still reference to the plaintiff and not the size of the group - the practical result, however, probably achieves such a distinction.

74 ALRC Report, p.52, paras 95-98.

of multiplicity of actions; (3) the fact that a generalised statement about a group would not necessarily refer to an individual member. The last argument is felt to be a weak one, because the question is really one for the jury as to whether they would understand the statement to be defamatory of the plaintiff. The "multiplicity" argument may be met, as McDonald suggests, by alternative remedies - and perhaps, also, a provision stating that no other proceedings in respect of the same subject matter may be brought by another member of the group. As to the first argument cited, it must be remembered that only defamatory falsehoods would be actionable, which do not make any valuable contributions to public discussion anyway.

The Australian Law Reform Commission thought that in principle it seemed desirable to give relief and favoured the remedies of correction and declaration. However, it was concerned at the possibility of the courts being used as a forum for interracial and interreligious feuding. It could not arrive at a unanimous view on the issue and decided by a majority that the issues raised were not suitable for courtroom resolution, but were more apt for conciliation and persuasion. It proposed to wait until the effectiveness of the new remedy, the correction order, was tested, and also to see the effects of legislation on religious discrimination. Two members of the Commission, however, thought that there should be a provision allowing a group member to obtain an order for correction, a declaration or an injunction -but not damages.

The Australian Law Reform Commission envisaged that most problems in this area would arise in the context of religious or racist statements. It is not obvious that the same climate obtains in Ireland. It should be borne in mind that groups of a very different type might be attacked e.g. a group of lawyers,⁷⁵ the owners of a factory,⁷⁶ a political organisation,⁷⁷ or members of a State department.⁷⁸ The cases in which such actions have been brought in Ireland have not been concerned with statements about religious or racial groups. We believe that liability should be imposed on the person who defames a group provided an individual member of the group may be identified. In such a case we see no reason to restrict the form of remedy. We found useful the definition offered by the United States (Second) Restatement of Torts -

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

- (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or

75 *Eastwood v Holmes*, [1858] 1 F & F 347 *Gallagher & Shatter case*, Irish Times 10/5/1980.

76 *Le Fanu v Malcolmson*, (1846) 8 ILR 418, (1848) 1 HLC 637.

77 *O'Brien v Eason & Son*, (1913) 47 ILTR 266.

78 *Cole case*, Irish Times 3/5/89.

- (b) the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to the member".

We recommend the adoption of a provision in similar terms as we believe it is declaratory of the common law.

C. DEFAMATION OF THE DEAD

498. At present, no actions may be maintained in defamation in respect of injury to the reputation of a person who was dead at the time of publication. This is subject to the principle that if the defamatory imputation contains a slur on the reputation of a living person, the latter may bring a defamation action in respect of the injury to his own reputation.

The Porter Committee refused to recommend any alteration of this position, finding no logical basis for granting a cause of action in respect of statements made about a dead person. They felt that granting a right of action to personal representatives was inappropriate, since the basis for vesting a right on the part of personal representatives was the injury suffered by the estate of the deceased.⁷⁹ By way of answer to this view, it may be said that an arguably logical basis for such an action is the fact that reputation does not die with the deceased - a reputation outlives its possessor. The result of the common law prohibition is that a person can without inhibition make any outrageously false statements about a person, from the moment of his death, so long as the statements do not reflect on living people. The individual interest is said to have been extinguished, so that the free speech interest gains dominance. Even if it were conceded that the former interest is extinguished, the real objection to the current position is that the freedom of speech interest is not enhanced by allowing such untrammelled freedom. Malicious and unfounded misstatements of fact do not further public discussion, information or education.

The Faulks Committee recommended an alteration to the law on a different ground, namely the interests of near relatives. "It would be an action to

79 Porter Committee Report, paras 27 and 28.

prevent people from telling defamatory lies about a dead man shortly after he is dead. Why should it remain lawful to add to the grief of a widow by stating falsely just after her husband has been buried that he was a criminal?"⁸⁰ The proposed right of action contained a number of features:

- (a) *No right to damages* - The new cause of action was limited to a declaration that the statement was false, and an injunction to prevent its repetition.
- (b) *Five year time limit* - Recognising that the new cause of action might have repercussions in the writing of biographies and historical texts, the right of action was subjected to a five year time limit.
- (c) *Family members* - The right of action was made available to surviving spouses and descendants and ascendants in any degree of the deceased, and brothers and sisters and their descendants in any degree of the deceased.

Notably, two members of the Committee dissented, stating that the grant of such an action would deal a "paralysing blow to the writing of recent history".

The New Zealand Committee noted the dissent of these Faulks Committee members and observed that the majority's recommendations were intended to inhibit "the scurrilous and unfair writer and not the historian".⁸¹ Therefore they limited their recommendation to cases where the words were not only proved untrue but the writer also knew of their falsity. The other point of difference from the English recommendation was that the time limit should be six years.⁸²

The Australian Law Reform Commission, concerned at the possible inhibition of historical writing, sought comment specifically from historians and the Royal Australian Historical Society. The response to the proposal of providing some cause of action was favourably received and there was no objection from anyone concerned with historical or biographical writing.

The Australian Law Reform Commission discarded the New Zealand view that the plaintiff should have to prove knowledge on the part of the defendant of the falsity of the statement. The purpose of the action being to set right a false statement, the fault of the defendant was considered irrelevant, particularly as there would be no award of damages at issue.⁸³

The time period recommended by the Australian Law Reform Commission was three years. The action was made available to the personal

80 Faulks Committee Report, para 419.

81 New Zealand Committee Report, para 440.

82 New Zealand Committee Report, para 442.

83 ALRC Report, para 101.

representatives of the deceased or the surviving spouse, parent, child, brother or sister of the deceased. There was also a proposal that where more than one person institutes such a defamation action in respect of the same matter, the court should make such order for transfer, removal, stay or consolidation as was necessary to avoid a multiplicity of actions. Where such a defamation action had been determined by a court, no further action could be instituted in respect of the same matter except by leave of the court.⁸⁴

499. The reform bodies cited were unanimous in proposing a course of action in defamation in respect of the dead. One commentator, however, has expressed strong disagreement with these views:⁸⁵

"It would involve a quite new element of liability - damage to a person's remembrance as perceived by his family, and, necessarily, a new basis for any redress since there would be no formal or extant reputation to be damaged. The redress suggested is, in itself, logical enough; however, the displacement of damages as the central remedy merely emphasises the novel nature of what is involved in the recommendations."

McDonald suggests

- (1) that it is a new species of action which would be better dealt with under the action for injurious falsehood;
- (2) that there is little evidence for a need to change the existing law;
- (3) that a new cause of action has the potential to "excessively inhibit" historical discussions and
- (4) that to restrict a constitutional right, here free speech, there must be an opposing constitutional right or policy; it was not apparent that dead people possessed such a constitutional right, or that the existing relatives had an interest strong enough to warrant this restriction of free speech.

In answer to these objections, it may be stated:

- (1) The first objection is largely one of classification, although there is a difference in terms of the burden of proving truth (in defamation, there is a presumption of falsity, in injurious falsehood the plaintiff must prove falsity). However, we should not miss the opportunity of recommending desirable changes since we will not be dealing with injurious falsehood.

84 ALRC Report, para 102.

85 McDonald, *Irish Law of Defamation*, p 282-3.

- (2) The counter-objection to the second argument is that law reform should be effected in areas that appear unjust even if they have not yet given rise to practical difficulties. It may well be that the law is in any case giving rise to difficulties: we mention a recent example below.
- (3) It is not clear that such a change would unduly inhibit historians, since only falsehoods would be affected, but we invite comments from interested bodies and individuals.
- (4) The last objection is the most powerful and the Irish constitutional provisions must be carefully examined. It may well be that there is no constitutional right in this context to counterbalance the constitutional guarantee of freedom of expression. On the other hand, it might be argued that it is a narrow view of personal rights to say that they cease to exist at the moment of death. Alternatively, since the reform bodies have based their recommendations on the feelings of relations with the deceased, a constitutional right might be found within our constitutional provisions on the family, although it is felt that this is probably too vague. Finally, it might be said that to prevent false defamatory statements about a dead person does not necessarily restrict freedom of speech, but gives freedom of speech more meaning. The constitutional guarantee of free speech may not necessarily refer to all types of speech, but only to those that enhance valuable discussion.

500. The difficulties to which the present law can give rise were vividly illustrated by a recent Irish case, *Hilliard v Penfield Enterprises Ltd and Others*. The widow of a clergyman who had been killed in horrific circumstances sought leave from the High Court to commence a criminal prosecution for the publication of a libel in a periodical published by the defendants. Gannon J, while considering himself bound by the present state of the law to refuse the application, described the article as "scurrilous and contrived" and commented:

"It is difficult to believe that either of the two individual respondents could stoop so low as to present or adopt such a mean, spiteful and wounding attack on the deceased under the guise of a commentary on his funeral".

Under the present law, the plaintiff was, of course, unable to maintain civil proceedings. The further implications of the decision will be considered in the Consultation Paper which we will be shortly publishing on Criminal Libel.

It is worth quoting the observations of an American writer, Epstein:

"It is hard to find in any theory of freedom of speech a theory that in principle protects the deliberate lie, just as it is inconceivable that any general theory of freedom of action could be pressed into service to reject the prohibitions against murder, rape and theft. Freedom is not the same as anarchy, whether we deal with words or actions. In both

cases it speaks of not only individual rights of action but of correlative individual duties as well. Freedom, as countless efforts to 'balance' interests have made clear, is a presumption in favour of speech or action, but is one that can be overridden when the conduct regulated involves the use of force or misrepresentation."⁸⁶

501. It is therefore suggested, that if there is no constitutional objection (based on the freedom of speech guarantee) to this reform, there should be a new cause of action in respect of defamatory statements made about a person who is dead at the time of publication. This should be subject to a time limit, the appropriate length of which is discussed below. It should vest in the close relatives and, perhaps, the personal representatives of the deceased. Damages should not be available, and provisions akin to the Australian recommendations should be enacted in order to prevent multiplicity of actions.

86 Epstein, *Was New York Times v Sullivan Wrong?* 53 U Chicago L Rev 782, 789.

D. THE LIBEL-PROOF PLAINTIFF DOCTRINE

502. A procedure might be considered which has been developed by the United States courts since the adoption of the *New York Times* rule and its progeny. The courts have responded to the increasing length, cost and complexity of libel trials by developing a means of dismissing the plaintiff's case by way of summary judgment. The "libel-proof plaintiff" doctrine allows a court to dismiss a libel action where it appears that a plaintiff's reputation has not been significantly harmed. The doctrine is composed of two distinct branches - the "issue specific" branch and the "incremental" branch.⁸⁷ The "issue specific" branch involves dismissal of the case on summary judgment if the judge determines that the plaintiff's reputation is already so tarnished that any harm caused by the publication challenged would lead only to nominal damages. The "incremental branch" involves dismissal of the case on summary judgment where the judge determines that unchallenged statements within an article or group of statements challenged damage a plaintiff's reputation to such a degree that the incremental harm caused by the challenged statement would lead only to nominal damages.

It can be seen at once that the doctrine in its dual form parallels two distinct areas of rules at common law. The issue specific branch broadly corresponds to the common law rule that evidence of the plaintiff's bad reputation is admissible to mitigate damages. The incremental branch broadly corresponds to the rules on partial justification, an area which has been seen to be fraught with difficulty at present. The essential difference is of course that under the libel-proof doctrine, the case is dismissed at summary stage.

⁸⁷ This terminology is put forward by Marder, *Libel Proof Plaintiffs - Rabble Without a Cause*, 67 B.U.L. Rev. 993.

It must however be pointed out that the US doctrine appears to be at an embryonic stage. The United States Supreme Court does not appear to have ruled on this doctrine, and the courts examining it have produced conflicting attitudes towards the use of summary judgment in this way. It is proposed to draw attention to a sample of the cases in which the doctrine has been at issue, by way of example as to the type of case to which it might apply.

A. THE ISSUE SPECIFIC BRANCH

503. The doctrine appears to have first emerged in its "issue specific" form in *Cardillo v Doubleday*,⁸⁸ a decision of the United States Court of Appeals for the Second Circuit. In that case the plaintiff was a convicted criminal serving a 21 year sentence for assorted felonies, and had been previously convicted of a number of crimes. He had been indicted in Massachusetts for fixing horse races and was the subject of testimony before a House Select Committee on Crime. The challenged statements were contained in a book and attributed to the plaintiff's participation in a variety of crimes, which the plaintiff denied having committed. The Court of Appeals affirmed the District Court's grant of summary judgment, finding that the plaintiff was "libel-proof" as a matter of law. The court defined a libel-proof plaintiff as a person "so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of his case".

However, in *Buckley v Littell*,⁸⁹ the same court refused to extend the doctrine and described the *Cardillo* case as confined to its own facts. It was held that the plaintiff had a reputation which could be defamed despite his life in politics as a spokesman for a controversial political position. On this view, the libel-proof doctrine may only be employed where the plaintiff has no reputation left to protect. It may be observed that this is probably the most difficult aspect of the doctrine, for it is a dangerous thing to hold that a person has no reputation left at all. The doctrine should arguably be at least confined to cases where the allegation is of the same type as the activity in respect of which the plaintiff no longer has a reputation. For example, it would surely be unfair to hold a plaintiff convicted of assault and burglary incapable of bringing a libel action in respect of allegations of bribery, corruption, sexual assault or any other activity of an entirely different type from the offence for which he was convicted. On the other hand, the doctrine can be seen as a useful device for disposing of a plaintiff's case where he has lost his reputation due to various corrupt activities and the statement challenged imputes to him involvement in slightly more activities than those in which he actually took part. However if the doctrine is applied too liberally, there is a real danger that a person who has lost his reputation due to one incident is an "open target" as far as slanders and libels are concerned.

Loss of reputation does not result only from criminal convictions and logically,

88 518 F 2d 638, (2d Cir 1975).

89 539 F 2d 882 (2d Cir 1976).

therefore, the doctrine would not be confined to "habitual criminals". However the closest the courts appear to have come to this is *Wynberg v National Enquirer*⁹⁰ where the court equated anti-social behaviour widely reported to the public with criminal behaviour, but the plaintiff involved had in fact been convicted for behaviour similar in nature to the behaviour imputed to him in the statements complained of.

A major problem with the doctrine is evidenced by the facts of *Liberty Lobby v Anderson*⁹¹ where the Court of Appeals for the District of Columbia refused to accept the doctrine. In that case the challenged publications had been preceded by publications containing similar matter. The defendants argued that the plaintiffs' reputation had been injured by the previous publications to a degree that the publication challenged added no further harm. These facts are clearly quite different and it certainly goes against common law principles to allow prior publications be a bar to an action with respect to a more recent libellous publication. Nonetheless, if the doctrine applies where the plaintiff's reputation in a specific area is already so low that nothing further can damage it, the case of previous publications would logically come within it. However, this particular problem is not peculiar to the libel-proof doctrine and the procedure of summary judgment. A court would be faced with the same dilemma if the defendant wished to bring in prior publications as evidence that the plaintiff had a bad reputation at the time of publication under the common law rule that evidence of bad reputation is admissible to mitigate damage. The root cause of the problem is probably the conflict between two common law rules which can pull in different directions; the first being the rule that every fresh publication is a libel, the second being that the plaintiff must only get damages commensurate with his reputation. Where the plaintiff has suffered a fall in reputation because of previous publications a problem arises due to the conflict between the two rules and not due to the summary procedure employed by the libel-proof plaintiff doctrine.

B. THE INCREMENTAL BRANCH

504. This part of the doctrine is employed to dismiss a plaintiff's case where he has brought an action in respect of one out of a number of libellous allegations, and leaves the remainder unchallenged. It will be remembered that this occurred in the controversial case of *Plato Films v Speidel*⁹² which prompted the Faulks Committee to urge reforms of the section of their Defamation Act⁹³ dealing with severable imputations.

90 564 F Supp 924 (CD Cal 1982).

91 7466 F 2d 1563 (D C Cir 1984).

92 [1961] AC 1090, discussed in Present Law above.

93 S 22 of our Defamation Act 1961.

The operation of the doctrine is illustrated in *Simmons Ford Inc v Consumers Union of United States*⁹⁴ where the defendant consumer magazine published a review of the plaintiff's electric car, citing a number of poor performance and safety considerations and rating the car as unacceptable. The plaintiff challenged only one section of the review, which concerned the car's failure to meet specific safety standards in relation to occupants of the car in the event of crashes. The court granted summary judgement on the basis that the harm caused by the unchallenged statements would mean that the plaintiff could expect only nominal damages in respect of the challenged statement.

A slight variation of the doctrine is where the plaintiff brings an action in respect of all the statements, but the court dismisses the majority as non-actionable. It may then dismiss the rest of case on the basis that the harm caused by the remaining minority will lead only to nominal damages due to the harm caused by the majority of statements. This occurred in *Herbert v Lando*.⁹⁵ Such a situation usually would arise where a U.S. court dismisses a libel case on summary judgment because there is insufficient evidence of malice under the *New York Times* standard. The operation of this branch of the doctrine was criticised in the *Liberty Lobby* case on the ground that the non-actionability of certain statements may be specifically due to lack of proof of malice and does not in any way imply that these statements are true. However, it is arguable that the effect that a bad reputation has on the plaintiff's case (whether under the common law where it mitigates damages or under the American libel proof doctrine) has little to do with whether the loss of reputation has occurred justifiably or not. This is merely the consistent application of the common law principle that the defamation law is concerned with what the plaintiff's reputation is, and not what it ought to be. On the other hand, it is indeed harsh that a plaintiff who cannot meet the legal burdens of proof with respect to part of an article should be deemed to forfeit the protection of libel law in respect of that part of the article which he feels capable of challenging.

505. A number of problems with the doctrine have emerged from the foregoing discussion. A number of other points may be added to this.

- (1) Even if a plaintiff claims only nominal damages the fact of the victory serves additionally to vindicate his reputation. Therefore, it is unfair to dismiss his case at summary stage.
- (2) A plaintiff who has a previous bad reputation is the most vulnerable because he has less credibility and he should be entitled to avail of the impartial tribunal represented by the judicial process.
- (3) Allowing the case to be dismissed summarily on the grounds of previous bad reputation gives judges an excessively broad power in the

94 516 F Supp 742 (S.D.N.Y. 1981).

95 781 F 2d 298 (2d Cir 1986).

assessment of reputation.

- (4) Allowing bad reputation as a ground for dismissing the case is unjust to a criminal who wishes to turn over a new leaf. This is also relevant where such evidence is admitted to mitigate damages, but here the jury may be swayed by evidence that the plaintiff is trying to start afresh and this publication is presenting an insurmountable obstacle.

506. In favour of the doctrine is undoubtedly the fact that it allows the court to dispose quickly of cases that are doomed from the start. However *on balance we do not favour the doctrine. We believe that the question of whether the plaintiff has a reputation which may be libelled should be dealt with at trial rather than at summary stage. Furthermore, we feel that our recommendations on partial justification and damages in such cases are preferable to the corresponding branch of the libel-proof plaintiff doctrine. We therefore are provisionally opposed to the introduction of such a doctrine.*

E. CORPORATE BODIES

507. In Part I it was seen that trading and non-trading corporations appear to be capable of suing in defamation in respect of defamatory allegations concerning their business capacity (trading corporations) and more general allegations (trading and non-trading corporations), including treatment of employees and sponsorship of public events. Partnerships can also sue in their own name, as can trade unions, although the latter are immune from tortious liability by virtue of s4 of the Trade Disputes Act 1906. Subject to those two exceptions, unincorporated associations as a general rule cannot sue or be sued in defamation in their own name.

Proposals for Reform

508. The Faulks Committee recommended that actions by trading corporations in defamation be limited to "cases where the trading corporation can either establish that it has suffered special damage, or can establish that the defamation was likely to cause it financial damage".⁹⁶ It was suggested that the same limitations apply to government authorities and to trade unions.⁹⁷

The New Zealand Committee Report endorsed these recommendations, but took the view that the term "pecuniary loss" be used rather than the term "special damage," on the ground that "special damage" includes not only financial loss, but also loss of some temporal or material advantage estimable in money".⁹⁸

⁹⁶ Faulks Committee Report, para 336.

⁹⁷ *Ibid* at paras 340 and 341.

⁹⁸ New Zealand Committee Report, paras 358-364.

A more radical reform of the law in this area has been proposed by the Boyle and McGonagle Report. It recommends the abolition of a right of action to sue in defamation for all entities other than individuals.⁹⁹ The report argues that such entities are afforded adequate protection by other areas of the law. For example, companies may sue for torts such as injurious falsehood. In addition, it is said that public bodies by their character and purpose should be "legitimate targets of public attention and criticism",¹⁰⁰ although it should be observed that it does not follow that they should be defamed. Furthermore, the abolition of a right of action for entities other than individuals would not deprive defamed individuals such as directors or officers of companies or employees of a local authority, from suing in their own name.

509. We are not convinced that there is sufficient justification for abolishing the cause of action in defamation which is available to corporate and quasi-corporate bodies. Although the type of reputation enjoyed by such bodies is somewhat different from that belonging to an individual and traditionally recognised by the common law, such bodies do undoubtedly have reputations which can be assailed. Furthermore, there may be an overlap between allegations against corporate or quasi-corporate bodies and allegations against an individual reflecting on his business reputation. We decline at this stage to recommend a proposal on the lines of the Boyle-McGonagle suggestion. We favour the New Zealand proposal over the Faulks proposal, because the term "special damage" has a peculiar meaning originating from the cases on slander actionable on proof of special damage and we believe it would introduce ambiguities into this area of the law. However we are not convinced that a corporate or quasi-corporate body should have to show that the allegation was likely to cause financial loss or, indeed, that it did in fact cause financial loss. We believe that such a limitation distorts the function of the action in defamation which is to compensate for reputational injury and not financial loss. This is not to say that financial loss consequent upon the publication is not recoverable. Rather damages could be awarded in respect of the reputational injury deemed to be caused by the allegation, and financial loss consequent upon such publication would require to be shown by the plaintiff in order to receive such increased damages as are necessary to compensate for that loss. This is consistent with our earlier recommendation on financial damage.¹⁰¹ However to make all damages conditional upon a showing of financial loss is a different thing. In many cases, there will in fact be harm caused by a defamatory statement but it will be almost impossible to prove. If a company gets a bad reputation, the financial loss sustained will be through individual or bodies deciding not to trade or associate themselves with it, which is one of the most difficult types of loss to prove. *We would therefore recommend no change in the law respecting corporate and quasi-corporate plaintiffs. We recommend that it be set out in statutory form that all such bodies have a cause of action in defamation irrespective of whether financial*

99 *Report on Press Freedom and Libel*, para 5.46.

100 *Ibid.*

101 See above, Part V Remedies; Damages.

loss is consequent upon the publication or was likely to be consequent upon the publication.

510. *We invite views, however, on the broad immunity conferred on trade unions by s4 of the Trade Disputes Act 1906. As McDonald notes, this may be an infringement of the right to a good name for no other reason than the fact that the defendant is a trade union and it may constitute unequal treatment of defendants without justification by reference to social or other function.¹⁰² McMahon and Binchy observe that the immunity is wider than that accorded to the State, following the decision in *Byrne v Ireland*¹⁰³*

¹⁰² See McDonald, p279.

¹⁰³ See McMahon and Binchy, p78; *Byrne v Ireland* is reported at [1972] IR 241.

F. MEDIA DEFENDANTS

511. Irish law at present does not in general distinguish between media and non-media defendants. There is one exception to this principle. The defences provided by sections 18 and 24 of the Defamation Act 1961, which are rights of reporting court proceedings and other matters, may only be availed of by media organs. We propose to examine whether a distinction between media and other defendants is desirable in terms of the defences which may be availed of, and whether the existing distinction in relation to rights of reporting is justifiable.

It may be noted that the United States Supreme Court has yet to establish a rule, if at all, for the media which would apply in every case. In *New York Times* the Court mentioned the press but did not rest its decision on that basis. In *Gertz*, the court specifically limited its analysis to the media, but omitted to explain why. In *Hepps*, it was established that the plaintiff must show falsity where the defendant is a media organ and the issue is one of public concern, but the Court reserved the question as to whether the same standard would apply in a non-media case.

512. A number of arguments may be put forward in favour of according a wider defence than truth to media defendants, where the statement is factual and cannot be defended on grounds of privilege, comment or fair report:

1. The Constitution refers specifically to the right of the media to criticise Government policy (Article 40.6.1.i). RTE suggest that this implies a separate and perhaps wider right of expression for the media on two grounds. First, if it were co-extensive with the ordinary citizens, right to expression it would not have deserved a special mention. Second, a wider right should be read into this guarantee of expression because of the peculiar functions of the media i.e. (a) the role they play in

reporting events of public interest, and (b) the role they play in providing a forum for public debate.¹⁰⁴

513. As against this view, one may argue that the particular mention of the media in the constitutional guarantee of freedom of expression was merely to emphasise its inclusion rather than an indication of a wider right. It may be noted that a number of European countries accord the media a special mention in their Constitutions, but do not appear to interpret this to mean that the media have wider rights than individual citizens e.g. Belgium (the general guarantee is contained in Article 14 while a guarantee of press freedom is contained in Article 18); Greece (the general provision is in Article 14.1 while the press guarantee is in Article 14.2); the Federal Republic of Germany (where Article 5(1) of the Constitution, like ours, refers both to general freedom of expression and press freedom). In the Netherlands and in Norway, although the respective Constitutional guarantees refer to the press alone, the governing law applies to all defendants.

2. The function of the media is to promote widespread communication of information. It provides information to a huge range of people. It acts as a "Fourth Estate"; in other words, the size of its audience and the range of its subject-matter render it an entity appropriate to keep in check abuses of the three branches of government by exposing misconduct. Unlike a private citizen, its efficacy is crucial to self-government and therefore restrictions on its freedom carry more implications for democracy than do restrictions on individual speakers.

514. In answer to this, one may argue that the fact that the media play such a vital role in democracy is precisely the reason for ensuring that their statements are trustworthy. If defences for the media are over-extended, or lax defences are introduced, false statements will go into widespread circulation. Therefore while we agree with the crucial importance of the media, we would not necessarily agree that this mandates wider protection than an individual citizen.

We have recommended the expansion of the defence of comment, which would render wider protection for the media in respect of opinions expressed unnecessary. Therefore the remaining form of expression which would benefit from increased protection would be factual statements. A number of defences in respect of factual statements have been considered in this report. Whichever position is ultimately adopted, we do not feel that the media should be given a special position.

515. Indeed we do not see why the reporting rights in s18 and s24 of the Defamation Act 1961 should be confined to the media. Legal Textbook and article writers should benefit from the same protection as they are performing an equally legitimate function. *We therefore recommend the extension of these*

104 Part of an RTE submission to this Commission.

defences to all defendants.

G. DISTRIBUTORS AND PRINTERS

Distributors

516. It is a general principle at common law that any person who publishes a defamatory statement is liable to the plaintiff. However, the common law itself has ameliorated the rigidity of this rule by providing a defence to some of those persons who take a subordinate part in publication, namely disseminators of defamatory matter. Such persons may escape liability provided they show:

- (1) that they had no knowledge of the defamatory matter contained in the material published;
- (2) that there was nothing in the surrounding circumstances which should have led them to suppose that it contained defamatory matter; and
- (3) that there was no negligence on their part in failing to detect the defamatory matter.¹⁰⁵

The last proposition is wide enough to cover the other two. It may therefore be stated that a disseminator of defamatory material shall not be liable for its publication if he can prove that he was not negligent in failing to detect the defamatory matter.

The Faulks Committee considered the argument of certain major distributors that a heavy and unjustifiable burden had to be met by them in order to avail of the defence, involving the necessity of considering whether large volumes of material were defamatory prior to their publication. An objection from a

105 See above under Present Law.

different angle was also voiced, namely that the current law gave distributors an excuse to engage in self-censorship. The Committee gave little weight to this latter argument. It declined to recommend any change to the existing law, stating:

"While we accept the evidence that the present law places a burden upon distributors to make proper checks in the doubtful cases, we are not satisfied that the risk involved is unduly onerous or unduly expensive."¹⁰⁶

Printers

517. At present, the defence of innocent dissemination is not available to printers. The Faulks Committee and the New Zealand Committees recommended the extension of this defence to this category of publishers.

Booksellers

518. The New Zealand Committee was urged by the Booksellers' Association to adopt a different solution. This was that there should be a sharing of responsibility between the author, printer, publisher, distributors and retailers in a 'hierarchy' of responsibility, whether or not the plaintiff sued all of these defendants. The New Zealand Committee observed that under existing legislation, contribution might be recovered from a tortfeasor who is liable in respect of the same damages, or who would have been if sued, a provision which appeared to include defamation cases. It may be noted that a similar provision in Irish law finds expression in section 21 of the *Civil Liability Act, 1961*. The New Zealand Committee noted further that there was nothing to prevent a distributor from asking for an indemnity or contribution from any other party to the publication. Also, in cases where the plaintiff became aware of the libel but failed to bring it to the attention of the distributor as soon as practicable, contributory negligence could be pleaded by the defendant. It therefore recommended that the defence of innocent dissemination applicable to other distributors should specifically include booksellers.

The Faulks Committee, however, thought that different considerations applied to booksellers as distinct from other disseminators. It considered that the crucial period of publication by a bookseller was within the first few months after publication, so that if a decision were made to withhold a book during this period, this would result in the loss of the author's and publisher's total expenditure on the book. A decision to uphold the book might be made by a publisher after a writ is issued by the plaintiff. A failure to take precautions by the publisher could result in an increased award of damages, although such precautions may involve great expense.¹⁰⁷ On the other hand, the

¹⁰⁶ Faulks Committee Report, para 297.

¹⁰⁷ Such measures include the stopping of sales, arranging for travellers to withdraw unsold copies, having copies withdrawn from public libraries.

plaintiff, it was said, faces no risk in bringing the action. (This view apparently disregards the real risk a plaintiff faces of bearing all the costs). The Faulks Committee contrasted the position of the plaintiff in this regard with the plaintiff who claims an interlocutory injunction. In the latter case, the plaintiff is required to give an undertaking to the defendant to compensate the defendant for any losses incurred as a result of the injunction if the action fails. Accordingly, the Faulks Committee recommended that where a plaintiff had either expressly or impliedly requested a defendant to withhold, withdraw or correct a book he should not be entitled to recover additional damages on the ground that a defendant continued to publish the book, unless the plaintiff had given an undertaking to compensate the defendant for any loss incurred in complying with the request, should the action fail or be struck out.

The Australian proposal is different from those of the two reform bodies considered. The English and New Zealand Committees recommended the retention of the defence of innocent dissemination, so that if a defendant establishes that he was not negligent, he has a complete defence to the action. The Australian Committee recommended a defence based on the identity of the publisher, which would be a complete defence to any action for damages. The first major point of difference is that there is no requirement that the defendant meet any standard of care. The second point is that the plaintiff could, despite the defence, obtain an injunction.¹⁰⁸ The Australian Law Reform Commission felt that the existing position on disseminators was inadequate in two respects. Firstly, the defence available to distributors was unreasonable in expecting them to read all of the publications going through their hands, which appeared to be what was required in order to negative negligence. Secondly, the rule put the disseminator on notice of the likelihood of the existence of defamatory matter as soon as the person claims the disseminator is handling matter injurious to him, which in practice had the effect of making the disseminator cease to handle the document. Such persons are not equipped to make such judgments and they would prefer to cease handling the document rather than run the risk of handling defamatory material. "The effect is to stifle freedom of expression by imposing censorship without the intervention of a Court". It may be noted that the Australian Law Reform Commission gave far more weight, and it is submitted, rightly so, to this latter factor than did the Faulks Committee.

The Australian Law Reform Commission acknowledged that any solution would have to cater for two innocent parties; the distributor who cannot be expected to know of the existence of defamatory material and cannot be reasonably expected to take the time and trouble to resist a claim, and the

108 It may be noted that Fleming, *Law of Torts*, 6ed, p 512 had made a similar suggestion. Referring to the existing law, he states:

"Even this reduced responsibility has been criticised as too onerous. For apart from uncertainty precisely what precautions are required to negative negligence, the defendant is in a quandary once a claim of libel is made. More reasonable would be to require distributor to yield only to an injunction".

innocent person who wishes to protect his reputation. Therefore, they recommended, first, that a complete defence in a defamation action should be afforded to certain persons on the basis of their identity, without any requirement of negating negligence on their part. Secondly, they recommended that the person claiming to be defamed should have the right to obtain an injunction restraining publication if he can satisfy the judge the matter is defamatory and otherwise indefensible. This would have three advantages: (a) abolish the fear of damages for the disseminator; (b) provide a protection of reputation for the plaintiff; and (c) restrict the flow of information to the public only after the intervention of a judge. This would be an improvement on the present situation which may encourage self-censorship.

Options for Irish Law

519. We believe that at the minimum the defence which is currently available to distributors should be available to printers i.e. a complete immunity upon a showing by the defendant that he was not negligent in failing to realise the publication contained defamatory matter. We would prefer this to be phrased in positive terms so that the defendant has a defence provided he shows that he "met a standard of reasonable care in attempting to ascertain whether the publication in question contained defamatory material".

However in view of modern printing methods and the resulting speed and deadlines which are necessary for a printer to remain viable in a competitive market, we are not convinced that a "reasonable care" defence would benefit printers. In most cases they simply do not have time to read the material passing through their hands and would presumably be unable to come within the defence. Although distributors do not operate under the same time constraints, they are in a similar position to printers in the sense that they play no role in determining the content of the publication with which they are dealing.

520. We considered the Australian proposal which would provide the printer with a complete immunity from damages, although the plaintiff could request an injunction restraining publication. We examined the question as to whether it would be desirable to allow a plaintiff to obtain an injunction where the printer or distributor was actually "aware" of the defamatory content of the publication. We are not, however, in favour of this proposal because printers and distributors would be constantly asked to refrain from printing material and this request would deprive the printer or distributor of its defence. On balance, we feel that distributors and printers should have an absolute immunity from defamation actions. *We provisionally recommend that distributors and printers should be immune from an action in defamation.*

The impact of such a defence must also be assessed in the light of the decision in *Englantine Inn v Smith*¹⁰⁹ where Andrews L C J held that although a printer was not itself liable for defamation by reason of want of publication, it could nonetheless be held jointly liable for a defamation published by a trade union. We invite views as to whether, assuming the decision is correct, it represents a desirable rule.

Broadcasters of Live Programmes

521. Both the Faulks and New Zealand Committees declined to recommend any change in the law relating to broadcasters of live programmes. Such publishers are in a precarious position, because they are liable for all material broadcasted, but since much of that material is live, they run the risk of defamatory statements being made by contributors. The Faulks Committee observed that such matters could be relied on in mitigation of damages. It also thought that to give the broadcast media a defence would often leave the defamed person remediless, unlike the position of booksellers, where the person will usually have a remedy against the author and publisher. The New Zealand Committee thought that to provide a defence "would be to invite an abuse of the media at the expense of other persons' reputations".

Suggestions

522. It might be specified that it should be a factor mitigating damages that the remark was made in the course of a live programme by a commentator, in situations in which the person conducting the programme could not have foreseen and avoided the comment, and took immediate steps to rectify the damage done.

It could be considered whether a correction might be an appropriate remedy, given that corrections on the broadcast media are an extremely effective means of drawing attention to the statement and vindicating the plaintiff's reputation. It could be provided that where a correction is made at the beginning of the next programme of the same series, this should be a defence to an action by the plaintiff for damages.

523. The RTE representatives in their meeting with the Law Reform Commission identified another problem with defamation actions and the broadcast media generally. This is that an oral statement made in a programme may be very fleeting in nature. By contrast, at trial, the statement is reproduced in a document given to the jury, available to them throughout the trial, and is subjected to dictionary-type analysis. This presentation of the statement may distort its effect. The sound of the original statements may affect its meaning or lessen its damage effect. For example, if a person makes a defamatory statement in the heat of a dispute where feelings are running high, the public listening is likely to make allowance for the anger of the

109 [1948] N129, discussed above.

speaker and may not take the statement literally. The average speaker does not pause to weigh up the implications of his words, and the average listener knows this. However, at trial, the isolation of the phrase from its context and the sheer fact of its being set down in black and white, may add a gravity to the words which they did not originally possess. Accordingly, RTE thought that there should be a requirement that a tape of the programme should be played to the jury once or twice at trial, so that they could have a realistic impression of the statement. If a transcript were given to them at all, it should not be retained by them throughout the trial. That would go some way to re-creating the original effect of the statement. *We invite views on this area.*

VIII. MISCELLANEOUS

A. LIMITATION PERIODS

524. Under existing law, an action for libel must be brought within six years from the date on which the cause of action accrued¹ while an action for slander must be brought within three years from the date on which the cause of action accrued.² With regard to libel and slander actionable per se, the cause of action accrues when publication to a third party occurs. With respect to slanders actionable only on proof of special damage, the cause of action accrues when the special damage is sustained.³

If the proposed abolition of the distinction between libel and slander is adopted, a single limitation period should be adopted in respect of all defamation actions. The Boyle-McGonagle Report thought that the six year period was too long and called for a limitation period of three years for all defamation actions. They also suggested the alternative that defamation actions could be commenced within six months of publication - a period of three months was the limitation period in France.

The Australian Law Reform Commission agreed that long limitation periods posed difficulties for the media in particular, because (a) journalists constituted an especially mobile workforce, with the result that the journalist who had written the material complained of might have long since left the newspaper, and (b) the media often did not keep records for long periods; tapes, for example, would rarely be kept for more than six months. Under Australian Legislation, radio and television stations were required to keep broadcasts of certain programmes for a period of six weeks only. Accordingly,

1 Statute of Limitations, s.11(2)(a).

2 Statute of Limitations, s.11(2)(c).

3 McDonald, *Irish Law of Defamation* p.238 Faulks Committee Report, para.526, citing *Darley Main v Mitchell* (1885) 11 AC 142.

the Australian Commission recommended a limitation period of six months from the time the plaintiff became aware of the publication, as well as an absolute period of three years where cases for the plaintiff did not learn of the publication for a long time. The plaintiff would therefore be required to bring his action within either period, whichever occurred first.⁴

The Faulks Committee opted for a longer time period, namely three years from the date of publication, capable of being extended by the court in appropriate cases where, owing to the plaintiff's ignorance of the relevant facts and circumstances relating to the cause of action, the limitation period expired before proceedings were commenced. On becoming aware of the relevant facts and circumstances in such a case, the plaintiff should institute proceedings within twelve months.⁵

The New Zealand Committee recommended that the limitation period should be reduced to two years, again capable of being extended, on grounds of mistake or other reasonable cause, up to a maximum period of six years from the date of publication.⁶

The Law Reform Commission of British Columbia noted that since the passing of legislation in 1979, all actions in defamation in that province were subject to a two year limitation period, and that the same period applied in most other Canadian provinces. The British Columbian limitation period runs from the date of publication. The Commission found that its time period operated well in practice and recommended that there be no change to the existing two-year limitation period.⁷

In America, it appears that most states apply a one year limitation period.⁸

We provisionally recommend a limitation period of three years, but invite views.

Limitation Periods and Defamation of the Dead

525. Another point that will require consideration is what limitation period should apply with regard to defamation of the dead, if such a cause of action is recommended by the Commission. The Faulks Committee recommended that an action in defamation in respect of defamatory statements about a dead person should be brought within five years of the death. The New Zealand Committee recommended a period of six years from the date of death, as well as being subject to the two years from publication recommended in all cases. In other words, if A died in 1984, and B published defamatory statements about him in 1986, his relatives would have to bring the action by 1988, two

4 ALRC Report, para 281.

5 Faulks Committee Report, para 543.

6 NZ Committee Report, para 476.

7 BC LRC Report, p 59.

8 Barrett, Symposium: New Perspectives in the Law of Defamation; Declaratory Judgements for Libels: A Better Alternative, 74 Calif L Rev 847, 850 16n.

years from the date of publication. However, if C published defamatory statements in 1989, and the relative attempted to commence an action in 1991, he would be statute-barred because of the expiry of the six years since A's death. The Australian proposal was that an action should be brought in respect of defamatory material and published within three years of death. The limitation periods suggested, therefore, range from three years to six years from the date of death. *We provisionally recommend that the time limit in respect of defamation of the dead should be 3 years.*

B. STRIKING OUT AND DISMISSAL FOR WANT OF PROSECUTION

526. The Boyle/McGonagle Report calls for provisions dealing with the situation where the plaintiff issues a writ, but fails to pursue the matter to trial within a reasonable time. It suggests that where defamation proceedings are not set down for trial within twelve months of the issue of the writ, there should be a power in the Court to strike them out.⁹ (Under the Rules of the Superior Courts at present the Court has such a power where no steps have been taken in the action for *two* years).

The reform bodies considered making similar recommendations. The Faulks Committee proposed a provision in the following terms;¹⁰

- (a) That a defendant should be entitled, unless the court otherwise orders, to have defamation proceedings against him dismissed for want of prosecution, where no step has been taken in the action by the plaintiff for one year; and
- (b) that if a defamation action is struck out or dismissed, no further proceedings in respect of the same cause of action should be issued without leave of the court.

The Australian Law Reform Commission recommended that defamation actions should be instituted by summons returnable before a judge of the court within fourteen days after the date on which the summons was issued or within such other period as in the particular case the judge directs.¹¹ The court could then set a hearing date and make a suitable order as to

⁹ At para 5.45 of the Report.

¹⁰ Faulks Committee Report, para 559.

¹¹ ALRC Report, Appendix C. Draft Bill, section 39(2)(a).

particulars, discovery, and interrogatories. The New Zealand Committee criticised this proposal because the preparation of the defence requires more time than the period envisaged by that provision.

The New Zealand Committee itself made a recommendation similar to that of the Faulks Committee. It felt that this would go some way towards solving the problems caused by "gagging writs". Gagging writs are writs intended to stifle publication of further material on the same subject matter, where the plaintiff has no intention of pursuing the matter to trial. If the defendant publishes further matter, he may or may not be in contempt of court, depending on whether the contents could be said to prejudice the fair trial of the action. However, the problem is that the defendant cannot know whether the plaintiff will proceed to trial. In order to address this problem, the Committee proposed a number of additional provisions;

- (a) a provision preventing the plaintiff in an action for defamation in which there is a news media defendant from specifying the amount of damages claimed;
- (b) a provision stating that where the judge is of the opinion that the damages claimed are grossly out of proportion to the amount covered or the damage caused, he may award costs to the defendant;
- (c) a provision stating that the issue of a writ of damages for defamation with no intention of pursuing the matter to trial should be deemed as a vexatious proceeding.¹²

Provisions (a) and (b) would not be of value in Ireland because a plaintiff seeking damages does not normally specify the amount claimed (except in the Circuit Court, where he usually claims £15,000 due to that figure being the monetary jurisdictional limit on that court). We are not convinced of the utility of the remaining provision (c). It is unclear how a court is to decide that the writ is issued without any intention of pursuing the matter to trial. If the running of a certain length of time, such as one year, without further move by the plaintiff indicates that the plaintiff has no intention of pursuing the matter for trial, then the provision adds nothing to the Faulks proposal which would allow a case to be struck out when a year without steps taken has run.

527. We believe that there should be a provision stating (i) where no step has been taken in a defamation action by the plaintiff within one year, the defendant should be entitled to have the proceedings dismissed for want of prosecution, unless the court orders otherwise and (ii) that if such proceedings have been struck out or dismissed, no further proceedings in respect of the same cause of action should be issued without leave of the court.

¹² New Zealand Committee Report, para 427.

C. SURVIVAL OF ACTIONS¹³

A. *Where the defamer dies before judgment*

528. The cause of action in defamation does not survive the death of the defamer, by virtue of s6 and s8(1) of the *Civil Liability Act 1961*, although most other causes of action in tort do survive the death of the wrongdoer. The rationale for the rule appears to be that it would be difficult to do justice if both parties cannot appear in the witness box, particularly in cases where a question of malice arises.

The Faulks Committee dealt specifically with the argument that the defendant's representatives would be prejudiced in presenting their defences.¹⁴ Firstly, they pointed out that in many cases the issue of malice would not arise at all. Secondly, in cases where the issue did arise, the onus was on the plaintiff to prove malice, and the inability to cross-examine the defendant would prejudice the plaintiff rather than the defendant. The Faulks Committee also pointed out that other causes of action, currently unaffected by the doctrine of '*actio personalis moritur cum persona*' seemed not to suffer adversely from the absence of the defendant, although one would have thought they would e.g. plagiarism, fraud and malicious prosecution. A majority of the Faulks Committee recommended that the cause of action in defamation should survive against the estate of a deceased person.

The New Zealand Committee recommended that the cause of action should survive, but that the plaintiff should be limited to recovering *special damages and costs*, stating that it "[did] not consider that compensatory damages are

13 This section deals with death of the defamed person or defamer after publication. Where the defamed person is dead at the time of publication this is known as defamation of the dead and is dealt with separately.

14 Faulks Committee Report, para 402.

justified in such a case because of the personal nature of a defamation action".¹⁵ However, as compensatory damages are by definition intended to compensate the plaintiff for injuries done, the death of the defendant would not appear to be a relevant reason for limiting such damages. It might, however, be a good reason for prohibiting punitive damages in such a case.

The Australian Law Reform Commission considered the death of the defendant to be an "irrelevant fact" in this context.¹⁶ The implications for the presentation of the case were not unique to defamation. Courts and juries take into account the fact that allegations against the dead are difficult to rebut; indeed, sometimes the absence of the dead assists the presentation of their case.¹⁷

529. *We recommend that a provision be enacted allowing a cause of action to survive the death of the defamer. We favour the recovery of compensatory damages in addition to special damages and costs, but not punitive damages.*

B. Where the person defamed dies before judgment

530. The Porter Committee averted to the fact that this case was different in that the issue of damages would necessarily be affected by the death of the plaintiff, although the liability of the wrongdoer would not. The Faulks Committee recommended the assimilation of this aspect of the law to that of Scotland so that where a person defamed starts an action but dies at any time prior to judgment, his personal representatives should be entitled to carry on the action to the extent of recovering both general and special damages; but that where the person defamed dies before starting the action, his personal representatives should be entitled to commence and carry on proceedings to the extent only of claiming an injunction and actual or likely pecuniary damage suffered by the deceased or his estate. There does not appear to be any reason for distinguishing between the plaintiff who dies before and the plaintiff who dies after commencing the action. In either case, he is dead by the time of verdict, and if it is considered that damages, or compensatory damages, are not appropriate, it is submitted that this should apply to both situations.

The New Zealand Committee thought that where the plaintiff died before commencing an action, no subsequent proceedings should be brought at all, because the representatives should not be allowed to bring an action which the plaintiff had neglected to do. However the Australian Law Reform Commission has pointed out that this assumes a decision not to take up a case. In fact the deceased may have intended to bring an action and instructed his solicitors to that end. However, the New Zealand Committee

¹⁵ New Zealand Committee Report, para 432.

¹⁶ Australian Law Reform Commission Report, para 104.

¹⁷ For example, there is no dilemma as to whether to give evidence or be cross-examined, or to refrain from doing so, with all the implications drawn from either course of action.

felt that where the plaintiff died between the commencement of an action and its judgment, his personal representatives should be entitled to carry on the action to the extent of claiming special damages, an injunction against further publication, and costs.

The Australian Law Reform Commission recommended that the right to institute an action should survive in favour of the personal representatives of a person defamed who dies without having instituted the action, and that a pending action should survive similarly in favour of his personal representative.

531. We provisionally recommend that there should be a provision that a cause of action survives in favour of the personal representatives of the person who is defamed, but dies after publication, whether or not proceedings have been instituted.

In such a case the remedy might be limited to an injunction alone; or it might include compensation for special damage. Compensatory damages are felt to be inappropriate. We invite views on the nature of the remedy to be provided in such a case.

Consistent with both of the foregoing recommendations we recommend the deletion of the words "or for defamation" in s6 of the Civil Liability Act 1961 so that defamation is removed from the "excepted" causes of action which die with the victim and the wrongdoer.

D. MULTIPLE PUBLICATION

532. Under present law, every copy of a newspaper, book or written matter, or any form of broadcast, is a separate publication to each recipient of the publication. The problem is not merely one of simultaneous actions in different locations. It is also possible for the same, or a different plaintiff to bring a second action in respect of words to the same effect as the publication involved in the first action. Although damages may be mitigated under S26 of the *Defamation Act 1961*, there is no prohibition upon such an action. Section 26 is worded as follows:-

"In any action for libel or slander the defendant may give evidence in mitigation of damages that the plaintiff has recovered damages, or has brought actions for damages, for libel or slander in respect of the publication of words to the same effect as the words on which the action is founded, or has received or agreed to receive compensation in respect of any such publication".

It would seem that this section does not apply where the plaintiff in the second action is a different person from that in the first action. In such a case, not only is there no prohibition upon the action, but the first action is not a ground for mitigating damages. The reform bodies agreed that a multiplicity of actions respecting the same, or substantially the same, publication was undesirable and made proposals for reform.

The Faulks Committee noted that although a single action would usually be sufficient to protect the plaintiff's reputation, cases might arise in which a second action would be justifiable e.g. subsequent publication of the same matter; a publication in a foreign country or indeed in the same country, of which the plaintiff learns after the first action. The Committee therefore recommended that where proceedings in a defamation action had been

concluded by settlement, judgment or discontinuance, the plaintiff should not be permitted to bring further proceedings against the defendant in respect of publication of the same matter, except with the leave of the court or on notice to the defendant.¹⁸ The New Zealand Committee made an identical recommendation.¹⁹

The Australian Law Reform Commission proposed that the defamed person should have a single right of action in respect of a multiple publication, subject to one exception.²⁰ It defined multiple publication as "the publication by a particular person of the same or substantially the same matter in the same or substantially the same form to two or more recipients". The sole exception allowed would be where a part of the multiple publication was not disclosed to the court during the first hearing. This was a response to the fact that a plaintiff might be unaware of a distribution until after the first hearing, and if there were a total ban on further proceedings, the defendant could conceal the extent of publication. However, this exception would be an incentive to the defendant to disclose the full extent of the publication during the first action.

533. The two proposals are essentially the same. The Australian proposal is more specific in defining multiple publication. On the other hand, it is narrower in that the only exception envisaged is where the plaintiff was not aware of the extent of publication at the first trial. The Faulks Committee proposal allows the court a discretion to allow a separate trial whenever it sees fit. It might be advisable to retain this wider discretion but to define multiple publication using the Australian proposal, thus adopting the best features of both proposals.

534. Another issue raised by RTE is the fact that a plaintiff may sue different publishers for the same statement.²¹ The above solution to multiple publication deals only with the same matter published by a single publisher. RTE point out that audiences receiving statements from different newspapers and broadcasters may not vary sufficiently to justify separate actions being brought against every publisher. However the expense of defending separate actions is far greater than if a single action is consolidated.

The New Zealand situation is interesting in this respect. Under their *Defamation Act 1954*, no action could be commenced in relation to the same or substantially the same matter in any other newspaper, unless the action were commenced within thirty days of the first action. If such an action is commenced within thirty days, the plaintiff is required to notify the defendants in each action or the other action, so that they may apply for consolidation. The New Zealand Committee recommended the extension of these provisions

18 Faulks Committee Report, para 291.

19 New Zealand Report, para 321(c).

20 ALRC Report, para 282.

21 Part of an RTE Submission to this Commission.

to other news agencies, radio and TV broadcasts and cinemas. There would not appear to be any reason for confining it at all: it could apply to all defendants. However, the New Zealand Committee thought that the thirty day time limit was too stringent, and proposed that the court have a discretion to extend the time limit up to the time of the setting down of the first action of the trial. This type of provision would address the difficulty raised by RTE.

535. RTE also raised the problem which arises where the plaintiff has lost an action taken outside the jurisdiction e.g. Northern Ireland or England.²² It is not clear that an estoppel defence would be available to a defendant in this situation. But RTE's fears that the plaintiff would be allowed to bring a case while they would be estopped from raising the same defences would seem to be ill-founded. If estoppel operates, it operates across the board so that the matter could simply not be raised a second time.

It is also not clear to us why a person who may have a reputation in different countries should not be entitled to sue in each of them. Accordingly, we would not be in favour of any change in the laws which would preclude such a plaintiff from issuing proceedings in this jurisdiction even though he has obtained damages in respect of the same defamatory statement in another jurisdiction. We think it should be left to the courts to determine when, if ever, estoppel should operate so as to prevent such a plaintiff from suing in this jurisdiction.

If the Australian proposal were to be adopted, multiple publication could be defined as:

"the publication by a particular person of the same or substantially the same matter in the same or substantially the same form to two or more recipients".

The provision would contain an exception allowing for a second action if a part of the publication was not disclosed at the time of the first hearing or an exception giving a discretion to the court to allow a second action if it appears necessary in the circumstances of the case.

Alternatively, there could be a provision along the lines of the English proposal, i.e.:

"where proceedings in a defamation action have been concluded by settlement, judgment or discontinuance, the plaintiff shall not be permitted to bring any further proceedings against the defendant in respect of the publication of the same matter, except with the leave of the court and on notice to the defendant".

22 *Ibid*, para 5.10.

536. Examples of Provisions

- A. *Where proceedings in a defamation action have been concluded by settlement, judgment or discontinuance, the plaintiff shall not be permitted to bring further proceedings against the same defendant in respect of publication of the same matter, except with leave of the court and on notice to the defendant.*

or

- B. *Where proceedings in a defamation action have been concluded by settlement, judgment or discontinuance, the plaintiff shall not be permitted to bring further proceedings against the same defendant in respect of publication of the same matter, unless such publication was not disclosed to the court during the hearing of the earlier action in respect of the same matter.*

or

- C. (a) *A multiple publication shall give rise to a single right of action against the defendant. (b) Notwithstanding (a), a person has a separate right of action in respect of any publication which is part of a multiple publication, particulars of which were not disclosed to the court during the hearing of an earlier action in respect of some other part of that multiple publication. (c) A multiple publication consists of the publication by a particular person of the same or substantially the same matter in the same or substantially the same form to two or more recipients.*

or

- D. (a) *A multiple publication shall give rise to a single right of action against the defendant and no further proceedings may be brought against the same defendant in respect of the same matter except by leave of the court and on notice to the defendant. (b) A multiple publication consists of the publication by a particular person of the same or substantially the same matter in the same or substantially the same form to two or more recipients.*

537. *We favour provision D but invite views on the various provisions suggested. We also recommend the following provision*

- (a) *Where proceedings have been commenced against a defendant in respect of defamatory matter, an action may be commenced in relation to the same or substantially the same, matter published by another defendant, only if commenced within thirty days of the first action.*
- (b) *If a subsequent action is commenced within thirty days of the first action, the plaintiff shall notify all the defendants involved of the*

existence of each action.

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

This last provision allows defendants the opportunity to consolidate their cases and to defend defamation actions more cheaply. The provision is modelled on the *New Zealand Defamation Act 1954* section 9. However, the range of defendants has not been confined.

E. CIVIL LEGAL AID

538. Under the existing scheme of civil legal aid, certificates will not be granted in respect of proceedings involving defamation.²³ Accordingly a person who does not have the means to protect his reputation is left without remedy.

We believe that the quality of a legal system should be judged not only by the calibre of its content but also by its accessibility. The numerous recommendations contained in this Paper will be rendered almost meaningless if they can be availed of only by a minority of defamed persons.

Neither are we convinced by the argument that the less wealthy person is less likely to be the target of a defamatory statement. If correct, this argument contains the seed of its own destruction because if there are few defamatory accusations against low income persons, there will be little strain on the financial budget of the legal aid system, which is the reason for excluding defamation actions in the first place. However, we believe that the argument is in fact incorrect in assuming that the wealthy suffer defamatory accusations to the exclusion of others. It overlooks the fact that public curiosity in a person is fed on many things other than wealth, prestige or status. A connection with crime, or a feature of morbid interest, for example, will be sufficient to bring a person into the public arena. A television documentary recently portrayed the distress of a woman whose son had been ridiculed and defamed by one of the English tabloids because of a severe physical handicap. One might even say that the greater the defamation the greater the public curiosity. Clearly the defamatory nature of the statement has little to do with the means or status of the victim, except perhaps that the public character of the victim may increase the newsworthiness of the story.

23 See Prl. 4147, Schedule A, A1(1).

Furthermore, many defamatory statements are made in a private sphere, for example to an employer, to a disciplinary board or to the local residents of a town. The assumption that libel law concerns a battle between the rich and famous and the press is alarming, and should prompt us to scrutinise our system to see if in fact the assumption is correct.

A good reputation is one of the few marketable commodities, not to say qualities, to which money is no obstacle. The poor man, like the rich man, has the right to a good reputation. The poor man, like the rich man, may have his life ruined by a defamatory statement. It is a travesty of justice to single out reputation as the human interest which one may only re-possess if one can pay for it.

We observe with approval that the Committee on Civil Legal Aid and Advice (1977) specifically rejected the argument that defamation be excluded from the civil legal aid scheme. It stated that:

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

We accept that there are financial limitations on the operation of the civil legal aid system. However, we agree with the Pringle Committee that if cases are to be excluded, it should be on grounds of gravity rather than category. The civil legal aid system is an attempt to achieve a measure of real justice in our society. Exclusion therefrom should be justified on strong grounds and not such arguments as put forward by the Dublin Solicitors Bar Association - namely that there would be a "proliferation of defamation actions when the legal aid scheme is introduced".²⁴ The right to a good name is a constitutionally guaranteed interest. Its exclusion from the civil legal aid system is difficult to reconcile with its explicit recognition and position in the Constitution of Ireland.

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

24 See Committee on Civil Legal Aid and Advice, page 45.

F. PRIVACY LAW AND DEFAMATION LAW

539. There is an overlap between the law on privacy and the law on defamation. If defamation law seeks to protect reputation, and privacy law seeks to protect matters which are personal to the individual and should not be regulated or revealed without his or her consent, it is clear that some invasions of privacy will also constitute an attack on reputation. For example, if it were said of a man that he indulged in sexually deviant practices in his home the statement would probably be defamatory and could also arguably be challenged as an invasion of privacy.

An essential difference between the two causes of action is that a true statement of fact is not actionable in defamation, whereas a true statement of fact could be actionable under privacy law. For example, if it is correctly stated of a man in 1989 that he was convicted of a criminal offence in 1933, this is not actionable in defamation because truth is a defence. However the person might argue that because he has since turned over a new leaf and led a life as a model citizen, it is an invasion of his privacy to rake up old slurs upon his reputation. The difference in treatment between the two causes of action is that defamation law looks to the *quality* of the statement (its truth, its negative effect) whereas privacy law looks to the *content* of the statement (whether it concerns a person's private life).

It might therefore be necessary to decide how the intersection between these two causes of action must be dealt with. A problem at the outset is the present state of privacy law in Ireland. To the extent that it exists, the right to privacy is an unenumerated right under the Constitution (Article 40.1). The Irish case law on privacy is set out in Appendix A, but for present purposes it is sufficient to say that jurisprudence in this area has been sparse. To date a right of privacy has been explicitly recognised only in the *McGee* case (a right to import and use contraceptives on the basis of the privacy of

the family unit) and the *Kennedy* case (a right not to have one's telecommunications intercepted without lawful justification by the State).

However a right to privacy has been refused recognition in more cases than it has been recognised.²⁵ Against this backdrop, a plaintiff who wishes to challenge an act on the basis that it infringes upon his privacy right is setting sail on an uncharted sea. This must be borne in mind when setting the limits of defamation law in this context. It would be unfortunate to widen defences in defamation law on the grounds that the plaintiff can seek redress under the guise of a privacy action, only to find that the particular privacy interest will not be protected by the Irish courts. On the other hand, any comprehensive treatment of defamation law, which seeks to protect the interest in reputation, should presumably not attempt to deal with a separate interest in a piecemeal way but rather present a set of rules which deal in a coherent manner with the central interest in reputation. However, the embryonic state of Irish privacy law may unfortunately necessitate a choice of practicality over theoretical satisfaction.

540. We have concluded that we should not address the question of privacy in any greater detail in this Paper or in the Report which we will ultimately be presenting to the Attorney General. Our programme of Law Reform includes as one of the topics to be examined the question of privacy. That question gives rise to many more issues than are embraced in the topic of Defamation. There is much and varied material to be considered, e.g. postal and telephonic communications, unauthorised photographs, prisoner's rights²⁶, police surveillance, computer data and so on. The kind of statements which arise in a defamation case which touch also on privacy are only one type of a broad range of cases. Rather than consider questions of privacy in a shallow and piecemeal fashion, we propose to defer consideration of the entire topic to the Report which we will be presenting to the Taoiseach in due course. We have, however, set out the existing law in Appendix A to this Consultation Paper.

25 *Norris v Attorney General* [1984] IR 36, *Madigan v Attorney General* [1986] ILRM 136, *Kane v Governor of Mountjoy Prison* Unreptd. Sup. ct. 11 May 1988.

26 Cf *Murray v Attorney General*, Supreme Court, unreported, judgments delivered 14th February 1991.

SUMMARY OF PROVISIONAL RECOMMENDATIONS

(References in brackets are to relevant paragraphs in this Consultation Paper)

PRELIMINARY

Distinction between Libel and Slander

1. We recommend the abolition of the distinction between libel and slander. We recommend the introduction of a new cause of action in defamation in which proof of special damage or specific pecuniary damage is not necessary. We recommend the repeal of sections 15, 16 and 19 of the Defamation Act 1961. The repeal of s15 will necessitate an amendment to s20(2) of the Defamation Act 1961. (Para 180).
2. We recommend the following definition of defamation: (Para 192)
 - (1) Defamation consists of the publication by any means of defamatory matter concerning the plaintiff.
 - (2) *Defamatory matter defined:* Defamatory matter consists of matter which tends to injure the plaintiff's reputation.
 - (3) *Publication defined:* Publication consists of the intentional or negligent communication of defamatory matter to a person other than the plaintiff.
 - (4) *Standard by which injury is measured:*
 - (a) Matter shall be considered injurious to the plaintiff's reputation if it tends to injure his reputation in the eyes of the community or a section of the community.
 - (b) Notwithstanding (a), matter shall not be considered injurious to the plaintiff's reputation if it states that he upheld, assisted or complied with the law in any way.

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

Meaning of Words (Paras 193-200)

- 3. We invite views on the proposal that in a defamation action where special damage is alleged by the plaintiff, the jury should determine whether the statement was defamatory prior to the plaintiff testifying on the issue of special damage.
- 4. We recommend that there be a Rule of Court stating that where the plaintiff in a defamation action alleges that the words complained of were used in a defamatory sense other than their ordinary meaning, the plaintiff shall be required (i) to give particulars of the facts and matters relied on to support such sense and (ii) to specify the persons or class of persons to whom these facts and matters are known.
- 5. We recommend that there be a Rule of Court stating that where the plaintiff in a defamation action alleges that the words complained of were defamatory in their ordinary and natural meaning,
 - (i) the plaintiff shall succinctly specify the meaning(s) which he alleges the words bear if such meaning(s) is *not* clearly apparent from the words themselves;
 - (ii) the pleaded meaning shall explain but not extend the ordinary and natural meaning of the words;
 - (iii) the plaintiff shall be confined to his pleaded meanings.

Payment into Court (Paras 201-203)

- 6. We recommend that Order 22 RSC be amended so that a defendant in a defamation action may make payment into court without admission of liability.

Apology (Para 204)

- 7. We recommend the following provision on apologies:
 - (1) In any action in defamation evidence that the defendant made or offered an apology to the plaintiff shall not be construed as

an admission of liability and, where the issues of fact are being tried by a jury, they shall be directed accordingly.

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

PRIVILEGED STATEMENTS

Absolute Privilege (Paras 206-209)

- 8. We invite views on whether absolute privilege should be retained.
- 9. We invite views on the following options:
 - (a) to reform all the instances of absolute privilege except parliamentary privilege so that they are all governed by clearly defined qualified privilege.
 - (b) to maintain the current distinction between absolute and qualified privilege so that there is a coherence of treatment with regard to statements in the Oireachtas, before the Courts and in the Executive.

Whichever option is preferred, statements made in the course of quasi-judicial or administrative proceedings would be governed by qualified privilege.

- 10. We recommend that section 2(2)(c) of the Houses of the Oireachtas (Privilege and Procedure) Act 1976 be amended so as to include the words "or witnesses before" after the word "agents", so as to confer the same privilege on witnesses before parliamentary committees as currently exists in respect of other parties appearing before such committees. (Para 210)

11. We recommend that there be a provision setting out the limits of executive privilege in respect of defamatory communications. We invite views as to whether this should be absolute or qualified, and to whom it should apply. (Para 212)
12. We recommend that there should be a provision that statements made by a judge or other officer performing a judicial function and who is not knowingly acting without jurisdiction or performing a purely ministerial function should be absolutely privileged if the publication has some relation to the matter before him. (Para 214)
13. We recommend that statements made by parties, witnesses, advocates and jurors in the course of legal proceedings should be absolutely privileged provided the matter bore some relation to the legal proceedings in question. (Para 216)
14. We recommend that there should be a provision that communications between solicitor and client, and between counsel and client, should attract qualified privilege only. (Para 218)

Qualified Privilege (Para 219 et seq)

15. We recommend that a statutory provision defining the elements which are necessary to form an occasion of qualified privilege and the conditions under which the privilege is deemed forfeited.
16. We recommend a provision stating that a qualified privilege shall be deemed forfeited and abused if (a) the defendant did not believe the matter to be true, (b) the defendant was primarily actuated by spite, ill-will or any other improper motive, (c) the matter bore no relation to the purpose for which the privilege was accorded, or (d) the manner and extent of publication exceeded what was reasonably sufficient for the occasion. We further recommend a statutory provision stating that a lack of belief in the truth of the matter will not result in forfeiture of the privilege if the defendant was reasonable in publishing the matter in all the circumstances. We recommend that the burden of proof be placed on the plaintiff to show abuse of the privilege. (Para 226)
17. Consistent with the foregoing recommendation, we recommend the repeal of s11(4) of the Civil Liability Act and its replacement by a provision stating that where there is a joint defamation in circumstances giving rise to an occasion of qualified privilege, forfeiture by one defendant on any of the grounds (a)-(d) above shall result in forfeiture of the privilege by the other defendant only if that other was vicariously liable for the first. (Para 226)
18. We recommend a statutory provision defining the elements which must be present in order to give rise to an occasion of qualified privilege as

follows: (Para 244)

- (1) It shall be a defence to an action in defamation that the publication of defamatory matter was made to a particular person or group of persons and
 - (a) the recipient(s) had an interest in receiving, or a duty to receive, information of the kind contained in the matter, and
 - (b) the publisher had an interest in communicating, or a duty to communicate, information of the kind contained in the matter.
 - (2) In sub-section (1), "duty" includes a legal, social or moral duty, and "interest" includes a legal, social or moral interest.
 - (3) A defence of qualified privilege shall not fail by reason only of the fact that the recipient of the communication had no actual interest or duty to receive information of the type contained in the communication, if a reasonable person would have believed the recipient to have an interest or duty to receive information of the type contained in the communication.
 - (4) Persons shall not be regarded as constituting a particular group by reason only of the fact that they received particular published matter.
 - (5) The defence under this section shall not fail by reason only of the fact that the matter was published for fee or reward.
19. We invite views on the adoption of an 'umbrella' defence of fair report which would include the reporting rights currently set out in s29 of the Defamation Act 1961 read in conjunction with the Second Schedule, and s18 of the same Act. This defence would not be defeated by "malice" and would include the specific matters currently contained in the Second Schedule as well as a more general provision designed to afford the privilege to reports of matters omitted by the Schedule. (Para 252)
20. In the absence of a more general defence of fair report, we recommend a number of changes to the matters set out in the Second Schedule to the 1961 Act. (Para 253)
21. In the absence of a more general defence of fair report, we recommend that the nature of the privilege in s18 of the Defamation Act 1961 be clarified. We also recommend (i) the abolition of the requirement that the publication of the report be contemporaneous with the proceedings

reported, (ii) the extension of the privilege to all defendants, and (iii) that the privilege extend to reports of a judgement made public although the proceedings were held in camera. We further recommend that s18 be reworded to make it clear that "proceedings" mean the full proceedings in any given case. (Paras 254-255)

STATEMENTS OF OPINION

Fair Comment

22. We recommend that a statutory provision set out the constituent elements of the defence of Fair Comment in a positive way.

23. We recommend the repeal of s23 of the *Defamation Act 1961* and its replacement by the following provision;

In order to avail of the defence of (fair) comment the defendant must show -

- (a) that the words complained of were correct;
- (b) that the comment was supported by facts either
 - (i) set out in the publication containing the comment, or
 - (ii) expressly or impliedly referred to in the publication containing the comment provided such facts were known to the recipient(s) of the publication,

and (c) the truth of sufficient facts to support the comment. (Para 276)

24. We recommend a statutory provision based on the rule in *Mangena v Wright*. At the minimum this should allow the defendant to avail of the defence of (fair) comment where the comment was supported by facts published on an occasion of absolute privilege. We invite views as to whether the defence of (fair) comment should be available where the comment was supported by facts published on an occasion of qualified privilege or, if a generalised defence of fair report is adopted, that the comment was supported by facts published on an occasion in respect of which there is a defence of fair report. (Paras 279-280)

25. We recommend the abolition of the common law rule that "malice" defeats the defence of fair comment. (Para 297)

26. Consistent with the above recommendation, we recommend the repeal of s11(4) of the *Civil Liability Act 1961* without replacement. (We have already recommended the repeal of this provision in the context of

qualified privilege but recommended a replacement in respect of qualified privilege only). (Para 300)

27. We recommend a statutory provision clarifying that it is not a requirement of the defence of (fair) comment that the comment be fair.
28. Consistent with the above recommendation we recommend a re-wording of the title of the defence. We recommend that it be re-named Comment or Comment Based on Fact.
29. We recommend for the purposes of clarification that there be a statutory provision stating that allegations of base, dishonourable or other sordid motives shall be treated in the same way as any other defamatory allegation and that such a statement shall not be treated conclusively as fact or comment, nor shall a more stringent defence apply if it is found to be comment.
30. We recommend the abolition of the "rolled-up plea". We recommend that there be a Rule of Court requiring the defendant who wishes to avail of this defence to (i) state which of the statements are factual and which are comment, and (ii) give particulars of the facts relied on to support the truth of the factual statements.
31. For our recommendation on the "public interest" aspect of the defence of fair comment, see below.

Distinction between Fact and Comment

32. We recommend that there be a statutory provision setting out guidelines for the court in distinguishing between fact and comment.
33. We recommend that part (a) of the provision should set out the following factors in distinguishing between fact and comment: (1) the extent to which the statement is objectively verifiable, (2) the language surrounding the statement, in particular cautionary or qualifying language, (3) the broader context of the statement, in particular whether one form of expression is traditionally associated with the type of publication in question. We recommend that part (b) state that a statement unsupported by any facts set out in the publication or expressly or impliedly referred to in the publication known to the recipient(s) of the publication shall be treated as a statement of fact.

FACTUAL STATEMENTS

Justification

34. We recommend that a statutory provision set out the requirements to be fulfilled in order to avail of this defence. We invite views as to whether it should be re-named 'truth'. (Para 339)
35. We recommend a statutory provision stating that in order to avail of the defence of truth in respect of a defamatory imputation, the defendant must show that it was in substance true or in substance was not materially different from the truth. (Para 342)
36. We recommend the repeal of s22 of the *Defamation Act 1961* and its replacement by -
 - (i) a provision stating that where the defence of truth is pleaded in an action in respect of defamatory matter containing a number of distinct imputations, proof that one or some only of the imputations were in substance true or in substance were not materially different from the truth shall establish a partial defence only and the defendant shall be liable in respect of the imputations not proved to be true,
 - (ii) a provision stating that in assessing damages, the Court shall have regard to the whole of the publication and the extent to which the defendant proves the truth of matters contained therein, irrespective of whether the plaintiff brings an action in respect of the publication in whole or in part. (See recommendation No.52). (Para 349)
37. We recommend a statutory provision that:
 - (a) where in a defamation action the question of whether a person party to the defamation action committed a criminal offence is relevant, proof that he stands convicted of the offence shall be conclusive evidence that he committed the offence;
 - (b) the conviction of a person not party to the defamation action should be evidence, but not conclusive evidence, of the facts on which it was based;
 - (c) the acquittal of a person party to a defamation action should be evidence, but not conclusive evidence, of the facts on which it was based. (Para 353-354)
38. We recommend that the practice of pleading in the statement of claim the words "falsely and maliciously" should be deemed obsolete. (Para 215)

39. We recommend that the rule that aggravated damages may be awarded where there is an unsuccessful defence of justification should be retained. (Para 356)

Defence of Reasonable Care (Para 385)

40. It shall be a defence to a claim for general damages in respect of a defamatory allegation of fact that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth of the allegation.
41. It shall not be a defence to a claim for damages in respect of financial loss clearly linked with the publication that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth if the allegation.
42. It shall not be a defence to a claim for a correction order and/or declaratory judgment that the defendant exercised reasonable care prior to publication in attempting to ascertain the truth of the allegation.

Presumption of Falsity

43. We recommend that the presumption of falsity existing under the present law should be retained. (Para 394)

Timely and Conspicuous Retraction

44. We recommend the repeal of s21 of the *Defamation Act 1961* and its replacement by a provision that the publication of a timely and conspicuous retraction should be a defence to a claim for a correction order and/or declaratory judgment. We make provision for defining 'timely and conspicuous retraction'.
45. Should the foregoing recommendation be rejected, we make a number of proposals for the reform of s21. (Paras 403-410)

Fiction and Satire

46. We invite views as to whether, in cases involving defamatory matter contained in a fictional context, the ordinary requirement of identification should be supplemented by a requirement that the matter be reasonably understood as referring to actual qualities or events involving the plaintiff. (Para 420)
47. We invite views as to whether the definition of defamation should include a provision stating that matter which would reasonably be understood as satire is not defamatory. (Para 421)

REMEDIES

Damages (Paras 422-451)

48. We recommend that:

- (1) in the High Court, the parties to defamation actions should continue to have the right to have the issues of fact other than the assessment of damages determined by a jury;
- (2) the similar right formerly enjoyed by parties in the Circuit Court should be restored, subject to some qualifications;
- (3) the damages in such actions should be assessed by the judge, but the jury should determine the nature of the damages that should be awarded i.e. nominal, compensatory or punitive;
- (4) for the removal of doubt, it should be expressly provided that the Supreme Court may in actions for defamation as in other civil actions assess the damages themselves in the event of an appeal. (Para 451)

49. We recommend that there be a statutory provision setting out the factors to be considered by the court when assessing damages and set out a wide range of factors including the circulation of the libel, matters relevant to the plaintiff's reputation, the state of mind of the defendant, the durable or other nature of the publication and the extent to which the defendant proves the truth of the publication, irrespective of whether the plaintiff sues in whole or in part. (Para 445)

50. We recommend the abolition of the rule in *Scott v Sampson* to the extent that it prohibits the defendant from adducing evidence of specific instances of misconduct by the plaintiff in order to show that the plaintiff had a bad reputation and thereby mitigate damages. We recommend a provision stating that the defendant may adduce in mitigation of damage any matter, general or particular, relevant at the date of trial to that aspect of the plaintiff's reputation with which the defamation is concerned. (Para 443)

51. We recommend that damages in respect of financial loss may be awarded only where the plaintiff shows (1) the extent of such damage, and (2) that the damage was clearly linked with the publication. (Para 445)

52. We invite views as to whether punitive damages should be abolished in defamation actions. (Para 449)

Injunctions

53. We recommend a statutory provision stating as follows -

- (1) Where in the course of proceedings for defamation the plaintiff seeks an interlocutory injunction restraining publication of allegedly defamatory material, the court should grant such injunction only if the matter is clearly defamatory and the defence raised is clearly bound to fail. (Para 452)
 - (2) The court shall not grant an injunction if the affidavit of the defendant discloses a case for consideration at trial. (Para 452)
54. We recommend a provision stating that where an injunction of any kind is issued to restrain publication of defamatory or allegedly defamatory matter, the court shall not have the power to make an order restraining the reporting of the fact that such injunction was issued. (Para 453)

Declaratory Proceedings

55. We recommend the introduction of proceedings for a declaratory judgement which would provide the plaintiff with a speedy method of correcting a false statement. We invite views on a number of matters of detail in this provision. (Para 464-466)

Correction Orders

56. We recommend that the Court should have the power to award a correction order where the defendant has failed to establish the truth of a defamatory allegation of fact. (Para 468)

Declaratory Judgment

57. We recommend that the court should have the power to issue a declaratory judgment stating the defamatory matter to be false where the defendant has failed to establish the actual truth of a defamatory allegation of fact. (Para 469)

Right of Reply

58. We examine a number of statutory rights of reply in other jurisdictions and welcome views as to whether there should be such a legally enforceable right in Ireland. We suggest features of such a right of reply. (Para 477)

Publication of Judgement

59. We welcome views as to whether the court should be given the power to order publication of its judgement. (Para 478)

IDENTITY OF PARTIES

Group Plaintiffs (Para 497)

60. We recommend a statutory provision affording a cause of action in defamation to an individual member of a group which has been defamed provided (a) the group or class is sufficiently small that the matter could be reasonable understood to refer to the individual plaintiff, or (b) the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the individual plaintiff.

Defamation of the Dead

61. We recommend that there should be a new cause of action in defamation in respect of defamatory statements made about a person who is dead at the time of publication, provided the action is brought within three years by close relatives or, perhaps, personal representatives of the deceased. We recommend that in such an action damages should not be available and instead that the remedies of correction order and injunction or declaratory proceedings should be available. We further recommend that provisions should be enacted to prevent multiplicity of actions. (Para 501)

Corporate Bodies (Paras 507-510)

62. Subject to recommendation no. 63, we decline to recommend any change in the law relating to corporate and quasi-corporate bodies.
63. We invite views on the broad immunity from tortious liability conferred on trade unions by virtue of s4 of the Trade Disputes Act 1906.

Distributors and Printers

64. We recommend that distributors and printers should be immune from defamation actions. (Para 520)

MISCELLANEOUS

Limitation Periods

65. Consistent with our recommendation on the abolition of the distinction between libel and slander and the introduction of a new cause of action

in defamation, we believe a single limitation period should apply to both forms of defamation.

66. We recommend that a limitation period of three years should apply to this cause of action. (Para 524)

Striking Out and Dismissal for Want of Prosecution

67. We recommend a provision stating (i) that where no step has been taken in a defamation action by the plaintiff within one year, the defendant should be entitled to have the proceedings dismissed for want of prosecution, unless the court orders otherwise, and (ii) that if such proceedings have been struck out or dismissed, no further proceedings in respect of the same cause of action should be issued without leave of the court. (Para 529)

Survival of Actions

68. We recommend that a provision be enacted allowing the cause of action in defamation to survive the death of the defamer after publication. We favour the view that compensatory damages, special damages and costs, but not punitive damages would be awarded in such a case, but invite views on this point. (Para 529)
69. We recommend that a statutory provision be enacted allowing the cause of action in defamation to survive the death of the victim any time after publication, whether or not proceedings were pending at the time of his death. We would exclude compensatory damages in this case but invite views on the remedy to be provided. (Para 531)
70. Consistent with the foregoing recommendations we recommend the deletion of the words "or for defamation" in section 6 of the Civil Liability Act 1961 which would remove defamation from the list of causes of action which die with the wrongdoer or the victim by virtue of the combined effect of section 6 and section 8 of the Act. (Para 531)

Multiple Publication (Paras 532-537)

71. We recommend a provision stating that as a general rule a person shall have a single cause of action in respect of a multiple publication by the same person, but that the court may permit a second action at its discretion. We define multiple publication as the publication by a particular person of the same or substantially the same matter in the same or substantially the same form to two or more recipients.
72. We recommend a provision stating that (a) where proceedings have been commenced against a defendant in respect of defamatory matter,

an action may be commenced in relation to the same or substantially the same matter published by another defendant only within thirty days of the first action, (b) where a second action is commenced within thirty days of the first action, the plaintiff shall notify all the defendant's involved of the existence of each action, (c) the court may in its discretion extend the time limit in paragraph (a) to the time of the setting down of the first action for trial. (Para 537)

Civil Legal Aid

73. We recommend that civil legal aid be available to the victims of defamatory statements. (Para 538)

APPENDIX A

SOME OBSERVATIONS ON THE RIGHT TO PRIVACY IN IRISH LAW¹

Reference has been made in this Consultation Paper to the Irish law on privacy and its state of relative uncertainty. It was relevant in particular to the discussion as to whether a "public benefit" limb should attach to the defences of justification and fair comment.² It is therefore considered relevant and useful to set out a summary of the legal developments in the privacy arena in Ireland to date.

If there is a general right to privacy under Irish law, it stems from the Constitution. There is no such right at common law. To the extent that a right of privacy exists, it is one of the unspecified personal rights under Article 40.3.1.

The first step towards a general right of privacy was taken in *McGee v Attorney General*,³ where the constitutionality of a section of the Criminal Law Amendment Act 1935 was challenged. The effect of this provision was to deprive the plaintiff, a married woman, of access to a contraceptive preparation. The plaintiff had had four children, and had received the medical opinion that another pregnancy would put her life at risk. A majority of the Supreme Court held that the provision in question violated the plaintiff's right to marital privacy, and reversed the decision in the High Court. Budd J stated in the Supreme Court:

"Whilst the 'personal rights' are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally

1 We wish to express our gratitude to Mr R Humphreys who kindly allowed us to use his LLM thesis on Covert State Surveillance for views on the Irish law of privacy.

2 See Section IX, Defamation Law and Privacy Law.

3 [1974] IR 284.

recognised and accepted with possibly the rarest of exceptions, and that the matter of marital relationships must rank as one of the most important of matters in the realm of privacy."

This robust statement on the right to privacy clearly reflected a view of privacy as a right more wide-ranging in ambit than merely marital relations. However the other members of the Supreme Court evidenced a more limited view of the privacy right, Henchy and Griffin JJ referring to a right of marital privacy, and Walsh J. basing his decision upon Article 41 and the guarantee in respect of the family. However the statement of

Budd J quoted above at least allowed for the possibility of recognising privacy rights quite distinct from those relating to marital affairs.

In *Norris v Attorney General*⁴ the plaintiff sought to build on the *McGee* decision to find a more generalised right of privacy. His contention was that legislation penalising homosexual acts between consenting adults in private was unconstitutional.⁵ He asserted that the State had no right to legislate in the field of private morality and that to legislate in relation to the private sexual conduct of consenting adults was in excess of the State's legitimate interference with the privacy of the individual.

The Supreme Court appears to have accepted that a wider right of privacy is recognised by the Constitution; the two dissenting judges expressed this view in strong terms and the majority judges did not deny its existence. The majority, however, rejected the contention that such a right had been violated in the circumstances before them.

Henchy J, dissenting, stated that a right of privacy inhered in each citizen as one of the unspecified rights under Article 40.3 and consisted of "a complex of rights varying in nature, purpose and range, each necessarily a facet of the citizen's core of individuality within the constitutional order". He gave as examples of this right to privacy the guarantee in Article 16.19 of voting by secret ballot and the right to marital privacy recognised in the *McGee* case. He continued:

"There are many other aspects of this right of privacy, some yet to be given judicial recognition. It is unnecessary for the purpose of this case to explore them. It is sufficient to say that they would all appear to fall within a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not always moral or commendable, but meriting recognition in circumstances which did not endanger considerations such as state security, public order or morality, or other essential components of the

⁴ [1984] IR 36.

⁵ The legislation challenged was sections 61 and 62 of the Offences Against the Person Act 1861, and s11 of the Criminal Law Amendment Act 1885.

common good".⁶

McCarthy J referred to the United States Supreme Court definition of the privacy right as the "right to be let alone" but declined to delimit the area of Constitutional State intervention. The complexity of drawing such lines between legitimate State restriction on privacy is illustrated by the comments of Henchy J:

"It would not be constitutional to decriminalise all homosexual acts, any more than it would be constitutional to decriminalise all heterosexual acts. Public order and morality; the protection of the young, of the weak-willed, of those who may readily be subject to undue influence, and of others who should be deemed to be in need of protection; the maintenance inviolate of the family as the natural and primary and fundamental unit of society; the upholding of the institution of marriage; the requirements of public health; these and other aspects of the common good require that homosexual acts be made criminal in many circumstances."⁷

Like the judgment of Budd J in the *McGee* case, the comments of the dissenting judges in the *Norris* case are significant in that they recognise a wide-ranging right of privacy with much potential for development. However the specific holding was that a right of privacy did not exist in this particular context. The legislation challenged in the *Norris* case has since been held to be a violation of Article 8 of the Convention of Human Rights and the specific right of privacy advocated by Mr Norris was recognised by the European Court of Human Rights.⁸

Infringements on the right of privacy were alleged in two cases involving taxation legislative provisions. In the first of these cases, *Murphy v Attorney General*⁹, the plaintiffs challenged, inter alia, section 192 of the Income Tax Act 1967. This section provided that a woman's income chargeable to income tax should, so far as it is income for a year of assessment during which she is a married woman living with her husband, be deemed for income tax to be his income and not hers. The result of this provision was to compel one spouse to declare particulars of her income to the other. In the High Court, Hamilton J rejected the contention that such enforced disclosure constituted a violation of the spouse's right of privacy, dealing with the issue in two paragraphs:

"In my opinion the Constitution does not guarantee any such privacy to either the husband or the wife. Though *McGee v The Attorney General* was cited in support of this submission, it is clear that the right

6 *Ibid*, per Henchy J at 71-72.

7 *Ibid*, at 78-79.

8 *Norris v Ireland* ECHR Decision of 26 October 1988 Series A No. 142.

9 [1982] IR 241.

of privacy therein referred to was the right of privacy of their relationships which did not impinge upon the common good or destroy or endanger human life. When a man and a woman marry, they form a family which is a unit of society regarded by the Constitution as the natural and fundamental unit group of that society which has rights as such which the State cannot control. As members of that unit and that society, they acquire under the Constitution a special status in that society but must respect the common good of that society.

The common good of that society requires that revenue be raised for the purposes of that society by taxation and that information be made available for the purposes of determining the amount payable by any individual. The Constitution does not guarantee the right to either spouse not to disclose to his or her spouse the source or amount of his or her income for the purpose of making such returns".¹⁰

The privacy point was not discussed in the Supreme Court as the Court reversed the decision of Hamilton J on a separate issue, holding that the statutory provision of a joint tax-free personal allowance to a married couple smaller than that provided in respect of an identical combined income enjoyed by two single persons living together constituted a breach of the guarantee in Article 41.3 of guarding with special care the institution of marriage and to protect it against attack. The treatment of the privacy issue is therefore confined to the comments of Hamilton J above, which make clear that the right did not arise in the particular case without illuminating the circumstances in which it might arise.

The second tax case in which the issue of privacy was raised was *Madigan v Attorney General*.¹¹ In this case a provision in the Finance Act 1983 was challenged. This provision did not mandate disclosure of income, but instead allowed relief to be given if dependants' incomes were below certain levels. To come within the section, the dependant would have to disclose his or her income to the family member claiming relief, and this, it was alleged involved a violation of the dependant's privacy. In the High Court, O'Hanlon J held that the absence of mandatory disclosure meant that there was no invasion of privacy. However, he went further than this, adding that even if there were mandatory disclosure of information where this was necessary to determine the tax liability of another person, it was doubtful if any constitutional guarantee would be infringed. As in the *Murphy* case, the privacy issue was not discussed in the Supreme Court.

The two final cases in which a privacy issue was raised concerned this right in a non-marital, non-sexual context. In the first of these cases, *Kennedy and Arnold v Ireland and the Attorney General*,¹² the right claimed was recognised

¹⁰ *Ibid.* 266.

¹¹ [1986] ILRM 136.

¹² [1988] ILRM 472.

in the High Court by Hamilton P. In 1982, the then Minister for Justice had authorised the tapping of the plaintiffs' telephones by issuing a warrant under s56 of the Post Office Act 1908. The plaintiffs claimed that the warrants and the tapping were, inter alia, a breach of their constitutional rights. Hamilton P noted that under the Constitution, "a right of privacy is not spelt out", but added that a number of specific rights in the Constitution were "different facets of the right of privacy".¹³ The judge then rejected the United States formulation of the privacy right - the right "to be let alone" - because "the very definition begs the question. The right to privacy is not in issue, the issue is the extent of that right ...". He described this right of privacy in the following terms:

"Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flows from the Christian and democratic nature of the State.

It is not an unqualified right. Its exercise may be restricted by the Constitutional rights of others, by the requirements of the common good and it is subject to the requirements of public order and morality.

There are many aspects to the right of privacy, some of which have been dealt with in the cases referred to by McCarthy J in the passage which I have just quoted from his judgment in Norris's case and the remaining aspects remain to be dealt with when suitable cases come before the courts for determination.

The question to be determined in this case is whether the right to privacy includes the right to privacy in respect of telephonic conversations and the right to hold such conversations without deliberate, conscious and unjustified interference with and intrusion thereon by servants of the State, who listened to such conversations, recorded them, transcribed them and made the transcriptions thereof available to other persons.

I have no doubt that it does ...

The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution namely, a sovereign, independent and democratic society."¹⁴

13 The rights referred to were as follows: The right of privacy in voting under Article 16.1.4; a limited right of privacy given to certain litigants under laws made under Article 34; the limited freedom from arrest and detention under Article 40.4; the inviolability of the dwelling under Article 40.5; the rights of citizens to express convictions, to assemble peacefully and to form associations, under Article 40.6.1; the rights of the family under Article 41; the rights of the family with regard to education under Article 42; the right to property under Article 43; and freedom of conscience and practice of religion under Article 44.

14 [1988] ILRM at 476-7.

Hamilton P held that the plaintiffs' right to privacy had been violated.

The privacy question was also referred to in the *Kane* case.¹⁵ The applicant was arrested in 1987 pursuant to s30 of the Offences against the State Act 1939 and released after 48 hours. The Garda Síochána were informed that the applicant had escaped from the Maze prison in Northern Ireland in 1983. For the next five hours the applicant was subjected to surveillance and was then re-arrested. The plaintiff challenged the surveillance (i) as breach of his constitutional rights to liberty and privacy and (ii) as criminal under s7 of the Conspiracy and Protection of Property Act 1875. He also challenged the second arrest as a "colourable device" for his detention. These arguments were rejected in both the High and Supreme Court.

Of relevance to this discussion are the observations made by Chief Justice Finlay:

"I accept the submission made on behalf of the appellant, that as far as privacy is concerned, overt surveillance may under certain circumstances be more onerous than covert surveillance. This is not always true and, indeed, one can conceive of circumstances in which the reverse would be true. I would be prepared to assume without deciding for the purpose of dealing with this submission that a right of privacy may exist in an individual, even while travelling in the public streets and roads".

As in the *Norris* case, although the particular right of privacy in the context was rejected, the language of at least one member of the Supreme Court indicated that there could be rights of privacy wider than those explicitly recognised by the Court to date, and existing apart from marital and family relations, or in the context of the dwelling-place.

It may be concluded that Supreme Court jurisprudence privacy in Irish law is both recent and sparse. To date, the Supreme Court has recognised a right of privacy concretely only in the marital area (*McGee* case) and in respect of interceptions of telecommunications, (*Kennedy* case) although certain dicta have indicated that a more general right of privacy may exist (*Norris* case, *Kane* case). However arguments that particular aspects of the right have been infringed were rejected in a number of cases (*Norris* case, *Kane* case, *Murphy* case, *Madigan* case). The right to privacy in Irish law is as yet in undeveloped form and in the absence of legislation will develop only in such detail and coherence as particular cases presenting themselves will require.

15 *Kane v Governor of Mountjoy Prison* Unreported Sup. Ct. 11 May 1988.

APPENDIX B

A COMMENT ON RULE 18 - RULES OF THE NATIONAL UNION OF JOURNALISTS

It is of interest to any study of libel law that there is a procedure prescribed by rule 18 of the NUJ Rules under which a member of the public may lodge a complaint about a journalist in relation to a breach of the code of professional conduct. Many of the standards set out in the code of conduct are similar to standards obtaining in the law of libel. Therefore a member of the public who has suffered from an inaccurate statement about himself could make a complaint about the author in question instead of pursuing an action in defamation. If the ultimate National Executive Council (NEC) decision is against the journalist, he may be subject to penalties of suspension, fines up to £1,000 or expulsion. The obvious difference between this and a libel action is that no compensation for the person defamed is forthcoming as the proceedings are not designed to protect reputation but rather to punish breaches of journalistic code and practice. However it is clearly a quick and cheap way of contesting an assertion made about an individual. We will therefore set out some details of this procedure.

The relevant portions of the journalistic code are as follows:

1. A journalist has a duty to maintain the highest professional and ethical standards.
2. A journalist shall at all times defend the principle of the freedom of the Press and other media in relation to the collection of information and the expression of comment and criticism. He/she shall strive to eliminate distortion, news suppression and censorship.
3. A journalist shall strive to ensure that information he/she disseminates is fair and accurate, avoid the expression of comment and conjecture

as established fact and falsification by distortion, selection or misrepresentation.

4. A journalist shall rectify promptly any harmful inaccuracies, ensure that correction and apologies receive due prominence and afford the right of reply to persons criticised when the issue is of sufficient importance.
9. A journalist shall not lend himself/herself to the distortion or suppression of the truth because of advertising or other considerations.
10. A journalist shall only mention a person's race, colour, creed, illegitimacy, marital status (or lack of it), gender or sexual orientation if this information is strictly relevant. A journalist shall neither originate nor process material which encourages discrimination on any of the above-mentioned grounds.

It can therefore be seen that many of the statements that would be in breach of these standards would also constitute a libel, where the information concerns an individual e.g. distortion of truth, relay of information in an unfair and inaccurate way, presentation of conjecture as fact.

The procedure under Rule 18 is as follows. Proceedings under the Rule may be instituted by the NEC, or by a member making a complaint against another member. Since August 1981, it has been possible for members of the public to lay grievances about media coverage alleged to be in breach of the Code of Conduct. Such a complaint must be made by a member of the NUJ on behalf of the individual concerned. In this case, it is the duty of the complainant member's Branch to decide whether a case has been made out for examination by the NEC. The member's complaint must be submitted in writing to that member's Branch Secretary, who sends a copy thereof to the member complained against. The latter must also be given 14 days' notice of the hearing of the complaint by the Branch.

When the Branch hears the complaint, it must do so in such a manner as to allow both parties to present their case. However where the complaint has been made by a person outside the union i.e. a member of the public, although such person may take part in the hearing, he may not be legally represented. Part (d) of Rule 18 provides, inter alia, that every effort "shall be made to make the hearing as independently representative as possible in accord with the principles of natural justice". The Branch decides whether a case for examination by the NEC has been made out. If this is the case, then the complaint and an account of the proceedings before the Branch must be forwarded to the General Secretary for investigation by the NEC, or a Complaints Committee under Rule 10(e). A complaint forwarded to the NEC must be done so within *eight weeks* of the receipt of the complaint by the Branch Secretary. If this time limit is not complied with, the complaint will lapse. Under part (h) of Rule 18, a member who is a party to a case may

appeal to the NEC against a finding by a Branch within 14 days of notification of the finding.

When the NEC receives a Branch decision, it takes such action as it "deems appropriate". This includes attempts at conciliation, but if such attempts fail, the NEC may decide to hold a formal hearing.

If a Complaints Committee is set up by the NEC, details of the complaint and hearing must be given in writing to the member complained against. The parties to the complaint must give notice to the NEC of witnesses they intend to call. At the hearing of the complaint, the member may present the case himself or be represented by a party of his choice. Again where the complaint is brought on behalf of a non-union member, this person may take part but may not be legally represented. The recommendations of the Complaints Committee are reported to the NEC for confirmation or variation.

Under part (j) of Rule 18, a party against whom a decision of the NEC is made has a right of appeal to the Appeals Tribunal, the decision of which is final. The adjudication of the NEC of any complaint laid under Rule 18 must be made within six months of the decision of a Branch to forward the complaint to the NEC. If the NEC is of the opinion that a member has been guilty of conduct which is in breach of the Code of Conduct, it may impose a fine not exceeding £1,000, suspend the member for a period not exceeding 12 months, express its censure in such terms as it deems appropriate (or impose more than one of the penalties), or expel the member from the Union.

A recent addition to the disciplinary procedure is Rule 18(c), which is designed to assist members who do not immediately know the identity of the author of the publication complained of. The complaining member can write to his/her branch secretary detailing the article and requesting the branch secretary to discover the identity of the relevant person. The branch secretary must then write to the father or mother of the chapel of the publication (FoC/MoC) who must inform the branch of the member responsible for the material published, or satisfy the branch that he or she made adequate attempts to discover the information but has failed.¹

It may be noted that the recent Declaration and Code of Practice issued by the editors of Britain's national newspapers² merely reflects procedures and standards already adopted by the Irish press. For example it says that "a fair opportunity for reply will be given when reasonably called for", "mistakes will be corrected promptly and with appropriate prominence", and "irrelevant references to race, colour and religion will be avoided". These standards form

1 A "chapel" is the smallest grouping of workers in the union, usually one to each newspaper. The FoC and MoC are basically shop stewards. "Branches" are a larger grouping and are decided on the basis of function or geographical location; there are four branches in Dublin and eight or more outside Dublin in the Republic.

2 See *The Independent*, 28 November 1989.

part of the Irish National Union of Journalists' Code of Conduct. Furthermore, the Declaration states that a system of readers' representatives will be established; most Irish newspapers do now have a readers' representative to handle complaints from the public.