THE LAW OF DEFAMATION IN THE NEW MILLENNIUM*

Introduction

The law of defamation is intended to protect reputations. The reputations of individuals (including politicians), the reputations of business corporations and until recently even the reputations of public authorities such as local councils.[1] In protecting those reputations, the legal systems, with which you are all familiar, attempt to secure a balance between freedom of speech or expression on the one hand and protection of reputation on the other. This is a delicate balance and the result achieved in the various countries of the Commonwealth and the United States varies according to the differing assessments made by the courts of the different countries of the competing principles, rights and interests.

As we move into a new millennium, I thought that it would be useful if I was to sketch out for you some of the ways in which I think the law of defamation will change and in some instances to consider how it ought to change. Of course, communications in the new millennium will be dominated by the new technologies and in particular, the Internet. It will be possible, indeed it is so already, for an individual sitting with a computer to communicate, to millions of Internet users all over the globe, a defamatory message concerning an individual or a business corporation. Newspapers, periodicals and radio and television will, I suspect, continue for some time to be the medium for the

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[1] In *Derbyshire County Council* v. *Times Newspapers Ltd* [1993] AC 534, the House of Lords decided that a local council or authority could not sue in defamation for alleged defamatory imputations on its governing reputation. Individual councillors could, however, sue if the defamatory matter cast aspersions on those individuals. See also, *Ballina Shire Council* v. *Ringland* (1994) 33 NSWLR 680.

communication of defamatory statements but the Internet will certainly grow in significance in the new millennium as a purveyor of defamatory communications.

The scope of the topic of this lecture is potentially vast and I hope I will be forgiven if I do not delve too deeply into some of the areas that I will discuss or omit other areas from consideration.

The Distinction Between Libel and Slander

In considering what will change in the law of defamation let me begin with the distinction between libel and slander. The law of defamation at the present time, in most jurisdictions, consists of the twin torts of libel and slander. Slander is available when the defamatory matter is conveyed orally (and consequently to the ear) and libel is available when the defamatory matter is conveyed in writing (and consequently to the eye). This distinction, which has a historical basis, but which has been made rather tenuous by the technological developments of the twentieth century, was very likely predicated upon the view that defamatory words spoken lack a degree of permanence and are therefore incapable of harming the reputation of the person spoken of except to those who hear the words spoken, while written words, being in permanent form, are capable of doing considerable damage because they could be shown, theoretically at least, to the whole world and certainly if the written words are published on the Internet. However, technological advances, particularly in the area of radio and television broadcasting, have made it possible even for words spoken over radio or on television to be broadcast to the whole world and in view of this, legislation in England,[2] Australia,[3] Singapore[4] and Malaysia[5] provides that "for the purposes of the law of libel and slander, the broadcasting of words by means of telecommunication shall be treated as publication in a permanent form." The effect of this legislation is to treat a

[2]See section 166 of the Broadcasting Act 1990, c. 42.

[3]See section 206 of the Broadcasting Services Act 1992 (Cth).

[4]See Defamation Act (Cap. 75, 1985 Revised Edition), section 2.

[5]See Defamation Act 1957, Act 286 (Revised 1983), section 2.

defamatory broadcast, to which the legislation applies, as libel rather than slander.

The most important consequence of the distinction between libel and slander is that libel is actionable *per se* but slander is only actionable on proof of *special* damage. What this means, in effect, is that if the words spoken or written are regarded by the court as libel then damage to the person defamed by the words is presumed whereas in the case of words regarded by the courts as slander the person defamed by the words would have to state with certainty the actual financial loss suffered as a natural and probable result of the defamatory statement and prove that loss at the trial. There are however several exceptions to the rule that slander is only actionable on proof of special damage[6] so that the number of cases of slander where the person defamed has to prove special damage has been narrowed very considerably in the twentieth century.

The distinction between libel and slander has been abolished, or the effect of the distinction has been removed in many of the States of Australia[7] and in New Zealand[8] but the distinction persists in some of the States of Australia[9] and in England and it continues to exist in Singapore and Malaysia. The distinction causes too many problems and there is no great value in it. A live play on stage has been classified as libel in England.[10] Why should that be so? Defamatory communications published electronically by e-mail have been regarded as libel in Australia even before a hard copy is made.[11] The courts have still to decide whether publication of defamatory words by means of a tape recorder or gramophone record is publication of libel or

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[6]For a list of these exceptions see Gatley, *On Libel and Slander*, Ninth Edition, Sweet & Maxwell (London), 1998, Chapter 4.

[7]New South Wales (Defamation Act 1974, section 8), Queensland (Defamation Act 1889, section 5), Tasmania (Defamation Act 1957, section 9), the Northern Territory (Defamation Act 1938, section 2) and the Australian Capital Territory (Defamation Act 1901, section 3).

[8]See Defamation Act 1954, section 4(1), now the Defamation Act 1992, section 4.

[9]Such as Victoria, South Australia and Western Australia.

[10]See the Theatres Act 1968, c. 54, section 4.

[11]See *Rindos* v. *Hardwick*, Judgment of Ipp J. of the Supreme Court of Western Australia delivered on 31 March 1994 (unreported).

slander and whether a defamatory message left on a voice-mail system should be classified as libel or slander. Nor have the courts been asked yet to decide whether defamatory statements made during a telephone conversation or teleconference in which the participants can both hear and see each other on a video monitor, should be classified as slander or libel. Undoubtedly these problems of classification will disappear if the distinction between slander and libel is abolished and it is my guess that slander will disappear as a tort and that the tort of libel will be the sole tort in the law of defamation within a few years of the new millennium.

Change in What is Considered Defamatory

In the new millennium we will also see a change in what is regarded as 'defamatory' by the courts. As I pointed out in the Second David Marshall Public Lecture[12] that I delivered in Singapore in 1999, the shift in community attitudes during the last two decades of the twentieth century has meant that what was regarded as defamatory twenty or thirty years ago may not be considered defamatory today and I instanced the shift in community attitudes towards sexual relations outside marriage, homosexuality and lesbianism, abortion and communism, all of which would have been held to be "defamatory" imputations twenty or thirty years ago but which today would almost certainly not be "defamatory" in England, Canada, Australia or New Zealand and which may well at some point in the future cease to be defamatory imputations in other countries including Malaysia and Singapore. I do not expect that the tests by which the defamatory quality of matter is judged to be much changed, but the fifth test by which the defamatory quality of matter is judged, namely, that the matter displays the plaintiff in a ridiculous light, has the potential to stifle caricature and parody and satirical and comical writing. This is well illustrated by the recent decision of the English Court of Appeal in *Berkoff* v *Burchill*[13] where an article written by Julie Burchill, the film critic, describing the well-

[12]"When is Matter Considered Defamatory by the Courts?" (1999) *SJLS* 1.

[13][1996] 4 All ER 1008.

known actor and director Steven Berkoff as not only unattractive but also physically repulsive comparing him unfavourably with Frankenstein's monster, was held to contain an imputation that he was 'hideously ugly' and that this was defamatory if the words were plainly intended to convey that meaning by way of ridicule. The courts may therefore consider that that test should be reconsidered or even abandoned and that the defamatory quality of matter will be judged only by the other existing four tests, namely, first whether the publication was 'calculated to injure' the reputation of another "by exposing him to hatred, contempt or ridicule", secondly, whether the published words "tend to lower the plaintiff in the estimation of right-thinking members of society generally"; thirdly, whether the publication tends to put the person to whom it refers in a position of being shunned and avoided and fourthly whether the publication is likely to injure the plaintiff in the plaintiff's office, profession or trade. Apart from the abandonment of the "ridiculous light" test, I am of the opinion that the standard which judges and juries (where they exist) use to determine whether matter is capable of being defamatory and whether the matter is in fact defamatory will undoubtedly change in the next few years. The standard which applies in England and Australia and Singapore and Malaysia is that "the defamatory nature of an imputation is ascertained by reference to general community standards, not by reference to sectional attitudes".[14] However, I am of the opinion that the application of this standard does cause difficulty in increasingly culturally diverse societies like England, Australia, Singapore and Malaysia where an imputation in alleged defamatory matter may reduce a person's reputation in the eyes of a respectable particular group or section of the community but not in the eyes of the community as a whole - the community generally. I therefore suggest that we should move towards the position in the United States where a plaintiff is able successfully to bring an action in defamation if his reputation is adversely affected in the eyes of "an important and respectable part of the community" and I am optimistic that in the new millennium we shall move towards that sensible and just position.

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[14]See *Reader's Digest Services Pty Ltd* v. *Lamb* [1981] 56 AJLR 214, at page 217 *per* Brennan J.

Publication

Another area of defamation law which is bound to be affected by the new communications technologies will be the rules in relation to *publication* of defamatory matter. In order to sue in relation to defamatory matter, the plaintiff must be able to prove that the defamatory matter has been "published". When does the law of defamation say that there has been *publication* of the defamatory material? In the case of libel publication it is "the making known of the defamatory matter, after it has been written, to some person other than the person of whom it is written"[15] and in the case of slander it means making the defamatory statement in the hearing of a third party, that is, a person other than the person in relation to whom the defamatory statement is made. If a written defamatory statement is sent "straight to the person of whom it is written there is no publication of it; for it has been held that you cannot publish a libel of a man to himself."[16] The rules in relation to publication of defamatory matter were fashioned at a time when (leaving aside books and newspapers) most of the defamatory communications were made by letters, postcards and telegrams. In relation to letters, the rule which was applied was that the writer of a defamatory letter who addressed it to the person defamed and who intended the letter to be read only by the person defamed and not by a third party and who therefore marked the letter "personal" or "for the attention of the addressee only" and sealed the letter would not be held to have "published" the letter if it was opened and read by an unauthorised curious or inquisitive third party. Whereas in the case of postcards, it was held that a defamatory statement about a person on a postcard and sent to him through the post was regarded as evidence of publication. There was a presumption that the postcard would have been read by a third person without any proof that the postcard had in fact been read by a third person. A similar position was taken by the courts in relation to telegrams. Nowadays a significant number of communications are by facsimile transmission (fax) and by

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[15] *Pullman* v. *Walter Hill & Co. Ltd* [1891] 1 QB 524, at page 527.

[16] *Ibid.*

electronic mail (e-mail). Does a confidentiality clause on the cover sheet of a fax require a judge to treat the fax in relation to publication in the same way as a sealed letter marked 'Personal' or should a fax be treated more like a postcard or telegram marked 'Personal'? There do not appear to be any decided cases on the question. Nor do there appear to be any decided cases on the question whether a defamatory message sent by e-mail addressed to the person about whom the statement is made is nevertheless to be regarded as *published* to a third party because someone with access to the e-mail message, for example, a secretary, or the post-master of the system can easily have access to the e-mail message. If this is so, then every defamatory message sent by e-mail will have to be regarded as *published* to a third party and there will therefore always be *publication* in relation to a defamatory message sent by e-mail, whether the message is addressed to the person defamed in the defamatory message or to a third party and whether the e-mail message has been read by a third party or not.

Under common law, at the present time, the person who publishes defamatory matter will be liable in a separate action in defamation for each and every act of publication of the defamatory matter. Where the defamatory matter is contained in a newspaper, periodical or book, there will be a series of *publications* of the defamatory matter each of which will give rise to a separate action in defamation. Thus the author of the defamatory statement will publish it to his editor or publisher, then the author and publisher (or editor) will jointly publish the defamatory statement to the printer and then there will be publication of the printed newspaper, periodical or book to the public for which the author, publisher (or editor) and printer will all be jointly liable. The person defamed can sue in relation to each of those separate acts of publication though it is normally only in relation to the last publication (that is the publication to the public) that the action in defamation is brought. The sale or delivery of every copy of a newspaper, periodical or book is a distinct publication to the person to whom it is sold or delivered and gives rise to a separate cause of action. If a library provides facilities for reading or borrowing newspapers, books or periodicals there is publication to every person who uses the facility and a fresh cause of action arises. The proprietors of newspapers and radio and television channels can also be liable for

the publication of the defamatory matter in the newspapers they own and for the broadcasts over the radio and television channels of which they have ownership whether or not they have knowledge of the publication before it is made and whether or not they realise that the matter published is defamatory. Thus proprietors of a newspaper can be sued for the publication of a defamatory letter in the 'Letters to the Editor' column of a newspaper owned by it and the owners of a broadcasting company can be sued for defamatory matter broadcast or televised on its network whether scripted or live and whether broadcast from a studio or outside. How relevant will these common law rules be in the new millennium when the Internet will grow in significance as a purveyor of defamatory communications? There has been only one decision of the English courts on the liability for defamatory material published by means of the Internet and that is *Godfrey* v *Demon Internet Ltd*[17] in 1999. In that case, someone unknown made a posting (that is, placed an article) in the United States of America in the newsgroup "soc.culture.thai.". The posting followed a path from an originating American Internet service provider to the defendant Internet service provider's news service in England. This posting was defamatory of the plaintiff. The plaintiff requested the defendant to remove the posting from its Usenet news server but even though it could have obliterated it immediately, it allowed the posting to remain on its news server for a further ten days after receiving the plaintiff's request. In an action for defamation Demon Internet, the defendant, argued that there was no "publication" on its part but the trial judge held that the transmission of a defamatory posting from the storage of a news server constituted a "publication" of that posting to any subscriber who accessed the newsgroup containing that posting. Such a situation was analogous to that of a bookseller who sold a book defamatory of a plaintiff, to that of a circulating library which provided books to its subscribers and to that of distributors. Thus in the instant case the defendant was not merely the owner of an electronic device through which postings had been transmitted, but rather had *published* the posting whenever one of its subscribers accessed the newsgroup and saw that posting.

[17] [1999] 4 All ER 342.

Moreover, the defendant could not rely on section 1 of the Defamation Act 1996 which provides a statutory defence to operators of and providers of access to a communications system by means of which a defamatory statement is transmitted or made available, by a person over whom they have no effective control because the defendant had known of the posting's defamatory content but chose not to remove it for a further ten days. The *Demon Internet* case shows that under the common law in England not only those who produce defamatory Internet content will be regarded as *publishers* but the range of intermediaries involved in the communication of Internet content, such as telecommunications carriers, Internet Service Providers, content hosts and bulletin board operators will also be regarded as *publishers* and responsible for the publication of the defamatory Internet content. These intermediaries are easier to locate and may have deeper pockets than those who produce defamatory Internet matter. It is interesting to observe that in the *Demon Internet* case, the plaintiff was unable to prove who had placed the defamatory Internet matter on the Internet in the first place.

The common law defence of innocent dissemination will also need to be reconsidered because of the new technologies. Under this "defence", defendants who did not play a primary part in the publication of defamatory material are held to be "innocent disseminators" and hence not to have "published" the defamatory material. This defence is available to newsvendors, booksellers, circulating libraries and the like but only if they can succeed in proving that they neither knew nor had any reason to know or suspect that they were handling defamatory material and that such lack of knowledge was not due to any negligence on their part.[18] The defence has never been available to authors, editors, proprietors, printers, publishers and others who play a part in the decision to publish. The New South Wales Court of Appeal in 1995[19] had to consider whether, contrary to past authority, a printer should be entitled to the defence of "innocent dissemination" because of the effect modern technology has had on the world of commercial

[18]See *Emmens* v *Pottle* (1885) 16 QBD 354.

[19]In *McPhersons Ltd* v. *Hickie* [1995] Aust Torts Reports 81-348.

publishing. The printing industry, it was argued, has been revolutionised by new processes which can allow printers to produce a finished printed work without seeing one word of the author's material in written form. The Court acknowledged that there may be a case for modifying the defence of "innocent dissemination" so that it could apply to printers "who can prove that their part in printing and publishing defamatory material was done in ignorance of the defamatory nature of the material."[20] The High Court of Australia has also recently had to consider whether a television station which did no more than re-transmit "live" broadcast material produced by another broadcaster, was entitled to plead the defence of "innocent dissemination."[21] The High Court held that there was no reason in principle why a mere distributor of electronic material should not be able to rely upon the defence of "innocent dissemination" if the circumstances permit but that in the circumstances of a live current affairs programme which carried a high risk of defamatory statements being made, and where the broadcaster had the ability to supervise and control the material televised but chose not to do so, the broadcaster was not a subordinate disseminator and the publication was not "innocently disseminated."

None of the modern technologies were contemplated when common law judges considered and introduced the concepts of *publication* and *innocent dissemination* into the law of defamation and undoubtedly, in the new millennium, these concepts will need to be modified and modernised to keep pace with these new technologies.

Justification

I now want to turn my attention to some of the defences that can be raised by a defendant who is sued for defamation. These defences, if successfully raised, provide a defendant with complete immunity from liability in respect of the defamatory matter which is the subject of the action in defamation. Many of the defences are creatures of the common

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[20] *Ibid*, at page 62,498.

[21] In *Thompson* v. *Australian Capital Television* (1996) 186 CLR 574.

law but there are also defences provided by statute. Sometimes a statutory provision might affect the way a common law defence operates.

I shall start with the defence of justification, or truth (as it is known in some jurisdictions). Once a plaintiff shows that defamatory matter identifying the plaintiff has been published the falsity of the defamatory matter is presumed and the plaintiff will succeed in the action in defamation unless the defendant can prove that the defamatory matter is true, that is, by raising the defence of truth. While in some jurisdictions like England, Malaysia, Singapore, New Zealand and some of the Australian States the truth of the defamatory statement will provide a defendant with a complete defence, in other jurisdictions like the Australian States of New South Wales,[22] Queensland,[23] Tasmania[24] and the Australian Capital Territory[25] the defendant is required to prove something more than the truth of the defamatory matter (that is, he must prove that it relates to a matter of either "public benefit" or "public interest"). If the allegations made by the defendant are true and it is a jurisdiction which does not require "public benefit" or "public interest" no amount of malice or bad faith will make the allegation actionable. The truth of the defamatory statement will provide a defendant with a complete defence.

In those jurisdictions which require defendants not only to prove the truth of a defamatory statement but also to prove in addition that it relates to a matter of "public interest" or "public benefit" in order to avail themselves of the defence of justification there is, in effect, protection for the privacy of the plaintiff and also protection from the disclosure of private facts concerning the plaintiff in addition to protection for the plaintiff's reputation. An excellent illustration of this point is provided by the decision in *Chappell* v *TCN Channel Nine Pty Ltd.*[26] In that case, the defendants (licensees of a television station) were about to publish a story in a current affairs segment alleging that the plaintiff (a well known Australian cricketer) had committed adultery

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[22]Defamation Act 1974 (NSW), section 15(2)(a).

[23]Criminal Code (Qld), section 376.

[24]Defamation Act 1957 (Tasection), section 15.

[25]Act: Defamation Act 1901 (NSW), section 6.

[26](1988) 14 NSWLR 153.

and engaged in sexual activities of an unusual nature with a woman who would be named in the programme. The plaintiff sought an injunction to prevent the segment being telecast. The plaintiff emphatically denied the truth of the story but the defendants tendered statutory declarations from the woman and others in support of the issue of truth. In these circumstances the injunction would probably have been refused if the defence of justification in New South Wales was based on truth alone, as courts have been reluctant to grant interlocutory injunctions to prevent publication in defamation actions when the defendant indicates that it is going to rely on the defence of truth. However, in the *Chappell* case, Hunt J. granted the plaintiff the interlocutory injunction sought because as he pointed out under the provisions of the New South Wales Defamation Act in order to rely upon the defence of justification the defendant had not only to prove the substantial truth of the defamatory allegation but also that it related to a matter of public interest. As Hunt J. had come to the conclusion that the plaintiff's private behaviour alleged against him on the television programme did not amount to a matter of public interest or concern the defendant was not likely to satisfy the requirements of the defence of justification and therefore the injunction would be granted. This decision sharply points out that the necessity to prove the additional requirement of "public interest" in addition to truth does have the effect of protecting the plaintiff's privacy and of protecting him from the disclosure of private facts concerning him whether those facts are true or not.

This then leads me to consider whether the law of defamation in the new millennium, in addition to protecting reputation, should also be protecting privacy and preventing the disclosure of private facts not only in the few Australian States where this is presently done and whether the law of defamation should afford some protection to privacy more generally in the Commonwealth by making a linkage of truth and public interest in those jurisdictions where currently truth alone suffices to provide justification.

The difficulty with having truth alone as a complete defence to an action in defamation is that it permits the gratuitous destruction of reputation. As Hunt J. pointed out in the *Chappell* case "the mischief which was sought to be remedied by the statutory requirement that the

imputation relate to a matter of public interest was the gratuitous destruction of reputation permitted by the defence of truth alone which is available at common law."[27] I am not persuaded that it is in the interests of society for the press (or anyone else for that matter) to dredge up, at their will, the indiscretions of youth and juvenile offences even of politicians and business leaders who may now be leading exemplary lives. The point I am making here was well put by a former Chief Justice of New South Wales when he said "To allow past misconduct, or discreditable episodes which are dead and gone, to be revived and dragged into the light of day at will, by maliciously minded scandalmongers is too hard on people who, whatever indiscretions they might have committed in the past, are now leading respectable lives".[28]

The solution to this problem is of course to insist on a linkage between truth and public benefit or public interest so that the defence of justification will not be available to a defendant who can prove the truth of the defamatory statement unless he can also show that the publication was for the public benefit or in the public interest. These additional requirements have been introduced by legislation in several of the Australian States and I would not be surprised if very quickly within the new millennium such legislation was introduced in those jurisdictions of the Commonwealth where it does not exist. In most of the jurisdictions of the Commonwealth there is no common law of privacy even though privacy is regarded by many as equally worthy of protection as one's reputation. Privacy is a value which requires protection and it is not inappropriate for this protection to be given through the law of defamation.

With the coming into effect of the United Kingdom Human Rights Act 1998 on 1 October 2000, United Kingdom courts have to enforce Convention rights in the United Kingdom, that is rights under the European Convention of Human Rights. Article 8 of the Convention grants "everyone the right to respect for his private and family life, his home and his correspondence." Besides, section 12(4) of the Human

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[27] *Ibid*, at page 165.

[28] *Rofe* v *Smith Newspapers* (1924) 25 SR (NSW) 4, at page 22 *per* Street ACJ.

Rights Act 1998 requires the court when considering the freedom to publish journalistic, literary or artistic material to have particular regard to the extent to which "it is, or would be, in the public interest for the material to be published." I think it is arguable therefore that with the coming into effect of the Human Rights Act 1998 it would not be sufficient for a journalist or an author who publishes or intends to publish defamatory material which involves the disclosure of private facts to rely solely on the truth of the material as a defence. He may need to persuade the court that it is, or would be, *in the public interest* for the material to be published. It would appear therefore that the Human Rights Act 1998 has already changed for the United Kingdom the common law defence of justification which required only proof of the substantial truth of the defamatory matter, and added a statutory requirement under the Human Rights Act 1998 that it is, or would be, in the public interest for the material to be published where the defamatory publication, whether true or false, involves an intrusion into the private and family life of the plaintiff. This may not have been an intended consequence of the Human Rights Act 1998 but it is, in my view, an arguable and welcome consequence of it.

I should now like to say a few words about the onus of proving truth or falsity in defamation actions. At common law defamatory matter is presumed to be false and the defendant must lead evidence of truth to escape liability. He cannot lead evidence of truth unless a plea of justification is made. A fundamental question which has been raised recently by law reform agencies, such as the New South Wales Law Reform Commission[29] and the Irish Law Reform Commission,[30] is whether the defendant should have to prove the truth of the statement at all or whether plaintiffs should have to prove the falsity of the statement in addition to proving the elements of the tort of defamation, namely, that the statement is defamatory, that it has been published and that it has identified the plaintiff in the publication. The three reasons generally given for requiring defendants to prove truth are first that it acts as a powerful deterrent to the publication of false information,

[29]See *Defamation*, New South Wales Law Reform Commission, Discussion Paper 32 (1993), at pages 116-117.

[30]See the *Report on the Civil Law of Defamation*, Irish Law Reform Commission, 1991, at pages 55-58.

secondly that it gives effect to the presumption of innocence which assumes that a person has a good reputation in the absence of evidence to the contrary and thirdly it removes the inequity of requiring the plaintiff to prove a negative. These are, in my view, strong reasons for the present position. To change the onus of proof and to require plaintiffs to prove falsity may have the effect of bringing a damages claim in defamation closer to the other torts where the plaintiff has the onus of proving most vital elements of the tort but it would be exceedingly unfair to plaintiffs. Two examples should suffice to demonstrate this. Ten years ago, the discredited newspaper magnate Robert Maxwell was found dead in the sea somewhere near the Canary Islands. There were many explanations for his death. He could accidentally have fallen off his yacht or had a heart attack and tumbled over the side or he could have committed suicide by jumping overboard. None of the inquiries conducted conclusively established the real cause of his death. Now suppose that a journalist, for unscrupulous and sensationalist reasons, publishes a totally false story which states that "Maxwell did not accidentally fall overboard, he was deliberately pushed by one of his crew." This statement certainly carries an imputation defamatory of the captain and crew on board Maxwell's private yacht at the time but how would they go about proving the falsity of the defamatory statement when several inquiries came to the conclusion that it was impossible to say how the body of Robert Maxwell came to be in the sea? Under present law the journalist and his newspaper would need to prove the truth of the allegation if they are going to rely on the defence of justification. This would deter them from publishing sensational but false stories. Take another case, if a newspaper falsely and maliciously and purely for reasons of a "scoop" publishes a story in which it is alleged that a well-known female politician was sexually abused by her long since dead grandfather when she was ten years old. As you may know, to allege sexual abuse of the female politician is to defame her as *Yousoupoff* v *MGM*[31] decided in 1934 but how is the politician to go about proving the falsity of that statement? Shifting the burden of proof in defamation actions will, in my opinion, have the

[31] [1934] 50 TLR 669.

potential to create great injustices to many potential plaintiffs who having been defamed will have no means of clearing their names if they are required to prove the falsity of the statement rather than requiring the defendant to prove that the statement is substantially true. I therefore cannot support the proposals to shift the burden of proof in defamation cases and I hope that in the new millennium there will not be much support for the proposed change.

Qualified Privilege and Its Extension to Political Discussion

I now want to turn to a significant and difficult question faced by the highest courts of the Commonwealth in the last decades of the twentieth century. How should the common law's protection of the personal reputation of politicians and government officials through the tort of defamation be developed in a way which would give the fullest scope for "political discussion", that is, the discussion of the conduct of politicians and government officials without tilting the balance in favour of freedom of speech over protection of the reputations of the politicians defamed.

The way in which the highest courts in Australia, New Zealand and England have decided to give protection from actions in defamation for political discussion without tilting the balance in favour of free speech over the reputations of politicians has been by developing and extending the defence of qualified privilege, which is one of the defences available in a defamation action to a defendant who publishes defamatory statements of fact which are untrue, and which has been part of the common law at least since 1834.[32] In order to take advantage of this defence, however, it is necessary for the defendant to show that the statement was published on an *occasion* of qualified privilege. These occasions have either a statutory or common law basis and in the absence of a statutory basis it is necessary for a judge to determine whether the occasion on which the defamatory statement was made was one of such privilege. Once such a determination is made no liability will be incurred by the maker of the defamatory statement

[32]See *Toogood* v. *Spyring* (1834) 1 CM & R 181.

even though the statement may be factually untrue. Several such occasions of qualified privilege have been created by the judges over the years. Thus statements made in discharge of a public or private duty (legal, social or moral) to persons who had an interest to receive them, statements made on a subject matter in which the defendant and the person to whom the statement is published have a legitimate common interest and statements made in self-defence to protect the defendant's own interests have all been held to be occasions of qualified privilege. The list of such occasions, under common law, is not closed and *new* occasions for the application of the defence can be created by the judges if the general welfare of society and changing conditions so require. This privilege, however, could be defeated by proof of malice, that is, personal spite, ill will or other improper motive, on the part of the maker of the defamatory statement and it could also be defeated by proof that the defamatory statement for which qualified privilege was claimed was published to a wider circle of recipients than is necessary. If the publication was made generally, that is, to the public at large, this was regarded as excessive publication and evidence of malice. This made it difficult for publishers of newspapers and periodicals of general circulation to rely on the defence because it would be difficult for them to show that the whole of the readership had a legitimate interest in what was published.

The courts in Australia, in *Lange* v *Australian Broadcasting Corporation*,[33] in New Zealand in *Lange* v *Atkinson*[34] and in England in *Reynolds* v *Times Newspapers Ltd.*[35] have now all decided that the best way to preserve the balance between freedom of expression and protection of reputation of politicians is by recognising an occasion of qualified privilege for communications made in the course of political discussion and by further recognising that this occasion of qualified privilege may be one in which the communication is made to the public at large (effectively to all the world) thereby removing the capacity for the defence to be defeated by a claim of "excessive"

[33](1997) 189 CLR 520.

[34][1998] 3 NZLR 424 and *Lange* v *Atkinson*, Judgment of the Court of Appeal delivered on 21 June 2000 (CA 52/97) (unreported).

[35][1998] 3 WLR 862.

publication. While the courts in each of these three countries have recognised that an extension should be made to the common law defence of qualified privilege to cover the publication of political discussion to a wide, even nation-wide or world-wide audience, thus giving protection to discussions of political matters in newspapers and other media outlets, there are differences between the three countries in the definition of the controls which govern that extension.

The highest courts in Australia, New Zealand and England have all decided that qualified privilege should be available to a defendant who publishes defamatory statements of fact which are untrue in the course of communicating political information even when the communication is published generally. The protection in Australia and New Zealand is given by the creation of a new occasion of qualified privilege for political discussion. In Australia the protection is given for the discussion of the conduct of politicians from Australia and elsewhere and even for discussion of matters concerning the United Nations or other countries but the publisher must satisfy the court that its conduct in publishing the defamatory material was "reasonable". The protection is lost if the publication is actuated by malice and it would be so regarded if the publication was made not for the purpose of communicating government or political information or ideas, but for some improper purpose. The motive of causing political damage to the politician or his or her party would not be regarded as an improper purpose.[36] In New Zealand protection is only given for discussion of the conduct of those currently or formerly elected to the New Zealand Parliament and those with immediate aspirations to be members but there is no requirement of reasonableness of conduct on the part of the publisher. However the protection is lost if the defendant takes improper advantage of the occasion and the defendant takes improper advantage of the occasion if he is reckless and thereby does not exhibit the necessary responsibility when acting under the cloak of privilege. He is also reckless if he fails to consider whether the statement is true or

[36]For a fuller discussion of this defence developed in *Lange* v *Australia Broadcasting Corporation* (1977) 187 CLR 520, see "Defamation in the Course of Political Discussion - The New Common Law Defence" (1998) 114 *LQR* 1.

false or takes a cavalier approach to the truth of the statement.[37] The Court of Appeal acknowledged that to require a defendant to give such responsible consideration to the truth or falsity of the publication as is required by the nature of the allegation and the width of the intended dissemination may in some circumstances come close to a need for the taking of reasonable care[38] but it still explicitly stated in its judgment[39] that it was rejecting the specific requirement of reasonableness of conduct in publishing the defamatory material insisted upon by the High Court of Australia in *Lange* v *Australian Broadcasting Corporation*. My own view is that the Court of Appeal in New Zealand in its 2000 judgment has covertly introduced the requirement of reasonableness into the extended defence of qualified privilege for communications in the course of political discussion in New Zealand and this view is shared by the Law Commission of New Zealand in its Report entitled *Defaming Politicians - A Response to Lange* v *Atkinson* published just six weeks after the 2000 judgment.[40] In England, protection is also given for defamatory communications made in the course of political discussion as a result of the decision of the House of Lords in *Reynolds* v *Times Newspapers Ltd.*[41] The House of Lords, however, declined to develop communications in the course of political discussion as a *new* occasion of qualified privilege whereby all statements which could be described as "political information" would attract such privilege whatever its sources and whatever the circumstances as the High Court of Australia and the Court of Appeal

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[37]*Lange* v *Atkinson*. Judgment of the Court of Appeal delivered on 21 June 2000 (CA 52/97) (unreported).

[38]*Ibid*, at paragraph 48.

[39]*Ibid*, at paragraph 38.

[40]As the Law Commission of New Zealand said in its Report entitled *Defaming Politicians - A Response to Lange* v. *Atkinson* at paragraph 16:

> "The Court's alteration of position is to be understood and respected as the dutiful performance of an obligation to correct earlier errors rather than derided as a volte-face, though it would have helped the understanding of those who have to grope their way through these thickets if the change had been expressly acknowledged."

[41][1999] 3 WLR 1010. For a fuller discussion of this decision, see, "Defamatory Statements and Political Discussion" (2000) 116 *LQR* 185.

of New Zealand had done in the two *Lange* cases. The majority in the House of Lords were of the opinion that it was unsound in principle to distinguish political discussion from discussion of other matters of serious concern and concluded that the established common law approach to misstatements of fact, whereby a judge determines whether the occasion is privileged was essentially sound. Qualified privilege would be available, on a case by case basis, upon application of the established common law test of whether there had been a duty to publish the material to the intended recipients and whether they had had an interest in receiving it. Put more simply, if the publisher can show that "the public" was entitled to know the information. However, as discussion of matters of serious concern (including political discussion) particularly if it is published to a world wide audience, has the capacity to cause great damage to the reputations of those concerned, Lord Nicholls speaking for the majority held that some further protection, apart from proving malice on the part of the publisher is needed. The defence of qualified privilege will therefore not be available to a newspaper which publishes defamatory material if the newspaper knew the story was false or made no real efforts to check if it was true. Although it will be up to the judge to decide whether the defence succeeds, Lord Nicholls set out several factors that a judge should take into account in deciding whether the defence succeeds. These include the nature of the information and the extent to which the subject matter is a matter of public concern. The seriousness of the allegation and the reliability of the sources of the information, the steps taken to verify the information, whether comment was sought from the subject of the story and the tone of the story are all factors to be taken into account though the weight to be given to these factors will vary from case to case. Over time, said Lord Nicholls, a valuable corpus of case law will be built up which would clarify the circumstances in which political discussion will be subject to privilege. He urged judges who are faced with situations involving the publication of defamatory statements of fact which are untrue, in the course of communicating political information, to have particular regard to the importance of freedom of expression when determining whether the publication should be subject to qualified privilege. As he said, "The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to

conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubt should be resolved in favour of publication."[42]

Having considered how the common law's protection of the personal reputation of politicians and government officials through the tort of defamation has been developed in Australia, New Zealand and England whilst giving the fullest scope for political discussion I should like briefly to consider the position in Malaysia and Singapore. In the recent decision in *Dato Seri Anwar bin Ibrahim* v *Dato Seri Dr. Mahathir bin Mohamad*,[43] Kamalanathan Ratnam J. apart from relying on the defence of justification (or truth) also relied on the defence of qualified privilege for political discussions developed in *Reynolds* v *Times Newspapers Ltd.* in granting the defendant's application to have the suit struck out on the basis that in view of the existence of these two defences the plaintiff's claim in defamation was "obviously unsustainable".[44] The common law defence of qualified privilege for political discussion developed in the *Reynolds* case could therefore be said to be part of the law of Malaysia. The position in Singapore is less easy to state. In *J.B. Jeyaretnam* v *Lee Kuan Yew*,[45] counsel for the defendant argued that the subject matter of the speech in relation to which he was being sued in defamation was political, namely, criticism of the plaintiff (then a candidate in a forthcoming election) in his capacity as Prime Minister in relation to a Cabinet colleague, that the speech was on an issue of major public interest and that the audience to whom the defendant addressed his speech were voters in the forthcoming election, and that the right of freedom of speech and expression conferred on every citizen by Article 14(1) of the Singapore Constitution required the law of defamation in Singapore to be reformulated to take account of the recognition in the Constitution of the right of freedom of speech and expression. The Court of Appeal,

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[42]*Ibid*, at page 1027.

[43][1999] 4 MLJ 58.

[44]*Ibid*, at page 72.

[45][1992] 2 SLR 310.

however, rejected this argument and held that Parliament was empowered under the Constitution to make laws to impose on the right of free speech restrictions designed to provide against defamation.[46] Since that decision in 1992 the highest courts in Australia, New Zealand and England have developed the common law to provide a defence in relation to defamatory communications made in the course of political discussion. It is not inconceivable, therefore, that the defences developed by the House of Lords in the *Reynolds* case and by the High Court of Australia and the Court of Appeal of New Zealand in the two *Lange* cases may provide a fresh basis for arguing for a defence of qualified privilege in relation to political discussion in Singapore. If the defence in the *Reynolds* case has gained acceptance in Malaysia there is a reasonable chance that it may be accepted in Singapore.

Damages

I could not conclude this lecture without adverting to the question of damages in defamation cases. Damages, that is, monetary compensation, has until now been the principal remedy for the vindication of the reputations of plaintiffs who have suffered a loss of reputation as a result of defamatory statements published by a defendant. There are two matters that I should like to address on the question of damages. The first is the excessively large awards of damages in defamation cases in recent years and the second is whether in the new millennium we should look to other remedies rather than damages for vindicating the reputations of those defamed.

It is undoubtedly true that in the last decade of the past millennium juries and judges in the Commonwealth have made extremely large awards of damages in defamation actions. In England in the *Tolstoy Miloslavsky* case[47] the jury awarded Lord Aldington £1.5 million for defamatory allegations appearing in a pamphlet. In *Rantzen* v *Mirror*

[46]Section 14(2) of the Singapore Constitution empowers Parliament to pass legislation such as the Defamation Act restricting the right of freedom of speech and expression conferred on every citizen by section 14(1) of the Singapore Constitution.

[47](1995) 20 EHRR 442.

Group Newspapers,[48] the successful television presenter Esther Rantzen was awarded compensatory damages of £250,000 in respect of four articles published in a newspaper which were defamatory of her and in *John* v *MGN*,[49] the rock superstar Elton John was awarded £350,000 by way of compensatory and exemplary damages for a libel published in a London newspaper, the *Sunday Mirror* about his allegedly bizarre new diet. In Australia, in *Carson* v *John Fairfax*,[50] a Sydney solicitor was awarded A$1.3 million by a jury in respect of two articles published in the *Sydney Morning Herald* which libelled him. And in Canada in *Hill* v *Church of Scientology of Toronto*,[51] a Crown Attorney was awarded compensatory and exemplary damages of C$1.6 million in relation to defamatory allegations made at a press conference and widely distributed by the two defendants, the Church of Scientology and its legal counsel. This was the largest award of damages for libel in Canadian history.

There are at least two reasons for the extremely large awards in these defamation actions. The first is that all these actions were tried by a judge sitting with a jury and the jury, in accordance with the general practice of the common law courts, were left with the task of assessing the amount of damages to be awarded to the plaintiff. However these juries were left to fix the quantum of damages without much guidance from the judge. In the Canadian case of *Hill* v *Church of Scientology of Toronto*,[52] when the jury sought some guidance from the judge as to the quantum of damages they were told they could have none. As the trial judge put it: "I'm afraid you're on your own." The only guidance juries were given was that the quantum of damages should be reasonable but they were given no guidance as to what might be thought to be reasonable or unreasonable and it is therefore not altogether surprising that juries lacked an instinctive sense of where to pitch their awards. The juries were, as Sir Thomas Bingham M.R.

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[48][1994] QB 670.

[49][1997] QB 586.

[50](1994) 34 NSWLR 72.

[51](1995) 126 DLR (4th) 129.

[52]*Ibid.*

said in *John* v *MGN* "in the position of sheep loosed on an unfenced common, with no shepherd."[53] The second reason for these very large awards is that juries in defamation cases were prevented from making any comparisons with awards in personal injuries cases. They could not, for example, be told that someone who had been totally blinded by the negligent conduct of another would be unlikely to be awarded as much as £150,000 in general damages.

In view of the two reasons which I have just given, it is not surprising that juries in England, Australia, Canada and New Zealand were in the second half of the twentieth century making extravagant awards of damages in defamation cases, wildly disproportionate to any damage conceivably suffered by the plaintiff, and this was particularly so in cases brought against media defendants who the juries assumed had very deep pockets.

But things changed somewhat towards the end of the twentieth century. In some jurisdictions civil juries were abolished in defamation cases and in others juries were stripped of their assessment function leaving the judge, even in jury trials, to assess the damages. In *Carson* v *John Fairfax & Sons*[54] the High Court of Australia by a majority held that in considering the quantum of damages in defamation cases it was legitimate to bear in mind the scale of values applied in cases of serious physical injury. While accepting that the harm suffered in defamation cases differs from the "tearing of flesh and bone and the pain of body" suffered in physical injury cases and that "precise comparisons should not be drawn between the different types of cases", they nevertheless felt that "for an appellate court which must test the quantum of a defamation award against some criteria to be prohibited from considering awards of damages in personal injury cases, would exclude reference to a potentially relevant criterion." The High Court also said that a judge presiding over a defamation case may indicate to the jury, for comparative purposes, the ordinary level of the general damages component of personal injury awards and that counsel may make a similar reference in their addresses. In England in the *Elton*

[53][1997] QB 586, at page 608.

[54](1993) 178 CLR 44, at page 58.

John case,[55] Sir Thomas Bingham M.R. said that whatever the position was before, it was now acceptable to make "reference to conventional levels of award for personal injuries *as a check* on the reasonableness of a proposed award of damages for defamation." In the view of the Master of the Rolls, it was "offensive to public opinion and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater perhaps by a significant factor, than if the same plaintiff had been rendered a helpless cripple or an insensate vegetable." The time has come, he said, when judges and counsel should be free to draw the attention of juries to these comparisons.

There are two other developments which have, in effect, put a clamp on excessive awards by juries in defamation actions in England. The first is that following the enactment of section 8(2) of the Courts and Legal Services Act 1990 and Rules of Court, the Court of Appeal is empowered, on allowing an appeal from a jury's award of damages, to substitute for the sum awarded by the jury such sum as might appear to the court to be *proper*. This power was first exercised in *Gorman* v *Mudd*[56] in 1992 where the damages were reduced from £150,000 to £50,000. It was also exercised in *Rantzen's* case[57] where the damages were reduced from £250,000 to £110,000 and in *Elton John's* case[58] where they were reduced from £350,000 to £75,000. The second development is that the European Court of Human Rights has said in the *Tolstoy Miloslavsky* case[59] that excessive awards of damages in defamation actions have a "chilling effect" on freedom of speech and are incompatible with Article 10 of the European Convention on Human Rights. Now that the European Convention on Human Rights has been incorporated into English law by the Human Rights Act 1998 it will reinforce and buttress the conclusions already arrived at by the English courts that excessive awards of damages in defamation cases, which

[55][1997] QB 586, at page 613.

[56]Judgment of 15 October 1992, Court of Appeal (Civil Division) Transcript No. 1076 of 1992 (unreported).

[57][1994] QB 670.

[58][1997] QB 586.

[59](1995) 20 EHRR 442.

bear no relation to the ordinary values of life, are not necessary or acceptable in a democratic society. These developments will also ensure that there is a just result in defamation cases. As Sir Thomas Bingham M.R. put it in the *Elton John* case,[60] "Any legal process should yield a successful plaintiff appropriate compensation, that is compensation which is neither too much nor too little. That is so whether the award is made by a judge or a jury. No other result can be accepted as just."

What is the position taken towards excessively large awards of damages in defamation cases by the courts in Malaysia and Singapore, where, as you well know, defamation actions like other actions in tort, are heard by judges sitting alone and damages are assessed by the judges themselves? Certainly there is some evidence of excessively large amounts of damages in defamation cases in those two countries. In the *Tan Sri Dato Vincent Tan* case in Malaysia in 1995 the trial judge awarded the plaintiff a sum of RM10 million for general damages plus costs against seven defendants in respect of four articles in a business magazine which libelled the plaintiff. Four of the defendants appealed to the Court of Appeal of Malaysia against that large award but the appeals were dismissed unanimously.[61] In dismissing the appeals, Gopal Sri Ram JCA in the Court of Appeal recorded his "strong disapproval of any judicial policy that is directed at awarding very low damages for defamation." The learned judge expressed the view that small or insignificant awards by courts will provide comfort to journalists that a person's reputation may be injured with impunity and said that "the time has arrived for this court to send a strong and clear signal to all and sundry that libel does not come cheap".[62] In the *Skrine & Co* case[63] in 1998 counsel for the defendants argued in the Court of Appeal that the quantification of general damages in large amounts in defamation cases (in that case RM60 million) has the effect of curbing freedom of speech which is a guaranteed fundamental liberty under Article 10(1)(a) of the Federal Constitution of Malaysia. He

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[60][1997] QB 586, at page 611.

[61]See *MGG Pillai* v. *Tan Sri Dato Vincent Tan* [1995] 2 MLJ 493.

[62]*Ibid*, at page 522.

[63]*Skrine & Co* v. *MBF Capital Bhd & Anor* [1998] 3 MLJ 649.

further argued that even though the Constitution in Article 10(2)(a) allows a restriction on freedom of speech in favour of defamation law, that restriction will completely overshadow or eclipse to the point of extinction the freedom of speech guaranteed by the Constitution if plaintiffs were permitted to threaten defendants with defamation actions with multi-million dollar claims. This is the "chilling effect" on free speech induced by the threat of civil actions for libel, particularly civil actions which claim exorbitant amounts by way of damages. The learned judge who delivered the judgment of the Court of Appeal did not, however, accept that argument. His view was that there should be truth in journalism and that truth in publication at common law will be encouraged by permitting the quantification of damages (in large amounts) and "thereby stop in their tracks would be publishers of false information".[64] He added that such deterrence is in keeping with the spirit and intendment of the guarantee of free speech in Article 10 of the Constitution and is not contrary to it. From these two decisions of the Court of Appeal it is reasonable to suggest that the courts in Malaysia do not appear to display the same concern in relation to the excessively large amounts of damages in defamation cases as has been expressed by the courts in England, Australia, New Zealand and the European Court of Human Rights and that the consequential "chilling effect" on freedom of speech caused by these excessively large awards appears to be accepted by the courts of Malaysia with equanimity.[65]

What about the courts in Singapore? Again, there is certainly evidence that extremely large awards of damages have been made in defamation cases particularly against "defendants who have attacked the honesty, integrity or character of public figures." Until the decision in *Lee Kuan Yew* v *Tang Liang Hong* in 1997 the highest award given

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[64]*Ibid*, at page 662.

[65]It should be noted, however, that the Malaysian Government is trying to find a way to set a limit to the damages awarded by the courts in defamation cases in view of the increasing number of suits claiming exorbitant amounts of damages. Datuk Dr. Rais Yatim, the Law Minister in the Prime Minister's Department said that the pattern in filing defamation suits for millions of ringgit is absurd because the amounts had increased tremendously in the past few years. See *The STAR*, 5 September 2000, and *The SUN*, 5 September 2000.

by the Singapore courts was S$ 400,000 in *Lee Kuan Yew* v *Vinocur*[66] in 1996.

But in *Lee Kuan Yew* v *Tang Liang Hong* in 1997 in 13 actions for defamation brought by 11 plaintiffs (all leaders of the ruling Peoples Action Party, 'the PAP') against the defendant (a prominent member of the Chinese community who stood as a candidate for the opposition Workers Party) the trial judge awarded the plaintiffs over S$8 million which was a total or global figure of all the awards. On appeal, the Court of Appeal of Singapore allowed the defendant's appeal on the quantum of damages and reduced the damages awarded by the trial judge by half (from just over $8 million to just under $4 million).[67] While not accepting the view that awards in personal injury cases are a helpful guide in determining the amount of damages in defamation cases,[68] L.P. Thean J.A. delivering the judgment of the Court of Appeal said that the court wished "to register a caveat on quantum of damages for defamation."[69] Acknowledging the fact that "there appears to be a trend of such damages rising steadily and significantly over the past few years" and that "each successive award appeared to overtop the preceding one" the learned judge said that "such a trend should be discouraged; otherwise, damages for defamation would mount and eventually become extremely high, ranking almost with the grossly exorbitant awards so often made in other jurisdictions." He indicated that he was not suggesting in any way that there should be a cap placed on quantum of damages for defamation and he accepted that there could never be any precise arithmetical formula to govern the assessment of general damages in defamation because each case depends on its own facts and there is a great deal of factual diversity in defamation cases. Nevertheless, L.P. Thean J.A. said that the Court wished "to stress that damages even for defamation, should fall within a reasonable bracket so that what is awarded represents a fair and reasonable sum which is proportionate to the harm and injury occasioned

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[66][1996] 2 SLR 542.

[67]See *Lee Kuan Yew* v *Tang Liang Hong* [1998] 1 SLR 97.

[68]*Ibid*, at pages 142-143.

[69]*Ibid*, at page 150.

to the victim who has been unjustly defamed."[70] The Court, he said, shared the sentiments expressed by Sir Thomas Bingham M.R. in the *Elton John* case that successful plaintiffs should receive *appropriate* compensation, that is, compensation which is neither too much nor too little, whether the award is made by judge or jury, and that no other result can be accepted as just. In view of these observations of the Court of Appeal it is not unreasonable to assert that I expect that in the future we will not see in Singapore the grossly exorbitant awards in defamation cases which we have seen in the last decades of the millennium just past.

I have of course in discussing damages not mentioned the question of costs. In accordance with the practice of the common law, costs follow the event so that a successful plaintiff in a defamation action would, normally, not only recover damages (which I have suggested in many cases have been exorbitant and excessive) but also the costs of the action. In many cases, these costs amount to hundreds of thousands of dollars and in some cases, even millions of dollars. It is the prospect of the combined effect of damages and costs which has the "chilling effect" on freedom of speech referred to by Lord Keith in the *Derbyshire County Council* case,[71] by the European Court of Human Rights in the *Tolstoy Miloslavsky* case[72] and more recently by the Court of Appeal of New Zealand in *Lange* v *Atkinson*.[73]

Other Remedies

I have discussed the matter of exorbitant and excessive amounts of damages in defamation actions and whether they are just and also the "chilling effect" on free speech which results from the prospect of unlimited or excessively high damages awards and the very high costs that defamation litigation entails.

I begin to doubt whether an award of damages should and will continue to remain the principal remedy for vindicating the reputations

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[70]*Ibid*, at page 151.

[71][1993] AC 534.

[72](1995) 20 EHRR 442.

[73]Judgment of the Court of Appeal of New Zealand delivered on 21 June 2000 (CA 52/97) (unreported).

of plaintiffs or whether there will be a shift away from damages as the primary form of final relief. Certainly Law Reform Commissions all over the Commonwealth have been engaged in efforts to suggest other, and perhaps more effective, forms of final relief.

It is certainly arguable that to a successful plaintiff an award of damages is not a restoration of his reputation but a money reparation for his loss. This is because most defamation actions take years to be heard and it is extremely doubtful whether the result of a successful action in defamation becomes generally known to readers of the original remarks. So in the new millennium I expect that there will be serious efforts to introduce alternative remedies to damages so that the injured reputations of plaintiffs can be more speedily and effectively restored. What are some of these alternative remedies?

One such remedy is a right of reply.[74] This remedy which is available in France and Germany where it is called a "correction" is appropriate when a plaintiff has been defamed in a newspaper. This right of reply (or correction) requires the newspaper to publish the reply of the person defamed free of charge within three days (24 hours during election periods) and it must be printed in the same position and type as the original defamatory article. The newspaper may not modify the reply in any way. There are limits on how long the reply can be. In case of dispute about the substance or length of the reply the Court will determine the matter and the Court will also enforce the Right of Reply by an order of the Court. This Right of Reply has been available in France and Germany for over a century without any apparent difficulties.

Another alternative remedy to damages is retraction of defamatory allegations by a defendant which is available in Canada.[75] This remedy allows a newspaper or broadcaster who has made a full and fair retraction of any matter contained in an alleged libel and alleged to be erroneous, to escape liability to pay damages (except for clearly documented economic loss) if the retraction is conspicuously published

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[74]For a concise discussion of this remedy, see *Unfair Publication: Defamation and Privacy*, Australian Law Reform Commission, Report No. 11, A.G.P. SECTION Canberra, 1979 paragraphs 178 ff.

[75]*Ibid*, at paragraphs 255 ff.

or broadcast in the next regular issue of the newspaper or within a reasonable time of the broadcast. This remedy ensures perhaps better than an award of damages that the reputation of the defamed person is more effectively restored, in so far as it is possible to do so. Where the remedy of retraction is available plaintiffs are required to commence an action in libel within 3 months of the date when the libel came to the plaintiff's knowledge. This short period of limitation is based on the premise that a successful action quickly brought and concluded will have a greater chance of restoring a lost reputation than protracted and long drawn out proceedings. The Defamation Act 1996 in England has reduced the period of limitation for bringing actions in defamation in England from three years to one year[76] from the date the cause of action accrued precisely for this reason.

Another alternative remedy to damages which will result in the speedy and public vindication of the plaintiff's reputation has been proposed by the New South Wales Law Reform Commission in 1995.[77] The Commission determined that the most effective means by which plaintiffs can vindicate their reputations is by obtaining a declaratory order from a Court (a single judge) that a publication which defames them is false. The Commission called this remedy a "Declaration of Falsity" and proposed that it should be developed as an alternative to damages. This Declaration of Falsity will be available to plaintiffs where the cause of action is founded on an imputation which is defamatory of the plaintiff and is false; the matter is published by the defendant of and concerning the plaintiff and the remedy is sought within four weeks of publication (or, exceptionally, within such longer period as the court may in its discretion permit). The remedy will be granted in the court's discretion. A successful plaintiff will be entitled to costs and to an appropriate publication of the terms of the declaration. The Commission claims that the reputation of plaintiffs, who successfully obtain this remedy, will be vindicated soon after the publication of the defamatory matter and that plaintiffs whose primary concern is to restore their reputations as speedily as possible will

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[76]Under section 5 of the Act.

[77]See *DEFAMATION*, New South Wales Law Reform Commission, Report 75, September 1995, pages 88 ff.

generally opt for a Declaration of Falsity rather than for an award of damages.

In England, the Defamation Act 1996, many of whose provisions have only come into operation in the year 2000, has provided two significant alternatives to the notoriously long drawn out and expensive defamation proceedings for damages. First, under section 2 of the Act, a person who has published a statement alleged to be defamatory of another may offer to make amends under the section. An offer to make amends is an offer to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party, to publish the correction and apology in a manner that is reasonable and practicable in the circumstances and to pay to the aggrieved party such compensation (if any) and such costs, as may be agreed or determined to be payable. Secondly, under sections 8 to 10 of the Act the court is given power in defamation proceedings to dispose summarily of the plaintiff's claim. It can do so by making a declaration that the statement was false and defamatory of the plaintiff; by making an order that the defendant publish or cause to be published a suitable correction and apology; by awarding damages not exceeding £10,000 or such other amount as may be prescribed from time to time and by making an order restraining the defendant from publishing or further publishing the defamatory matter complained of. Every defamation action must now come before a judge at an early stage so that he or she can decide if the claim is suitable for summary disposal, whether or not the parties have asked the judge to do so. It is not now possible for any claim in a defamation action to go to trial until there has been a hearing at which the judge has considered whether the claim should be disposed of summarily.

Buttressing these alternative remedies to damages found in the Defamation Act 1996 are the ample powers introduced by the Civil Procedure Rules 1998 to control the way in which litigation, in claims of more than £10,000, is conducted to save cost and time. These rules introduce a new procedural code and litigation culture in defamation actions which enlarges the court's management powers. Rule 3.1(2) empowers the court to direct a separate trial of any issue, such as whether the defamatory words complained of were published on an occasion of qualified privilege and whether there was evidence of

malice. Besides, following a recommendation in the Neill Report,[78] the Rules of the Supreme Court have been amended so that, under Order 82 rule 3A, either party can now apply for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings. Rule 3.1(2) also empowers the court to exclude an issue from consideration and to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective which is to enable the court to deal with the case justly. That includes saving expense and dealing with the case proportionately, expeditiously and fairly. This new procedural code will have a significant impact on the way that defamation cases are tried in the future. As May L.J. in the Court of Appeal pointed out in the *GKR Karate* case,[79] decided this year: "Libel cases generally have historically been notoriously long drawn out and expensive and are especially amenable to the culture of the new procedural code. They need novel and imaginative case management to achieve what has hitherto often not been achieved." Part of this novel and imaginative case management is to encourage both parties to defamation proceedings to arbitrate and mediate their claims. Both parties will be expected by the courts in future to provide evidence that alternative means of resolving their dispute have been considered. These include arbitration or mediation by an independent third party such as a defamation silk or a retired High Court judge. There is little doubt that in the new millennium the emphasis in England will shift, from an award of damages as the primary form of final relief in a defamation action to some of the alternative remedies just discussed, including the new regime for summary disposal of defamation claims introduced by sections 8 to 10 of the Defamation Act 1996 and brought into force with effect from February 28, 2000. In addition, in claims of more than £10,000, long drawn out and expensive litigation will very likely give way to arbitration and mediation by experienced defamation silks and respected retired judges. I expect that other jurisdictions in the Commonwealth might well find these developments attractive and worthy of emulation.

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[78]Report of the Neill Committee on Practice and Procedure in Defamation (1991).

[79]*GKR Karate (U.K.) Ltd* v *Yorkshire Post Newspapers Ltd & Others (No.1)* [2000] EMLR 396, at page 404.

Concluding Remarks

Let me end this lecture on a lighter note. When the Human Rights Act 1998 of the United Kingdom, which came into operation on 2 October 2000, was in its passage through the House of Lords, the Scottish judge Lord McCluskey in unsuccessfully opposing the Bill, said that its enactment would provide "a field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers." I am a little inclined to look upon the law of defamation in the same way. It may not exactly provide a field day for crackpots but your credulity might be stretched a bit when I tell you that in 1996 a plaintiff brought an action in defamation in the New South Wales Supreme Court against a newspaper which reported that he had required his lover to cut his toenails and put on his socks and shoes for him - he being too corpulent to do so.[80] Is the law of defamation a pain in the neck for judges and legislators? Certainly the large number of cases where judges have misdirected a jury or misdirected themselves and have been reversed on appeal might suggest that this is so. The complexity of defamation law is legendary. In *Slim* v *Daily Telegraph Ltd*[81] after three lords justices and four counsel had spent the best part of three days upon a minute linguistic analysis of every phrase used in two short letters trying to determine the meaning of the allegedly defamatory letters, Diplock L.J. ended his judgment in that case in sheer exasperation when he said: "I venture to recommend once more the law of defamation as a fit topic for the attention of the Law Commission. It has passed beyond redemption by the courts."[82] And will the task of legislators be any less exasperating when they attempt, for example, to define who should bear responsibility for publishing defamatory material on the Internet where technological progress is now so exponentially rapid that tomorrow's technology may well make today's advances appear old fashioned. Is the law of defamation a goldmine for lawyers? I think

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[80]*Warren* v. *Nationwide News Pty Ltd*, 7 July 1996, Supreme Court of New South Wales, No. 21322 of 1995 (unreported).

[81][1986] 2 QB 157.

[82]*Ibid*, at page 179.

the answer to that question must be self-evident. It has always been a goldmine for lawyers. Sometimes it has even been an enriching experience for the clients they represent.

I have endeavoured in this lecture to convey the shape that I think the law of defamation will take or, in some instances, ought to take in the new millennium. This reshaping I believe will be of great benefit to us all. I hope that in its new shape the law of defamation will not provide a field day for crackpots and that it will cease to be a pain in the neck for judges and legislators but you can rest assured that it will continue to provide a goldmine for lawyers.

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RULE OF LAW IN THE *MERDEKA* CONSTITUTION

This article[1] will look at the original intent of the drafters of the Federal Constitution of Malaysia, as reflected in the *Reid Commission Report 1957*,[2] and as modified in the *Government White Paper*[3] which formulated the *Merdeka* Constitution[4] in the creation of an autochthonous Rule of Law for Malaysia. Law, including the meaning of the Rule of Law, is never a static phenomenon. This is especially so when there is no clear meaning or content assigned to it by either the Constitution or the legislature of a country. The meaning and the future development of a constitutional doctrine therefore are open to the forces influencing its development. In the creation of an autochthonous Rule of Law in Malaysia, other than the meaning of the Rule of Law as evidenced by the *Merdeka* Constitution, account must be taken too of the role of the common law, ASEAN law, Islamic law and international law as the primary determinants of a Rule of Law for Malaysia. This article however will only focus on the role of the original intent of the drafters, as reflected in the *Reid Commission Report 1957*, and as modified in the *Government White Paper* which formulated the *Merdeka* Constitution.

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[1]This article is based, with some amendments, on Chapter II, Khoo Boo Teong, *Rule of Law and Fundamental Liberties in Malaysia*, Unpublished PhD thesis, Faculty of Law, University of Sydney, 1999.

[2]Colonial Office, *Report of the Federation of Malaya Constitutional Commission 1957*, Colonial No. 330, London: Her Majesty's Stationery Office, 1957, *Reid Commission Report 1957*.

[3]Colonial Office, *Constitutional Proposals for the Federation of Malaya*, Cmnd. 210, London: Her Majesty's Stationery Office, 1957 (hereinafter referred to as the *'Government White Paper'*).

[4]The new Constitution for the future independent Federation of Malaya as recommended by the Reid Commission had undergone changes in both substance and form, and was published as Annexe I to the *Government White Paper*. This Annexe, 'Proposed Constitution of the Federation of Malaya', became the *Merdeka* Constitution of independent Malaya on 31 August 1957.