

**REALITY AND MYTH:  
THE NEW ZEALAND MEDIA AND THE CHILLING EFFECT  
OF DEFAMATION LAW**

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A thesis submitted in fulfilment of the requirements for the Degree  
of Doctor of Philosophy in Law  
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by Ursula Cheer  
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All errors and omissions are, of course, my own.

## PREFACE

This preface records a difference in point of view between the author and one of the oral examiners (Associate Professor Rosemary Tobin) on the one hand, and the other oral examiner (Professor John Smillie) on the other as to the appropriateness of the inclusion of Chapter 9 and Part 2 of Chapter 10 within the thesis.

While Professor John Smillie accepts that the thesis merits the award of the PhD degree on the basis that it records and analyses the results of an extensive and well-designed empirical study of the chilling effect exerted on the media by the law of defamation, he considers that the proposal for a change in the judicial approach to the application of the defamation law set out in Chapter 9 and Part 2 of Chapter 10 is inconsistent with the conclusions drawn from the empirical research data, and would have preferred those sections of the thesis be deleted.

The author and Associate Professor Rosemary Tobin are of the view that Chapter 9 and Part 2 of Chapter 10 are integral to the thesis because they address and advocate continued development of an aspect of the law of defamation which was already present in the law as examined in the empirical study. Therefore Chapter 9 and Part 2 of Chapter 10 are consistent with the conclusions of the empirical research.

Although this point was not directly addressed in the report of the external examiner, Professor Hazel Genn in her Examiner report, and Professor Genn was not present at the oral examination, it should be noted that the final sentence of the first paragraph of her report states: '[t]his is a robust approach to the research questions which provides original and convincing evidence upon which to support the thesis and its conclusions.'

## ABSTRACT

In 2001, I began the field work in an empirical study of the laws of defamation in New Zealand. This study involved a comprehensive mail-out survey of the New Zealand media, and an adapted survey of defamation lawyers, which were designed to discover how the laws of defamation affected both groups, and what the respondents thought about those laws. The survey was augmented by an extensive search of defamation court files in the most important New Zealand High Court registries. The question behind the survey was essentially whether New Zealand's defamation laws have a chilling effect on the media, to the extent that stories which should be told do not see the light of day.

In this thesis, I contextualise and report on the results of the survey. I first describe and analyse the sources and trends in current defamation law, the other forms of regulation of the media in New Zealand, and the patterns of media ownership. I go on to utilise background data from the survey to present a character and business profile of the media who responded to the survey and find the data confirms the representative nature of those respondents. I then complete contextualisation of the survey by analysing the nature of the chilling effect doctrine itself, a canon which began as a predictive theory importing sociological concepts into legal analysis, but which is now a doctrine applied somewhat inconsistently, but with substantive effects, by the courts. In the following chapters I present the results of the media survey, the court file search and the survey of defamation lawyers, both in narrative and graph or tabular form. My tentative initial finding, that New Zealand's defamation laws do not have an excessive chilling effect on our media, although they do have some, is progressively confirmed, with each set of data appearing to mirror and corroborate that which went before. In the final chapters, I take this somewhat surprising finding and augment it by theorising about future developments in defamation law. I suggest that increased constitutionalisation of this area of private law, in the form of full incorporation of a Bill of Rights methodology, is both desirable and necessary to protect against any chilling effects, such as they are. I conclude by posing a question about a possible joint future for defamation and privacy claims.

**Reality and Myth:  
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# Chapter One - Introduction

... “uncertainty in both the principles of defamation law and their practical application induce great caution on the part of the media. Virtually every interviewee, in all branches of the media, emphasised the lottery aspect attached to this area of the law.”<sup>1</sup>

“The newspapers in this case brought about the total and utter destruction of mine and my family's life and caused immense distress...I'm pleased that the publications concerned have today admitted the falsity of all their allegations and I can now start to rebuild my life....Today's statement of full apology in open court means I can emerge from this action with vindication and with the recognition and acknowledgement that what was said against me was wholly untrue.”<sup>2</sup>

“Generalisations in this area are dangerous but it is possible to say that New Zealand has not encountered the worst excesses and irresponsibilities of the English national daily tabloids.”<sup>3</sup>

## 1. Genesis

This thesis presents an analysis of the results of an empirical study of the effects of defamation laws in New Zealand carried out in 2001. The study sought to discover whether such laws have a chilling effect on the media, to the extent that stories with a high element of public interest are suppressed or edited, with detrimental effects on freedom of expression. The idea for the research came from a number of sources. In 1977, a government-appointed Committee, the McKay Committee, reported after a comprehensive investigation into the defamation laws at that time.<sup>4</sup> The report formed the basis for a bill, which after many years' gestation became the Defamation Act 1992, the current legislation which operates in New Zealand in conjunction with the common law. The McKay Committee commissioned a study of the practical effects of the defamation laws as a background to its work. The passage of

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<sup>1</sup> Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson, *Libel and the Media: The Chilling Effect* (1997), at 186, referred to in *Lange v Atkinson* [2000] 3 NZLR 385, at 394-5.

<sup>2</sup> Extracts from a statement made by Robert Murat outside the High Court, after four United Kingdom national newspaper groups apologised for publishing false allegations in over 100 articles about Mr Murat and two other people suggesting they were involved in the abduction of four year old Madeleine McCann, and agreed to pay £600,000 in libel damages, 17 July 2008. Prompted by these cases, a parliamentary committee is now investigating privacy, libel and standards in the press in the United Kingdom: *The Guardian*, 18 November 2008.

<sup>3</sup> The New Zealand Court of Appeal in *Lange v Atkinson* [2000] 3 NZLR 385, [34].

<sup>4</sup> ‘Recommendations on the Law of Defamation,’ *Report of the Committee on Defamation*, December 1977. The empirical research carried out for the Committee is discussed by a member of the Committee, Professor Geoffrey Palmer, (as he then was), in ‘Defamation and Privacy Down Under’ 64 *Iowa Law Review* 1209 1978-1979, together with the results of Professor Palmer’s own analysis of reported Australian and New Zealand defamation cases in the period 1969-1978.

time and the size of that study eventually rendered its results completely outdated. This meant it was timely to carry out a further study in 2001.

In the United Kingdom a complex study has been made of this issue in the late 1990's. After analysing the results of that empirical study,<sup>5</sup> its authors concluded "the chilling effect genuinely does exist and significantly restricts what the public is able to read and hear."<sup>6</sup> In a leading New Zealand defamation case,<sup>7</sup> the Court of Appeal acknowledged a chilling effect of defamation law, but based its conclusion on the English research.<sup>8</sup> In 2001, no such research had been carried out in New Zealand for over twenty five years. It was therefore appropriate to investigate the issue in an empirical way.<sup>9</sup>

It was important to determine as a preliminary matter the limits of the question being asked when seeking to determine whether New Zealand's laws have a chilling effect on freedom of

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<sup>5</sup> Barendt et al (1997) n. 1 above. I define legal empirical research as being that which seeks to collect and analyse quantitative and qualitative factual data impacting on legal issues. Another useful definition is offered by Baldwin and Davis: 'the study, through direct methods rather than secondary sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effects they have,' John Baldwin and Gwynn Davis 'Empirical Research in Law', Ch 39, Cane and Tushnet, *The Oxford Handbook of Legal Studies*, (OUP 2003), 880-881.

<sup>6</sup> Barendt et al (1997) n. 1 above, 191. However, the United Kingdom Law Commission more recently carried out a small study of certain aspects of defamation law, and concluded that there is no evidence there of abuse of defamation procedures by way of gagging writs or letters: The Law Commission, *Aspects of Defamation Procedure: A scoping study*, May 2002, 1, 5 (UK). The majority of the small number of media organisations which took part in this study did complain that the law of libel more generally created a 'gagging' or 'chilling' effect on the freedom of the press: *ibid*, 3.

<sup>7</sup> *Lange v Atkinson* [2000] 3 NZLR 385.

<sup>8</sup> *Ibid*, 394. The Court referred to the United Kingdom research as careful and accepted its conclusions. See above, n. 1, 186.

<sup>9</sup> The study was made possible by the grant of funding from the Research Committee of the University of Canterbury and by matching funding provided by the School of Law. Aspects of the study have been published in 'Myths and Realities about the chilling effect: The New Zealand media's experience of defamation law' (2005) 13 *Torts Law Journal* 259; 'Defamation in New Zealand and its Effects on the Media – Self-Censorship or Occupational Hazard?', [2006] *NZLRev* 467-524, and 'The Bill of Rights and the Chilling Effect', *Law, Liberty, Legislation: In Honour of John Burrows QC*, S. Todd and J Finn eds, LexisNexis, (2008). I acknowledge the further support of the Centre for Media and Communications Law, Faculty of Law, University of Melbourne, and my appointment there as a Visiting Fellow in February 2004 and 2005, and as a Senior Fellow in 2004 and 2005, during which time I was able to complete much of the writing up of the empirical research. The Director of the Centre, Professor Andrew Kenyon, has also completed a three-year empirical research project on "Defamation Law in Context", see: Andrew T. Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, 2006) where the author puts forward evidence based on content analysis which suggests that Anglo-Australian defamation law has a chilling effect on media speech when compared to the US. See also R Weaver, A Kenyon, D Partlett, & C Walker, *The Right to Speak III – Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006), where the authors detail comparative research carried out in Australia, England, and the United States, and C Dent & A Kenyon, "Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers" (2004) 9 *MALR* 89; T Marjoribanks & A Kenyon, "Negotiating News: Journalistic Practice and Defamation Law in Australia and the US" (2003) 25 *Australian Journalism Review* 31; and R Weaver, A Kenyon, D Partlett & C Walker, "Defamation Law and Free Speech: *Reynolds v Times Newspapers* and the English Media" (2004) 37 *Vand J of Transnat'l L* 1255. Previous comparative work has also been carried out by Australian academics: see 'The Sociology of Defamation in

expression of the media. To this end, it was necessary to define what is meant by ‘chilling effect’. All defamation laws create a chilling effect to the extent that protecting reputation will at times require prevention of publication or payment of damages if wrongful publication has occurred. That is what defamation laws are intended to do. The issue, therefore, is not merely whether any chilling effect exists, but whether, accepting that a society desires some laws to protect reputation, the chilling effect of those laws is unacceptable and too damaging of freedom of expression and of the press. In Chapter Four and Chapter Nine of this thesis, I examine in detail the development of the chilling effect doctrine and how New Zealand courts and overseas jurisdictions have utilised it. It is clear that in this era of human rights, freedom of expression is accorded increasing significance.<sup>10</sup> Therefore, this thesis is essentially a study of the relationship between a so-called right of reputation and a right to freedom of expression. In the end, the question asked in my study had to reflect the reality, which is a process in which public and private interests in these rights are balanced in some way. The question I posed ultimately was: Do New Zealand’s defamation laws create a chilling effect on the media which is not justifiable in a free and democratic society?

## 2. Survey Methodology

Collection of data for the study essentially broke down into three parts: a survey of the media,<sup>11</sup> a survey of media lawyers and a search of civil court files. Information was collected in 2001-2002, but the period studied covered the six years between 1996-2001. The data collected was analysed, and also compared to work carried out in other jurisdictions where relevant.<sup>12</sup>

For the survey of the media, approximately 800 confidential postal surveys were sent to every identifiable member of the New Zealand media in the first half of 2001. This included newspapers, television and radio broadcasters, magazines, book publishers, independent writers and journalists, information service providers and advertising agencies and public relations firms. A follow-up letter was sent some time later to encourage the completion and return of the surveys. A postal survey was chosen for the reason that it is still a well-

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Australia and the United States’ Michael Newcity, (1991) 26 *Tex. Int’l L.J.* 1; ‘Politicians, Defamation Law and the ‘Public Figure’ Defence,’ Brendan Edgeworth and Michael Newcity, (1992) 10 *Law in Context* 39.

<sup>10</sup> In New Zealand, the New Zealand Bill of Rights Act 1990 provides that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The Bill is not supreme law, however, as it cannot invalidate inconsistent legislation (s 4), and the rights in it are subject to reasonable limits ‘...prescribed by law as can be demonstrably justified in a free and democratic society’ (s 5). See further Chapter Nine below.

<sup>11</sup> A copy of this postal survey, which was the main survey used in the study, is attached in the Appendix, p 236 below.

recognised form of data collection which can reach a dispersed population,<sup>13</sup> and because of the financial limitations imposed on the research. Postal surveys also offer anonymity and time for the respondents to check and confirm responses.<sup>14</sup> Against this lie the disadvantages of the risk of a low response rate and declining response rates to surveys world-wide in recent years – ‘survey exhaustion’.

Responses to the media survey were received from a total of 225 media, being 52 newspapers, 6 television broadcasters including the state-broadcaster and its largest private rival, 31 radio broadcasters, 26 magazines, 9 individual writers and journalists, 24 book publishers, 68 advertising agencies or public relations firms, 2 information service providers and 7 multi-media interests. The response rate overall was just over 28%. This figure was augmented by a response from the New Zealand section of the Commonwealth Press Union, which voluntarily submitted its views on some of the questions contained in the media survey.<sup>15</sup>

While any information collected in survey form needs to be comprehensive and representative, there appears to be disagreement about a norm for response rates in academic studies,<sup>16</sup> and what effects non-responses can have. Non-responses can be of concern when significant groups in the survey cohort do not complete and return the survey. But poor response alone may not undermine the results if the findings are still representative of the population being surveyed. If those who do not respond do not differ significantly from those who do, the results are arguably still valid.<sup>17</sup> Therefore, if the character of respondents can be confirmed as representative in other ways, then the results will have substance.

Furthermore, it is at least clear that postal surveys have been shown to have lower response rates than those employing other methodologies such as face to face interviews or delivered

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<sup>12</sup> See ns 4-6 and 9 above.

<sup>13</sup> D A Dillman, ‘The design and administration of mail surveys’ (1991) 17 *Annual Review of Sociology* 225.

<sup>14</sup> L Kanuk and C Berenson, ‘Mail Surveys and Response Rates: A Literature Review’, *Journal of Marketing Research* Vol XII (November 1975), 440.

<sup>15</sup> The CPU has as its members all editors of daily and Sunday newspapers in New Zealand.

<sup>16</sup> Y Baruch, ‘Response rate in academic studies – a comparative analysis’, *Human Relations*, April 1999, Vol 52, 421. Don Dillman, of the Social & Economic Sciences Research Centre, Washington State University, has developed a methodology for mail out surveys which can achieve a high response rate, but which requires extensive resources: see *Mail and Telephone Surveys: the Total Design Method* Don Dillman (John Wiley & Sons, 1978) and the papers available at <http://134.121.51.35/dillman/papers.html> See also *Social Research Methods: Qualitative and Quantitative Approaches*, Harvey Russell Bernard, (SAGE, 2000).

<sup>17</sup> See n. 14 above.

surveys.<sup>18</sup> For this methodology, a response rate of 30% is in fact considered reasonable, and private surveying companies appear to consider anything in the 20-30% range as typical and acceptable.<sup>19</sup>

Ultimately, I judged the response rate to my mail-out survey to be valid and publishable, for two reasons. Firstly, at 28% (and higher with the CPU results factored in), the response rate appears to be well within the norm for mail-out surveys. Secondly, my detailed analysis of the business composition of the respondents in Chapter Three of this thesis confirms that they were representative of the media and communications sector in New Zealand at the time the survey was carried out. Nonetheless, although I believe the overall response rate to be acceptable, to ensure full clarity, I have commented in detail on response breakdown throughout the relevant chapters of this thesis.

The media survey was broken down into five parts. The first part sought background information such as what form the media respondent took, what sort of enterprise was involved, what sort of circulation the respondent had, did they have defamation insurance, what sort of training they had, and what sort of risks of defamation they faced. The second part investigated pre-publication procedures, how they worked and if these were always complied with. The third part of the survey asked for information as to actual experience of statements of claim (writs) in the years 1996-2001, and the fourth part investigated the experience of threats of action which did not proceed to trial for the same period. The final part of the survey sought the views of the respondents on aspects of the law, such as defences, delays, technicalities, damages, and injunctions, and also invited any general comments or suggestions for reform.

To survey media lawyers, adapted media postal surveys were sent to legal practitioners (the legal practitioner survey) who are prominent defamation lawyers, both plaintiff and defendant representatives, to find out about their practices and views. As the response rate to these surveys was low, this part of the survey was bolstered by a small number of face to face interviews with specifically targeted practitioners, essentially those at the top of the defamation game. Although some data was collected from lawyers answering the postal

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<sup>18</sup> J Ilieva, S Baron, N Healey, 'Online surveys in marketing research: Pros and cons', *International Journal of Market Research* Third Quarter 2002, Vol 44, 361. See also n. 14 above.

<sup>19</sup> See n. 16 above, and see Research Note by Chanelle Gallant, 'The Influence of Colour and Incentives on Mail Survey Response Rates', *ISR Newsletter* 13(2) 1998, <http://www.isr.yorku.ca/newsletter/fall98/research.html>

survey as to actual threats and claims experience, the interviews sought answers only to the final section of the survey, to elicit views of legal practitioners on the state of the law.

A vital part of the project proved to be a separate study (the court file search) based on the collection of information about defamation statements of claim (writs) involving media defendants filed in a significant sample of High Court registries in New Zealand, for the four-year period 1998-2001. This part of the study involved collecting statistical information about the proportion of defamation statements of claim filed in the High Court and what proportion of those claims were filed against media defendants. Information was also recorded on the context of the claim, who the defendant was, the remedies sought (including levels of damages), and how the matter was resolved.

All of the information in the study was gathered in a general and statistical way and no party was identified or identifiable publicly at any stage of the research. My aim throughout the project has been to use very simple and straightforward methodology. Although empirical research is commonplace in media studies,<sup>20</sup> socio-legal research is in its infancy in New Zealand.<sup>21</sup> I have received no formal training in the discipline such as that offered in other jurisdictions.<sup>22</sup> The funding I received for the research was very small. For these reasons, I have endeavoured to present the empirical data in as straight-forward and non-technical a manner as possible. This then is by no means the work of an expert, but of an academic lawyer perhaps setting out on a path to acquire valuable skills in socio-legal research.<sup>23</sup>

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<sup>20</sup> See eg: James Hollings, Geoff Lealand, Alan Samson and Elspeth Tilley, 'Profile 2007. The big NZ journalism survey: Underpaid, under-trained, under-resourced, unsure about the future - but still idealistic', *Pacific Journalism Review* September 2007, 13(2), 175.

<sup>21</sup> See 'Law in the Real World: Improving Our Understanding of How Law Works', *Final Report and Recommendations of the Nuffield Inquiry on Empirical Legal Research*, Professor Dame Hazel Genn, Professor Martin Partington, Professor Sally Wheeler, November 2006, 26-27.

<sup>22</sup> Eg: the Oxford Centre for Socio-Legal Studies in the United Kingdom. In the period 1990-1994 I was employed as a lawyer for the United Kingdom Law Commission, during which time I supervised an investigation into the laws governing personal injury in that jurisdiction. As part of that large project, socio-legal research was conducted for the Commission by Professor Hazel Genn, into the compensation experiences of victims of personal injury. The result was *Personal Injury Compensation: How Much is Enough?* Law Com No 225, (1994).

<sup>23</sup> During the completion of this thesis, I have developed and obtained funding for another smaller empirical project carried out for the Families Commission. This work was a collaborative one published as 'The Family Court, Families and the Public Gaze,' Ursula Cheer, John Caldwell and Jim Tully, Canterbury University, *Families Commission Blue Skies Report* No 16/07, March 2007.

### **3. Outline of the thesis**

Chapter Two of this thesis is a treatment of important background information. It briefly describes relevant characteristics of the law of defamation in New Zealand, and the various forms of regulation of the media as at 2001, the year the media survey at the centre of this investigation was carried out. This is followed by a description of media ownership in New Zealand in 2001 and currently. This analysis concludes that the small New Zealand media market is split between a number of mainly foreign interests, many of them now Australian.

In Chapter Three, I make first use of some of the empirical background data collected in the media survey, to develop a comparatively detailed character and business profile of the media which took part. This analysis confirms the representative character of those responding, and prepares the ground for the analysis which follows in later chapters. The presentation of this material, and of that outlined below, is augmented by the use of graphs and tables where appropriate. I conclude that there are many reasons why stories might not see the light of day, the chilling effects of defamation laws being only one of these. I go on to suggest that New Zealand's small media market, dominated by foreign interests, might support a reasonably robust approach to potential defamation claims.

Chapter Four augments the two preceding chapters by interrogating the origins of the chilling effect doctrine in the USA, and tracing how both overseas and New Zealand courts have used and developed it. Here I conclude that the doctrine may have thrown off its original sociological precepts to become a doctrine with real substantive effects in most western jurisdictions. While the legal approach to the doctrine is currently somewhat haphazard, the approach in defamation law appears to unite around a broad function of developing media responsibility while giving appropriate weight to freedom of expression.

Chapter Five presents results collected from the main part of the empirical study, the media survey carried out in 2001-2002. The chapter deals with responses about what material is regarded as risky, training in defamation law, pre-publication procedures and how they impact on alterations and deletions, whether defamation insurance is held, and the impact of regulatory bodies such as the Broadcasting Standards Authority and the Press Council. An analysis of data collected from the media about threats of legal action follows. Finally, data about actual claims collected from the media is presented and examined. The analysis of both threats and actual claims breaks down the data and looks at whether defamation threats and

claims against the media appear to be increasing, who the potential and actual plaintiffs and defendants are, the context of threats and claims, the nature of remedies sought, and outcomes. The material on actual claims is compared to that compiled from the media survey about threats where relevant. I discuss and compare previous research carried out in Australia, New Zealand and the United Kingdom throughout. I conclude the chapter by summarising the data presented and put forward initial conclusions. Here I present a tentative view that the quantitative data demonstrates the operation of defamation law on a dynamic, generally assertive New Zealand media, backed by strong foreign ownership, and does not produce excessive chilling effects although clearly it does produce some.

In Chapter Six I present and analyse the results of the court file search which was carried out at the most important High Court registries. Because this data was not collected from media, I was able to use it as independent control data against which the results of the media survey could be tested. The court file search revealed a fairly low level of filed claims, and no evidence of any trend towards an increase in numbers of filed claims, at least for the years 1998-2001. The context and characteristics of the claims mirrored those reported by the media. Here I concluded that the most remarkable feature of this data was the extent to which it confirmed and reinforced the data derived from the media survey.

Chapter Seven does for defamation lawyers what Chapter Five did for media respondents. Here I produce the results of surveying and interviewing both plaintiff and defendant lawyers on their general experience of defamation claims, covering pre-vetting, threats, and claims which did not, and did, come to a full hearing. The data is presented as of qualitative rather than quantitative value, because numbers responding to the survey were not high, and further information had to be sought through selective interviews. Nonetheless, the data from both groups tended to mirror and reinforce that collected from the media and from court files previously – it did not suggest an excessive chill factor arising from New Zealand's defamation laws.

Chapter Eight deals with the final part of the survey – that which sought opinion data on various aspects of New Zealand's defamation laws. Here I detail responses from both media and defamation lawyers on the developing defence of constitutional qualified privilege, the need for a special media defence, and on costs. I also present unsolicited comments which expressed the view that the balance of the law was about right. The responses to this part of

the survey were small, and therefore the data is presented as being of qualitative value only. However, this chapter contains a selection of significant and representative extracted responses which have a strong flavour and allow the respondents to give the benefit of their experience ‘in their own words’. Once again, the results point to reasonable satisfaction with the current state of affairs generally, although a clear view emerged that the issue of costs requires further investigation. This chapter draws to a close with a general conclusion on all of the data. Here I find that when examined in the round, the empirical data suggests that arguments about the chilling effects of defamation laws on the New Zealand media have been somewhat overstated.

Chapter Nine is a final substantive chapter which looks forward rather than back. Here I examine the growing influence on New Zealand law of the right of freedom of expression. This involves an investigation of the impact of the New Zealand Bill of Rights Act 1990 on the common law and on defamation law in particular. I then suggest a transparent and consistent methodology for applying the Bill to defamation which might apply in the future, and analyse how it might impact on the law. I conclude that a combination of full maturation of current common law developments, and application of a Bill of Rights methodology, would mediate, repair and limit possible chilling effects of our defamation laws, such as they are.

In Chapter Ten, I draw the threads of discussion and analysis in the previous nine chapters together, to reach a final conclusion. Although my final deduction is that the data shows the balance of the current law is about right, I go on to outline the constant risks of a chilling effect which must be guarded against, and I draw attention to areas which my study suggests might need further investigation, such as costs and the difficulties faced by small media enterprises. Overall, however, I infer that the media can take heart from the state of the law generally. This final chapter draws to a close by asking the tantalising question: ‘What is to be the relationship between defamation and its currently more prominent cousin, privacy, in the future?’

## Chapter Two – Defamation law, media regulation and ownership

In this chapter, I paint a backdrop against which the results of the empirical study can be posed. This is made up of a summary of the main points of defamation law impacting on the media in the New Zealand jurisdiction, an outline of how the media is regulated, and a discussion of media ownership generally.

### 1. Defamation law in New Zealand

#### 1.1 Sources

New Zealand defamation law is very similar to that in the United Kingdom and some Australian states. The requirements of the tort are often argued by the media as overly plaintiff-friendly. Although New Zealand has a statute which has refined certain elements of the law of defamation and offers some new remedies,<sup>24</sup> it is still basically a common law subject.<sup>25</sup> The definition of ‘defamation’ remains untouched, and it is necessary to look to the case law, including that from the United Kingdom and Australia. There is no single comprehensive definition of what amounts to a defamatory statement. However, four case law definitions tend to dominate the discourse. They are: a statement that might tend to lower the plaintiff in the estimation of right-thinking members of society generally;<sup>26</sup> a false statement about a man to his discredit;<sup>27</sup> a publication without justification that is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule;<sup>28</sup> and a statement about a man that tends to make others shun and avoid him.<sup>29</sup>

#### 1.2 Publication and identification

Before a damaging statement about a person can be held to be defamatory it must have been published, in the sense of being communicated to some person or persons other than the plaintiff. Furthermore, the plaintiff must show the statement was about him or her. A plaintiff who is suing for defamation is not required to prove that the statement made about him or her was false; it is enough if he or she can show that it was published, and that it had a tendency to affect his or her reputation.

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<sup>24</sup> Defamation Act 1992.

<sup>25</sup> See generally for the following: J Burrows and U Cheer, *Media Law in New Zealand* (5<sup>th</sup> ed, 2005, OUP) Chs 2-3.

<sup>26</sup> *Sim v Stretch* [1936] 2 All ER 1237 at 1240 per Lord Atkin.

<sup>27</sup> *Youssouf v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 at 584 per Scrutton LJ.

<sup>28</sup> *Parmiter v Coupland* (1840) 6 M & W 105 at 108 per Parke B.

### 1.3 Judge and jury

In New Zealand, a defamation claim is one of the few civil claims which can still be heard before a judge and jury. If the case is tried by a judge and jury, the judge must decide whether the words used were capable of being defamatory. Submissions on this matter are made in the absence of the jury, to ensure that its members are not influenced in any way.<sup>30</sup> If the judge rules that the case should proceed, it is for the jury to say whether or not in the circumstances of this case the words were, in fact, defamatory in that they tended to injure the plaintiff's reputation. Where the judge sits alone, the two functions become blurred and can be addressed as one question.<sup>31</sup>

### 1.4 Unintentional defamation

A person publishing defamatory words in New Zealand may be liable even if he or she did not intend to defame anyone. It does not matter what the defendant intended the words to convey but rather what they do convey to a reasonable reader or listener. Thus, there is no defence of unintentional defamation, and problematic cases such as *Hulton & Co v Jones*<sup>32</sup> can apply. However, as the 'spit and image' exception for look-alike cases<sup>33</sup> may also apply in New Zealand, it may be that the ambit of unintentional defamation will steadily decline, a development which would be welcomed by the media.

### 1.5 Meanings

In ascertaining the meaning of words, an approach very similar to that in the United Kingdom is taken, so that everything depends on the overall impression created by the publication,<sup>34</sup> and the bane and antidote doctrine applies.<sup>35</sup> The meanings of words can be coloured by their

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<sup>29</sup> *Youssouppoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 at 587 per Slesser LJ.

<sup>30</sup> Defamation Act 1992, s. 36. See *PPCS v NZ Rural Press Ltd* Unreported, High Court Auckland, 14 March 2000, CP412/SD99, Cartright J, at paras 10-12.

<sup>31</sup> *Jaques v Independent Radio News Ltd* (1999) 13 PRNZ 294.

<sup>32</sup> [1910] AC 20. See also *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331, *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377, *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32.

<sup>33</sup> *O'Shea v MGN Ltd* [2001] EMLR 40. In this case, a pornographic advertisement contained a photograph of a woman it was alleged was the exact look alike, or 'spit and image' of the plaintiff. The English court held it would impose an impossible burden on a publisher required to check if the true picture of someone resembled someone else who because of the context of the picture was defamed. The court thought that to impose such a burden would be an unjustifiable interference with the vital right of freedom of expression disproportionate to the legitimate aim of protecting the reputations of 'look alikes' and contrary to art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights and referred to by that title from hereon) and s 12(4) of the Human Rights Act 1998 UK). Such reasoning could be advanced in New Zealand based on the New Zealand Bill of Rights Act 1990: see Chapter Nine below.

<sup>34</sup> *New Zealand Magazines v. Hadlee* CA, 24 October 1996, CA 74/96. See also *Charleston v News Group Newspapers* [1995] 2 AC 65, per Lord Bridge at 71-2.

<sup>35</sup> *Charleston v News Group Newspapers* [1995] 2 AC 65; [1995] 2 All ER 313. Under this doctrine,

surroundings and the overall style of a publication may be significant in deciding how words in it are likely to be understood by readers. An article that seems inoffensive by itself may assume a defamatory meaning when read in conjunction with other articles or news items, whether in the same newspaper or in earlier or even (possibly) later issues of the newspaper,<sup>36</sup> or within a television broadcast, and a later one, from the same broadcaster or otherwise.

### 1.6 *Publication and repetition*

The chain of publication rule applies. If a defamatory statement appears in a newspaper, all those concerned with the publication are liable—the newspaper company, the editor, the reporter, even the subeditors and typesetter. Similar principles apply to radio and television companies even though some aspects of broadcasting have no real equivalent in the newspaper world. Yet even in relation to the live interview and ‘talkback show’, where there is always the risk that the interviewee, without any involvement on the part of the broadcaster, may make an impromptu remark that is defamatory of some person, the broadcasting station will normally be held liable.<sup>37</sup> Furthermore, liability can attach to repetition. As the news media can be liable for repeating the words of speakers, so they can also be liable for repeating defamatory words that other newspapers or broadcasting stations have used.<sup>38</sup>

### 1.7 *The internet*

There is no doubt that defamation can occur via the internet in New Zealand, based on ordinary principles. It has been held that the fact that the defamation appeared in ‘cyberspace’ makes no difference to the application of defamation law.<sup>39</sup> It has also been held in a striking-out action that references to a website in a defamatory article are sufficient communication of the defamatory contents of the website so as to constitute publication also of the contents of the website.<sup>40</sup> The question of the liability of Internet Service Providers (ISPs) is yet to be

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words used elsewhere in an article may cancel out, or act as the ‘antidote’ to the ‘bane’ of defamatory words.

<sup>36</sup> See *Pilcher v Knowles* (1900) 19 NZLR 368; *Simons Proprietary Ltd v Riddell* [1941] NZLR 913, and *Ballantyne v Television New Zealand Ltd* [1992] 3 NZLR 455.

<sup>37</sup> *Russell v Radio i Ltd*, SC Auckland, A 590/74 (1976); *Australian Broadcasting Corporation v Comalco Ltd* (1986) 68 ALR 259. The Australian defence of innocent dissemination where the publisher can show that it was a mere conduit, (*Thompson v ACTV* (1996) 141 ALR 1), is unlikely to be of much assistance to either newspapers or broadcasters. New Zealand has a statutory defence of innocent dissemination in s 21 of the Act, but this mirrors the common law and is limited in application to parties akin to processors and printers.

<sup>38</sup> *Simunovich Fisheries Ltd v Television NZ Ltd* [2008] NZCA 350, [74], [94].

<sup>39</sup> *O’Brien v Brown* [2001] DCR 1065, ‘...I know of no forum in which an individual has the freedom to say what he likes and in any manner he wishes about another individual citizen with immunity from suit for all consequences. Merely because the publication is being made to cyberspace does not alter this.’ per Judge Ross at 1074.

<sup>40</sup> *International Telephone Link Pty Ltd v IDG Communications Ltd* H C Auckland, 20 February 1998, CP 344/97.

addressed in New Zealand. It is unclear whether English cases like *Bunt v Tilley*,<sup>41</sup> which held that an ISP was not a publisher if it performed no more than a passive role in facilitating postings on the internet, will apply in New Zealand, although it appears the courts are inclined to focus on the existence of knowledge to determine liability for publication on websites.<sup>42</sup> The Australian case *Dow Jones v Gutnick*,<sup>43</sup> establishing that the place of downloading will be the place where defamation may occur, may also have application,<sup>44</sup> as may the English *Loutchansky* decisions<sup>45</sup> which confirmed that multiple publications can arise from initial publication on the internet under the ‘multiple publication’ rule.<sup>46</sup> Therefore, subsequent occasions upon which a website is accessed potentially give rise to separate causes of action, each with an individual limitation period.

### 1.8 Defamation and negligence

New Zealand courts hold steady in cases involving media defendants in refusing to adopt the principle in the English case *Spring v Guardian Assurance*,<sup>47</sup> that a negligence action can be used to protect reputation. There have been a number of unsuccessful attempts to persuade the Court of Appeal to recognise a duty based on negligence which would bind the media.<sup>48</sup>

### 1.9 Defences

As to defences, the plaintiff will not succeed in a defamation action if the defendant can show that he or she has a recognised defence. In New Zealand, there is a form of absolute privilege which applies to those taking part in court proceedings,<sup>49</sup> and to statements made in parliament. The latter is being cut back somewhat in a manner which has made it quite risky for members of parliament to give interviews about statements they have made in the House.<sup>50</sup> However, the media’s privilege defences are not absolute but conditional.

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<sup>41</sup> [2006] EMLR 18.

<sup>42</sup> *Sadiq v Baycorp (NZ) Ltd*, Unreported, High Court, Auckland, CIV-2007-404-6421, 31 March 2008. Copyright law now deals with such liability by use of a notice and take-down scheme: see the Copyright (New Technologies) Amendment Act 2008, ss 92A-92D.

<sup>43</sup> 194 ALR 433.

<sup>44</sup> *Nationwide News Pty v the University of Newlands and Forrester*, Unreported, CA, 202/04, 9 December 2005; *Solicitor-General v Siemer*, Unreported, High Court Auckland, CIV 2008 404 472, 8 July 2008, at [70].

<sup>45</sup> *Loutchansky v Times Newspapers Ltd* (Nos 4 and 5) *Loutchansky v Times Newspapers Ltd* (Nos 2, 3 and 5) [2002] QB 783.

<sup>46</sup> *Sadiq v Baycorp (NZ) Ltd*, Unreported, High Court, Auckland, CIV-2007-404-6421, 31 March 2008.

<sup>47</sup> [1995] 2 AC 296.

<sup>48</sup> *Midland Metals Overseas Pty Ltd v The Christchurch Press Company*[2002] 2 NZLR 289, *King v TV3 Network Services* Unreported, Court of Appeal, CA221/02, 14 October 2003.

<sup>49</sup> *Rawlinson v Oliver* [1995] NZFLR 481.

<sup>50</sup> *Jennings v Buchanan* [2004] EMLR 22; [2005] 2 NZLR 577. The Privileges Committee of Parliament recommended amendment to the Legislature Act to make it clear that no criminal or civil liability will be

### 1.9.1 *Qualified privilege*

The media's privilege to report statements is a qualified privilege only. There exist extremely useful forms of statutory qualified privilege, but although common law qualified privilege also applies,<sup>51</sup> it is usually defeated by excess publication on the part of media defendants. The most profound development in recent years in relation to defences which are of use to the media has been the appearance of an extended form of qualified privilege applying to political statements which are published generally. In *Lange v Atkinson*,<sup>52</sup> it was held that the wider New Zealand public have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government. A proper interest only exists, however, in statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities. The width of the identified public concern justifies the acceptable extent of publication.

There have been contemporaneous developments in the United Kingdom and Australia,<sup>53</sup> where forms of political discussion published generally are now protected although this is generally conditional upon some form of media responsibility in relation to investigation and publication of the story.<sup>54</sup> Although the New Zealand defence did not come with a code of media responsibility, our courts have been developing their own idea of a responsible defendant based on the idea that qualified privilege is not a licence to be irresponsible. So far, the method by which this is done is in judicial application of s 19 of the Defamation Act, which provides that all forms of qualified privilege will be lost if the defendant was motivated by ill will or took advantage of the occasion of publication.

The motives of the publisher and whether the publisher had a genuine belief in the truth of the statement can now come under scrutiny. The Court of Appeal stated in *Lange* that lack of evidence of a genuine belief in truth may support an inference that no such belief existed. Furthermore, recklessness or indifference to the truth goes to genuine belief also. Carelessness

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incurred as a result of endorsement, adoption or affirmation of statements made under parliamentary privilege where the statement would not, but for the proceedings in Parliament, give rise to the civil or criminal liability. The government announced that the change would be made, but it was never passed into law: see P A Joseph, *Constitutional and Administrative Law in New Zealand*, (3<sup>rd</sup> ed, 2007), 427-430.

<sup>51</sup> *Adam v Ward* [1917] AC 309 at 334 per Lord Atkinson.

<sup>52</sup> [1998] 3 NZLR 424, [2000] 1 NZLR 257, [2000] 3 NZLR 385.

<sup>53</sup> *Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818, 835; *Reynolds v Times Newspapers Ltd*, [1998] 3 WLR 862.

alone will not be sufficient to negate the defence, but may support an assertion of a lack of belief or recklessness.<sup>55</sup> Therefore, the privilege may be lost if the defendant takes what in all the circumstances is a ‘cavalier’ approach to the truth of the statement. What is more, no consideration and insufficient consideration of the existence of truth or otherwise could also create an inference of misuse of the occasion.<sup>56</sup>

How far the New Zealand approach differs from that in the United Kingdom is examined further below.<sup>57</sup> In *Lillie and Reed v Newcastle City Council*<sup>58</sup> Eady J examined the New Zealand approach and concluded that it was very close to the notion of responsible journalism introduced by *Reynolds v Times Newspapers*<sup>59</sup> with its ten guidelines which were initially interpreted more like a code by the English courts.<sup>60</sup> However, he acknowledged that in *Loutchansky v Times Newspapers Ltd*<sup>61</sup> the English Court of Appeal described the New Zealand approach as having redefined the concept of actual malice to provide a stronger safeguard against abuse. Whether or not this is so, it is at least clear that the onus of proof is different in the different jurisdictions. In New Zealand, the plaintiff has to prove that the defendant was predominantly motivated by ill will or took improper advantage of the occasion of publication,<sup>62</sup> while in the United Kingdom, the defendant must discharge any onus as to responsibility.

It appears the courts in the United Kingdom,<sup>63</sup> and in Australia,<sup>64</sup> generously opened the gateway to the constitutional qualified privilege defences by interpreting their scope widely, but then limited application, at least initially, by developing defacto codes of journalistic

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<sup>54</sup> See the discussion below, Chapters Four and Nine.

<sup>55</sup> *Lange v Atkinson* [2000] 3 NZLR 385, 401.

<sup>56</sup> *Ibid.*

<sup>57</sup> See Chapters Four and Nine.

<sup>58</sup> [2002] EWHC 1600.

<sup>59</sup> [1998] 3 WLR 862.

<sup>60</sup> *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600, para 1293. The more recent English cases indicate a relaxation of the code-like requirements: see *Jameel v Wall Street Journal* [2007] EMLR 2 where the House of Lords confirmed that the question is still whether steps taken to gather the information were responsible and fair, but the 10 *Reynolds* criteria are treated as pointers only, not a series of hurdles to be overcome. The approach is a more media-friendly one. See Chapters Four and Nine below.

<sup>61</sup> (No 2) [2002] 1 All ER 652 .

<sup>62</sup> Defamation Act 1992, s 19(1) and s 41.

<sup>63</sup> See eg: *James Gilbert Ltd v Mirror Group Newspapers Ltd* [2000] EMLR 680, *Grobbelaar v News Group Newspapers* [2001] 2 All ER 437, [2002] UKHL 40, *GKR Karate v Yorkshire Post Ltd* [2001] EMLR 410, *Al-Fahig v HH Saudi Research & Marketing (UK) Ltd* [2002] EMLR 13, *Al Misnad v Azzaman Ltd* [2003] EWHC 1783 (QB), [2005] EMLR 7, *Galloway v Telegraph Group* [2004] EWHC 2786 (QB), *Galloway MP v The Telegraph Group Ltd* [2006] EWCA Civ 17 (25 January 2006), [2006] EMLR 11.

<sup>64</sup> See eg: *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* [2002] FCA 860, *Popovic v Herald & Weekly Times* (2003) 9 VR 1 (CA), *Brander v Ryan* (2000) SASC 446,

conduct.<sup>65</sup> This is in contrast to the New Zealand position, which on one view, appears to have developed the other way around. Although the privilege is generic in New Zealand, it is limited by the subject matter and by the requirement that the occasion of publication be appropriate.

Only one other case has so far reached the New Zealand Court of Appeal, where it was held that the defence covers statements about the activities of national (and possibly local) politicians but not those about the activities of employees of public bodies.<sup>66</sup> Further, it appears *Lange* will not apply to allegations of criminality, which are seen as serious enough to destroy the additionally required reciprocal relationship of duty/interest.<sup>67</sup> However, a recent High Court decision demonstrates the natural propensity for expansion of such defences, once recognised. In *Osmose New Zealand v Wakeling*<sup>68</sup> Harrison J apparently extended the coverage of the qualified privilege defence to matters of public interest. This leap is out of step with precedent and is discussed in more detail below.<sup>69</sup> Suffice to state in a summary way at this stage that for the media, *Lange v Atkinson* is a mixed blessing, as similar developments are proving to be in other jurisdictions, but the defence is tantalisingly open to expansion in the future.

### 1.9.2 Honest opinion

Formerly New Zealand had the useful defence of fair comment on a matter of public interest. The Defamation Act 1992 renamed it honest opinion and apparently swept away the need for the matter to be one of public interest.<sup>70</sup> The requirements now are that the opinion must be based on facts which are true, the opinion must obviously be opinion, and that it must clearly be genuine. The Act provides that a defence of honest opinion by a defendant who is the

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*Conservation Council of SA v Chapman* (2003) SASR 62 (FC) and *Cornwall v Rowan* (2004) 90 SASR 269 (FC).

<sup>65</sup> In the United Kingdom, it is unclear whether the defence is limited to the media. In non-media cases, the requirements of media responsibility may have no application or may require adjustment: see *Kearns v General Council of the Bar* [2003] 2 All ER 534, cf *Seaga v Harper* ([2008] 1 All ER 695).

<sup>66</sup> *Vickery v McLean* Unreported, Court of Appeal, CA 125-00, 20 November 2000. There are brief obiter comments about the defence in *Simunovich Fisheries Ltd v Television NZ Ltd* [2008] NZCA 350, [73].

<sup>67</sup> *Ibid.*

<sup>68</sup> [2007] 1 NZLR 841.

<sup>69</sup> See Chapter Nine below.

<sup>70</sup> Sir Ian McKay, who, as Mr I L McKay, was chairman of the Committee on Defamation that produced the report leading to the new Act, has written: 'Under the statutory defence of honest opinion, however, there is now no requirement that the opinion be a matter of public interest.': 10 *The Laws of New Zealand*, para 133, at 99. It does seem rather remarkable that such a fundamental requirement would be swept away by a side-wind, due to statutory omission. See also *Shadbolt v Independent News Media Ltd* HC Auckland, 7 February 1997, CP 207/95, *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590, 595, *Lange v Atkinson* [1998] 3 NZLR 424, 436, *Mitchell v Sprott* [2002] 1 NZLR 766. A requirement for the matter to be of public interest would mirror the

author of the material fails unless the defendant proves that the opinion expressed was the defendant's genuine opinion.<sup>71</sup> The defendant must now prove that the genuine belief existed and it was subjectively held by the defendant.

The Defamation Act 1992 also provides two new rules to cover the situation where the person sued is not the person who expressed the opinion, which often involves the media. It provides that a defence of honest opinion fails where the author was an employee or agent of the defendant unless the defendant proves that the opinion, in its context and in the circumstances of the publication, did not purport to be the opinion of the defendant; and the defendant believed that the opinion was the genuine opinion of the author.<sup>72</sup> This would cover, for example, articles written by journalists employed by a newspaper. The employer has to positively believe in genuineness, and it may not be easy to establish what the actual belief was.

The Act also provides that where the author was not an employee or agent of the defendant, the defence fails unless the defendant proves that the opinion, in its context and in the circumstances of the publication, did not purport to be the opinion of the defendant or of any employee or agent of the defendant; and the defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author.<sup>73</sup> This provision would cover the freelance writer or an ordinary member of the public writing a letter to the editor.

It is by no means clear how a newspaper or broadcaster will establish whether an opinion is its own, or show it held a genuine belief.<sup>74</sup> Clearly media defendants must adduce some evidence to satisfy the requirements, and calling the author would appear to be the normal approach. This will be possible where the author is an employee or agent of the defendant. Where an outside contributor is involved, his or her evidence will be useful to establish authorship if he or she can be tracked down.<sup>75</sup>

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political discussion defence as it appears to be developing: see 1.9.1 above.

<sup>71</sup> Section 10(1). See *Hubbard v Fourth Estate Holdings* Unreported, HCt, Auckland, Venning J CIV-2004-404—5152, 13 June 2005.

<sup>72</sup> Section 10(2)(a).

<sup>73</sup> Section 10(2)(b).

<sup>74</sup> See eg: *Shadbolt v Independent News Media Ltd* HC Auckland, 7 February 1997, CP 207/95; see also *Hubbard* above, n. 71.

<sup>75</sup> In *Vague v Banks* [2002] DCR 782, Judge McElrea made obiter comments on the liability of radio stations for comments of talk-back callers. The judge thought that it might not be too difficult for a radio station proprietor to establish that the station did not hold the opinions of callers to it and had no reasonable cause to believe the opinion was not genuinely held by the caller. However, he added the rider that the matter depends on

*Haines v Television New Zealand Ltd*<sup>76</sup> dealt with the issue of how it is to be decided that imputations are capable of being expressions of opinion. The plaintiff argued that only the imputations it had pleaded should be considered by the jury in answering this question. The Court of Appeal rejected this approach, stating that this could not be considered in a vacuum, devoid of the context in which the words arise. Therefore, the jury must look at the publication as a whole when determining whether the imputation it has found to arise was an allegation of fact, or an expression of opinion.<sup>77</sup> It is not confined to using only the meanings pleaded by the plaintiff.<sup>78</sup>

### 1.9.3 Truth

All a New Zealand plaintiff needs to do in a defamation action is to prove that disparaging statements have been made about him or her. The plaintiff does not have to prove that those statements are false, on the grounds that a person's character is assumed to be good unless the contrary is proved. But once a plaintiff has established that defamatory remarks were made, the defendant is then allowed, if he or she can, to prove that the remarks were true. If the defendant succeeds in this, he or she has a complete defence. The Defamation Act 1992 requires the defendant to plead particulars specifying which statements are statements of fact and the facts and circumstances relied on to show they are true.<sup>79</sup> As in other jurisdictions, it is sometimes very difficult for the media to prove the truth of statements, particularly where this may require the disclosure of sources,<sup>80</sup> or where media have been relying on the statements of others, rather than independent investigation.<sup>81</sup> Further, although the defendant

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the nature of the talk-back programme, the style and approach of the host and whether the callers were known cranks rather than those giving their genuine opinion.

<sup>76</sup> [2006] 2 NZLR 433.

<sup>77</sup> Ibid, [90]-[95].

<sup>78</sup> See also *Simunovich Fisheries Ltd v Television NZ Ltd* [2008] NZCA 350, [126].

<sup>79</sup> Section 38. See *Bunton v Kirton*, Unreported, High Court, Wellington, CP 249/98, 15 April 1999, *Wasan International Co Ltd v Lee* Unreported, High Court, Auckland, CIV 2003-404-4113, 26 May 2004, *Simunovich Fisheries Ltd v Television NZ Ltd* [2008] NZCA 350.

<sup>80</sup> In April 2005, the editor of the *Sunday Star Times* apologised for publishing a front-page story alleging that the New Zealand Intelligence Service had been involved in unlawful surveillance of Maori organisations, after an inquiry into the matter concluded that the allegations were not true. The sources used by the newspaper would not give evidence to the inquiry and became unavailable. The newspaper acknowledged that it should have been more cautious in presenting the claims but noted the difficulties it faced obtaining corroborating evidence. The editor suggested the publication had been used by unknown men for unknown reasons (ultimately, the newspaper found it was unsure whether the sources were in fact ex-SIS members, as they had previously held themselves out to be, and could not determine what the motives of the sources were): *Sunday Star Times*, 17 April 2005.

<sup>81</sup> *Simunovich Fisheries Ltd v Television NZ Ltd* [2008] NZCA 350, [82].

has to prove truth only on the balance of probabilities, the courts have tended to require a fairly high standard of accuracy.<sup>82</sup>

Recent skirmishes bearing on truth have produced a collection of judicial statements, many of them obiter and some contradictory, about the New Zealand approach to the meanings words bear in relation to truth. However, it now appears that the previously applied ‘pick and choose’ rule, whereby the plaintiff is able to select parts of a publication to sue on and thereby restrict the defendant from referring to the whole of the publication in order to prove truth,<sup>83</sup> has been relaxed.<sup>84</sup> The complications attending this development are yet to be fully identified.<sup>85</sup> As with the elimination of the public interest requirement in honest opinion, this change has been motivated by ambiguity in the statute.

New Zealand also took a strict approach to attempts to plead lesser meanings in the past.<sup>86</sup> This meant a defendant was prevented from alleging that the words bear a lesser defamatory meaning than that claimed by the plaintiff and attempting to prove the truth of that meaning. Following the passage of the Defamation Act, which was silent on this issue, attempts were made to argue that relaxation of the ‘pick and choose’ rule referred to above also supported relaxation of the approach to pleading lesser meanings. However, the Court of Appeal has confirmed the conservative approach, in *Haines v Television New Zealand Ltd*.<sup>87</sup> This is because, in contrast to the English courts,<sup>88</sup> New Zealand judges consider the defendant has the chance to argue that the words used do not bear the meaning contended for by the plaintiff, at the earlier point when the plaintiff argues before a judge that the words are capable of having certain imputations and attempts to prove to the trier of fact that the words actually have the imputations identified. The defendant therefore cannot attempt to suggest lesser meanings at the later stage when raising the defence of truth. The Court of Appeal stated that this approach is necessary because proving a lesser meaning leaves the plaintiff’s alleged meaning undefended, and a parallel enquiry is unhelpful and confusing for the jury.<sup>89</sup>

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<sup>82</sup> *Reeves v Saxon* CA, 17 December 1992, CA 134/89. The court has regard to the gravity of the case and the seriousness of the allegations, particularly where the allegation is one of fraud: at 16.

<sup>83</sup> *Templeton v Jones* [1984] 1 NZLR 448.

<sup>84</sup> *Haines v Television New Zealand Ltd* [2006] 2 NZLR 433, [45].

<sup>85</sup> See eg: *Ansley v Penn* Unreported, High Court, Christchurch, A36/98, 28 August 1998, 13, *Manning v TV3 Network Services Ltd* [2003] NZAR 328.

<sup>86</sup> *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234. See also *Isbey v Broadcasting Corporation of New Zealand* [1975] 1 NZLR 721.

<sup>87</sup> [2006] 2 NZLR 433. See also *Simunovich Fisheries Ltd v Television NZ Ltd* [2008] NZCA 350, [51].

<sup>88</sup> *Polly Peck (Holdings) plc v Trelford* [1986] QB 1000.

<sup>89</sup> *Haines*, n. 84 above, [56]-[59]. See also *Simunovich Fisheries Ltd v Television NZ Ltd* [2008] NZCA 350.

## 1.10 Remedies

### 1.10.1 Damages

Damages are the most common remedy sought in New Zealand defamation actions and the attempt in the Defamation Act to introduce other remedies designed to vindicate reputation has not altered this position. Damages are generally compensatory; however punitive damages are recoverable for defamatory statements where the defendant has acted in flagrant disregard of the rights of the plaintiff.<sup>90</sup> The supposed difference between aggravated and punitive damages is maintained, although some members of the judiciary have expressed the view that there are in reality only two categories: compensatory and punitive.<sup>91</sup> Punitive damages clearly remain in a separate category, whatever stance is taken to aggravated damages. The leading New Zealand case on punitive damages is still *Television New Zealand Ltd v Quinn*,<sup>92</sup> where the court emphasized that such damages were rare and have always been moderate.

As to levels of damages, the highest jury award to date was made in *Columbus v Independent News Auckland Ltd*<sup>93</sup> where the jury awarded a record \$675,000 in damages. More recently a plaintiff defamed in three articles was entitled to an award of \$125,000, while another, less well known and defamed in one article, was awarded \$25,000 by a High court judge,<sup>94</sup> and a High Court jury awarded sums of \$280,000, \$270,000 and \$230,000 to three former police officers against a newspaper publisher and its columnist for a column and article criticising the officers.<sup>95</sup> In the earlier *Quinn* case,<sup>96</sup> the Court of Appeal rejected with little discussion an argument put forward that levels of damages were so high in New Zealand as to have a chilling effect on freedom of expression, and was of the view that this jurisdiction has no real difficulty with unrealistic levels being claimed and awarded.<sup>97</sup> In the much more recent *Columbus*, the judge displayed confidence in the ability of juries to understand and carry out their roles. He referred to the nature of the jury, identifying their occupations to show they were truly representative and aware of the value of money and community values. The recent cases may indicate a movement upwards in levels; however it is really too soon to tell.

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<sup>90</sup> *Taylor v Beere* [1982] 1 NZLR 81, s 28 of the Defamation Act 1992.

<sup>91</sup> *Midlands Metal Overseas Pte Ltd v The Christchurch Press Ltd* [2002] NZLR 289, 302-303, per Tipping J.

<sup>92</sup> [1996] 3 NZLR 24. The proceedings were filed before the Defamation Act came into effect, but Lord Cooke of Thorndon noted that there was little difference between the old law and the 'flagrant disregard' test in the new Act: at 36.

<sup>93</sup> Unreported, 7 April 2000, HC, Auckland, CP 600/98.

<sup>94</sup> *Chinese Herald Ltd & ors v New Times Media Ltd & ors* [2004] 2 NZLR 749.

<sup>95</sup> *The Press*, 5 August 2004. The articles contained many factual errors and were unbalanced.

<sup>96</sup> See n. 92 above.

### 1.10.2 Injunction

Although uncommon, injunction to prevent publication is certainly a possible remedy in defamation cases in New Zealand. An injunction has been granted to stop the continued display of a defamatory poster<sup>98</sup> and of a billboard sign,<sup>99</sup> and to prevent publication in emails and on the internet.<sup>100</sup> But the question that arises most often is whether an interim injunction should be granted. Normally the principles laid down by the House of Lords in *American Cyanamid Co v Ethicon Ltd*,<sup>101</sup> which require the plaintiff to establish no more than that there is 'a serious question to be tried' and that the balance of convenience lies in favour of granting the interim injunction, would apply. However, cases subsequent to *American Cyanamid* in England,<sup>102</sup> Australia,<sup>103</sup> and New Zealand<sup>104</sup> have changed the approach in defamation cases. Hence the more restrictive rule laid down in *Bonnard v Perryman*<sup>105</sup> governs because of the importance of the value of freedom of speech.

Despite this rule of caution, in the late 1980s there was a number of unreported instances in New Zealand of interim injunctions being granted (sometimes ex parte), although they were discharged later. However, since the passing of the New Zealand Bill of Rights Act 1990, the Court of Appeal has emphasized that it is not part of the function of the court to act as a censor, and that the jurisdiction to restrain is exceptional.<sup>106</sup> The leading case currently is *TV3 Network Services Ltd v Fahey*,<sup>107</sup> where the Court of Appeal affirmed its view that an interim injunction will not be granted readily in a defamation case because of the need to preserve

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<sup>97</sup> Ibid at 33–4 per Cooke P, at 56–8 per McGechan J.

<sup>98</sup> *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488.

<sup>99</sup> *CB Norwood Distributors Ltd v Nottingham* HC Hamilton, 13 June 1995, CP 34/95.

<sup>100</sup> *Wells v Haden* [2008] DCR 859.

<sup>101</sup> [1975] AC 396.

<sup>102</sup> *Herbage v Pressdram Ltd* [1984] 1 WLR 1160. See also *Harakas v Baltic Exchange* [1982] 1 WLR 958; *Microdata Information Services v Rivendale and Cryne* [1991] FSR 681; *Kaye v Robertson* [1991] FSR 62; *Compaq Computers Corp. v Dell Computer Corp.* [1992] FSR 93.

<sup>103</sup> *Church of Scientology v Readers' Digest* [1980] 1 NSWLR 344; cf., however, *Chappell v TCN Channel Nine Pty Ltd* (1988) Aust. Tort Rep. 67, 743.

<sup>104</sup> *McSweeney v Berryman* [1980] 2 NZLR 168; *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4; *Ron West Motors Ltd v Broadcasting Corporation of NZ (No.2)* [1989] 3 NZLR 520. An interim injunction was granted, in a strong case, in *Boyle v Nield* HC Christchurch, 6 April 1989, CP 93/89. The injunction was made permanent, but wilful disregard resulted in a saga of contempt proceedings: *Boyle v Nield* HC Christchurch, 1 May 1992, CP 93/89. See also *CB Norwood Distributors v Nottingham* HC Hamilton, 13 June 1995, CP 34/95.

<sup>105</sup> [1891] 2 Ch 269. An interim injunction will not be granted in defamation cases where there is doubt about the required defamatory character of the words, or if the defendant intends to prove truth or rely on another recognised defence, unless the court is convinced the defence will fail.

<sup>106</sup> *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406.

<sup>107</sup> [1999] 2 NZLR 129, at 132.

freedom of expression. The jurisdiction to prevent publication is 'of a delicate nature' and 'ought only to be exercised in the clearest cases.'<sup>108</sup>

In *Hodgson v Siemer*,<sup>109</sup> the High Court granted a rare interim injunction to replace an ex parte interim injunction directing a billboard to be taken down and material to be removed from a website. The plaintiff was a receiver of a company in which the defendant was a managing director. During differences about the receivership, the defendant erected a billboard which mentioned the plaintiff and referred readers to a website which contained statements the plaintiff alleged were serious allegations of criminal conduct and scandalous and outrageous breaches of professional and ethical standards. An application for rescission of the injunction and for an amended injunction were heard together. The parties agreed that the threshold for injunction to restrain defamatory material is higher than that normally applied. Clear and compelling reasons are required and the circumstances must be exceptional.<sup>110</sup> The judge noted determination of the matter was fact-dependant, and, having surveyed those, concluded this was one of those exceptional cases where the Court could say there was no reasonable possibility of a defence of truth, honest opinion or qualified privilege succeeding.<sup>111</sup> However, Justice France noted her concern the injunction sought might be too broad. She did not think she could say the defences would fail in relation to statements that the plaintiff was not doing 'a good job' for example, or that comments to the effect that he had a 'dark side' or was a 'bully' should be restrained.<sup>112</sup> Declining to comment on submissions of both parties that where the higher defamation threshold applied, there was no need to also consider where the balance of convenience lay, the Court found that in any event, this favoured the grant of injunctive relief, as there was no particular damage to the defendant which flowed from restraint.<sup>113</sup> The ex parte order was rescinded and replaced with an interim order which prevented publication by the defendant of any information containing allegations of criminal or unethical conduct or as to improper personal enrichment on the part of the plaintiffs, and which directed that the defendants not reinstate the billboard (which had been recently taken down).<sup>114</sup>

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<sup>108</sup> Ibid.

<sup>109</sup> Unreported, High Court, Auckland, CIV 2005-404-1808, 5 May 2005.

<sup>110</sup> Unreported, High Court, Auckland, CIV 2005-404-1808, 5 May 2005, at [39], affirming *TV3 Network Services v Fahey*, above, n. 107.

<sup>111</sup> Ibid, [55]-[67].

<sup>112</sup> Ibid, [60]-[62].

<sup>113</sup> Ibid, [68].

<sup>114</sup> Ibid, [83]. Appeal to the Court of Appeal failed: *Siemer & Anor v Ferrier Hodgson & Ors* CA87/05, 13 December 2005. In this long-running litigation, the defendant continued to display defamatory material on various websites, and is currently resisting a successful application by the Solicitor-General for committal to

This decision demonstrates that while the courts are reluctant to act as censors, they will do so where the facts do not support tenable defences. Where, as in *Siemer*, the allegations are of serious criminality, documentation suggesting a defence of truth or honest opinion must be substantively supportive, and it seems likely that qualified privilege will be not be available at all.<sup>115</sup> However, in terms of freedom of expression, it is heartening that even in one of these rare cases where censorship prevails, the courts take care to limit and control the eventual restraint order.

### 1.10.3 *Other remedies*

The Defamation Act 1992 provides for a number of other remedies intended to encourage a move away from the inexorable quest for damages. These allow the plaintiff to seek a recommendation from the court requiring the defendant to publish a correction of the matter that is the subject of the proceedings.<sup>116</sup> The recommendation may cover content, timing, and prominence of the correction.<sup>117</sup> Further, a plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.<sup>118</sup> The Act also provides that anyone who claims to have been defamed in a news medium may, within five working days of becoming aware of the publication, request the person responsible for the publication to publish a retraction or a reasonable reply in the same medium, with substantially similar prominence and without undue delay.<sup>119</sup>

### 1.11 *Summary*

This brief survey of New Zealand defamation law demonstrates that it has a rich content made up of both legislative provisions and the common law. On the face of it, many of the basics of our defamation law do appear to be plaintiff friendly – for example, the publication rule and the repetition rule. However, this is a rather simplistic view. Furthermore, the common law provides some flexibility to adapt and change within a changing political, cultural and social backdrop. Developments such as that arising from the *Lange* litigation show that the law is

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prison for contempt of court: *Solicitor-General v Siemer*, Unreported, High Court, Auckland, CIV 2008 404 472, 8 July 2008, and *Siemer v Solicitor-General* [2008] NZCA 369, [2008] NZCA 438.

<sup>115</sup> On the latter point, the Court followed the Court of Appeal in *Vickery v McLean* Unreported, CA 125/00, 20 November 2000, [18]-[19].

<sup>116</sup> Defamation Act, s. 26.

<sup>117</sup> *Ibid*, s 27.

<sup>118</sup> *Ibid*, s 4.

<sup>119</sup> *Ibid*, s 25.

not set in stone. Some changes have favoured the media, some have not. At the time the media survey was carried out, defamation was probably regarded as the branch of the law that the New Zealand media fear most. The media survey was an attempt to determine whether this fear was justified. However, before turning to the results of the survey, it is also necessary to outline the regulatory framework within which the New Zealand media must operate, and to determine patterns of media ownership, as these too, limit how and what the media may publish.

## 2. Media regulation in New Zealand

The New Zealand media landscape has changed its bedrock since the mid-1970's but the basic topography remains small and monopolistic. In 1974, Professor John Burrows described a regulatory framework which reflected 'a very effective attempt to keep control of New Zealand newspapers and broadcasting stations out of the hands of overseas interests'.<sup>120</sup> By 1990, such regulation had been repealed and the result appeared to be the very opposite. New Zealand had entered the era of the so-called 'New Zealand experiment'<sup>121</sup> during which it privatized and deregulated many of its communications (and other) markets and opened them up to competition, including foreign competition.<sup>122</sup> The New Zealand Government's policy of deregulation generally encompassed a light-handed approach with little or no industry-specific regulation. All special restrictions on overseas ownership of both newspapers and broadcasters were removed, allowing investment by overseas investors, with no regulation of cross-media ownership. Entry into these markets became regulated by the general law of competition as set out in the Commerce Act 1986.<sup>123</sup>

### 2.1 *Print media*

Regulation of the printed press in New Zealand currently derives from a number of disparate formal and informal sources. Although newspapers are no longer required to be registered, as stated, general competition laws have effect.<sup>124</sup> Newspapers are also subject to consumer

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<sup>120</sup> J F Burrows, *News Media Law in New Zealand* (1974), 377. Regulation took the form of the News Media Ownership Act 1965. Burrows cites from a speech of the then Minister of Justice, J R Hanan, who in presenting the Bill to parliament, expressed anxiety that overseas control could lead to the 'continuous and subtle slanting of news and comments': NZPD Vol cccxl v (1965) 3887: Ibid.

<sup>121</sup> J Farnsworth, 'Back from the Edge?' in Lees, Ralph & Brown, *Is Regulation Still an Option in a Digital Universe?* (2000), 161.

<sup>122</sup> See U J Cheer, *Laws NZ 'Media and Communication'*, Reissue 1, LexisNexis (2003).

<sup>123</sup> Ibid.

<sup>124</sup> Ibid, para 1.

protection legislation.<sup>125</sup> In common with broadcasters, the activities of the print media are subject to censorship laws.<sup>126</sup> The New Zealand Press Council administers a form of partial self-regulation of content based on a complaints procedure.<sup>127</sup> It is a purely voluntary organisation with no legislative backing and no legally enforceable punitive powers. The Press Council's own survey has recently confirmed that it is seen as biased, inconsistent, lacking in resources, and ineffective.<sup>128</sup> The number of complaints received by the Council remains steady - it receives between 75-85 complaints a year and adjudicates about half of them. Currently, the uphold rate appears to be fluctuating although it has yet to return to a low point achieved in 2001 of 8%. In 2003, 36% of the 52 adjudications released were upheld or part upheld, but this rate fell to 26% in 2004 and 19% in 2005/2006.<sup>129</sup> In 2007, the uphold rate returned to 30%.<sup>130</sup> This does not compare well with the Council's sister bodies. The Australian Press Council upheld in whole or part 42.1 % of its adjudications in 2006/2007.<sup>131</sup> The United Kingdom Press Complaints Commission upheld approximately 50% of its 2006/2007 adjudications.<sup>132</sup> It must be recognised that both those bodies carry out forms of mediation, in contrast to the New Zealand body, and therefore steer complaints away from the more formal process of adjudication.

The recent independent Press Council Review tried to address its difficulties.<sup>133</sup> The recommendations focussed on giving the Council more kudos and credibility but maintaining self-regulation. They include better resourcing, adoption of mediation and conciliation processes, a review of the statement of Principles, and a graduated system of publication sanctions. Self-regulation will always be susceptible to charges of bias. Any changes which result from the Review will have to be significant to overcome this basic vulnerability. Furthermore, as the print media is moving onto other platforms and is itself becoming part of

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<sup>125</sup> Under the Fair Trading Act 1986. However, the provisions of the Fair Trading Act relating to misleading and deceptive conduct and to false and misleading representations, do not generally apply to the publication of any information or matter in a newspaper by a newspaper publisher: Fair Trading Act 1986, s 15(1) and (2). The provisions relating to misleading and deceptive conduct and false or misleading representations are covered by ss 9 - 14. The immunity does not apply to the publication of advertisements: Ibid, s 15(1)(a). See U J Cheer, *Laws NZ 'Media and Communication'*, Reissue 1 LexisNexis (2003), para 7.

<sup>126</sup> Films, Videos and Publications Classification Act 1993.

<sup>127</sup> See U J Cheer, *Laws NZ 'Media and Communication'*, Reissue 1 (2003), paras 9-14, and [www.presscouncil.org.nz](http://www.presscouncil.org.nz)

<sup>128</sup> See *Review of the New Zealand Press Council*, Ian Barker and Lewis Evans, (NPA, EPMU, MPA, November 2007), Part VI.

<sup>129</sup> *Annual Report of the Press Council* (2006), 19.

<sup>130</sup> *Annual Report of the Press Council* (2007) 37.

<sup>131</sup> *Annual Report No. 31* (2007) Australian Press Council, 42.

<sup>132</sup> *The Review*, Press Complaints Commission 2007 (United Kingdom), 26.

<sup>133</sup> *Review of the New Zealand Press Council*, Ian Barker and Lewis Evans, NPA, EPMU, MPA, November 2007.

an anticipated state of ‘convergence’ with other media, any reform of the Press Council may well be taken over by the major review of broadcasting I go on to discuss below.

## 2.2 Broadcasting

Regulation of broadcasting is also minimal. As for print media, general competition laws have effect, and so does consumer protection legislation.<sup>134</sup> While it has backed away from broadcast regulation, the New Zealand Government maintains social objectives in the sector by preserving special access to radio and television for particular groups in the community, in particular for non-commercial broadcasters.<sup>135</sup> Further social objectives are pursued by Government regulation of the content of broadcasting. The main form of regulation used in this regard is the Broadcasting Act 1989. The Act sets out responsibilities of broadcasters for programme standards, and provides for a Broadcasting Standards Authority (BSA) to oversee and enforce the standards regime.<sup>136</sup> The Broadcasting Standards Authority’s regulatory work is based on a set of Broadcasting Codes agreed between government and broadcasters. The codes focus on standards which govern balance and fairness, accuracy, privacy, children’s interests, good taste and decency, violence and denigration and discrimination. Uphold rates for viewer complaints have tended to hover around 25% but recently this has fluctuated. In the year to June 2006, the BSA issued 156 decisions. Of these, 12 percent were upheld in full or in part. In the year to June 2007, that rate increased to 22 percent.<sup>137</sup> Most complaints are usually about good taste and decency, or fairness and accuracy, but the former are upheld less and less often now.<sup>138</sup>

The Broadcasting Act 1989 also established the Broadcasting Commission, an independent body which operates under the name New Zealand On Air.<sup>139</sup> Its functions include reflecting and developing New Zealand identity and culture and it fulfils its requirements by providing funds for broadcasting, and for production and archiving of local programming.<sup>140</sup> Importantly, no Minister of the Crown may give directions to the state broadcasters TVNZ

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<sup>134</sup> See U J Cheer, *Laws NZ ‘Media and Communication’*, Reissue 1 (2003), paras 79, 136. General censorship laws have no application to broadcasting: see s 2 Films, Videos and Publications Classification Act 1993, and *re Baise-Moi* [2005] NZAR 214.

<sup>135</sup> See U J Cheer, *Laws NZ ‘Media and Communication’*, Reissue 1 (2003), para 78.

<sup>136</sup> *Ibid.* See Broadcasting Act 1989, s 4 and [www.bsa.govt.nz](http://www.bsa.govt.nz)

<sup>137</sup> *BSA Annual Report 2007*, 11.

<sup>138</sup> *Ibid.*, 10.

<sup>139</sup> Broadcasting Act 1989, Part 4 (ss 35-53).

<sup>140</sup> *Ibid.*, s 36.

and RNZ, as to particular programmes, news gathering and responsibility for programme standards.<sup>141</sup>

Following a general election in 2000, the coalition government reformed the broadcast content requirements of its state broadcasters, TVNZ, which had no Charter, and Radio New Zealand, which had a legislated Charter set out in the Radio New Zealand Act 1995.<sup>142</sup> As part of restructuring TVNZ, it approved a Charter containing a broad statement of objectives intended to govern the broadcast content of TVNZ, which became law in the Television New Zealand Act 2003.<sup>143</sup> TVNZ is obliged to fulfil Charter functions<sup>144</sup> while maintaining its commercial performance. Parliament must review the Charter at least every five years and the first review, to be carried out by the Commerce Select Committee, began in February 2008.<sup>145</sup> However, the matter of the Charter, and its funding and functions, remain intensely political issues. In May 2008, the Minister for Broadcasting, Trevor Mallard, announced changes to administration of Charter funding following criticism about lack of transparency in TVNZ's reporting on its use of the public funds. This appeared to pre-empt the review referred to above.<sup>146</sup>

The announcement by the Minister also appears to pre-empt the findings of a further, long-term major review of broadcasting, telecommunications and internet media being carried out by the Ministry of Culture and Heritage.<sup>147</sup> This review has been prompted by the rapid technological changes taking place in broadcasting, producing forms of communication and entertainment which look like broadcasting, but which do not behave like broadcasting as we have known it. Digital broadcasting, for example, provides platforms outside of conventional television and radio.<sup>148</sup> Many in the media now look to a magic moment called 'convergence' when the new technologies and old forms of broadcasting will miraculously meld together. Meanwhile, some of the new platforms are not currently subject to regulation, reviving

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<sup>141</sup> Television New Zealand Act 2003, s 28 and Radio New Zealand Act 1995, s 13.

<sup>142</sup> See [www.executive.govt.nz/minister/hobbs/index.html](http://www.executive.govt.nz/minister/hobbs/index.html) Charter for TVNZ, Press Release, 1 May 2001. See also U J Cheer, *Laws NZ 'Media and Communication'*, Reissue 1 (2003), para 134.

<sup>143</sup> Television New Zealand Act 2003, s 12(2).

<sup>144</sup> Which are focussed on reflecting and maintaining a New Zealand identity and culture.

<sup>145</sup> Press Release: New Zealand Government, 12 December 2007,

[www.beehive.govt.nz/release/review+tvnz+charter+goes+next+step](http://www.beehive.govt.nz/release/review+tvnz+charter+goes+next+step)

<sup>146</sup> See Peter Thompson, *TVNZ's Charter: expectations and accountability*, Scoop 28 May 2008, [www.scoop.co.nz/stories/print.html?path=HL0805/S00378.htm](http://www.scoop.co.nz/stories/print.html?path=HL0805/S00378.htm) who suggests that an independent regulatory body be established to oversee the use of public broadcasting money.

<sup>147</sup> See Broadcasting Programme of Action Project, Ministry of Culture and Heritage, <http://www.mch.govt.nz/projects/broadcasting/index.html>

<sup>148</sup> See Regulatory Review of Digital Broadcasting, Ministry of Culture and Heritage, <http://www.mch.govt.nz/publications/digital-tv/index.html>

concerns about content and access. The government review is considering what can be regulated, what should be regulated, and what part existing regulation should play in the new landscape. In September 2008, the Government announced the second phase of its review programme, part of which involves an examination of current regulation of broadcasting. Two options will be considered – a single umbrella regulatory body, (like the Office of Communication (OFCOM), an independent regulator of the United Kingdom communications industries, set up by statute),<sup>149</sup> or two converged regulators, one of which would deal with content issues and the other with network or delivery issues. Officials will report back to Cabinet on this phase of the review by 31 August 2009.<sup>150</sup>

### 2.3 Summary

Currently, media industries operate world-wide in a state of constant and major technological change. This has provoked and revived government interest in regulation of media content generally. Partly this interest relates to damage which can result from publication of information, and how complaints about such damage are dealt with. New forms of regulation will therefore continue to impact on the incidence and outcome of defamation claims. The self-regulation of most of the print media administered by the Press Council, and the mixed form of regulation administered by the Broadcasting Standards Authority are intended to provide easily accessible, informal processes whereby members of the public can complain after publication or broadcast takes place. Those processes may therefore pre-empt formal civil litigation, or take the heat out of a dispute so that threatened court proceedings never eventuate. Therefore, as important background, media respondents to the survey were asked what they thought of the current media complaints systems, and their responses are detailed and analysed below.<sup>151</sup>

In preparing for this study, I also surmised that a related background issue – that of media ownership in New Zealand, required some investigation, in order to determine whether it impacted on the question of any chilling effect of New Zealand's defamation laws. I turn now to investigate media ownership in this country.

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<sup>149</sup> See [www.ofcom.org.uk](http://www.ofcom.org.uk)

<sup>150</sup> Press Release: New Zealand Government, 23 September 2008.

<sup>151</sup> See Chapter Five, 2.5.

### 3. Media ownership in New Zealand

Burrows noted in 1990 that the centralisation of newspaper ownership in New Zealand was a matter of concern to some, and that two large companies controlled the majority of daily and weekly print publications. This was seen as a potential threat to editorial independence, and to raise the possibility of influence over advertising and business news, though that commentator concluded that there was no evidence this was occurring in practice at that time.<sup>152</sup> These concerns do, however, remain, as will be evident from the discussion below.

#### 3.1 *The media landscape in 2001*

Following the deregulation referred to above,<sup>153</sup> by 2001 when the media survey which is the subject of this paper was carried out, New Zealand media ownership had shifted even more tectonically to admit significant foreign interests and to embrace market liberalism, and on the surface, assorted forms of monopoly control appeared to persist. One commentator has noted that every major media company in the private sector in New Zealand was at that time foreign-owned, ‘a situation without parallel in the Western world, which no doubt flows from the fact that there are no legal restrictions...’<sup>154</sup> Another noted that two companies dominated, INL (in which Rupert Murdoch’s News Limited holding was then just over 49 percent)<sup>155</sup> and Wilson & Horton, (originally a New Zealand-owned company but eventually taken over by Independent News and Media PLC, the Dublin-based company of media magnate, Tony O’Reilly) between them owning 81.9 percent of daily press circulation of provincial newspapers and 92.8 percent of metropolitan readership.<sup>156</sup> In broadcasting, the only real commercial threat outside the state broadcasters, (Radio New Zealand in radio, and TVNZ in television), was an acquisitive Canadian competitor, CanWestGlobal. The remaining significant player in 2001 was made up of the publishing and broadcasting interests of Australian media magnate, Kerry Packer, who owned Prime Television and Australian Consolidated Press (ACP), the largest single publisher of magazines in New Zealand with over 17 titles.

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<sup>152</sup> J F Burrows, *News Media Law in New Zealand* (1990), 413.

<sup>153</sup> See 2. above.

<sup>154</sup> Paul Norris, ‘Media Ownership in New Zealand’, *What’s News? Reclaiming journalism in New Zealand* (2002, Dunmore Press, Eds Judy McGregor and Margie Comrie) 36.

<sup>155</sup> In 2001, New Zealand’s dominant pay television company, Sky Network Television Ltd, also became an INL subsidiary.

<sup>156</sup> Bill Rosenberg ‘News media ownership: How New Zealand is foreign dominated’ (2002) 8 *Pacific Journalism Review*, 59.

This over-simplified snapshot of the main participants in the New Zealand media market in 2001, the year the media survey was carried out, reveals a picture of significant foreign ownership. This was augmented by considerable cross-pollination of promotional agreements in the private sector. The print media was a competitive market in which players came and went. Most newspapers were foreign-owned, although there were some independently locally-owned newspapers, including the *Otago Daily Times*<sup>157</sup> and eight provincial dailies. The state-owned broadcasting enterprises, in television at least, still enjoyed a majority of audience-share due in large part to the historical state monopoly. However, they faced an uncertain future dependent on the broadcasting policies of future governments, the shape of technologies to come, and the vigour and tenacity of private rivals who stood ready to seize audience share while strongly resisting any government regulation of their content. Radio was a mix of public and privately-owned stations, with the New Zealand population having access to the highest number of stations per person in the world.<sup>158</sup> This sector also featured continual consolidation of ownership in foreign hands.

### 3.2 *Ownership in the intervening years*

That consolidation continued from 2001 to the present. In 2003, Australian company John Fairfax Holdings acquired about 70% of New Zealand's newspapers, magazines and sporting publications by buying the INL stable.<sup>159</sup> APN News and Media, also an Australian company, took over the Wilson & Horton concerns in 2001, and owned them through a New Zealand subsidiary.<sup>160</sup> The companies competed by consolidating publications. For example, in Auckland, where Fairfax dominated the community newspaper market, APN closed down a number of its own community newspapers and launched a single publication, *the Auckland*.<sup>161</sup> Fairfax closed the Wellington paper, the *Evening Post* and renamed its previous rival, the *Dominion*, the *Dominion Post*, because of a fall in advertising revenue.<sup>162</sup>

In television, the battle over audience-share intensified, in particular over ratings for real news, with Prime Television 'poaching' some of TVNZ's celebrity broadcast announcers and

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<sup>157</sup> Owned by Allied Press, belonging to the local Smith family.

<sup>158</sup> Norris, n. 154 above, 39.

<sup>159</sup> Bill Rosenberg, 'News media ownership in New Zealand', <http://canterbury.cyberplace.org.nz/community/CAFCA/publications/miscellaneous/mediaown.pdf> (26 February 2004), 2.

<sup>160</sup> Ibid, 3.

<sup>161</sup> Ibid, 4.

<sup>162</sup> Ibid, 2.

unveiling plans to offer substantive news programmes.<sup>163</sup> The CanWest company TV3 continued to announce the capture of some TVNZ audience share among the younger age group. Some small regional stations also existed.<sup>164</sup> Sky dominated the pay-television sector, having entered into platform agreements with all the terrestrial broadcasters.

In radio, two foreign-owned groups, RadioWorks (owned by CanWest), and the Radio Network (a subsidiary of Australian Radio Network, Australia's largest radio broadcaster, a joint venture between APN News and Media and Clear Channel International), dominated, although there were a handful of independent stations, as well as non-profit, community access radio broadcasters.

### 3.3 Contemporary ownership patterns

In 2008, these patterns of ownership appear to have become indelible. If anything, the consolidation of foreign-owned media interests has intensified, in the sense that the sector remains largely owned off-shore, but the make-up of those off-shore interests is constantly changing. One notable development is that new players have entered the market, in the shape of companies which have no experience in communications, but which seek to acquire media companies as part of investment portfolios.

Rosenberg now reports that four overseas-owned companies currently dominate the New Zealand news media.<sup>165</sup> The Australian company, John Fairfax Holdings Ltd and the Australian registered company<sup>166</sup> APN News and Media (ANM) own 86.9% of audited daily press circulation of provincial newspapers and 92.2% of metropolitan readership between them.<sup>167</sup> Both companies are increasing their already extensive ownership of community newspapers and magazines. ANM also has substantial radio holdings as it owns one of the two largest radio networks, but its rival is Mediaworks which owns the other. Mediaworks is now owned by an Australian private equity corporation called Ironbridge. Mediaworks also owns the private television channels, TV3 and C4. The other significant television

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<sup>163</sup> See [www.scoop.co.nz](http://www.scoop.co.nz) 2 November 2004.

<sup>164</sup> See Rosenberg, 'News media ownership in New Zealand', <http://canterbury.cyberplace.org.nz/community/CAFCA/publications/Miscellaneous/mediaown.pdf> (15 October 2007), 7.

<sup>165</sup> Bill Rosenberg, *News Media Ownership in New Zealand*, <http://canterbury.cyberplace.org.nz/community/CAFCA/publications/Miscellaneous/mediaown.pdf>, (13 September 2008), 1.

<sup>166</sup> Although still controlled by Irish Independent News and Media (INM) and the O'Reilly family.

<sup>167</sup> Ibid. Provincial newspapers are described as those with circulation under 25,000, while metropolitans are those with more than 25,000 circulation.

broadcasters are still the state broadcaster TVNZ, made up of TVOne and TV2, and News Corporation, which is US-based, controlled by Rupert Murdoch, and the third-largest media conglomerate in the world,<sup>168</sup> and has a monopoly on pay television through Sky Television, but also owns the free-to-air channel, Prime Television. This media make-up mirrors overseas patterns of ownership.<sup>169</sup>

Around these flagships, a few independents hover. In print, Allied Press, owned by the Smith family, still owns the largest independent daily, the *Otago Daily Times*, and some smaller South Island dailies and community newspapers.<sup>170</sup> Other southland dailies, such as the *Ashburton Guardian*, are locally owned still. The national financial newspaper the *National Business Review*, having been in and out of the Fairfax stable, is owned by New Zealander, Barry Colman's Liberty Press, which has a subsidiary, Fourth Estate. Even that press has sold off some of its titles to Australian interests over the years. In television, Maori television, a state owned channel launched in politically charged circumstances in 2004, has surprised and impressed audiences with its depth and breadth of local content.<sup>171</sup> Regional television stations come and go. Two which stand out are Alt TV which started as an alternative music channel and broadcasts free to air in Auckland, but also on the Sky network,<sup>172</sup> and Triangle Television, originally Auckland-based but now broadcasting in Wellington as well, a self-described public broadcaster, allocating air-time on a first-come, first-served basis, which appears to be a genuine attempt at community television.<sup>173</sup>

The success of these independents is something of a lottery, because many of them lack a stable financial base, and they struggle to attract and retain sufficient advertising to sustain each operation. Even smaller foreign-owned ventures face difficulties. For example, in Christchurch, the New Zealand Media Group, owned by American businessman Jim

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<sup>168</sup> Ibid, 32.

<sup>169</sup> In his book, *The New Media Monopoly*, (Beacon Press, 2004) Ben H. Bagdikian outlines how the number of corporations controlling most of America's daily newspapers, magazines, radio and television stations, book publishers, and movie companies has dwindled from fifty to ten to five. In the United Kingdom, the House of Lords Communications Committee reported recently that the national newspaper industry is run by eight companies, radio news is dominated by the BBC, and four companies dominate the commercial radio market. National television news is dominated by three companies: House of Lords Communications Committee – *First Report*, 11 June 2008, Chapter 4, [www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12202.htm](http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12202.htm)

<sup>170</sup> Ibid, 7.

<sup>171</sup> Ibid, 16.

<sup>172</sup> Ibid, 18. This alternative channel broadcasts a Naked News programme (so far, strangely, using only women presenters), but has also broken the odd 'scoop': See Alt TV Video: *Let's Be Frank - Phil Goff*: <http://www.scoop.co.nz/stories/HL0805/S00278.htm>, an interview in which a Government MP apparently admits his party might lose the 2008 election.

<sup>173</sup> Rosenberg, see n. 165 above, 19.

McCotter, closed the tabloid newspaper, the *Citizen Today* a year after it was launched in 2001. The resulting redundancies appeared to surprise many of the journalists involved. At the same time, NZMG was reported to be consolidating its New Zealand television holdings, by buying and amalgamating the assets of regional television stations. This resulted in two South Island cities having no local television news programmes.<sup>174</sup>

This brief survey would be incomplete without mention of new media. Digital television and the internet as information and entertainment platforms were tantalising unknowns at the time I carried out the media survey in 2001. Now it is accepted they will change the face of the communications industry as we know it. Digital broadcasting, using terrestrial and satellite services, is expected to replace traditional analogue broadcasting within the next eight years.<sup>175</sup> A consortium of free-to-air broadcasters, including TVNZ, MediaWorks, Maori TV, Trackside and Radio New Zealand, agreed in 2006 to build a digital transmission network, largely in competition with Sky which currently dominates the pay-tv sector in this country. Transmission began in 2007 and by 2008, Freeview<sup>176</sup> presented 13 television channels, including TVNZ 6, (offering advertising-free programming with between 50% and 70% local content divided into three distinct services targeting preschooler, families, and adult viewers), TVNZ 7, (a commercial-free “factual” channel made up of news and a mixture of documentaries both new and historical, and sports and current affairs programmes), Stratos Television (providing regional, ethnic and educational television programming from New Zealand and around the world); Parliament TV (which broadcasts the full unedited proceedings of Parliament, approximately 17.5 hours per week live and unedited when the House is sitting) and New Zealand's first 100 per cent Maori language television channel (Te Reo, aimed at fluent Maori speakers and Maori language learners).<sup>177</sup> Three radio broadcasters are also available - Radio New Zealand in its national and concert formats and a dance music station called George. Currently, although essentially commercial-free, the service is only available to those who purchase a set-top box decoder<sup>178</sup> with additional costs for those who also want high definition television. It is clear that the eventual analogue switch-off will truly be akin to the earlier tumultuous arrival of television in the late 1950's.<sup>179</sup>

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<sup>174</sup> *The Press* 13 July 2002, D5.

<sup>175</sup> Broadcasting Minister, Steve Maharey, Press statement, 15 June 2006.

<sup>176</sup> <http://freeviewnz.tv/>

<sup>177</sup> [http://freeviewnz.tv/index.php?section\\_id=5#cue](http://freeviewnz.tv/index.php?section_id=5#cue)

<sup>178</sup> At a price of about \$200 for those who already have a satellite dish, with dish installation requiring a further \$800 investment: see Rosenberg, n. 165 above, 15-16.

<sup>179</sup> See *Voice and Vision: A History of New Zealand Broadcasting*, Dr Patrick Day, (AUP, 2000).

Originally a technology developed on a military and then a not-for-profit basis, the internet appears currently to embrace competing aims of setting information free, and the discovery and exploitation of seemingly endless commercial potential. Media websites began in a bandwagon fashion – as alternative means of getting conventional material published.<sup>180</sup> Now they have a life of their own and no media outlet would be without a proliferation of websites for all their publications. Thus every newspaper now has its own website or link to a stable website providing text, audio and video material.<sup>181</sup> This has produced a blurring of mainstream media functions. For example, it is now commonplace for newspapers to break stories using video before television news programmes can get to air. Rosenberg notes that media companies have now moved beyond news, advertising and information into online auctions, job advertising, dating services, holiday accommodation, house and car sales and managed funds.<sup>182</sup> It remains true, however, that the proliferation of outlets and apparent explosion of information now being made available, is paid for, as with conventional media, by advertising.

The first media websites were very simple affairs compared to the contemporary busy visual feasts containing pop-up ads from which there is no easy escape, games, trivia contests, celebrity stories and on-line surveys, which have replaced them today. In many ways, it is harder to find the real news amidst all these ‘noisy’ distractions. Rosenberg suggests the role of the internet in providing alternative news sources has been exaggerated.<sup>183</sup> He does note, however, the emergence of internet-only media services, such as Scoop,<sup>184</sup> ‘disintermediated’ news agencies which literally publish almost anything released as news, and in that sense, are perhaps true promoters of a marketplace of ideas. The internet has also facilitated a significant increase in ‘citizen journalism’, where ordinary folk voluntarily contribute recordings of newsworthy events, such as cell-phone photography or video, or are asked to contribute such material. This had produced mixed results – for example, hoaxing can be a common feature.<sup>185</sup>

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<sup>180</sup> Rosenberg above n. 165.

<sup>181</sup> See eg: <http://www.mediaworks.co.nz/default.aspx?flashEnabled=true>, or the Fairfax website, [www.stuff.co.nz](http://www.stuff.co.nz) and the New Zealand Herald Website, <http://www.nzherald.co.nz/>,

<sup>182</sup> Rosenberg, above n. 165, 27.

<sup>183</sup> Ibid, 29. See also House of Lords Communications Committee – *First Report*, 11 June 2008, Chapter 2, para 102, [www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12202.htm](http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12202.htm)

<sup>184</sup> [www.scoop.co.nz](http://www.scoop.co.nz)

<sup>185</sup> See eg: Ian Mayes, ‘The Cautionary tale of a citizen hoaxer’, *Guardian* 27 March 2006, where Mayes recounts the story of how Sky television broadcast images of a heath fire in Dorset, UK, showing elk silhouetted against the flames. The footage was later also used by the *Guardian* as a still image. Sky was also taken in recently by hoaxed photos of the London Marathon depicting Death and other colourful characters taking part:

This paper is not about the growth of new media, and so the fascinating question of its impact on trust, truth and on defamation law must remain for another day. I simply note here that these developments confirm a potent capacity of the media to reinvent itself. In that sense, it is at least clear that new media bring new forms of speech and publication, speech which can harm reputation, and so the question of the chilling effect of defamation laws remains germane.

### 3.4 Conclusion on media ownership in New Zealand

The New Zealand population is a small one and huge fortunes are not to be made on the back of purely New Zealand media empires. But because there is no restriction on foreign ownership or on cross-media ownership, any person with money to buy into or set up a media business may do so as long as the acquisition will not substantially lessen competition in the relevant market.<sup>186</sup> This might imply the existence of a healthy competitive market, but it remains true that smaller enterprises face more of a struggle for basic existence whether foreign-owned or not.

Currently, though, ownership by *large*, foreign conglomerates appears to have become the default model for most media in New Zealand. This has led to the identification of a particular form of chilling effect. Media commentators argue that ownership by such conglomerates, themselves also the subject of ongoing concentration of ownership, restricts and reduces local content and homogenises the general content of the news in particular.<sup>187</sup> Concentration of ownership is identified as crushing of diversity because national media lose interest in reflecting a country's own values and culture.<sup>188</sup> Regulation of media ownership to prevent consolidation and increase competition would be a logical response.<sup>189</sup> Rosenberg, however, does not agree that this is the only problem for New Zealand media. He suggests that

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see <http://www.blognetnews.com/newsinnovation/feed.php?channel=17&iid=23552&y=2008&m=04&d=14>, 14 April 2008.

<sup>186</sup> Commerce Act 1989, s 47(1) and 66(3). This test is actually less strict than the previous test, which established a higher threshold because it prohibited an acquisition which resulted in a dominant position or a likely dominant position, or which strengthened a dominant position: Commerce Amendment Act 2001, s 11. See Laws of New Zealand, Cheer, *Media and Communication*, paras 7, 79 and 140.

<sup>187</sup> See Norris, n. 154 above and Rosenberg, n. 165 above, 60.

<sup>188</sup> See eg: the essays in *What's News? Reclaiming journalism in New Zealand* (2002, Judy McGregor and Margie Comrie, Eds). See also House of Lords Communications Committee – *First Report*, 11 June 2008, Chapter 4, paras 179-204, [www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12202.htm](http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12202.htm)

<sup>189</sup> Rosenberg discusses the possibilities, see Rosenberg, n 165 above, 64-65. See House of Lords Communications Committee – *First Report*, 11 June 2008, Chapter 5, para 220, [www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12202.htm](http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12202.htm)

increased competition cannot be the whole answer to dominance of a few narrow viewpoints, because in a country as small as New Zealand, competition will invariably operate at a commercial level, with a drive for profit motivating a ‘sameness of voices for fear of driving off advertisers and mass audiences’.<sup>190</sup> Indeed, there is empirical evidence to support the view that commercial motives may have increasing influence on the content of what is published in the media in this country. In a recent survey of New Zealand journalists, over half of the respondents agreed that newsrooms had been pressured to do a story because it related to an advertiser, owner or sponsor.<sup>191</sup> Therefore Rosenberg advocates a combination of mandated levels of local content, and control of foreign ownership and cross-media ownership of New Zealand media, as solutions to commercially-induced media censorship.<sup>192</sup> However, commercially-induced censorship is a different form of chilling effect than that investigated in this thesis, and so I do not address it further here. Nonetheless the question of media ownership does have other relevance to the effects of defamation law, as I surmise in the next chapter, where I use some of the first data obtained in the media survey to ascertain empirically the actual character and business profile of the media interests which responded to my survey.

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<sup>190</sup> Rosenberg, n. 165 above, 61.

<sup>191</sup> See “Profile 2007. The big NZ journalism survey: Underpaid, under-trained, under-resourced, unsure about the future – but still idealistic”, James Hollings, Geoff Lealand, Alan Samson and Elspeth Tilley, Massey University and Waikato University, *Pacific Journalism Review*, September 2007, 13(2), 175-197, referred to in Rosenberg n. 165 above, 62. Converse arguments can be made, however, such as those of columnist Joanne Black, who argued in print recently that media ownership by off-shore interests can support resistance to pressure from advertisers: see ‘The Black Page’, *Listener*, June 2008.

<sup>192</sup> Rosenberg, n. 165 above, 57. See also House of Lords Communications Committee – *First Report*, 11 June 2008, Chapter 9, [www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12202.htm](http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcomuni/122/12202.htm)

## Chapter Three - Character and business composition of media survey respondents

It is important to place the respondents to the media survey in the ownership and regulatory context set out above. In fact, the background information collected in the media survey allowed a reasonably detailed picture of the character of the media respondents as media business enterprises to be developed. This part of the survey investigated the character and ownership structure of the sector group, the annual turnover and the number of employees involved. The data is presented below broken down for each type of media respondent, and then analysed as a whole in relation to business composition.<sup>193</sup>

### 1. Responses

Together, newspaper, magazine and book publishing businesses comprise the publishing industry in New Zealand. However, they were dealt with separately for the purposes of the survey. Newspapers dominate the sector, being larger than the others combined. The annual turnover of newspapers in 2002 was \$1,071 million, of magazines, \$375 million, of book publishers, \$204 million and all others, \$111million.<sup>194</sup>

#### 1.1 Newspapers

New Zealand has been described as having a high number of daily newspapers in relation to its population size.<sup>195</sup> In 2000, there were approximately 26 daily newspapers, of which 18 were evening papers, nearly all of them published in provincial towns and cities.<sup>196</sup> Of the eight morning dailies, the Auckland-based *New Zealand Herald* had the largest audited net circulation at 213,150 copies daily. The largest provincial paper was Hamilton's *Waikato Times* with an audited net circulation of 40,622. Other daily newspapers had circulations ranging from about 2,400 to about 100,000. As already noted, the majority of the country's daily papers were owned by two major publishing groups, Independent Newspapers

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<sup>193</sup> Some repetition of detail relating to ownership is present in this chapter, but is used in a different context, and kept to a minimum where possible.

<sup>194</sup> See *New Zealand Book Publishing: Industry Development Issues*, A report prepared for the New Zealand Trade and Enterprise by Murray Ellis, Dr Tom Ludvigson and Dr Peter Phillips, December 2003, 9.

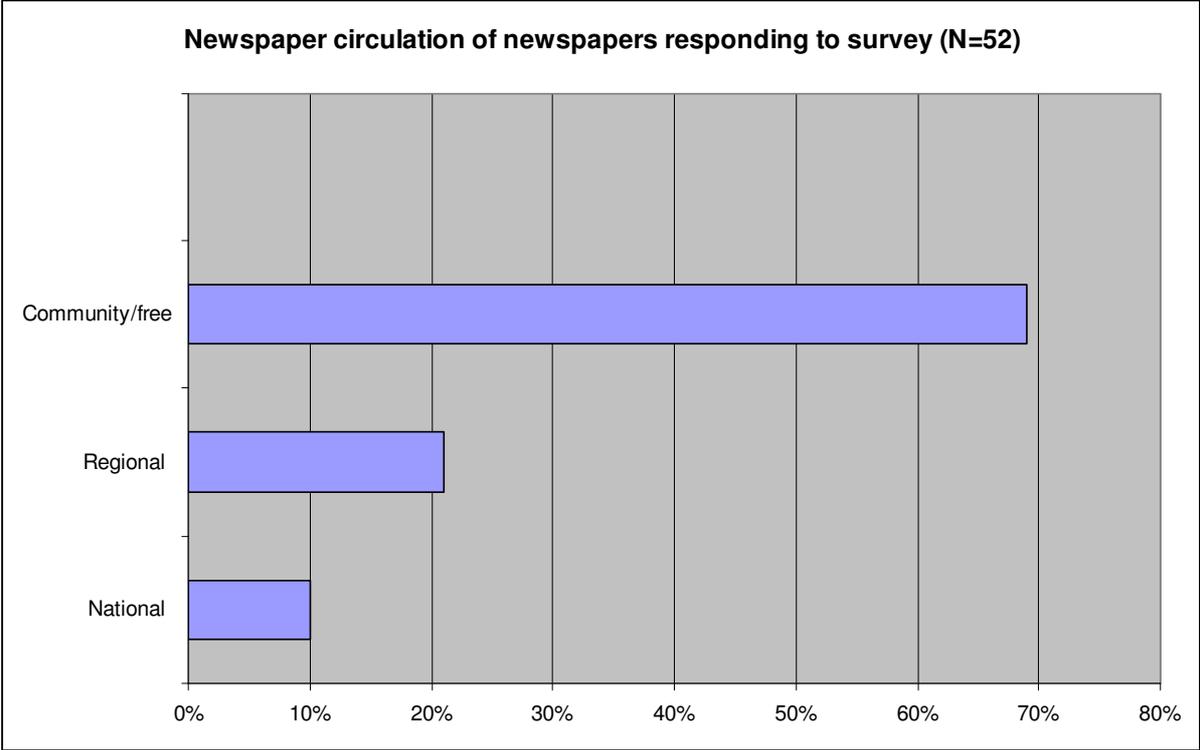
<sup>195</sup> See Profile of New Zealand 2000, Statistics New Zealand Website: <http://www.stats.govt.nz/>, Quick Facts, Communication, Mass Media. This is the source for the remainder of the statistical information in this paragraph.

<sup>196</sup> One, Wellington's *Evening Post*, closed in July 2002. It was described as the last metropolitan evening newspaper in Australasia.

Limited<sup>197</sup> and Wilson and Horton Limited. Between them in 2000, these two groups accounted for almost 90 percent of New Zealand's aggregate daily newspaper circulation of about 850,000 copies. In 2000 there were two Sunday newspapers, *Sunday Star Times* and *Sunday News*, both published by Independent Newspapers Limited and distributed nationwide. The *Sunday Star Times* is a broadsheet and at that time circulated 197,619 copies every Sunday. There were also approximately 120 community newspapers in New Zealand of which the great majority are tabloid. Many of these community papers are owned by the two big newspaper publishing groups but some are owned by individuals, families or by small companies.

Fifty-two newspapers responded to the survey. Of these, nearly 10% (5) had a national circulation, 21% (11) were regional, and over two-thirds (36) were community or free newspapers. (Fig.1 below).

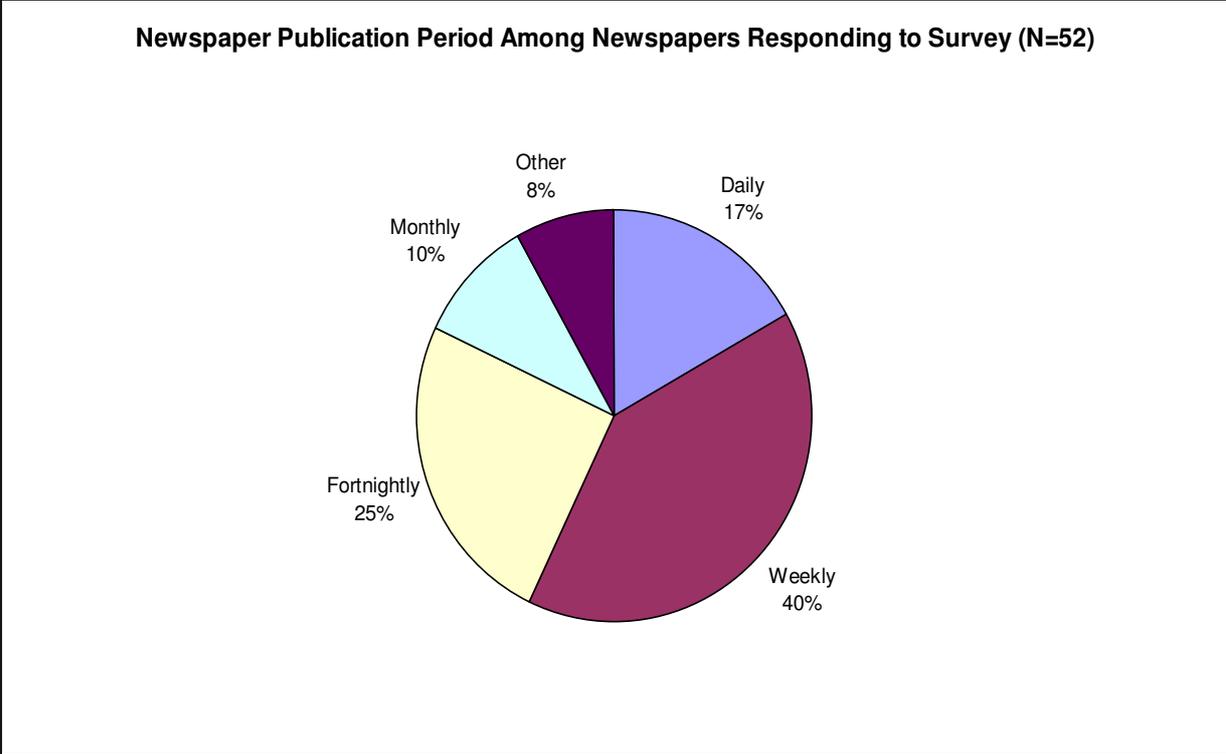
Fig. 1



<sup>197</sup> Now owned by the Australian media conglomerate, Fairfax Holdings. By 2002, almost all of New Zealand's newspaper and magazine publishing businesses were owned by the two completely off-shore companies, APN and Fairfax. Statistics New Zealand is now prevented from publishing information for these industries for reasons of commercial confidence: *New Zealand Book Publishing: Industry Development Issues*, A report prepared for the New Zealand Trade and Enterprise by Murray Ellis, Dr Tom Ludvigson and Dr Peter Phillips, December 2003, 8.

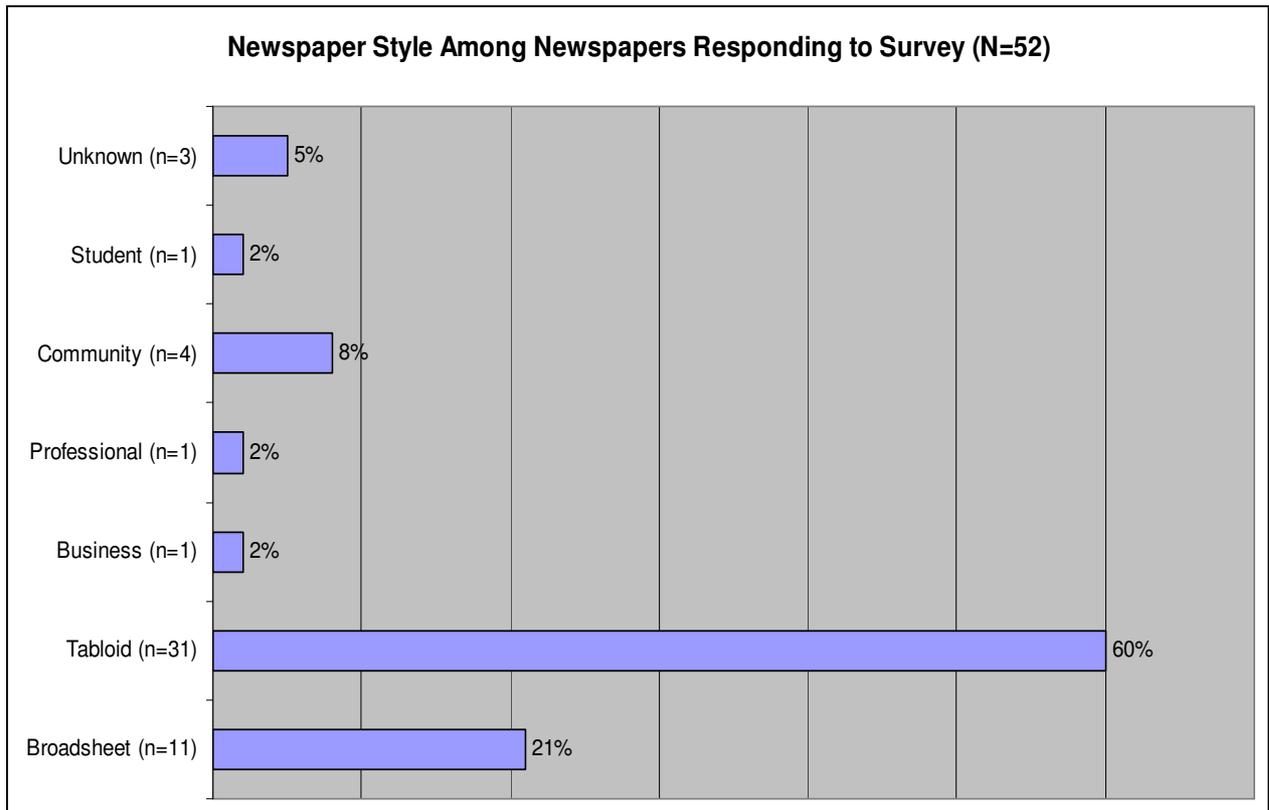
Daily newspapers comprised 17% (9), 40% (21) were published weekly, over a quarter (14) were published fortnightly, nearly 10% (5) were monthly publications, and the remaining 8% (3) were published twice and three times a week (community newspapers) and quarterly. (Fig. 2 below)

Fig. 2



Twenty-one percent (11) of the newspapers identified themselves as broadsheet publications. Nearly 60% (31) identified as tabloid style newspapers, nearly 2% (1) as a business publication, a further 2% (1) as professional, nearly 8% (4) as community newsletters or community or in-house newspapers, 2% (1) as a student newspaper and 5% (3) did not identify what sort of publication they were. (Fig. 3 below)

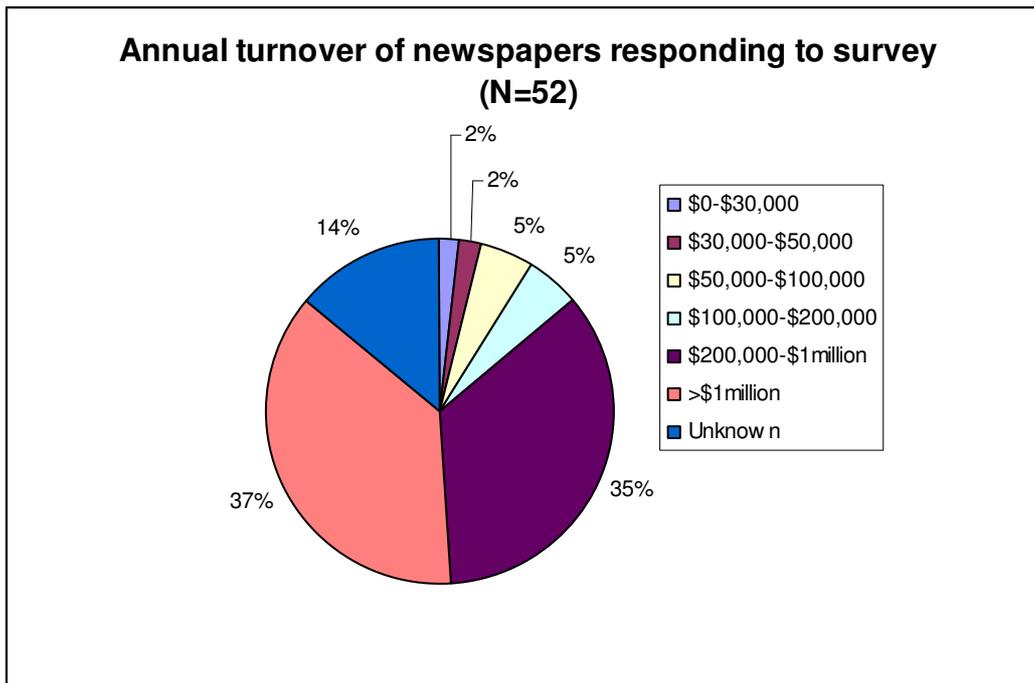
Fig. 3



As to business composition, a quarter of newspapers who responded to the survey (13) identified themselves as parent companies, nearly 56% (29) as subsidiaries, 4% (2) as partnerships, nearly 10% (5) had other forms of ownership (a division of Independent News Ltd, individual ownership, a professional society, a charitable trust, and a member of the Independent Community News Group (ICN) (which is a subsidiary of INL), and 5% (3) did not identify their ownership structure.

Two percent of newspapers (1) reported an annual turnover between 0 and \$30,000, a further 2% (1) between \$30,000 and \$50,000, 5% (3) had an annual turnover between \$50,000 and \$100,000, and a further 5% (3) between \$100,000 and \$200,000. However, nearly 35% (18) had an annual turnover of between \$200,000 and \$1 million, and nearly 37% (19) greater than \$1 million. Fourteen percent (7) did not identify any range of figures for annual turnover. (Fig. 4 below)

Fig. 4



Two percent (1) of newspapers comprised a single individual, 40% (21) had 2 to 10 employees, nearly 31% (16) had 10 to 50 employees, nearly 10% (5) employed 50 to 100 people, and the same percentage (5) had greater than 100 employees. Nearly 8 % (4) did not identify how many employees were involved in the publication of the newspaper.

### 1.2 Television

The public television broadcaster, TVNZ, had up to 75% of the free-to-air market in 2001.<sup>198</sup> TV3Network Services, Canadian-owned, took 25%, at times eating into the historical TVNZ monopoly to a greater degree.<sup>199</sup> Prime Television, an Australian interest, remained on the edge of these figures. Sky Television, also foreign-owned, was New Zealand's main pay-tv provider, penetrating into almost a third of New Zealand households by 2001.<sup>200</sup>

Six television broadcasters responded to the survey in 2001. Although this number seems small, it is reasonably comprehensive in terms of coverage, because these responses included the major competitors - the state broadcaster, TVNZ, the privately-owned TV3 Network (TV3), and the smaller privately-owned Prime Television. Therefore one respondent

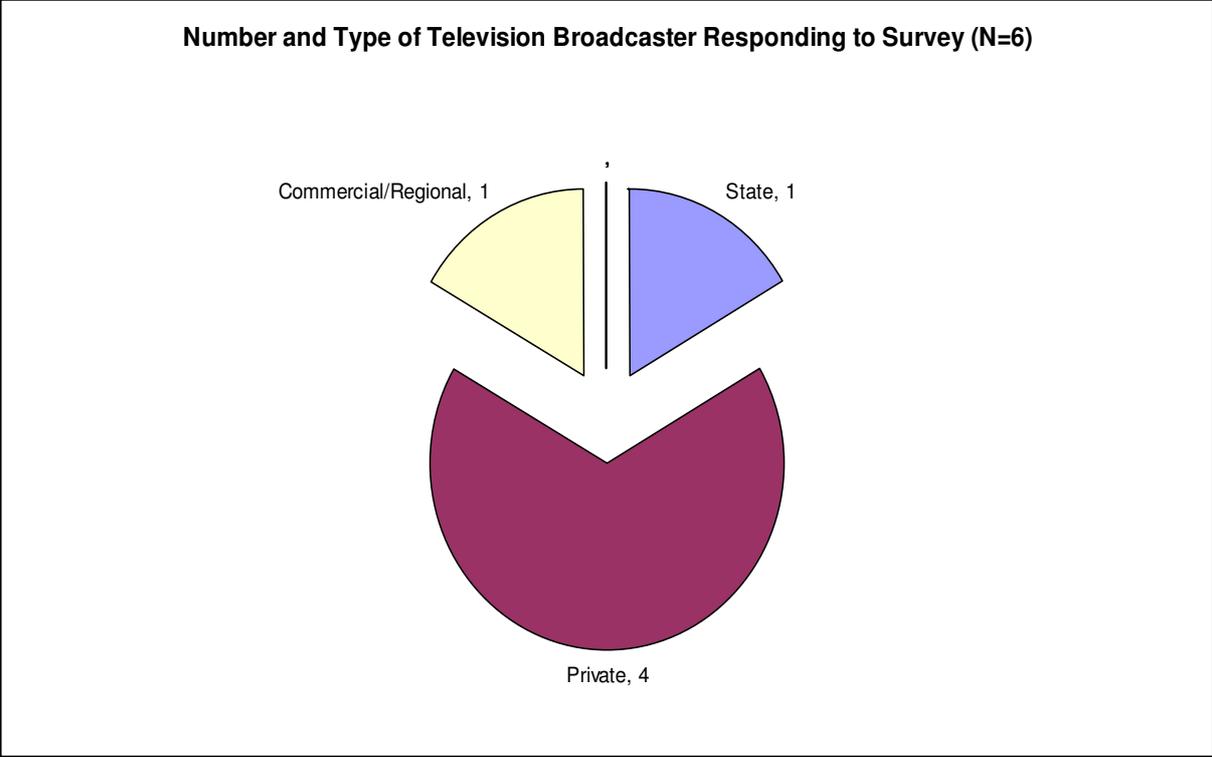
<sup>198</sup> See *New Technologies and the Digital Future*, A report prepared for NZ on Air by Paul Norris and Brian Pauling, 2001, 69.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid, 73-74.

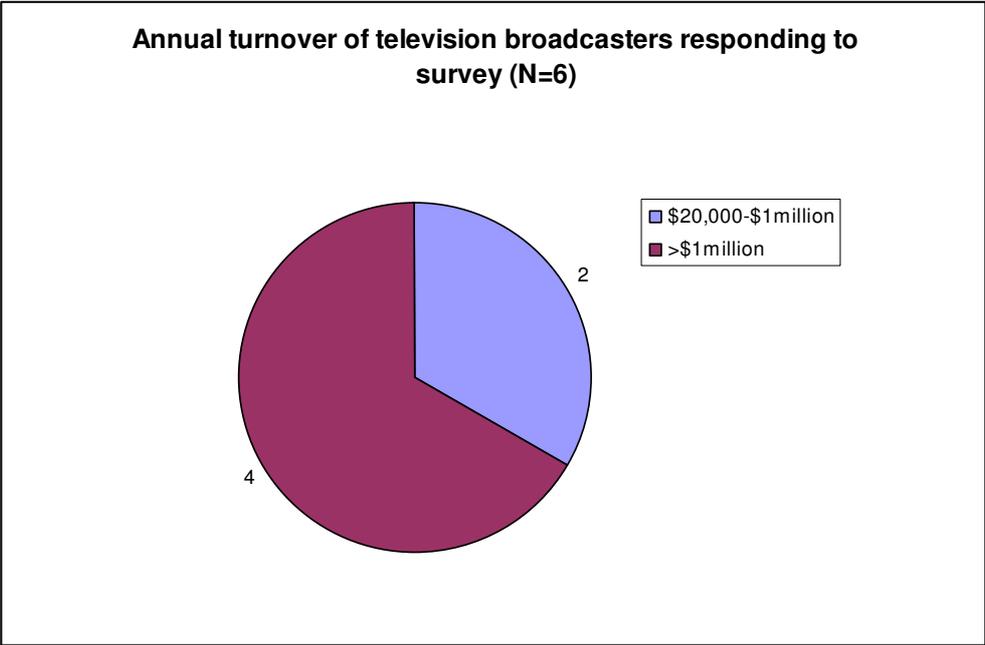
identified itself as a state broadcaster, four as private broadcasters, and one as both a community and regional broadcaster. (See Fig. 5 below, showing numbers not percentages).

Fig. 5



One television broadcaster was a parent company, four were subsidiaries and one was a trust. Two television broadcasters had an annual turnover of \$200,000 to \$1 million, and four identified their annual turnover as greater than \$1 million. (See Fig. 6 below).

Fig. 6



One television enterprise employed 2 to 10 employees, a further television enterprise employed 10 to 50 employees, two had 50 to 100 employees and two had more than 100 employees.

### 1.3 Radio

It has been said that it is quite remarkable that New Zealand's population base seems able to support so many radio stations.<sup>201</sup> Radio broadcasters operating in New Zealand at the time of the survey can be grouped under various networks: The CanWest network had approximately 21 stations in 2001. The Radio Network, (formerly the government-owned Radio New Zealand Commercial), owned by a consortium comprising radio, newspaper and outdoor advertising group Australian Provincial Newspapers Holdings Limited, US radio and television operator Clear Channel Communications Inc., and local newspaper and publishing group Wilson and Horton Limited, comprised approximately 53 stations.<sup>202</sup> Radio New Zealand, New Zealand's public radio broadcaster, consisted of three non-commercial radio networks: National Radio, Concert FM and the AM Network. New Zealand also developed a vigorous alternative radio system through its community access radio network.<sup>203</sup> These stations shared the non-commercial radio spectrum with public radio, Radio Rhema (religious broadcasters), Iwi radio (Maori language broadcasters), student campus radio and a small number of local community owned and operated stations. The Rhema group numbered 3 religious stations, and the numerous independent, guardband, iwi and access radio stations totaled approximately 40 stations.

Thirty-one radio broadcasters completed the survey in 2001. This lively and diverse group included the state broadcaster Radio New Zealand (3%), 12 broadcasters (39%) which identified as private, (one being the Radio Network), 13 (42%) which identified as community, and 7 (23%) as other, the latter including such descriptions as Maori language or Iwi radio, community network, and Christian. (The fact that these responses total 33 rather than 31 indicates that two respondents chose more than one answer to the question about what type of broadcaster they were). (See Fig. 7 below).

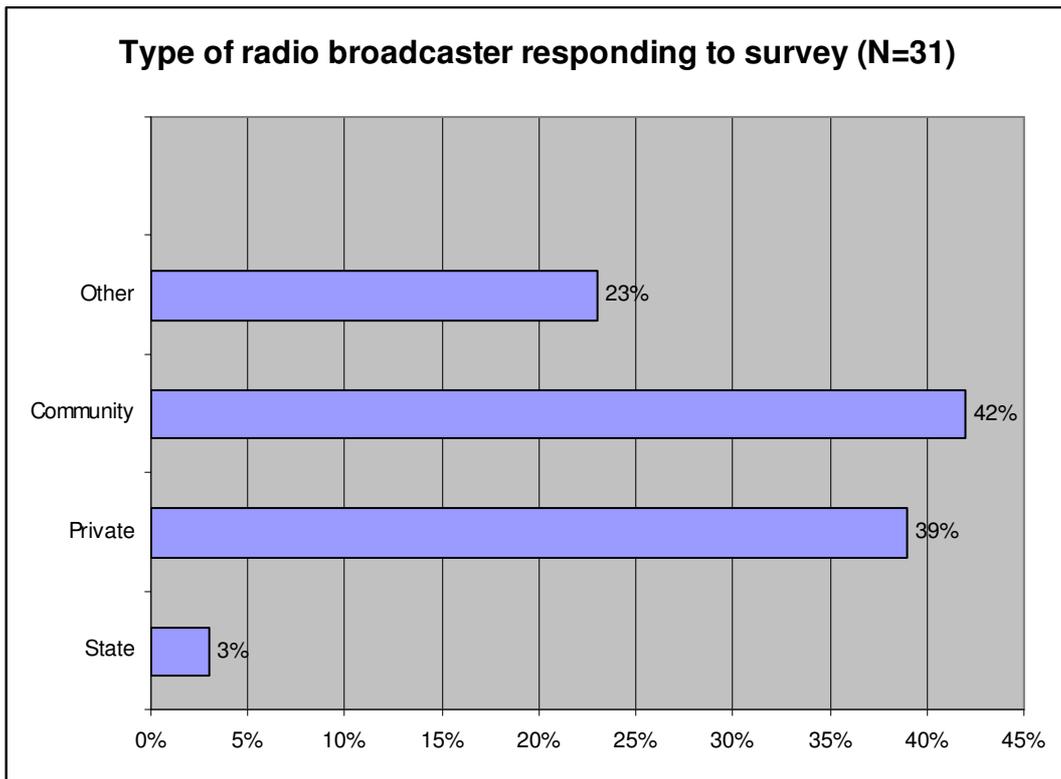
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<sup>201</sup> *New Zealand Book Publishing: Industry Development Issues*, A report prepared for the New Zealand Trade and Enterprise by Murray Ellis, Dr Tom Ludvigson and Dr Peter Phillips, December 2003, 76. New Zealand had the highest number per capita in the world. See also Rosenberg, n. 165 above, 22.

<sup>202</sup> April 2002 figures: see [http://www.waikato.ac.nz/film/NAME/extras/MediaNZ\\_06\\_2005.doc](http://www.waikato.ac.nz/film/NAME/extras/MediaNZ_06_2005.doc).

<sup>203</sup> These numbered approximately 11 in 2002: see Rosenberg, n. 159 above, 19.

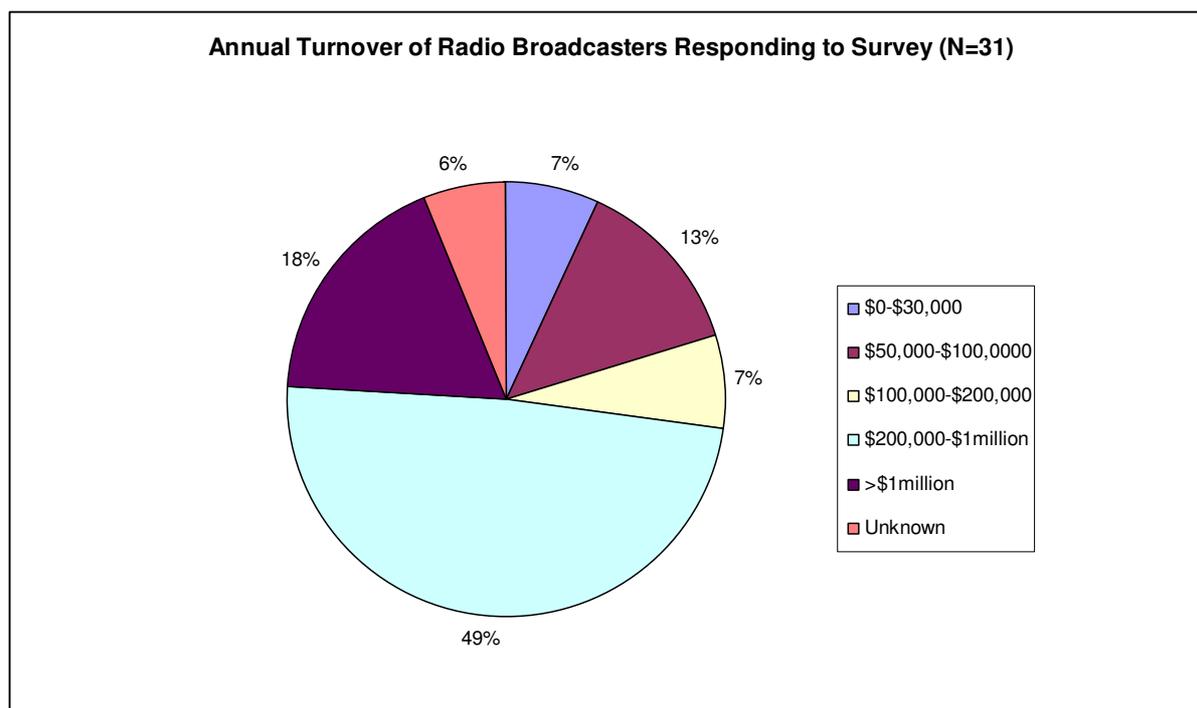
Fig. 7



Most radio broadcasters identified their business structure. Nearly 19% of these (6) were parent companies, and just over 26% (8) were subsidiaries. However, 48% (15) took some other form, such as a trust or charitable trust, a sole trader, a non-profit incorporated society, 100% husband and wife owned, and a Crown owned entity. Seven percent (2) did not identify their structure.

Nearly all radio broadcasters gave some indication of annual turnover. The greatest number of these, 48% (15) were in the range \$200,000 to \$1 million. Nearly 7% (2) had an annual turnover of 0-\$30,000, 13% (4) chose a range of \$50,000 to \$100,000, 7% (2) chose \$100,000 to \$200,000, 19% (6) had an annual turnover of greater than \$1 million, and one respondent did not know its annual turnover. One radio respondent did not answer the question. (See Fig. 8 below).

Fig. 8



Nearly all radio broadcasters also answered the question about the size of the radio undertaking. Over half (nearly 55%, or 17) employed 2 to 10 employees. The next most common enterprise (29%, or 9) employed 10 to 50 employees, one had 50-100 employees, nearly 6% (2) employed greater than 100 employees, and one undertaking was a single individual. One radio broadcaster did not answer the question.

#### 1.4 Magazines

The New Zealand magazine market is extremely vibrant – we are estimated to be second or third in magazine readership in the world.<sup>204</sup> With well over 2 million copies of magazines, on average, being circulated each week, New Zealand’s magazines come in all shapes and sizes, frequency of distribution and circulation.<sup>205</sup> Types of magazine vary from the very small (for small niche markets) to the very large (with broad general appeal). Weekly magazines have powerful circulations and the ability to reach millions of New Zealanders. The three women's weekly magazines are regarded as having a powerful, combined circulation.<sup>206</sup> It is difficult to establish the exact number of locally published magazines. However, it is estimated the approximate number published in 2001 was 700.<sup>207</sup>

<sup>204</sup> Rosenberg, n. 159 above, 8.

<sup>205</sup> John McClintock, Executive Director of the Magazine Publishers Association, [www.mpa.org.nz](http://www.mpa.org.nz), replying to query from the author in June 2003.

<sup>206</sup> Ibid.

<sup>207</sup> In 2003, John McClintock estimated from the MPA’s membership, media directories and distributors that there was a constant of at least 800 locally published magazines year on year. At that stage, there were

New Zealand's largest magazine publisher in the early 2000's was ACP Media, and its subsidiary, Trader Group.<sup>208</sup> ACP was also the proprietor of Netlink, one of New Zealand's two main magazine distributors. The next largest publisher was the INL Group, made up of INL Magazines and News Media Ltd. INL was the owner of the other main magazine distributor – Gordon & Gotch (NZ) Ltd. The third largest magazine publisher was New Zealand Magazines, part of the Wilson & Horton newspaper group. This form of magazine publishing industry is atypical world-wide, in that two of the four main publishers were owned by newspaper publishing groups: Wilson & Horton and INL. The fourth largest publisher was Pacific Magazines, a division of PMP Communications, Australia.<sup>209</sup>

ACP, INL Magazines, New Zealand Magazines and Pacific Magazines were primarily consumer magazine publishers.<sup>210</sup> There were also large business publishers<sup>211</sup> and some which were part of both consumer and business categories.<sup>212</sup> Two other noteworthy publishers, which produced weekly tabloid business newspapers, were Liberty Press Group, which published the *National Business Review*, and Pauanui Publishing Co, which published the *Independent*.<sup>213</sup> The remainder of the magazine market in the early 2000's was made up of a proliferation of medium to small niche market publishers.<sup>214</sup>

Twenty six magazine enterprises responded to the survey. This group included INL, the second largest publisher of magazines in New Zealand. Nearly 77% (20) of the respondents described their magazines as national magazines, and nearly 4% (1) one was a regional publication. One described itself as a community or free magazine, one as a student magazine and one had some international circulation. Seven percent (2) were business, or in-house or professional magazines (see Fig. 9 below).

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approximately 6,800 titles available in the country, which meant New Zealand imported about 5800-6000 titles. See [www.mpa.org.nz](http://www.mpa.org.nz)

<sup>208</sup> See [www.mpa.org.nz](http://www.mpa.org.nz)

<sup>209</sup> Ibid

<sup>210</sup> Woman's Day (ACP), New Zealand Woman's Weekly (NZ Magazines), and New Idea (Pacific Magazines) were then the three weekly women's magazines available in New Zealand. Other consumer magazine publishers were Readers Digest, Time, and the New Zealand Automobile Association, which published AA Directions. Sky watch and AA Directions were both contract-published by INL Magazines.

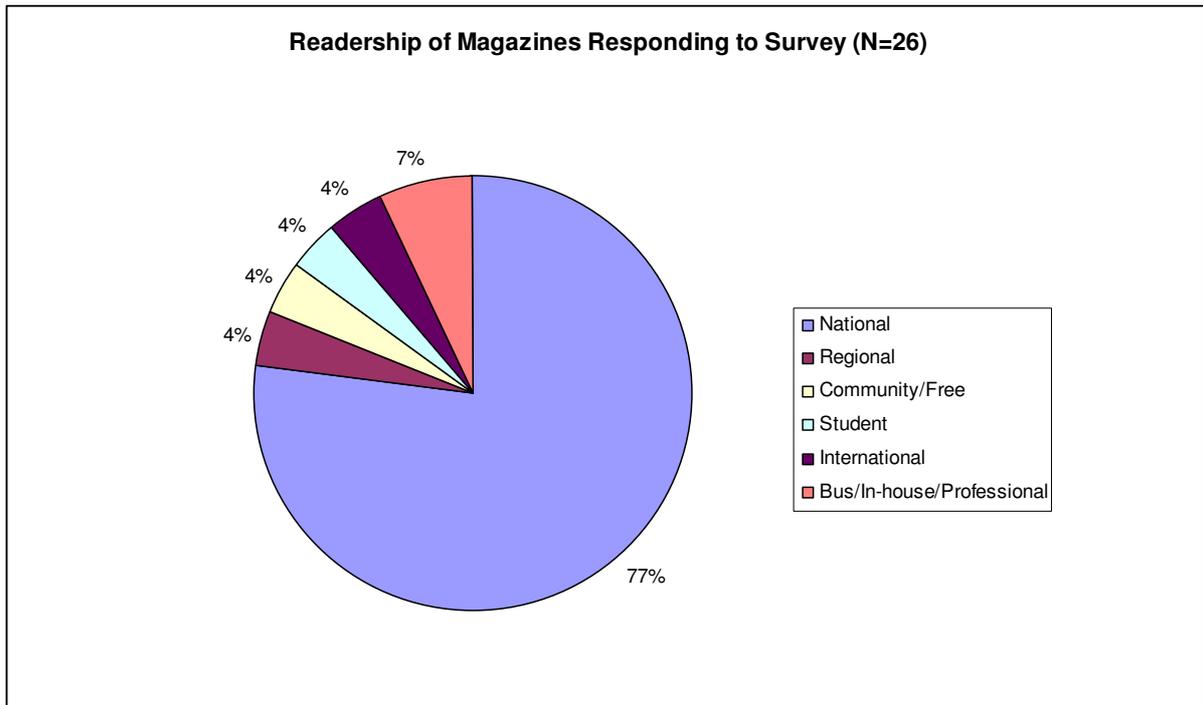
<sup>211</sup> Major multi-title business-to-business publishers were AGM Publishing, which published in architecture, building and design, IDG Communications, in computers, MediMedia New Zealand, specializing in medical publishing, the NZ Rural Press, which covered the rural sector, Profile Publishing, which covered advertising, marketing and business, and TPL Media, publishing in hospitality, food/beverage, travel and local government.

<sup>212</sup> IDG Communications published titles aimed at computer professionals and individual consumers: see n. 195 above.

<sup>213</sup> Ibid.

<sup>214</sup> There were over 136 multi-title publishers in New Zealand in the early 2000's: *ibid*.

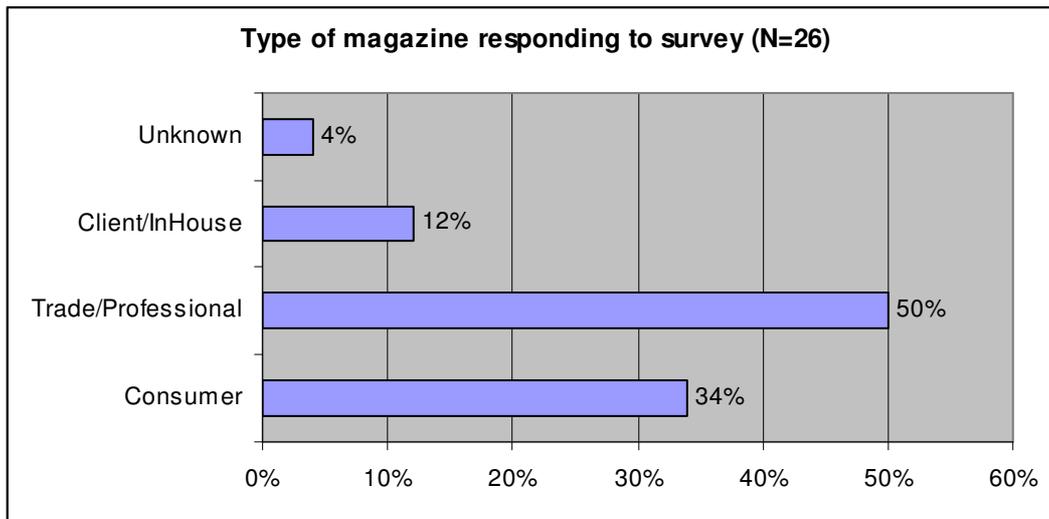
Fig. 9



Ninety-two percent (24) of magazines answered the question about publication frequency. Nineteen percent (5) were published weekly, 4% (1) was bi-weekly, 35% (9) were monthly, 12% (3) were quarterly, and 23% (6) were published with varying frequency. Seven percent (2) did not identify their publication frequency.

Most gave some indication of the sort of magazines published. Thirty-four percent (9) were consumer magazines (described as men/women/lifestyle/business/specialist). Half (50% or 13) published trade/professional magazines, and 12% (3) chose the special category, described as client or in-house. Four percent (1) did not answer the question. (See Fig. 10 below).

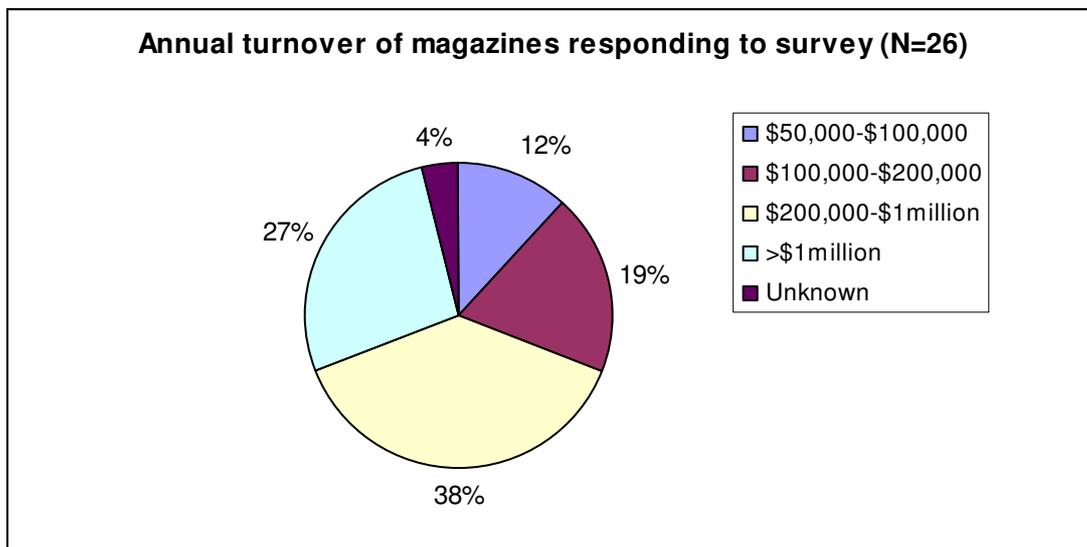
Fig. 10



Twenty-five magazines responded to the question asking about business composition. Sixty-two percent (16) of magazine respondents described themselves as a parent company, 12% (3) were subsidiaries, nearly 8% (2) were partnerships, and the remaining 15% (4) chose the 'other' category, being a charitable trust, an incorporated society, an associated company and a government agency. One did not answer the question.

Nearly all magazine respondents gave some description of their annual turnover. Twelve percent (3) had a turnover of \$50,000 to \$100,000, 19% (5) chose the range of \$100,000 to \$200,000, 38% (10) chose \$200,000 to \$1 million, and 27% (7) identified an annual turnover greater than \$1 million. Four percent (1) did not answer the question. (See Fig. 11 below).

Fig. 11



As to size of undertaking, nearly 8% (2) of magazine respondents stated they were a single individual, nearly 81% (21) advised they had 2 to 10 employees, another near 8% had 10 to 50 employees, and approximately 3% (1) had 50 to 100 employees.

### 1.5 Publishers

The publishing industry is made up of books, magazines, newspapers and a miscellaneous 'other' category. However, since newspapers and magazines have been dealt with separately in the survey, the category of publishers in this study represents book publishers in the main. Book publishing is below newspapers and magazines for turnover in New Zealand. In 2001, newspaper publishing generated \$1,071 million in turnover, while magazines generated \$375 million.<sup>215</sup> Book publishing in New Zealand is, however, still a noteworthy contributor to the economy, with an estimated turnover in 2002 of \$204 million.<sup>216</sup> Over 3600 titles were published in 2002, 58% (2100) of which were exported. Educational titles made up 56% of all titles published.<sup>217</sup> Book publishers are dominated by sole traders, and what are known as 'micro-businesses – 66% of these publishers employ 1 person.<sup>218</sup> However, only a few businesses, mostly overseas-owned firms, generate most of the total turnover – in 2002, the top 5% of publishers generated nearly 90% of the total turnover and 74% together generated 2%.<sup>219</sup> Furthermore, more than half of the overseas-owned firms earned more than \$1 million in 2002, while only 4% of the New Zealand firms did this.<sup>220</sup>

Twenty-four publishers responded to the survey, 87% (21) of whom were book publishers, while 4% (1) was described as a information service provider or exclusive internet publisher, and 9% (2) placed themselves in the 'other' category, being a literary agent and a desktop publisher. Henceforth, this group can be taken to represent book publishers.

Of the book publishers, a majority (76% or 16) published non-fiction works, followed by 38% (8) which published fiction works, while the next largest category, 29% (9) published pictorial books, a further 29% (6) of these respondents published professional books., and one third (33.3% or 7) published a variety of books, including educational texts (4), trade

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<sup>215</sup> *New Zealand Book Publishing: Industry Development Issues*, A report prepared for the New Zealand Trade and Enterprise by Murray Ellis, Dr Tom Ludvigson and Dr Peter Phillips, December 2003, 8.

<sup>216</sup> Ibid, 1.

<sup>217</sup> Ibid, 6.

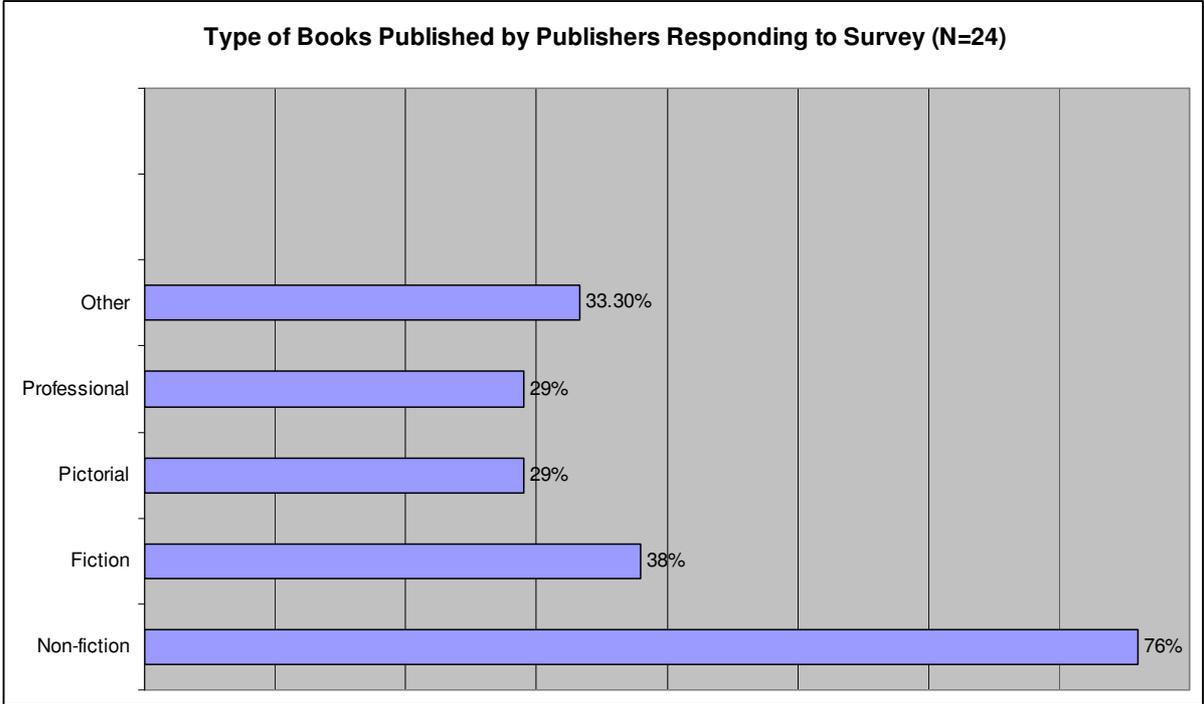
<sup>218</sup> Ibid, 11.

<sup>219</sup> Ibid, 8.

<sup>220</sup> Ibid, 8.

bibliographies, print information, and technique manuals. (Some respondents chose more than one category. (See Fig.12 below).

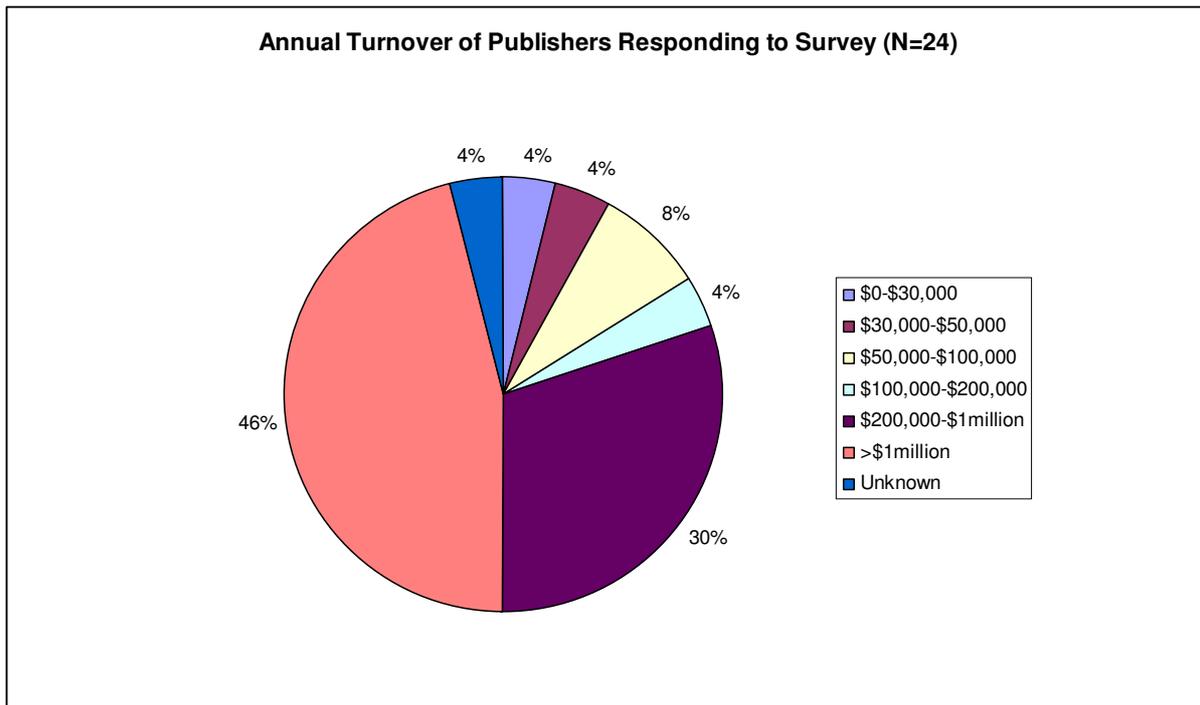
Fig. 12



Thirty-seven percent (9) of the publishers identified themselves as parent companies, while nearly 17% (4) were subsidiaries, one-quarter (6) were partnerships and nearly 21% (5) specifically identified themselves in the ‘other’ category as a sole trader, a New Zealand owned limited company, two single limited companies, a contract publisher and a university-owned organisation functioning as an autonomous department (a university press).

The turnover for most publishers was in the higher brackets. The largest group of 46% (11) stated that they had an annual turnover of greater than \$1million. The next largest group of 30% (7) had an annual turnover of between \$200,000 and \$1million. Eight percent (2) were in the range \$50,000 to \$100,000, while 4% (1) each identified their range as up to \$30,000, \$30,000-\$50,000 and \$100,000-\$200,000. One respondent did not answer the question. (See Fig.13 below).

Fig. 13

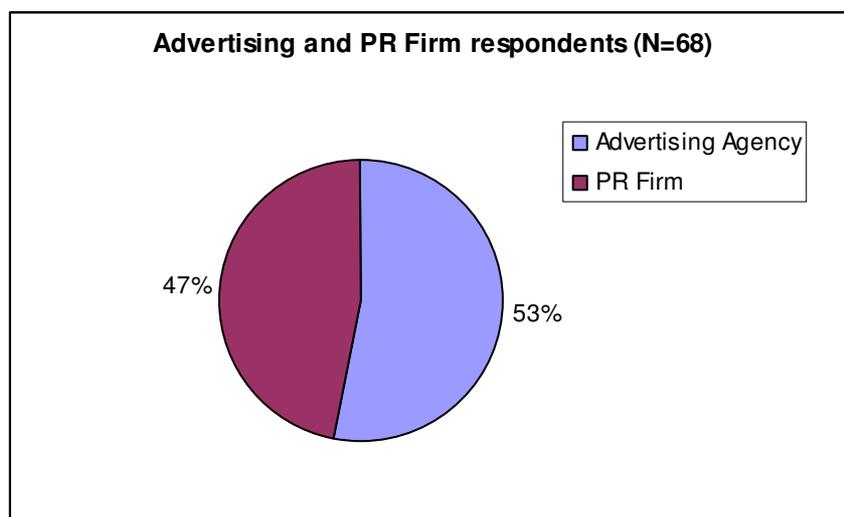


The majority of publishers, (62% or 15) employed 2 to 10 employees, while 21% (5) had 10 to 50 employees, 13% (3) were single individuals and 4% (1) had 50 to 100 employees.

#### 1.6 Advertisers and public relations firms

Sixty-eight responses were received from advertising agencies and public relations firms. Of this number, 53% (36) were advertising agencies or consultancies. Forty-seven percent (32) were public relations firms. (See Fig. 14 below).

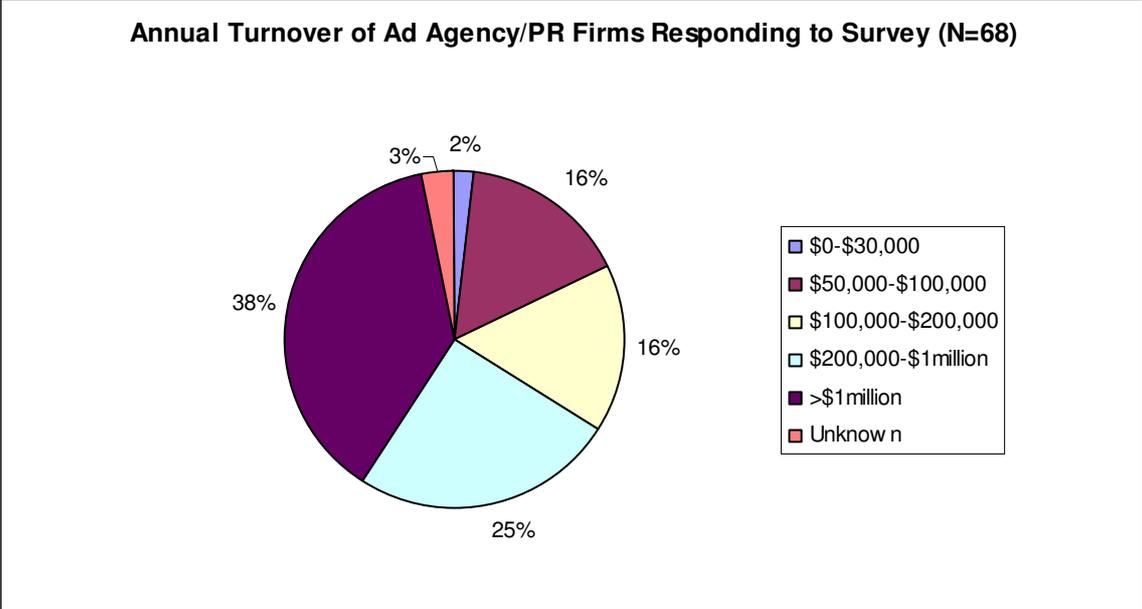
Fig.14



Most of the advertising agency and public relations firms respondents gave some idea of the commercial structure of the undertaking. Thirty-four percent (23) of these were parent companies, 12% (8) were a subsidiary, 13% (9) were a partnership, 19% (13) were sole traders or freelance operators, and 13% (9) described themselves as privately-owned limited liability companies. Nine percent (6) did not answer the question.

Three percent (2) of ad agency and public relations firms respondents were not prepared to give any indication of their turnover. However, 2% (1) chose a range of 0 to \$30,000, 16% (11) selected a range of \$50,000 to \$100,000, the same percentage (11) identified a range of \$100,000 to \$200,000, a quarter (17) chose a range of \$200,000 to \$1 million, and 38% (26) identified an annual turnover of greater than \$1 million. (See Fig. 15 below).

Fig. 15

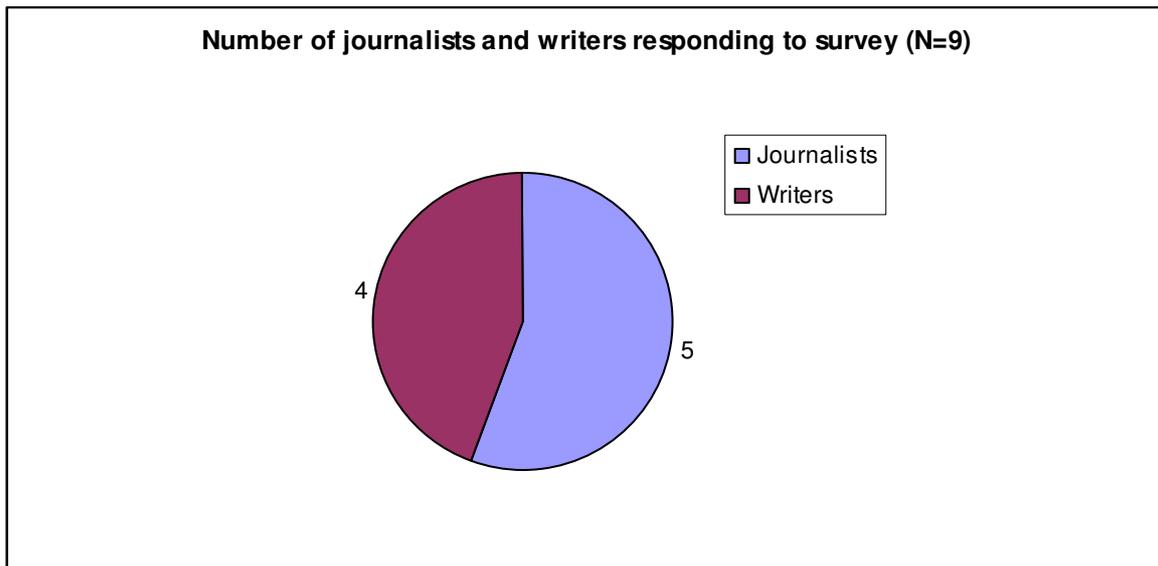


Twenty-nine percent (20) of the ad agency and public relations firms respondents were single individuals, but the majority, 56% (38) had 2 to 10 employees. Twelve percent (8) had 10 to 50 employees, and 3% (2) had 50 to 100 employees.

1.7 Independent journalists and writers

Nine individuals identifying themselves as independent journalists and writers responded to the survey in 2001. Five of these were journalists and four were writers. (See Fig. 16 below, numbers only.)

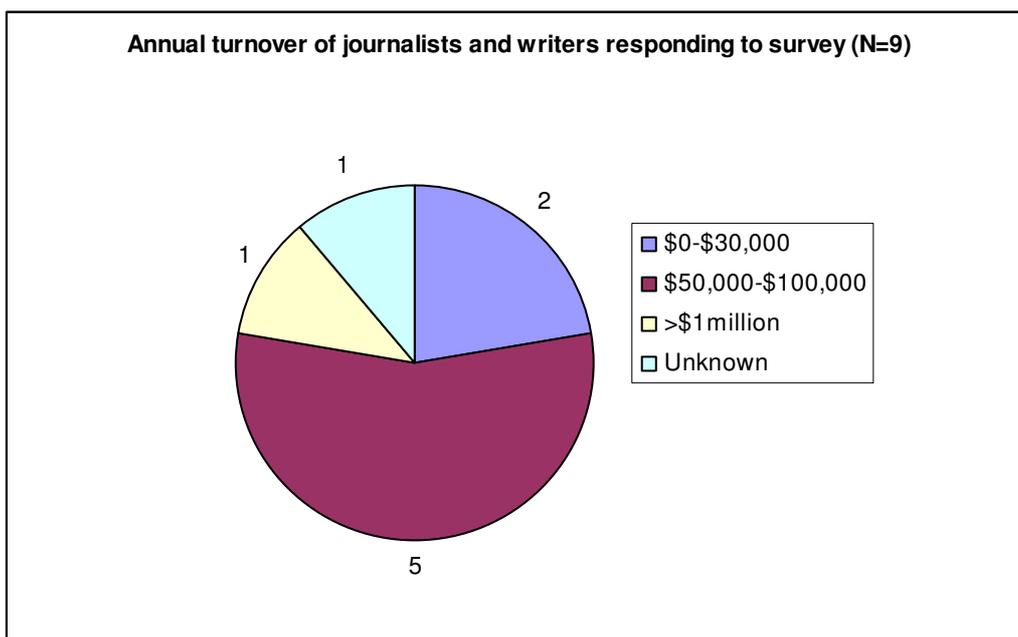
Fig. 16



Six of the journalist and writer respondents gave information on their business structure. One of these worked for a subsidiary company, one for a partnership and four were independent operators or sole traders. Three did not answer the question.

Eight journalist and writer respondents identified a range of figures to indicate their annual turnover. Two earned in the range of \$0 to \$30,000 per annum, five were in the \$50,000 to \$100,000 range and one chose a range that was greater than \$1million. One did not answer the question. (See Fig. 17 below, numbers only).

Fig. 17

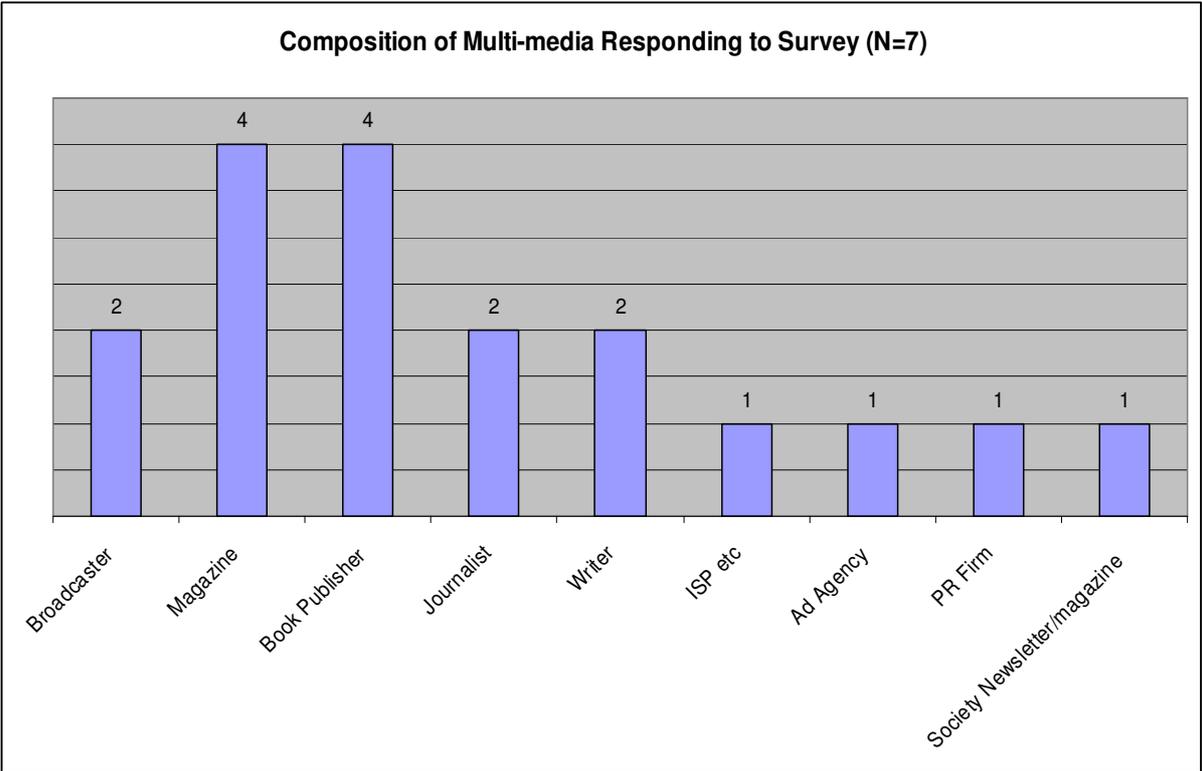


Seven of the journalist and writer respondents gave some indication of the size of their undertaking. Six worked as single individuals, and one was within an organisation which employed 50-100 employees. Two did not answer the question.

1.8 *Multi-media*

Seven respondents identifying themselves as having more than one media function responded to the survey in 2001. Two of these were broadcasters and four were magazines, the same number were book publishers, two were individual journalists, two were individual writers, one was an information service provider or another type of internet publisher, one was an advertising agency, one was a public relations firm and one described itself as a society newsletter/magazine. This group is referred to collectively as multi-media respondents. Because of their involvement in multi-media some of these respondents chose more than one category answer in relation to these profile questions. (See Fig. 18 below, numbers only).

Fig. 18



Of the 2 broadcasters, one identified as being involved in television, one in radio and one also identified involvement in cable media. One of the broadcasters was involved in private television while the other identified as being a US network correspondent.

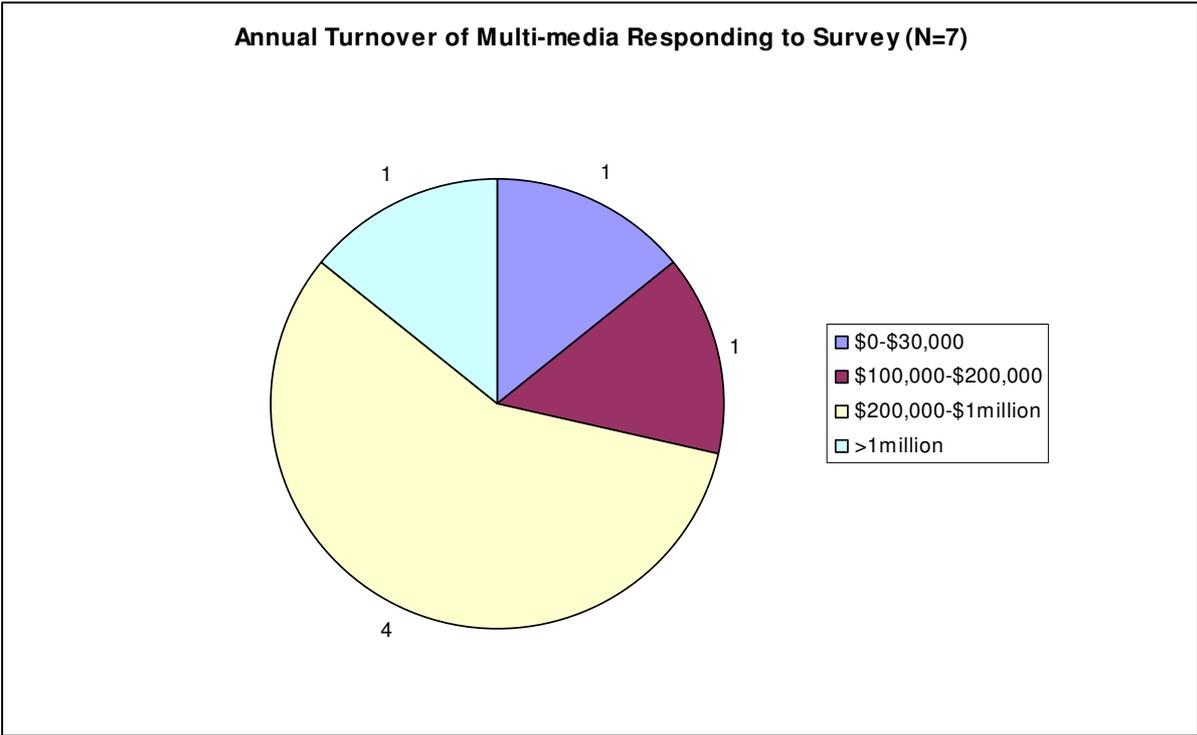
Of the four book publishers, one published fiction books, three chose non-fiction, one pictorial, one professional and two chose the ‘other category’ identified in one case as children’s picture books.

Of the four magazines, all identified their publication as having national circulation. One was published bi-weekly, one quarter monthly and two of the magazines were published quarterly. Three of the magazine publishers identified what sort of magazines were published. Two were trade/professional magazines and one was a special type, such as for particular clients or in-house.

All of the multi-media respondents gave information on their business structure. Four worked for parent companies, one was a subsidiary, and two were ‘other’ being a professional organisation and a private limited liability company.

All multi-media respondents identified a range of figures to indicate their annual turnover. One earned in the range of \$0 to \$30,000 per annum, one was in the \$100,000 to \$200,000 range, four chose the range \$200,000 to \$1 million and one a range of greater than \$1 million. (See Fig. 19 below, numbers only).

Fig. 19



All of the multi-media respondents gave some indication of the size of their undertaking. Two worked as single individuals, four were involved in enterprises with 2 to 10 employees and one was within an organisation which employed 10 to 50 employees.

### 1.9 Internet service providers

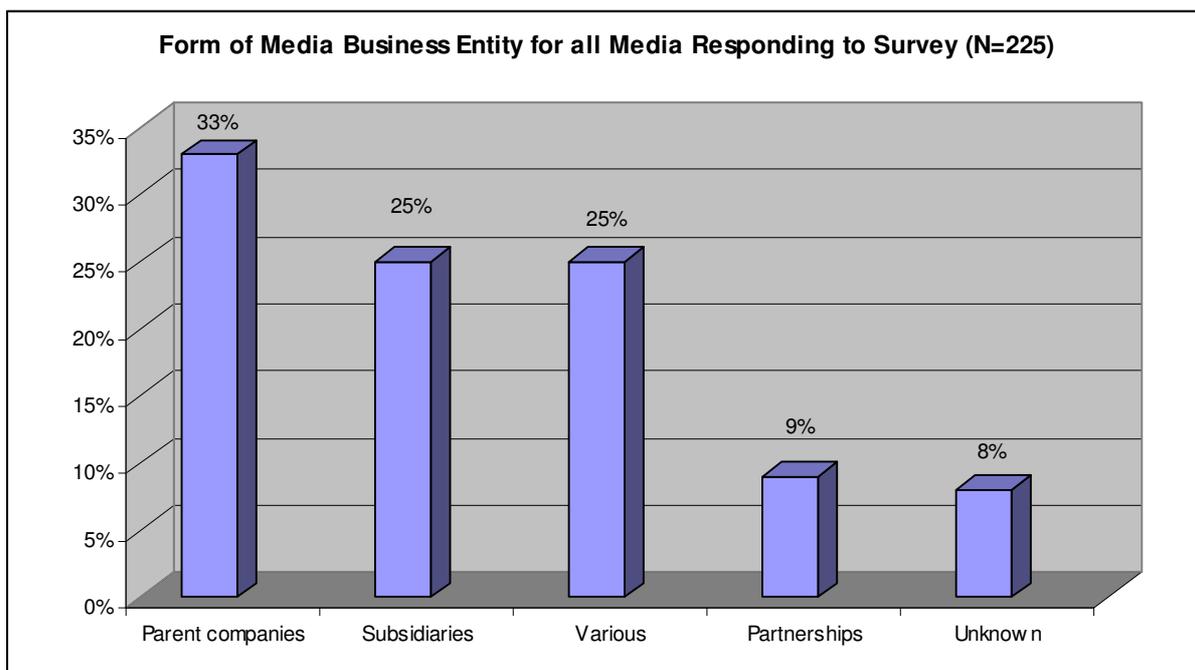
Only two respondents identifying themselves as Internet service providers responded to the survey in 2001 although a special effort was made to contact the main players. One had been publishing in this medium for one year and the other for three-five years. The information collected from the ISPs can be of interest only as numbers responding were so small.

Both ISPs were parent companies. One had an annual turnover of between \$30,000 to \$50,000 and the other of between \$200,000 to \$1 million. (No graph is shown for these figures.) Both companies employed 2-10 employees.

## 2. Analysis of data on business composition – all media

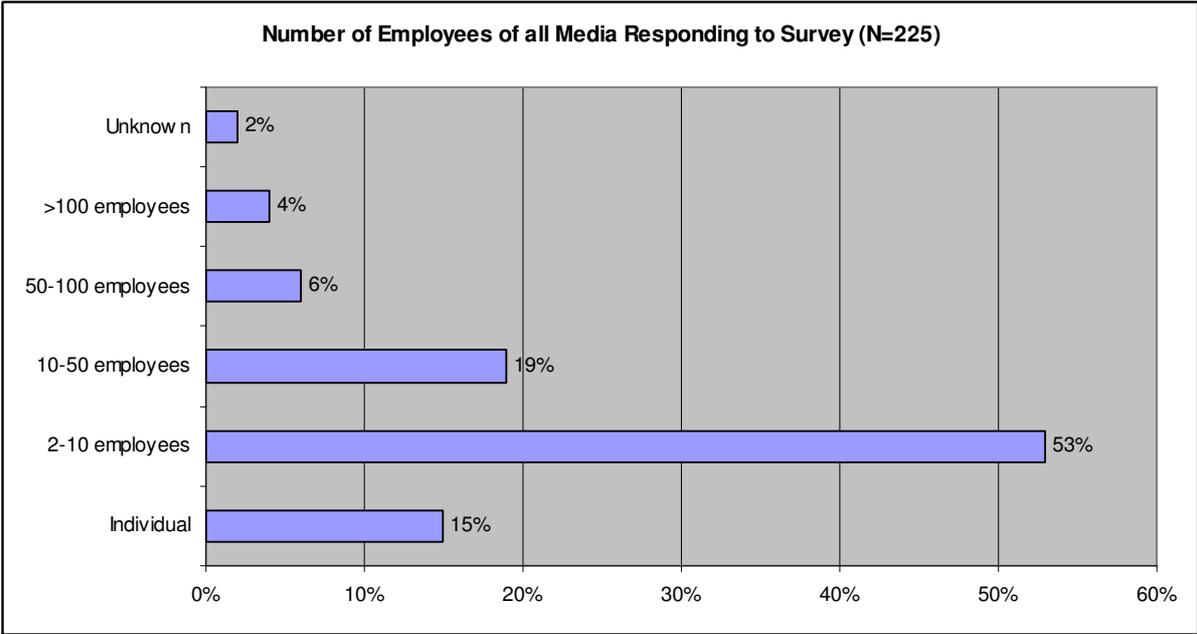
It is possible to amalgamate the business profile information detailed above to build an accurate picture of the media which responded. Two hundred and twenty five New Zealand media players responded to the survey. Of these, the largest group (one-third, or 74) were parent companies. The next largest group (one-quarter or 58) were subsidiaries. A further quarter (58) took other various business forms, while 9% (20) identified themselves as partnerships. The business form of 7% (15) was unknown. (See Fig. 20 below).

Fig. 20



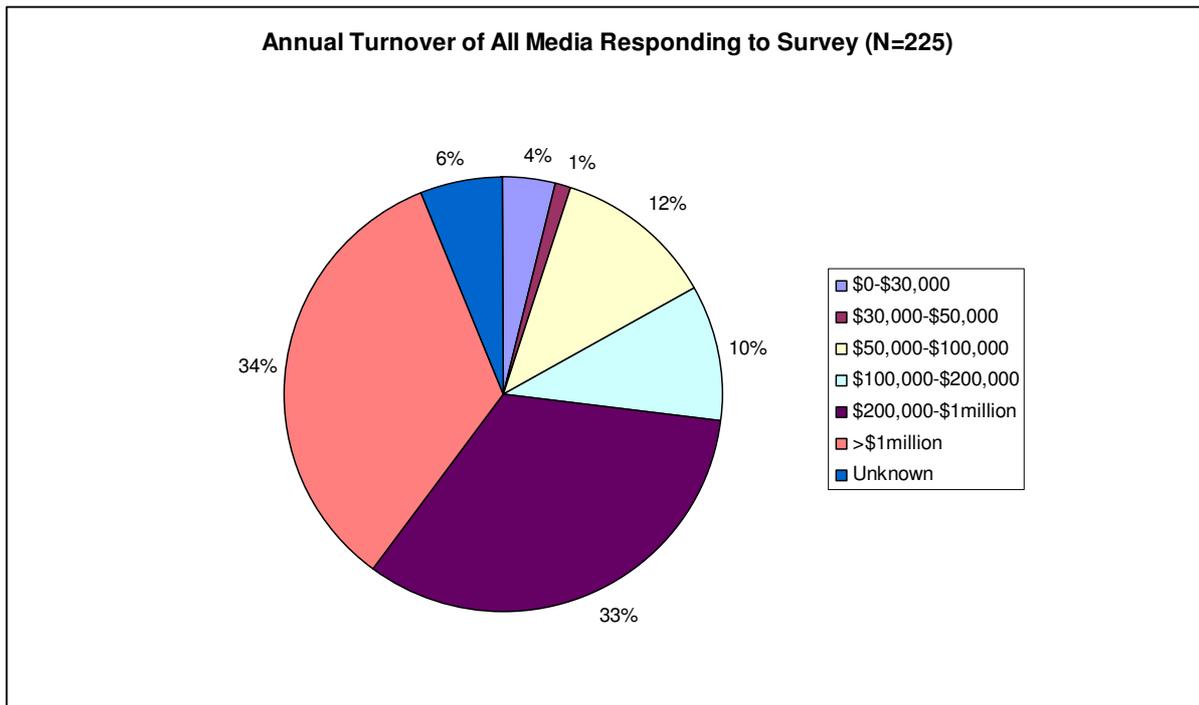
Over half (53% or 119) of all media respondents employed 2-10 workers, while the next largest group, (19% or 42) employed 10-50. Therefore, of all media respondents, over two-thirds employed between 2 and 50 people. Fifteen percent (35) were single individuals, 6% (13) employed 50-100 people, and 4% (9) employed greater than 100 people. Two percent (7) did not answer. (See Fig. 21 below).

Fig. 21



Probably, annual turnover reveals most about these media enterprises. Thirty four percent (75) of all media respondents had an annual turnover of over \$1million. A further 33% (74) had an annual turnover of between \$200,000 to \$1million. This means over two-thirds of the media respondents had a high annual turnover, indicating that they were substantial and significant enterprises. Twelve percent (28) earned \$50,000 to \$100,000, 10% (23) had an annual turnover of \$100,000 to 200,000, 4% (8) were in the \$0 to \$30,000 bracket, and 1% (3) in the \$30,000-\$50,000 range. Six percent (14) did not answer this question or did not identify a range for annual turnover. (See Fig. 22 below).

Fig. 22



The Ministry of Economic Development has examined the structure and dynamics of enterprises in New Zealand, in particular, small and medium sized enterprises.<sup>221</sup> Small and medium sized enterprises are defined by the Ministry as employing 19 or fewer full time equivalent employees.<sup>222</sup> Eighty-five percent of enterprises in New Zealand employ 5 or less full time equivalent staff, while 97% of enterprises employ 19 or fewer staff.<sup>223</sup> More than 68% of the media respondents in the survey could be described as small and medium sized enterprises. This is consistent with the fact that such enterprises are dominant in the communications sector.<sup>224</sup>

One percent of all enterprises in New Zealand employ 50-99 people and 1% employs over 100 people.<sup>225</sup> The figures for the survey respondents are higher, being 6% and 4% respectively. This reflects the structure of the media in New Zealand, with significant foreign ownership, particularly of newspapers, by large conglomerates and parent companies.<sup>226</sup> The data as to business form and annual turnover is consistent with this conclusion.

<sup>221</sup> See SMEs in New Zealand: Structure and Dynamics, Industry and Regional Branch, Ministry of Economic Development, June 2001.

<sup>222</sup> Ibid, 3.

<sup>223</sup> Ibid, 4.

<sup>224</sup> Ibid, 9.

<sup>225</sup> Ibid, 5.

<sup>226</sup> See *New Zealand Book Publishing: Industry Development Issues*, A report prepared for the New Zealand Trade and Enterprise by Murray Ellis, Dr Tom Ludvigson and Dr Peter Phillips, December 2003, 8-9.

This analysis suggests that the respondents to the survey were not only robust enterprises, some on a larger scale, but, reassuringly, were also a reasonably representative cross-section of the media sector in New Zealand.

### 3. Relevance of the character of the New Zealand media

What then is the character of the New Zealand press, apart from being mainly foreign-owned, and apart from the business characteristics outlined above? The *Lange v Atkinson* Court of Appeal defamation decision endorsed the following view of the New Zealand print media, contrasted with that in the United Kingdom:<sup>227</sup>

The combination of the smallness of the population with the fact that the dailies are not national papers produces low circulation figures. In 1998 the largest circulation of a New Zealand daily was about 220,000 and the other 27 dailies had circulations from about 2400 to about 100,000 (*New Zealand Official Yearbook 1998* at p 257). Another consequence of the regional character of the dailies is that there is not the same competition that can arise, and has arisen, in the United Kingdom between national papers. The three weekly publications which contain extensive commentary on political matters have circulations of about 10,000 and 14,000 (two business weeklies) and about 90,000 (*The New Zealand Listener*, which is also a television and radio guide). Two general monthly magazines which include serious political commentary have circulations of about 35,000 (*North & South*, the publication in issue in this case) and 18,000 (*Metro*). By contrast, five of the British dailies have circulations of about one million or more with the highest being about 3.4 million. Another difference is that some of the British dailies have close associations with particular political parties; competing political positions are by contrast often expressed in the opinion pages of individual New Zealand dailies and weeklies.

There has also been judicial recognition that the New Zealand print media at least is generally regarded as responsible. In *Lange v Atkinson*, the Court of Appeal went so far as to endorse the view that ‘New Zealand has not encountered the worst excesses and irresponsibilities of the English national daily tabloids’.<sup>228</sup> But it also noted that the responsibility and vulnerability of the press are critically dependent on its ethics and practices, ownership structures and the independence of editors. Nonetheless, there is an emerging view that the broadcast media is becoming more tabloid in New Zealand, both in style and in the use of intrusive news-gathering methods, and that the print media is aping this development to some degree.<sup>229</sup> This reflection of a global trend may bring with it an increased general risk of exposure of the media to legal action, including the possibility of defamation actions.

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<sup>227</sup> *Lange v Atkinson* [2000] 3 NZLR 385, [34].

<sup>228</sup> *Ibid.* The Court referred to a view put forward by journalist Karl Du Fresne, in a publication: *Free Press Free Society* (Newspaper Publishers Association of New Zealand, 1994) at pp 26 and 34, that: “some British tabloids have thrown away the rule book in their pursuit of sensational exclusives. Invasion of personal privacy, fabrication of interviews and the obtaining of information by dishonest means have become the norm in the down-market tabloid press.” Sir Douglas Graham, at the time the Minister of Justice, was also quoted by the Court and Du Fresne as saying at the New Zealand Press Council’s twentieth anniversary that “Compared to our British counterparts, media intrusion into our daily lives is rather tame, but I do not believe the standard of journalism is by any means inferior. If anything, quite the contrary.”

<sup>229</sup> See the essays in *What’s News? Reclaiming journalism in New Zealand* Judy McGregor and Margie Comrie, Eds (Dunmore Press, 2002).

Conversely, it might also raise the level of tolerance of what would have been seen previously as unlawful behaviour. Palmer has argued further that an increasing drift to triviality of content, coupled with increasing fragmentation of outlets in the digital age, may also weaken incentives for plaintiffs to sue.<sup>230</sup>

#### 4. Conclusion

The consideration in Chapter Two of the ownership and background of the New Zealand media, and in this Chapter of the character and business profile of the media survey respondents, has been useful for a number of reasons. First, it has revealed that there are many complex reasons why a journalist or editor might pull a story, and that the chilling effect of defamation laws is only one of these. Content control by media proprietors,<sup>231</sup> direct or indirect political pressure,<sup>232</sup> and commercial pressure exerted by client advertisers, may be others.<sup>233</sup> In writing up and analysing the responses to the survey, it was necessary to isolate these influences where appropriate.

Second, my investigation of New Zealand media ownership and business profile led me to give plausibility quite early on in the study to a position which suggested that foreign ownership of the majority of media players in New Zealand could support a more robust approach to defamation law and the risk of defamation actions than would otherwise be the case in a small market. It seemed to me one might reasonably expect that standing behind even the smaller community newspapers, for example, would be access to company lawyers, insurance policies and funds, if necessary. The expectation might then be that the data revealed in the survey would reflect this robustness in relation to number, frequency,

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<sup>230</sup> See Rt Hon Sir Geoffrey Palmer, 'The Law of Defamation In New Zealand: Its Recent Evolution and Problems', *Law, Liberty, Legislation: In Honour of John Burrows QC*, S Todd and J Finn Eds, (LexisNexis, (2008).

<sup>231</sup> Such as the rule imposed by the Canadian Asper family that all of its big-city newspapers would run the same national editorial each week: *Washington Post Foreign Service*, 27 January 2002. See Rosenberg n. 165 above at fn. 511.

<sup>232</sup> The New Zealand government attempted unsuccessfully to revive a form of criminal libel in 2001 by last minute amendment to an electoral amendment bill, which many regarded as an inappropriate use of the parliamentary process. Eventually, following a meeting with media representatives, the provision was dropped from the Bill, reportedly after it was pointed out that the media would find itself chilled from providing live coverage during elections.

Just prior to an election in 2002, the Leader of the Opposition, Bill English, was reported to have launched a stinging attack at his party's conference on Prime Minister Helen Clark, saying her handling of a particular personal matter meant she could not be trusted. The Prime Minister's staff was reported to have reacted quickly to the speech, telling journalists they had a legal opinion that a number of Mr English's comments and assertions were defamatory. The state broadcasters initially appeared cautious in reporting the matter. However, a newspaper, the *NZ Herald*, wrote a piece setting out English's claim, explaining what it was based on, and allowing rebuttal from the PM. The privately-owned TV3 also reported the matter fully.

seriousness and the outcomes of defamation claims and potential claims. These possibilities should be borne in mind as I move on to present and analyse further results of the media survey, and the court file search in Chapters Five to Eight. Prior to this, however, I want to examine in more detail the origins of the chilling effect doctrine and its manner of development.

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<sup>233</sup> In 2002, the Buller District Council was reported to have backed off threats to stop advertising in a newspaper which published details of a poorly performing council investment: *Press* 19 September 2002.

# Chapter Four – The chilling effect doctrine

## 1. Origin and theory

In this Chapter, I contextualise my survey results more deeply before presenting them by examining the chilling effect doctrine in more detail. This is undertaken initially by investigating what North American scholars have said about ‘the chilling effect’, since it appears to have originated in that jurisdiction. I then discuss and analyse developments in the case law in the United Kingdom, Europe, Australia and New Zealand, and include a separate discussion of the possible chilling effects of levels of damages awarded. I conclude with some reflections on the doctrine.

### 1.1 North American origins

Schauer<sup>234</sup> states that the US Supreme Court introduced the word ‘chill’ in a first amendment case in 1952,<sup>235</sup> and that the label ‘chilling effect’ appeared first in 1963.<sup>236</sup> According to Schauer, the idea first attracted judicial scepticism because it appeared to introduce sociological principles into judicial analysis.<sup>237</sup> Schauer concludes that although the concept was originally based on largely emotive appeal, it has since become much more constitutionally significant, with substantive impact on free speech jurisprudence in the US.<sup>238</sup> Schauer’s definition of a chilling effect for his thesis naturally takes its colour from the background provided by the US constitution. He suggests that ‘[a] chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from doing so by government regulation not specifically directed at that protected activity.’<sup>239</sup> More significantly, he uses defamation law as an example which has relevance to this thesis ‘...if a common-law sanction aimed at punishing the publication of defamatory factual falsehood causes the suppression of truth or opinion, chilling effect reasoning is ...applicable.’<sup>240</sup> However, Schauer is careful to isolate benign chilling effects – those which are the proper result of government regulation, from those which chill invidiously, as in the defamation example.<sup>241</sup> In his thesis, then, some chilling effects are permissible and indeed, desirable. I

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<sup>234</sup> Frederick Schauer, ‘Fear, Risk, and the First Amendment: Unravelling the “Chilling Effect”, *Boston University Law Review* [Vol 58: 685, 1978]. See also Anonymous, ‘The Chilling Effect in Constitutional Law’ *Columbia Law Review*, Vol. 69. No. 5. (May, 1969), 808.

<sup>235</sup> Schauer, n. 234 above, at n 1.

<sup>236</sup> *Ibid*, at n 2.

<sup>237</sup> *Ibid*, 730.

<sup>238</sup> *Ibid*, 685.

<sup>239</sup> *Ibid*, 693.

<sup>240</sup> *Ibid*.

<sup>241</sup> *Ibid*, 690.

have also taken this position in the introduction to this thesis, pointing out that in order to protect reputation, defamation law must chill some speech.<sup>242</sup> One lawyer responding in my empirical study carried out in 2001 put it well: ‘Yes! There is a chilling effect arising from our defamation laws in New Zealand. Whether it is inappropriate is another question. I am not totally convinced it is inappropriate...’ Schauer would draw the line where publications which are true, or which contain lawful opinion, never see the light of day.

Lepofsky takes a less theoretical and perhaps more balanced approach. He offers a very practical description of libel chill as a claim that the law of defamation ‘improperly interferes with the full and effective reporting of important news to the public.’<sup>243</sup> This arises from fear of litigation with its attendant costs, personal stress and pressure on journalists and editors, self-censorship, and the tendency for these effects to be particularly intense where the media organisation is small.<sup>244</sup> However, while Schauer’s premise is that the chilling effect can be more than benign, Lepofsky believes this to be overstated.<sup>245</sup> Lepofsky argues that adverse chilling effects are exaggerated by media because it is self-interested. He observes instead that as a matter of fact, the US print and broadcast media are full of real news, not bland coverage, journalists are not delicate flowers, but tough fighters, that any law of libel would give rise to the chill effects suggested by media, no matter how framed, because of the general risk of litigation, and that no matter where the burden of proof lies, in practice, discovery is possible, which means journalists’ methods always need to be scrutinised. Further, Lepofsky suggests ordinary citizens are not served by libel law either as they cannot afford to sue, and in contrast, many media interests are wealthy, well funded, and monopolistic and oligopolistic. He concludes that freedom of the press may in fact be characterised as freedom from legal responsibility.<sup>246</sup> For Lepofsky, ‘[t]he libel chill may be the only thing which precludes the overheating of the newsroom,<sup>247</sup> and is thus largely, if not exclusively, benign.

In the United Kingdom, the authors of the major study which inspired my own took as an object of their research the aim of investigating whether the law of libel was a significant

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<sup>242</sup> See Chapter One, Part 1. above.

<sup>243</sup> M David Lepofsky, ‘Making Sense of the Libel Chill Debate: Do Libel Laws Chill the Exercise of Freedom of Expression?’ (1994) 4 *NJCL* 168, 172.

<sup>244</sup> *Ibid*, 173-74.

<sup>245</sup> *Ibid*, 182.

<sup>246</sup> *Ibid*, 178-180.

<sup>247</sup> *Ibid*, 182.

fetter on the freedom of the media to publish stories of real public interest.<sup>248</sup> However, in their conclusion, they open out this ‘definition’ to include *direct* chilling effects, meaning changes to publications such as omission or amendment in order to avoid legal action, and *structural* chilling effects, meaning the complete failure to publish material in some subject areas and the predominance of a polemical tone in publication.<sup>249</sup>

More recently, Australian commentators have examined the issue. Dent and Kenyon, embarking on a significant study comparing aspects of US, United Kingdom and Australian defamation laws, suggest a definition based on the idea that the risks of defamation liability deter publications. These commentators set out to investigate whether the quality of public debate about political and public interest matters is limited by the media’s fear of lengthy, complex and expensive defamation litigation.<sup>250</sup> For Dent and Kenyon, excessive chilling effects are those which restrict media reporting on stories of political or public interest.

It is clear that most definitions of the chilling effect converge on an understanding that defamation law has the potential to produce both acceptable and unacceptable censorship of speech. Commentators disagree, however, on what might amount to unacceptable censorship. Unacceptable censorship might relate to the spiking of ‘important’ stories or stories of genuine public interest, but what are these? Making a Schaueresque distinction based on truth may not assist. Even if the assumption is that all true stories should be told, the nascent tort of privacy suggests there may not be genuine public interest in all true stories. Neither are commentators agreed on the extent of unacceptable censorship *in fact*, as the stand-off between Schauer and Lepofsky illustrates, and empirical research such as my own is intended to illuminate. Because of these uncertainties, content tends to be given to the chilling effect doctrine which is characterised either by an apparently media-friendly, or a non media-friendly, stance. The former would give weight to freedom of expression without requiring any substantive press responsibility, while the latter would not. The approach of the judiciary, to which I will now turn, certainly reflects this dichotomy.

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<sup>248</sup> Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson, *Libel and the Media: The Chilling Effect* (Clarendon Press, 1997), 32.

<sup>249</sup> *Ibid*, 191.

<sup>250</sup> Chris Dent and Andrew Kenyon, ‘Defamation law’s chilling effect: a comparative content analysis of Australian and US newspapers’, (2004) 9(2) *MALR* 89.

## 2. Comparative analysis

Many commentators and judges do not attempt to define the chilling effect, or are prepared to assume it exists to some unspecified extent.<sup>251</sup> An examination of dicta dealing with the issue is enlightening. It is at least clear that chilling effect arguments arise both in relation to the operation of substantive defamation law, and in relation to remedies, specifically as to levels of damages.

### 2.1 *The United States*

In the leading US case, *New York Times v Sullivan*<sup>252</sup> Justice Brennan for the Supreme Court developed American defamation law to favour defendants, by requiring a plaintiff to establish that defamatory statements made about public officials (later extended to public figures) were made with malice. The Court accepted that fear of losing, or even simply fighting, a defamation case meant a ‘...pall of fear and timidity [was] imposed upon those who would give voice to public criticism...’<sup>253</sup> The *Sullivan* decision remains the core of American libel law, and is a steady declaration of preference for speech protection.

Later research has tended to suggest that the substantive change made in *Sullivan* had a limited effect only, because it can be undermined by procedural impediments. In 1991, American journalist and academic Anthony Lewis pointed out that the high cost of fending off suits, genuine or otherwise, caused a chilling effect which arises from fear of litigation alone.<sup>254</sup> In 1995, David Boies, an American defendant lawyer, confirmed this occurs in spite of the fact that plaintiffs in the US do not win very often.<sup>255</sup> As recently as 2006, Australian commentator, Andrew Kenyon, reporting on a large, comparative empirical study, notes that US rates of defamation appear to have been falling,<sup>256</sup> but that the discovery and depositions processes required to investigate editorial behaviour in order to determine the malice issue can be lengthy, and costly to implement.<sup>257</sup> Boies and others have suggested procedural changes

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<sup>251</sup> See eg: the New South Wales Law Reform Commission, Report 75, (1995), para 2.27; Paul Rishworth in Rishworth et al, *The New Zealand Bill of Rights* (2003, OUP), 315-316.

<sup>252</sup> 376 U.S. 254 (1964).

<sup>253</sup> *Ibid*, [16]-[17]. The Court noted the defendant had stated that four other libel suits based on the allegedly defamatory advertisement in this case had been filed against it by others who held or had held public office, that another \$500,000 verdict had been awarded in the only one of these cases that had gone to trial, and that the damages sought in the other three totalled \$2,000,000: *ibid*, fn 18.

<sup>254</sup> See Anthony Lewis, *Make No Law* (Random House, 1991).

<sup>255</sup> David Boies, ‘The Chilling Effect of Libel Defamation Costs: The problem and Possible Solution (1995) *St Louis U LJ* 1207.

<sup>256</sup> Andrew T. Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, 2006), 384.

<sup>257</sup> *Ibid*, 386.

to reduce litigation time and expense in defamation claims.<sup>258</sup> Such an approach assumes that the chilling effect is worse for potential defamation defendants than defendants in civil litigation generally, and that specific procedural solutions can be found.

## 2.2 *The United Kingdom*

In the United Kingdom, the House of Lords altered defamation law in the early 90's after concluding that '[t]he threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.'<sup>259</sup> In the *Derbyshire* case, the House held a local authority did not have the right to maintain an action against the publishers of a Sunday newspaper, its editor and two journalists, as it would be contrary to the public interest for the organs of government, whether central or local, to do so. In doing this, the House of Lords accepted a chilling effect as arising from mere threats of action. This approach was borne out by the results of the later UK Barendt study, which concluded that in that jurisdiction 'the chilling effect...genuinely does exist and significantly restricts what the public is able to read and hear.'<sup>260</sup> However, although the *Derbyshire* decision was applied in other cases,<sup>261</sup> its development into a fully fledged doctrine has been stunted by another development in defamation law.

The relevant English case in this respect is, of course, *Reynolds v Times Newspapers Ltd*,<sup>262</sup> in which each of the judgments gives consideration to the chilling effect. The dicta reveal a House of Lords which is wary of the press and somewhat sceptical of a chilling effect. Nonetheless, because of an altered constitutional background,<sup>263</sup> and a developing rights consciousness, their Lordships were prepared to have particular regard to the importance of freedom of expression. As a result, their Lordships extended the defence of qualified privilege within defamation law, where there is discussion of political matters. The scope of the defence was wide, with Lord Nicholls referring to '...matters of serious public concern.'<sup>264</sup> This covers such topics as the governance of public bodies, institutions and companies which

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<sup>258</sup> See eg: Susan M Gilles, 'Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation' (1998) 58 *Ohio State Law Journal* 1753, 1774, noted in Kenyon, *ibid*, 385, and see Kenyon, *ibid*, 386-387.

<sup>259</sup> *Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011. Kenyon refers to this as part of the 'years of great doctrinal change since the early 1990s.' See Kenyon, n. 256 above, 15.

<sup>260</sup> See n. 248 above, 191.

<sup>261</sup> *British Coal v Nation Union of Mineworkers*, *The Times*, 13 August 1996, *Goldsmith v Bhojru* [1997] 4 All ER 268.

<sup>262</sup> [2001] 2 AC 127.

<sup>263</sup> The passage of the Human Rights Act 1998, incorporating the European Convention on Human Rights into English law.

<sup>264</sup> See n. 262 above, 204.

give rise to a public interest in disclosure, but excludes matters which are personal and private.<sup>265</sup> However, having apparently altered the balance of the law in favour of the media, the House imposed conditions of care on those claiming the defence. As is well known, the Law Lords developed a 10 point code of journalistic conduct containing the matters to be taken into account in determining whether an occasion of privilege will arise for a media defendant.<sup>266</sup>

In stating this non-exhaustive list, the House of Lords acknowledged that the outcome of checking media behaviour against it would vary from case to case. While this would have the benefits of being a flexible test, Lord Nicholls acknowledged directly it might also have a chilling effect. His understanding of the chilling effect is similar to Schauer's, but he also considered that it might have different impacts on different sectors of the English media:

...The outcome of a court decision, it was suggested, cannot always be predicted with certainty when the newspaper is deciding whether to publish a story. To an extent this is a valid criticism. A degree of uncertainty in borderline cases is inevitable. This uncertainty, coupled with the expense of court proceedings, may 'chill' the publication of true statements of fact as well as those which are untrue. The chill factor is perhaps felt more keenly by the regional press, book publishers and broadcasters than the national press.<sup>267</sup>

However, his Lordship thought that uncertainty caused by any chilling effect should not be exaggerated and that practical problems could be managed through the development of guidelines. Lord Nicholls considered that the list of 10 factors had as its aim no more than responsible journalism, which the media would aspire to in any event.<sup>268</sup>

Like Lord Nicholls, Lord Steyn took as a starting point that freedom of expression is the rule and regulation of speech is the exception requiring justification.<sup>269</sup> He noted also the strictness of English defamation law and that the argument for addressing the chilling effect of the law on political speech and for striking a better balance between freedom of speech and defamation was strong.<sup>270</sup> But in the end, he too preferred a flexible approach rather than a broader defence, balanced by media responsibility.

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<sup>265</sup> Lord Cooke acknowledged in *Reynolds* that public figures other than politicians exercise great power over the lives of people and greatly influence public opinion or act as role models: *ibid*, 220. This might even extend to the activities of celebrities.

<sup>266</sup> They were: the seriousness of the allegation, the nature, source and status of the information, steps taken to verify the information, urgency of publication, whether comment was sought, whether the article contained the gist of the plaintiff's side of the story, the article's tone, and the circumstances of publication: *ibid*, 205, per Lord Nicholls. His Lordship did emphasise that the comments were illustrative only.

<sup>267</sup> *Ibid*, 202.

<sup>268</sup> *Ibid*.

<sup>269</sup> *Ibid*, 208.

<sup>270</sup> *Ibid*, 210, referring to the work of Barendt et al, see n. 248 above, 191–192.

Lord Cooke noted the moral, intellectual and emotional attractiveness of freedom of speech arguments.<sup>271</sup> Nonetheless, he was wary of the commercial pressures on media to present and package stories in exciting ways which might in fact distort, exaggerate or unfairly represent the truth. Lord Cooke also appeared to accept defamation law may have a tendency to chill the publication, not only of untruths, but also of that which may be true but cannot be proved to be true.<sup>272</sup> But he thought there was nothing new in this. His Lordship did not know which tendency was greater, but his experience of defamation litigation suggested that it was more common for chill effects to be benign.<sup>273</sup>

Lord Hope appeared particularly sceptical of the chilling effect idea generally, and thought the description of the current law ‘...as having a ‘chilling’ effect on free speech, as if this in itself shows that something is wrong with it, is too simple. Of course, it does ‘chill’ or inhibit the freedom of the communicator. But there are situations in which this is a necessary protection for the individual.’<sup>274</sup>

Lord Hobhouse agreed with Lord Nicholls and Lord Cooke and was somewhat distrustful of the media. Although he did not engage in a direct chilling effect analysis, by implication, his Lordship rejected any suggestion of excessive chill arising from existing defamation law. He was concerned not to hand a broad, generic defence to the media, on the grounds that it ‘...would be handing to what are essentially commercial entities a power which would deprive the subjects of such publications of the protection against damaging misinformation.’<sup>275</sup>

In *Reynolds*, then, the House of Lords shared a view of the chilling effect as being the risk of the suppression of stories both true and untrue due to fear of litigation with its attendant uncertain outcome and cost. Their Lordships were prepared to accept a theoretical possibility of excessive chilling effects, although they were sceptical as to the reality, but in any event, they did not consider that imposing some sort of duty of care on the media in order to gain access to a wider form of qualified privilege ultimately gave rise to such an effect.

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<sup>271</sup> Ibid, 218.

<sup>272</sup> Ibid, 220.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid, 235.

<sup>275</sup> Ibid.

*Reynolds* was followed by the series of *Loutchansky* decisions which display continuing judicial uncertainty in the United Kingdom about chilling effect arguments. *Loutchansky v Times Newspapers Ltd*<sup>276</sup> went against media interests. It confirmed that in defamation law, multiple publications can arise from initial publication on the Internet, so that subsequent occasions upon which the website is accessed give rise to separate causes of action, each with an individual limitation period. The defendant newspaper had argued this could mean a maintainer of a website is exposed to continuous and indefinite claims every time archived material is accessed. However, the Court considered that any chilling effect resulting from the multiple publication rule on the willingness of the media to maintain and provide access to such material was justified in terms of the UK Human Rights Act 1998, which protects freedom of expression. While once again acknowledging the theoretical possibility of a chilling effect, in this case, on the keeping of media archives, the court thought, like the House of Lords in *Reynolds*, that in reality it could be reduced and controlled in practical ways. It suggested that if archive material was known or suspected to be defamatory, the attachment of an appropriate notice warning against its reliability as truth will normally remove the sting from the material, and furthermore, subsequent actions arising from fresh publication on the Internet would be likely to give rise to only modest damage compared to the original publication.<sup>277</sup> Such suggestions offered little reassurance to media. Warning notices, like denials and disclaimers, may not in fact remove the sting of a defamation, and the material may still give rise to defamation proceedings or threats of impending claims. In fact, the suggestion that only modest damage might arise implicitly recognises this possibility.

A later decision in the *Loutchansky* litigation was more media-friendly. In *Loutchansky v. Times Newspapers Ltd (No. 6)*,<sup>278</sup> acceptance of conventional chill factor arguments led Gray J in the High Court to reduce remedial choice to the plaintiff. In this set of proceedings, Loutchansky applied to amend his particulars of claim to seek a declaration establishing the falsity of what was said about him. This was refused and the judge stated a declaration could not also be sought where the main defence relied on was qualified privilege. As well as subverting the balance between the claimant's right to reputation and the defendant's right to freedom of expression, the Court thought that to permit such a claim would open the

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<sup>276</sup> (No's 2, 3 and 5) [2002] QB 783.

<sup>277</sup> *Loutchansky v. Times Newspapers Ltd* (No's 2, 3 and 5) [2002] QB 783, [74].

<sup>278</sup> [2002] EMLR 1001.

floodgates and increase the risk of the media's right to freedom of expression being blighted by the cost of defending defamation claims seeking declarations rather than damages.<sup>279</sup>

More recent developments have also benefited the media. The *Reynolds* 10 point code ossified for a time, unduly restricting the usefulness of the defence. In *James Gilbert Ltd v Mirror Group Newspapers Ltd*,<sup>280</sup> for example, *Reynolds* was treated as creating a need to address each of the criteria separately as relevant to the facts in every case, thus becoming an obstacle course for media defendants. However, in *Jameel v Wall Street Journal*,<sup>281</sup> the House of Lords rejected this inflexible approach. In *Jameel*, the privilege metamorphosed into the *Reynolds* 'public interest' defence,<sup>282</sup> indicating that the material, and not the occasion, is protected, and that the defence is being developed with the media in mind. The context of the article as a whole is used to determine public interest,<sup>283</sup> so if an allegation is serious, the article has to make a real contribution to that.<sup>284</sup> The next question is still whether steps taken to gather the information were responsible and fair, but the 10 *Reynolds* criteria are pointers only, not a series of hurdles to be overcome. Weight is to be given to the professional judgment of the editor or journalist in the absence of evidence of any slipshod approach.<sup>285</sup> Thus, one inaccurate fact in a generally true article might not be irresponsible.<sup>286</sup> Regard is had to matters such as the steps taken to verify information and the opportunity to comment. In *Jameel*, the article published about the use of bank accounts to channel funds for terrorist organisations was clearly of public interest. The other relevant factors which indicated media responsibility were that the article was unsensational, it was by an experienced specialist reporter and approved by senior staff, and although a response was sought at a late stage, it would not have been particularly useful anyway.<sup>287</sup> *Jameel* has been described in a later case as '...releasing the shackles on the freedom of expression afforded to the media in matters of public interest.'<sup>288</sup>

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<sup>279</sup> This may not be the approach in New Zealand. See n. 361 below.

<sup>280</sup> [2000] EMLR 680.

<sup>281</sup> [2006] UKHL 44, [2007] 1 AC 359.

<sup>282</sup> Ibid, [46], per Lord Hoffman, [146], per Baroness Hale.

<sup>283</sup> Ibid, [48] per Lord Hoffman, [111] per Lord Hope.

<sup>284</sup> Ibid, [51].

<sup>285</sup> Ibid, [33], per Lord Bingham.

<sup>286</sup> Ibid, [34].

<sup>287</sup> Ibid, [35]. Interestingly, although the House was prepared to open out the *Reynolds* defence to make it more useful to the media, it was not prepared (by a majority of 3:2) to go further and change the rule that a trading company with a trading reputation does not have to plead or prove special damage if the publication has a tendency to damage its business: *ibid*, see Lords Scott, Hope and Bingham, [27], [98] and [125]. Baroness Hale expressed concern about the possible disproportionate chilling effect of the rule on freedom of speech and favoured a test based on likelihood of causing financial loss: [154], [157], while Lord Hoffman focussed on the commercial nature of a corporate reputation: [91].

<sup>288</sup> *Charman v Orion Group Publishing Ltd* [2008] 1 All ER 750, [71], per LJ Ward.

*Reynolds* privilege is also apparently beginning to subdivide into further special forms in the United Kingdom – the first of these is called neutral reportage or simply reportage. This manifestation of the defence is very attractive, because if certain conditions are met, the journalist need not have attempted to verify. In *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd*<sup>289</sup> the defendant was a small newspaper with a circulation of 1500 in London, part-owned by the Saudi-Arabian royal family, and supportive of the Saudi Arabian government, which reported a dispute between prominent members of a Saudi-Arabian dissident political organisation. The report stated that the reporter had been told by one party that the other had spread malicious rumours and allegations of immoral behaviour about him. The Court of Appeal held by majority that *Reynolds* privilege could protect a report of defamatory allegations and counter-allegations where attribution was clear, the matter was of proper interest to the reader, and the reporter did not adopt the allegations.<sup>290</sup> In a case of true reportage, for example, where a political dispute is fully, fairly and disinterestedly reported, the reporter need not verify the information.<sup>291</sup>

The Court of Appeal went on to apply the doctrine in *Roberts v Gable*,<sup>292</sup> where Ward LJ clarified the following requirements:

- the information must be in the public interest;
- in a true case of *reportage* there is no need to take steps to ensure the accuracy of the published information;
- the report as a whole must simply set out in a neutral fashion the fact that something has been said without adopting the truth;
- the judge rules objectively on the effect of the article as a whole, by looking at all of the circumstances relevant to the gathering of the information, in particular, the manner and purpose of reporting;
- if the journalist adopts the report or fails to report in a fair, disinterested and neutral way, the only possible defence will be *Reynolds* responsibility;
- the *Reynolds* responsibility factors are still relevant, adjusted as may be necessary for the special nature of *reportage*, and looked at in all the circumstances;

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<sup>289</sup> [2001] EWCA Civ 1634.

<sup>290</sup> *Ibid*, [65], [67] and [68].

<sup>291</sup> *Ibid*, [52]. Arguably, in fact, verification is inconsistent with the objective reporting required.

<sup>292</sup> [2007] EMLR 457. See also Mr Justice Eady in *Prince Radu of Hohenzollen v Marco Houston & Sena Julia Publications Ltd* [2007] EWHC 2735.

- reportage can protect serious allegations as well as scandal-mongering – reported criminality does not automatically require verification, but may be relevant to the question of public interest;
- relevant factors properly applied include the position of the protagonists in public life but there is no requirement that the defendant be a responsible prominent person or the claimant be a public figure as required under US law;
- urgency is relevant to the weight given to editorial decisions, but every story must be judged on its merits at the moment of publication.<sup>293</sup>

The Court accepted that in this case, Mr Gable was merely reporting conflicting positions arising from allegations and cross- allegations of criminal offences being made by British National Party factions against each other, and not necessarily their truth or falsity. This was so in spite of the use of one sarcastic reference in the article, because a whole, it did not adopt any position to the allegations, and the sarcasm was judged to be speculative.<sup>294</sup> The article was also responsible in terms of the 10 *Reynolds* factors. Crucially, however, Sedley LJ commented that neutral reportage must modify the repetition rule, and so should be used restrictively.<sup>295</sup>

Reportage was not available to the defendant book publishers in *Charman v Orion Group Publishing Ltd*,<sup>296</sup> because the author of a book ‘*Bent Coppers*’ had written an investigative account or ‘inside story’ of police corruption, by ‘sniffing out information like a bloodhound’, rather than acting as a ‘watchdog barking to wake us up to the story already out there’.<sup>297</sup> However, this case was celebrated as the first where *Reynolds* responsibility was argued successfully by a book publisher.<sup>298</sup> Working methodically through the 10 points, although not required to, Ward LJ observed the parties had accepted the public interest element in the very serious allegations made, and found the author had used varied sources, and had taken all steps possible to verify the information.<sup>299</sup> The claimant had rebuffed attempts to get his side of the story, but in any event, this was contained in the book. The tone of the book was essentially factual in context and unsensational. Readers were left to form their own impression. The circumstances of the publication were not relevant. However, while there was

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<sup>293</sup> Ibid, [61]. These points are paraphrased.

<sup>294</sup> Ibid, [66].

<sup>295</sup> Ibid, [74]. See Chapter Two, 1.6 above.

<sup>296</sup> [2008] 1 All ER 750.

<sup>297</sup> Ibid, [49].

<sup>298</sup> See eg: Ward LJ, [83]: ‘I see no reason at all for confining responsible journalism to newspapers and magazines. It must be extended to the authors and publishers of books.’

no urgency as for newspapers or broadcasters, this criterion did have some relevance. The book was not a ‘perishable commodity’, but the lack of urgency was taken into account and actually weighed against the defendant, because greater care is to be expected of authors and publishers in such circumstances.<sup>300</sup> However, Sedley LJ refused to engage in a retrospective editorial function, and held that even though the book was a selective and evaluative account, it was within the bounds of responsible journalism.<sup>301</sup>

This on-going refinement of the public interest or responsible journalism defence, and the further fracturing of it into an even more specialist defence such as reportage, represent a sea-change in English defamation law which must mediate any real chilling effects existing in that jurisdiction. These are changes to substantive law which provide more accessible defences for the media.<sup>302</sup> Although they require responsible media behaviour, it appears the question of responsibility is now being dealt with in a manner which is realistic and cognisant of media interests.

### 2.3 Europe

The European Court of Human Rights considers the domestic defamation laws of its member states as potential restrictions on freedom of expression, when a media applicant objects to a successful defamation claim or some other speech restriction. Freedom of expression is contained in Article 10 of the European Convention on Human Rights, and is given a wide interpretation by the Court to include offensive, shocking and disturbing ideas and opinions,<sup>303</sup> and the form in which those ideas are conveyed, such as photographs.<sup>304</sup> The Court also makes a distinction between statements of fact and value judgments or opinions. In general, there is no requirement to prove the truth of the latter,<sup>305</sup> although where excessive, there must be some basis in fact.<sup>306</sup>

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<sup>299</sup> Sedley LJ agreed in 4 paragraphs: *ibid*, [88]-[91]. Hooper LJ used a very close textual analysis to conclude that the defendant had engaged in responsible journalism: *ibid*, [92]-[259].

<sup>300</sup> *Ibid*, [83].

<sup>301</sup> *Ibid*, [90].

<sup>302</sup> See Kenyon, n. 256 above, 15.

<sup>303</sup> See *White v Sweden* [2006] ECHR 793, [2007] EMLR 1, [21].

<sup>304</sup> *Verlagsgruppe News GMBH v Austria (No. 2)* [2006] ECHR 1094, [29].

<sup>305</sup> See *Lyashko v Ukraine* [2006] ECHR 712, [41], following *Lingens v Austria* [1986] ECHR 7, 8 EHRR

407.

<sup>306</sup> See for example, *Prager and Oberschlick v Austria* [1995] ECHR 12, which involved criticisms of the judiciary.

However, media responsibility has also been expressly recognised as required by the Convention.<sup>307</sup> Therefore, although the Court has a very clear idea of the importance of a free press, it construes the character of that press as an ethical and responsible one:

...a constant thread running through the Court's case-law is the insistence on the essential role of a free press in ensuring the proper functioning of a democratic society. Although the press must not overstep certain bounds, regarding in particular the protection of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest.<sup>308</sup>

Together with the wide interpretation given to speech referred to above, the Court interprets the Convention requirements in ways which are expansive of journalistic freedom. Responsible journalism can therefore include publication of material which has a degree of exaggeration, or even provocation,<sup>309</sup> and the Court attempts to assess media behaviour without the benefit of hindsight, and in a realistic fashion.<sup>310</sup>

For example, in *White v Sweden*,<sup>311</sup> the ECHR found that domestic courts had struck a correct balance in holding that the public interest in a series of articles suggesting the applicant was guilty of criminal offences, including a prominent murder, outweighed his right to protect his reputation because the subject matter was of very serious public interest, and the newspapers had presented a balanced view and acted in good faith in attempting to verify.

In *Verlagsgruppe News GMBH v Austria*,<sup>312</sup> it found the absolute prohibition of publication of a photograph<sup>313</sup> of a Mr G together with an article reporting pending investigations on suspicion of large scale tax evasion against him to interfere with freedom of expression, because the information contributed to a public debate on the integrity of business leaders, on illegal business practices and the functioning of the justice system, the tax offences were serious, and because an absolute prohibition was disproportionate.

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<sup>307</sup> Under Article 10(2), freedom of expression carries 'duties and responsibilities'. See *White*, above, n. 303, [21], *Tonsbergs Blad as and Haukom v Norway* [2007] ECHR 186, [89].

<sup>308</sup> See *White*, above n. 303, [21], *Verlagsgruppe News* above n. 304, [35], *Lombardo and Others v Malta* [2007] ECHR 323, [53].

<sup>309</sup> *White*, above n. 303, [21], *Lyashko v Ukraine* above, n. 305, [41].

<sup>310</sup> See *Tonsbergs Blad As and Haukom v Norway*, n. 307 above, [99].

<sup>311</sup> See n. 303 above.

<sup>312</sup> See n. 304 above.

<sup>313</sup> Mr G had obtained an injunction under s 78 of the Austrian Copyright Act which provided: '(1) Images of persons shall neither be exhibited publicly, nor in any way made accessible to the public, where injury would be caused to the legitimate interests of the persons concerned or, in the event that they have died, without having authorised or ordered publication, those of a close relative.'

In *Tonsbergs Blad as and Haukom v Norway*,<sup>314</sup> the Court made it very clear that ‘the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide reliable and precise information in accordance with the ethics of journalism.’<sup>315</sup> The Court described a number of factors to be examined, which are mirrored in *Reynolds*.<sup>316</sup> They included the nature and degree of the defamation, the reliability of sources, the words and context of the report as a whole, and whether the journalists acted in good faith in attempting to verify.<sup>317</sup> In this case, a relatively minor and limited defamation which had resulted in a damages award was nonetheless an excessive and disproportionate burden on a regional newspaper. The *Tonsberg Blad* had published an article alleging that the name of the head of one of Norway’s largest industrial companies appeared on an official list of persons considered to have breached permanent residency requirements. In finding the newspaper’s behaviour to be responsible, the Court noted although the matter was one of public interest, the allegation itself was not serious and had been presented in a qualified form. Further, the report was balanced and it was not for the Court to dictate reporting techniques. Finally, although the source was anonymous and thus, greater care was required, the evidence available to the journalist at the time supported the allegation, which meant verification was adequate and in good faith. The disproportionate burden borne by the newspaper of fighting the action was capable of having a chilling effect on press freedom in Norway.<sup>318</sup>

Significantly, like the House of Lords in the *Derbyshire* case,<sup>319</sup> the European Court accords great weight to political context when assessing whether there is public interest in a publication. Permissible criticism is wider in relation to governmental behaviour and politicians in contrast to that of private citizens. Thus, politicians, national or local,

...inevitably and knowingly lay themselves open to close scrutiny of their words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance.<sup>320</sup>

It is therefore much harder to justify restricting political debate.<sup>321</sup> In *Lombardo and Others v Malta*,<sup>322</sup> for instance, an article which suggested Fgura Local Council had not consulted the public about roading and was ignoring public opinion was held to have been part of a lively

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<sup>314</sup> See n. 307 above.

<sup>315</sup> Ibid, [89].

<sup>316</sup> See n. 262 above.

<sup>317</sup> Ibid, [ 89] –[90].

<sup>318</sup> Ibid, [102].

<sup>319</sup> See n. 259 above.

<sup>320</sup> *Lombardo and Others v Malta*, see n. 308 above, [53].

<sup>321</sup> See *Lindon, Otchakovsky and July v France* [2007] ECHR 836, [46].

political debate at a local level, in which elected officials and journalists should have had broader opportunity to criticise the local authority, even though the allegations might not have a clear factual basis.

European jurisprudence has taken an expansive view of the nature of media itself, a position which has great relevance to the development of new media. In *Steel and Morris v the United Kingdom*<sup>323</sup> the Court demonstrated very clearly its own idea of media responsibility. This case was an application against the United Kingdom government by Steel and Morris, two impecunious pamphleteers who had partially unsuccessfully defended defamation proceedings brought against them by corporate giant McDonald's in relation to the distribution of a six page document by the pair at McDonald's outlets. The defamation trial was the longest civil and defamation trial in English legal history and the applicants had to defend themselves because they possessed few assets and legal aid was not available for defamation trials in the United Kingdom. Steel and Morris argued that English defamation law and the lack of legal aid gave rise to violations of their rights to a fair trial and freedom of expression under the European Convention on Human Rights. Although the applicants were not journalists, the Court considered that in a democratic society even small and informal campaign groups had a legitimate and important role in stimulating public discussion.<sup>324</sup> Nonetheless, like journalists, the applicants had to act in good faith in order to provide accurate and reliable information, and while a certain degree of hyperbole and exaggeration would be tolerated in a campaigning leaflet, it was right that serious allegations presented as fact could become the subject of defamation proceedings.<sup>325</sup> However, in weighing the apparent inequalities of the parties to those proceedings, the Court thought that the correct balance was not struck between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's rights and reputation.<sup>326</sup> Here, a potential chilling effect played a part in the balancing process, which in the end favoured the applicants:

The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion...<sup>327</sup>

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<sup>322</sup> Ibid, [60].

<sup>323</sup> [2005] ECHR 103.

<sup>324</sup> Ibid, [95].

<sup>325</sup> Ibid, [90].

<sup>326</sup> Ibid, [95].

<sup>327</sup> Ibid.

The decision suggests that small sectors of the media and even unconventional non-media parties play important roles in freedom of expression.

Overall, then, it appears the ECHR has given some primacy to freedom of expression. A recent development in the jurisprudence may impact on this, however. The Court has begun to accord the protection of reputation equal status with freedom of expression under the privacy rubric. Article 8(1) of the Convention. provides that ‘Everyone has the right for respect for his private...life’, and the Court has accepted arguments that the Article has been breached by the failure of state courts to provide due protection of name and reputation.<sup>328</sup> This development has been outlined in a passionate defence of the right to reputation stated in the concurring opinion of Judge Loucaides in *Lindon, Otchakovsky and July v France*,<sup>329</sup> where the judge also expressed disquiet about the apparent tendency to give primacy to political speech even where statements are untrue.

In *Lindon*, the Court clearly struggled with applications made by a writer and publisher of a novel called ‘*Jean-Marie Le Pen on Trial*’ based on real events surrounding a murder carried out by skinheads in 1995, which contained passages defamatory of the National Front Leader, Mr Le Pen. A third applicant was the publisher of a newspaper which published an article by 97 contemporary writers in the form of a petition denying the book was defamatory and repeating the statements. The applicants were convicted of criminal defamation under French law. A majority of the Court<sup>330</sup> surprisingly found that convictions and fines imposed on the applicants did not breach Article 10 of the Convention. The finding appears to be based in the main on the perceived extreme virulence of the allegations (Le Pen was likened to a chief of a gang of killers, and described as a vampire) and the moderate nature of the fines imposed.<sup>331</sup> Judge Loucaides commented that the Court had on occasion shown excessive sensitivity and over-protected freedom of expression in contrast to protection of reputation, and concluded with a strong indictment of the tendencies of the modern mass media to behave in an uncontrolled and self-interested manner. His judgment clearly endorses benign chilling effects of defamation law on irresponsible journalism.<sup>332</sup> However, the speech in this case does not appear to be particularly irresponsible or virulent, and criminal libel laws are, by their very

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<sup>328</sup> See eg: *White v Sweden* n 303 above, [14].

<sup>329</sup> [2007] ECHR 836.

<sup>330</sup> Thirteen out of 17 judges.

<sup>331</sup> See n. 329 above, [57]-[58].

<sup>332</sup> *Ibid.*

nature, objectionable, because the state has no legitimate place in the protection of private reputation, and the risk of abuse is high.<sup>333</sup>

The minority took a similar position, and attached considerable weight to the nature of the work as a piece of fiction, pointing out the role of artistic creation in political debate.<sup>334</sup> Further, these judges believed that Mr Le Pen, as a politician holding extremist views, should accept a higher degree of tolerance.<sup>335</sup> These judges would not have imposed high verification standards on the applicants,<sup>336</sup> did not find the publications themselves incited violence or hate speech,<sup>337</sup> and questioned the validity of criminal defamation provisions in the 21<sup>st</sup> century.<sup>338</sup>

The European decisions probably favour the media overall, and it is to be hoped that the result in the *Le Pen* case is an aberration. The approach to the chilling effect itself in these cases is varied, as in the domestic common law jurisdictions. In many of the cases, the chilling effect is implicit in the decision, but not acknowledged. In others, such as *Tonsbergs Blad*,<sup>339</sup> the doctrine is simply referred to like a mantra, without any in-depth investigation or critical analysis. In yet others, the doctrine is discussed in more detail. In *Lombardo and Others v Malta*,<sup>340</sup> for instance, the effect was described generally as arising from ‘fear of sanction’, and in that case, it was accepted as discouraging the applicants from criticising the local council in the future.<sup>341</sup> In these cases, a potential effect is assumed. However, sometimes, the Court goes further, and states specifically that no evidence is required to support chilling effects arguments at all.<sup>342</sup> The European dicta demonstrate how a predictive assertion of the chilling effect has become a doctrine with substantive, though variable, effects on the law of the European Convention on Human Rights.

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<sup>333</sup> See the New Zealand example referred to in n. 232 above.

<sup>334</sup> See n. 329 above, Joint Partly Dissenting Opinion of Judges Rozakis, Bratza, Tulkens and Sikuta, at 2.

<sup>335</sup> *Ibid*, 5.

<sup>336</sup> *Ibid*, 5.

<sup>337</sup> *Ibid*, 6.

<sup>338</sup> *Ibid*, 7.

<sup>339</sup> See n. 307 above. See also *Lyashko v Ukraine*, n. 305 above, [57].

<sup>340</sup> See n. 308 above.

<sup>341</sup> *Ibid*, [61].

<sup>342</sup> See eg: *Independent News and Media and Independent Newspapers Ireland Ltd v Ireland* [2005] ECHR 402, [114].

## 2.4 Australia

The chilling effect doctrine has also had substantive effects on defamation law in Australia. After some skirmishing in *Theophanous v Herald and Weekly Times*<sup>343</sup> and *Stephens and others v West Australian Newspapers Ltd*,<sup>344</sup> the High Court held in *Lange v Australian Broadcasting Corporation*<sup>345</sup> that the Australian constitution had implied in it a freedom of communication. However, the High Court was concerned only about excessive effects and sought to mediate those arising from defamation laws, and thus to adapt those laws. Therefore, protecting personal reputation was seen as legitimate as long as it did not unnecessarily or unreasonably impair freedom of communication about government and political matters.<sup>346</sup> However, the public interest in the law of defamation was acknowledged, because it was accepted by the Court as also protecting those taking part in government and political life and therefore conducive to the public good. The result was an extension of the defence of qualified privilege which was only available on the basis of reasonableness of the defendant's behaviour. The decision, like *Reynolds*, recognised a chilling effect, relaxed defamation laws (in NSW and now elsewhere) in favour of defendants, but tempered this with a requirement of media responsibility.

Although the defence looks to be turning into one of public interest in Australia,<sup>347</sup> as in the United Kingdom, an apparently rigid approach by courts to responsibility requirements has been criticised as obstructive to press freedom. The defence has rarely been successfully used. A recent example is *Obeid v John Fairfax Publications Pty Ltd*,<sup>348</sup> where the Supreme Court of New South Wales found the defence was not available where two journalists had published serious allegations of corruption and bribery against a State Minister without verifying the

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<sup>343</sup> (1994) 182 CLR 104 (1994) 124 ALR 1 (1994). Four Justices, Mason CJ, Toohey J, Gaudron J and Deane J reached the conclusion that an unqualified application of the defamation laws of Victoria to impose liability in damages in respect of political communications and discussion was precluded by the constitutional implication of political communication and discussion. However, a strong minority of three did not agree. Of the chilling effect, Brennan J said: '[It] simply translates into tendentious language the legal truism that the tort of defamation achieves its purpose of providing protection for personal reputations by providing the remedy of damages against the tortfeasor. If the publication of defamatory matter were not chilled by the remedy, there would be no sanction for publications that are neither justified nor excused:' see para 28 of his judgment.

<sup>344</sup> (1994) 182 CLR 211 (1994) 124 ALR 80.

<sup>345</sup> (1997) 71 ALJR 818.

<sup>346</sup> Ibid.

<sup>347</sup> See eg: *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 204 ALR 193.

<sup>348</sup> [2006] NSWSC 1059. See also *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals* (Vic) [2002] FCA 860; *Brander v Ryan* (2000) SASC 446; *Popovic v Herald & Weekly Times* [2003] VR 1.

words of an unreliable source. The more flexible and media-friendly approach of the House of Lords in *Jameel* has not been judicially endorsed in Australia, but is seen as desirable there.<sup>349</sup>

*Dow Jones v Gutnick*<sup>350</sup> appears less media friendly. In that case, the High Court refused to accept arguments that freedom of expression would be chilled if the ordinary principles of publication in defamation were applied to the Internet. An article in an on-line magazine uploaded in the US contained several allegedly defamatory references to Mr Joseph Gutnick. He was held entitled to bring an action in the Supreme Court of Victoria in Australia against Dow Jones, although the latter argued that the claim should have been brought in the US, where the company could have taken advantage of the greater constitutional protections for defendants. The article could be downloaded in Victoria, which was where Mr Gutnick lived and had his business headquarters. The High Court confirmed that a defamation is to be located at the place where the damage to reputation occurs. But because material on the Internet is not available in comprehensible form until downloaded on to the computer of a party using a web browser to pull the material from the web server, the place of download is where the damage to reputation may be done, and the place where the tort of defamation is committed. Callinan J stated:

Quite deliberately, and in my opinion rightly so, Australian law places real value on reputation, and views with scepticism claims that it unduly inhibits freedom of discourse. In my opinion the law with respect to privilege in this country, now and historically, provides an appropriate balance which does justice to both a publisher and the subject of a publication.<sup>351</sup>

However, even more recently, chilling effects have been implicitly recognised in the context of federal law reform in Australia. New uniform defamation laws finally came into force in that jurisdiction in 2006.<sup>352</sup> These reforms can certainly be described as limiting or relaxing defamation laws, thereby arguably also limiting real or perceived chilling effects. In Australia now, large non-charitable corporations cannot sue in defamation, the defence of truth no longer has a requirement of public interest, death puts an end to a plaintiff's claim, there is a cap on damages at \$250,000 unless there is special aggravation, punitive damages have been abolished, and there is a widened contextual truth defence. The Australian Press Council has

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<sup>349</sup> See *State of the News Print Media in Australia: a supplement to the 2006 Report of the Australian Press Council*, October 2007, 63. See also *Australian Press Council Annual Report No. 31* (2007), 10.

<sup>350</sup> [2002] HCA 56; 210 CLR 575; 194 ALR 433.

<sup>351</sup> *Ibid.*, [190].

<sup>352</sup> See Defamation Act 2005, No 77 (NSW), Defamation Act 2005 No 55 (Qld), Defamation Act 2005 No 50 (SA), Defamation Act 2005 No 73 (Tas), Defamation Act 2005 No 75 (Vic), Defamation Act 2005 No 44 (WA), Civil Law (Wrongs) Amendment Act 2002 (as amended by the Civil Law (Wrongs) Amendment Act 2005 No 2 (ACT), and Defamation Act 2006 (NT).

reported an apparent significant decrease in new defamation actions since the passage of the harmonised legislation.<sup>353</sup>

## 2.5 New Zealand

In the New Zealand leading case, *Lange v Atkinson*<sup>354</sup> Justice Elias (as she then was) in the High Court gave unusually close but also wide-ranging attention to the development of the chilling effect doctrine. In that case, as is well known, former Prime Minister and former leader of the Labour Party, David Lange claimed general and punitive damages for defamation arising from a *North and South* article, which he claimed suggested that he was irresponsible, dishonest, insincere, manipulative and lazy. Essentially the case was about whether the appropriate balance was properly struck by the common law between the two principles of reputation and free speech<sup>355</sup> in New Zealand.

Of the ‘chilling effect’ Elias J said:

... The basis of the concern is a recognised "chilling effect" which inhibits dissemination of information and comment on matters of public interest because of the risk of liability in damages or exposure to costly litigation. Because of the uncertainties of outcome in litigation, the difficulties of proof in a manner acceptable in Court, and the costliness of the process, defamation laws are feared to inhibit not only false speech made in good faith but true speech as well.<sup>356</sup>

Although inclined to take a position which was sympathetic to the media, in the end, she too tempered her approach with caution. While prepared to adjust the balance between freedom of speech and protection of reputation as a value judgment, informed by local circumstances and guided by principle,<sup>357</sup> Elias J acknowledged that whether there is a need to provide additional protection for the media turned in part on a sociological assessment of the vulnerability or power of the news media and that a Court may not be sufficiently informed about that.<sup>358</sup> For this reason, she was not prepared to go as far as changing the law to reflect the American position, and instead held that the common law defence of qualified privilege could apply to ‘discussion which bears upon the function of electors in a representative democracy by developing and encouraging views upon government’.<sup>359</sup> The defence would be available to all, including media. No more than honest belief would be required as a condition of the

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<sup>353</sup> See *State of the News Print Media in Australia: a supplement to the 2006 Report of the Australian Press Council*, October 2007, 62.

<sup>354</sup> [1997] 2 NZLR 22. High Court, Elias J.

<sup>355</sup> *Lange v Atkinson* [1997] 2 NZLR 22, 31.

<sup>356</sup> *Ibid*, 37.

<sup>357</sup> *Ibid*, 43.

<sup>358</sup> *Ibid*, 44.

<sup>359</sup> *Ibid*, 45.

defence. This was because the judge accepted the US ‘actual malice’ approach has itself-arguably created a chilling effect because it requires an investigation into media methods.<sup>360</sup>

Furthermore, in *Lange*, foreshadowing the *Loutchansky* decision,<sup>361</sup> Elias J held that the defence applied to claims for damages but the matter of declarations was left for another court. The potential chilling effect was recognised by the judge again in this context, because the question as to availability of a declaration was seen to turn on whether the costs of litigation and the exposure to solicitor and client costs would have an unacceptable chilling effect on political discussion.<sup>362</sup> This specific remedial issue has not been finally determined in New Zealand.<sup>363</sup>

The *Lange* case went to the Court of Appeal twice.<sup>364</sup> In *Lange No 1* it was held that the defence of qualified privilege applied to generally-published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affected their capacity (including their personal ability and willingness) to meet their public responsibilities. The determination of the matters that bore on that capacity depended on a consideration of what was properly a matter of public concern rather than of private concern<sup>365</sup>. There was no requirement of reasonable care for the defence of qualified privilege to be invoked, but (per Tipping J) reasonableness could be relevant to the question whether the defendant had taken improper advantage of the occasion of publication.<sup>366</sup>

In the majority judgment delivered by Blanchard J (for himself, Richardson, Henry and Keith JJ) the chilling effect is mentioned a number of times. First, the Court discusses the judgment of Brennan J in *NY Times v Sullivan*, where he recognised the effect to justify the eventual defendant malice rule developed in that case.<sup>367</sup> Later, the judgment of Lord Keith of Kinkel delivered for the House of Lords in *Derbyshire* is cited, where he referred to the *NY Times*

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<sup>360</sup> Ibid 50. This was similar to the approach taken by the House of Lords in *Reynolds*, n. 262 above.

<sup>361</sup> See n. 277 above.

<sup>362</sup> See n. 354 above, 48.

<sup>363</sup> In the Court of Appeal In *Lange v Atkinson* [1998] 3 NZLR 424 (*Lange No 1*) the Court noted that it did not make a decision as to the application of the law to claims for declarations rather than damages, but hinted that the principle it declared does not depend on the remedy being sought: *ibid* 470. Cf *Loutchansky* (No 6), see n. 279 above.

<sup>364</sup> See *Lange No 1* and *Lange v Atkinson (Lange No 2)* [2000] 3 NZLR 385.

<sup>365</sup> *Lange No 1*, 428, 475.

<sup>366</sup> *Ibid*, 469, 474, 477.

<sup>367</sup> *New York Times v Sullivan* 376 US 254, 270.

case and to the chilling effect of the threat of civil actions for libel.<sup>368</sup> Tipping J, in a separate judgment, thought that chilling effects should be borne in mind, but that they should not always be seen as a bad thing, and may serve a useful purpose in certain circumstances.<sup>369</sup>

This decision of the Court of Appeal, with its emphasis on the public having a proper interest in statements made about the actions and qualities of past, present or future MPs, and the extension of the defence of qualified privilege to cover statements about such matters published generally, is implicitly based on an acceptance that defamation laws may otherwise chill such statements. However, although political statements were given primacy, the decision is also conditional. Although no requirement for reasonable care was imposed in order to claim the defence, the loss of the defence where there is ill will or taking improper advantage of the occasion of publication was emphasised.<sup>370</sup> Tipping J, taking what Elias J would probably see as a conservative approach, focused on the role of a responsible press in particular. For this judge, rights go with responsibilities and he is sceptical about the exercise of those responsibilities.<sup>371</sup> Although Tipping J indicated he would like to impose a reasonableness requirement on the defence and was worried the balance might be wrong without it, he did not do so in the end, because he thought creating a whole new defence rather than extending an existing one would usurp the role of Parliament.<sup>372</sup> He hoped that the provision in s 19 of the Act that the defence is lost where there is ill will or taking advantage of the ability to publish would allow some examination of the issue of reasonable care.<sup>373</sup> He concluded by expressing general concern about the media, reflecting a belief in its considerable power:

It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power and capacity to cause harm and distress are considerable if that power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. It may be asked whether the public interest in freedom of expression is so great that the accountability which society requires of others, should not also to this extent be required of the news media.<sup>374</sup>

The same Court reconsidered the matter about two years later on remission from the Privy Council, and held that the defence of qualified privilege it had recognised in 1998 would not

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<sup>368</sup> *Lange No 1*, supra n 363, 454 referring to *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 547.

<sup>369</sup> *Ibid*, 474.

<sup>370</sup> *Ibid*, 469.

<sup>371</sup> *Ibid*, 473.

<sup>372</sup> *Ibid*, 474-5.

<sup>373</sup> *Ibid*, 475, 476-477.

<sup>374</sup> *Ibid*, 477.

be struck out.<sup>375</sup> The privilege was a generic one attaching to subject-matter coming within the category of political information and did not require an examination of the circumstances of publication in each case before determining whether the occasion is to be treated as one of qualified privilege (as had been decided by the House of Lords in *Reynolds* in the United Kingdom.).<sup>376</sup> Section 19 of the Defamation Act would provide protection against press irresponsibility not available in England. The Court of Appeal noted also that the position of the press in the two countries was different.

The Court of Appeal considered the chilling effect again. It referred to the ‘careful research’ in the Barendt study of English defamation law in practice,<sup>377</sup> and accepted the finding in that research of negative chilling effects<sup>378</sup> was relevant to *North and South* magazine.<sup>379</sup> However, the Court then rejected the English approach of considering first whether an occasion is privileged by looking at the circumstances (using the *Reynolds* checklist of media methods), because it considered this would add significantly to the chilling effect.<sup>380</sup>

The Court also made subtle distinctions to support its decision not to follow the *Reynolds* approach. One suggestion it made was that the New Zealand media is a vulnerable one,<sup>381</sup> and different from that in the UK, in that we have not experienced the worst excesses and irresponsibilities of the English national daily tabloids.<sup>382</sup> This was said to arise from the smallness of the market, less competition, low circulation figures and lack of close association with political parties.<sup>383</sup> The implication in the judgment is that the well-behaved New Zealand media can be trusted to behave responsibly, thus removing the need to impose any conditions on an extended qualified privilege defence. However, the court was still concerned to emphasise that the defence must be used with care:

If the privilege is not responsibly used, its purpose is abused and improper advantage is taken of the occasion. If a false and defamatory statement which qualifies for protection is made, and is disseminated to a wide audience, the motives of the publisher and whether the publisher had a genuine belief in the truth of the statement, will warrant close scrutiny. If the publisher is unable or unwilling to disclose any responsible basis for asserting a genuine belief in truth, the jury may well be entitled to draw the inference that no such belief existed. ... Furthermore, a publisher who is reckless or indifferent to the truth of what is published, cannot assert a genuine belief that it was true.<sup>384</sup>

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<sup>375</sup> *Lange No 2* n. 364 above.

<sup>376</sup> *Ibid.*, 400; *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010.

<sup>377</sup> See Eric Barendt et al, *Libel and the Media: The Chilling Effect* (1997).

<sup>378</sup> *Ibid.*, at 191.

<sup>379</sup> *Lange No 2*, supra n 364, 394.

<sup>380</sup> *Ibid.*

<sup>381</sup> *Ibid.*, 397.

<sup>382</sup> *Ibid.*, 398.

<sup>383</sup> *Ibid.*

<sup>384</sup> *Ibid.*, 400.

The language of responsibility was used repeatedly: ‘Responsible journalists in whatever medium ought not to have any concerns about such an approach...qualified privilege is not a licence to be irresponsible.’<sup>385</sup> This approach means that a publisher who has not checked sources, or perhaps not obtained the other side of the story, will find it hard to assert a genuine belief in the material, and the issue of recklessness or carelessness can be raised. So media methods may still be investigated in New Zealand, but at the stage after the occasion is said to be privileged, where the plaintiff wants to suggest s 19 should apply to deprive the media defendant of the defence because of ill will. However, just why this is less uncertain, and hence less chilling, for the media than the *Reynolds* approach is not made clear in the judgment.

In *Lange*, it was Elias J in the High Court who was most receptive to the chilling effect doctrine, and it may be said that the almost unconditional form her version of the constitutional privilege defence took and her reservation as to remedial application, owed much to her assumption that fear of the uncertainties associated with fighting a defamation action (outcome, cost, difficulties of proof, levels of damages) actually causes the New Zealand media to censor not only untrue stories, but also true ones. Yet even Elias J was not prepared to go so far as to adopt the American approach to defamation, because she did not wish to guess as to the actual power or vulnerability of the New Zealand media. While the Court of Appeal appeared to accept the notion of a possible chilling effect indirectly, it seems that Tipping J’s concept of media responsibility rendered the more media-friendly defence conditional, and it will only be available when a certain standard of behaviour is met. This implies that irresponsible media will in general get no relief from any potential chilling effect, and perhaps that any effects it may have on such media are appropriate. Thus, for the *Lange* Court of Appeal, the chilling effects doctrine was defined so that the term ‘media’ refers in fact to ‘responsible media’.

### **3. The chilling effect of damages awards**

A distinct argument made about the chilling effect arises in connection with the remedy of damages. Here a defendant argues that levels of damages awarded in defamation cases generally are too high, and/or that the level of an award made in the particular case was so high that it was disproportionate to any need to protect the right of reputation, chilling not

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<sup>385</sup> Ibid, 402.

only the defendant but also others, from exercising their freedom of expression in the future. There are cases going both ways.

*Hill v. Church of Scientology of Toronto*,<sup>386</sup> the leading Canadian case, did not involve a media defendant, but rather the Church of Scientology, which made serious malicious statements about Mr Hill in a press conference called for the purpose. The Supreme Court took a conservative approach to a chilling effects argument and to arguments that damages should be subject to more judicial control. The Court held that an award of punitive damages served an entirely rational purpose in the case and was not excessive. Scientology alleged that the size of the award of punitive damages had a chilling effect on its right to freedom of expression. The Court was not prepared to accept this argument without evidence.<sup>387</sup> Whether this had to relate to actual effects or potential effects is not made clear in the judgment, but in any event, Scientology did not produce any evidence which would satisfy the Court. However, the Court did note that different factors might have to be taken into consideration where evidence was put forward and where a member of the media was a party to the action.<sup>388</sup> The case was therefore a poor one to test the viability of the chilling effects doctrine in relation to damages. Clearly, such arguments are seen as more persuasive when made by the media or parties akin to media, as in *Steel and Morris v the United Kingdom*.<sup>389</sup>

However, at about the same time, the New Zealand Court of Appeal did reject similar arguments made against a media defendant. *TVNZ v Quinn*<sup>390</sup> concerned the amount of damages in two extraordinary defamation awards made against the *Holmes* television current affairs show, for broadcasting two programmes suggesting Mr Quinn was involved in illegal activities related to the horse racing industry. TVNZ wanted judgment set aside and a new trial on the issue of damages in relation to an award of \$400,000. Mr Quinn cross-appealed an order made to set aside a second award of \$1.1m and ordering a new trial. Both appeals were lost in the Court of Appeal. The judgment indicates a cautious approach to arguments that high defamation awards have a chilling effect on free speech, based in part on a 'rights come with responsibilities' approach, and on a view that levels of damages awards in New Zealand were not out of control.

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<sup>386</sup> [1995] 2 S.C.R. 1130.

<sup>387</sup> Ibid, [203].

<sup>388</sup> Ibid.

<sup>389</sup> See n. 323 above.

<sup>390</sup> [1996] 3 NZLR 24.

In *Quinn*, Cooke P (as he then was) referred to a report of the New South Wales Law Reform Commission<sup>391</sup> which placed great weight on having standards that will not chill freedom of speech,<sup>392</sup> but would not lay down any specific requirements on judges when summing up on the issue of damages. He thought there was insufficient evidence of a trend to excessive damages in New Zealand.<sup>393</sup> McKay J and Cooke P referred to an argument raised for TVNZ that excessive awards can have a chilling effect on the media, inhibiting both investigative journalism and the wider dissemination of information.<sup>394</sup> They rejected this argument, using the careless and damaging reporting by the *Holmes* show as evidence of lack of any effect on investigative journalism in this case. The broadcaster had failed to check its facts, had embellished the programmes and had not been deterred by the threat of legal action after the first show from broadcasting further damaging untrue allegations. Cooke P said: ‘I am not persuaded that the Bill of Rights has the result of putting media freedoms above the right to one’s reputation, nor that this case has anything to do with the proper freedom of the media, as distinct from a licence to be irresponsible.’<sup>395</sup> He thought there was no apparent need in NZ to change the approach to jury directions in defamation cases and would not impose any specific rules on judges.<sup>396</sup>

TVNZ sought to have standard directions to juries reappraised, because of what it argued was a trend towards increased awards of damages. It suggested the perceived increase needed to be restrained, before it developed further, imposing a chilling effect on freedom of the press.<sup>397</sup> McGechan J was not sure there was such a trend in New Zealand. Even if there was, he thought a court should not automatically assume it was improper and should be stifled, because ‘...defamation awards have a social function, not merely judicial.’<sup>398</sup>

It is clear that, for different reasons than arose in *Hill*, the *Quinn* case was not a good one to advance chilling effect arguments. The defamations were particularly serious, a motive in publishing appeared to be to enhance ratings, the insinuations in the programmes could not be proved to a sufficient standard, TVNZ declined to apologise at the time, the defendant published further unprovable implications in response to the plaintiff’s complaint, and

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<sup>391</sup> Report 75, September 1995.

<sup>392</sup> [1996] 3 NZLR 24, 35.

<sup>393</sup> *Ibid*, 36.

<sup>394</sup> [1996] 3 NZLR 24, 31, 43-44.

<sup>395</sup> *Ibid*, 45.

<sup>396</sup> *Ibid*, 47.

<sup>397</sup> *Ibid*, 73.

<sup>398</sup> *Ibid*.

persisted at trial in denying clear meanings in the face of the evidence. The case demonstrates that chilling effects, both real and potential, tend to be seen as benign and indeed, desirable, where the defamation is clear and there are aggravating and exemplary circumstances.

This was also the approach taken in the more recent Privy Council decision *The Gleaner Co Ltd v Abrahams*,<sup>399</sup> where Lord Hoffmann strongly endorsed the validity of a chilling effect of a large award of damages in the circumstances of the case. Two daily newspapers in Jamaica belonging to the Gleaner Company Ltd published defamatory articles about the plaintiff, Mr Abrahams, who had been Minister of Tourism for Jamaica between 1980 and 1984. The proceedings were extremely protracted, lasting over 16 years, during which time the defendants doggedly continued to pursue unsupportable defences of truth and qualified privilege. By 1996, the only remaining issue was the amount of damages. The jury awarded J\$80.7 million, at that time equal to £1.2 million. Although the Court of Appeal set aside the award on appeal as excessive and substituted J\$35 million, the defendants appealed to the Privy Council, arguing in particular that insufficient consideration had been given to the inhibiting effect of so large an award on freedom of expression.

This argument was turned against the defendants by their Lordships' Board, which considered that damages in defamation cases have both compensatory and deterrence functions. *Gleaner* and *Quinn* demonstrate that in cases involving serious defamations where an irresponsible or even malicious media defendant aggravates the original defamation and unreasonably resists all efforts of the plaintiff to clear his or her name, the chilling effect is not regarded as simply benign, but is in fact seen as essential when both corrective and distributive justice rationales are applied. Deterrence is regarded as effective in the particular case because damages have to be paid either by the defendant personally or under an insurance policy the underwriter of which would be sensitive to the frequency of claims.<sup>400</sup> More broadly, high awards are required to chill future irresponsible or malicious publications in a normative sense and 'may also be necessary to deter the media from riding roughshod over the rights of other citizens'.<sup>401</sup> In *Gleaner*, the Court of Appeal was held entitled to take the view that if a high award had a chilling effect upon the kind of conduct which characterised the case, that would

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<sup>399</sup> PC 86/2001, 14 July 2003. [2003] EMLR 32.

<sup>400</sup> Ibid, [53].

<sup>401</sup> Ibid.

be no bad thing.<sup>402</sup> Furthermore, their Lordships did not believe that the award of so large an amount in the special circumstances of the case would inhibit *responsible* journalism.<sup>403</sup>

The European Convention on Human Rights requires that an award of damages for defamation must be proportionate to the injury suffered to reputation.<sup>404</sup> In any event, it seems the European court is more accepting of the chilling effects doctrine when determining the question of proportionality. In *Independent News and Media and Independent Newspapers Ireland Ltd v Ireland*,<sup>405</sup> the Court stated that it will accept that unpredictably large damages awards have a chilling effect without the need for proof in a particular case. Therefore, such awards require close scrutiny.<sup>406</sup> But the Court has gone further. In *Steel and Morris v the United Kingdom*, the court compared the amounts awarded against the plaintiffs, which it accepted as relatively moderate by contemporary standards in defamation cases in the United Kingdom, against the plaintiffs' much more moderate incomes and resources, and found them to be disproportionate to the legitimate aim of protecting the reputation of McDonald's. This suggests an approach which takes account of the relative economic and civil positions of plaintiff and defendant, which in turn assumes that chilling effects can fall more heavily on some parties than others.

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<sup>402</sup> Ibid, [72].

<sup>403</sup> Ibid.

<sup>404</sup> See *Tolstoy Miloslavsky v the United Kingdom*, 13 July 1995, Series A, No 316-B, [49] and *Steel and Morris v the United Kingdom*, n. 323 above, [396].

<sup>405</sup> [2005] ECHR 402.

<sup>406</sup> Ibid, [114]. In this case, the domestic safeguards in Irish law against a disproportionate award were held to be sufficient.

#### 4. Reflection on the chilling effect

This comparative survey of leading defamation cases dealing with the chilling effect<sup>407</sup> shows that the doctrine has had substantive effects on the development of the law not only in the US, but also in the United Kingdom, Australia and New Zealand, and that judicial attitudes towards the doctrine in these jurisdictions are quite complex. The concept has entered ordinary parlance and understanding, and yet the legal approach to it cannot, as yet, be described under any unifying principle. However, at the least, it seems clear that the chilling effects doctrine is being harnessed and managed by non-US courts in two ways, to perform a broad social function of encouraging and advancing media responsibility while still giving weight to freedom of expression.<sup>408</sup>

In the US context, Schauer goes further than this. His thesis is that the chilling effect doctrine can be better understood as the logical outcome of two basic propositions – that all litigation and legal processes are invested with uncertainty;<sup>409</sup> and that determining whether an erroneous result in a free speech case will do more harm than good must result in giving priority to the first amendment and freedom of speech.<sup>410</sup> It is better, posits Schauer, to overextend free speech than to erroneously limit it. Schauer develops a model of comparative

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<sup>407</sup> The doctrine has, of course, been recognised and discussed in cases which involve other areas of the law. For example, the effect influenced the application of the open justice principle in *Re S (FC) (a child)* [2004] UKHL 47, where the House of Lords considered an application for an injunction preventing the press from identifying an eight year old boy whose mother was to stand trial for the murder of his brother by acute salt poisoning, on the grounds that he had a right to respect for his private and family life under the European Convention on Human Rights (Article 8). Lord Steyn, for the House, rejected the application, in part because it would encourage other applicants, thus exposing newspapers to an ever wider spectrum of potentially costly proceedings and would seriously deter the open reporting of criminal trials: [32]. Great concern was expressed about the position of regional and local newspapers in particular, ‘...who do not have the financial resources of national newspapers, [for whom] the spectre of being involved in costly legal proceedings is bound to have a chilling effect.’: [36]. In the recent New Zealand contempt case *Solicitor-General v Smith* [2004] 2 NZLR 540, where MP Nick Smith had sought to improperly influence the Family Court, the High Court considered an argument that the uncertain nature of the common law offence of scandalising the Court chilled freedom of expression, and rejected it, stating that such effects had never been felt in New Zealand. The Court thought ‘there is more freedom of expression today, in particular in relation to what New Zealanders and the New Zealand media are able to say about Courts, Judges and judgments, than there ever has been’: [135]. The Court acknowledged the chilling effect concept, but thought it had had no effects. Arguably, this has an element of illogicality, because acknowledging the validity of the doctrine requires an assumption that there *are* effects on human behaviour. In *Hosking v Runting* [2005] 1 NZLR 1, Keith J, in the minority, used the chilling effect to reject the development of a tort of invasion of privacy in New Zealand. He argued that the ‘... very existence of an ill-defined tort carries with it costs, not simply financial but also those arising from the chilling effect it may have on freedom of expression. The prospect of that effect arising from the shadowy existence of the proposed tort is the more serious if interim relief is available, as it was here’: [220]-[221].

<sup>408</sup> See Lepofsky, M D, ‘Making Sense of the Libel Chill Debate: Do Libel Laws Chill the Exercise of Freedom of Expression?’ (1994) 4 *NJCL* 168, 201.

<sup>409</sup> Schauer F, ‘Fear, Risk, and the First Amendment: Unravelling the “Chilling Effect”, *Boston University Law Review* [Vol 58: 685, 1978] 687.

<sup>410</sup> *Ibid*, 688.

harm to determine whether a chilling effect should be recognised or not.<sup>411</sup> He concludes that the harm caused by the chilling of free speech is comparatively greater than the harms resulting from allowing free speech to prevail.<sup>412</sup> In the result, he argues that legal rules must be adopted which lessen uncertainty attached to behaviours which are forms of expression or speech, thereby reducing or eliminating the chilling effect.<sup>413</sup>

Schauer demonstrates his thesis by applying it to defamation.<sup>414</sup> He cites *New York Times v Sullivan*<sup>415</sup> as a clear example of the US Supreme court mediating the chilling effect of legal rules which protect reputation, by requiring a plaintiff who is a public official to prove with convincing clarity<sup>416</sup> that a false statement made about official conduct was made with ‘actual malice’.<sup>417</sup> Using a set of diagrams, Schauer shows convincingly that in the US, even though they have no social value, false factual statements about public officials are protected, as long as they are uttered without actual malice.<sup>418</sup> This buffer, or over-protection zone, argues Schauer, is created to ensure that legal mistakes about material that is deserving of protection (correct factual information and opinion) are not made, and that any chilling effect is eliminated or mitigated.<sup>419</sup> To Schauer, the case demonstrates that an ‘erroneous penalization of a publisher is more harmful than a mistaken denial of a remedy for an injury to reputation.’<sup>420</sup> This is a ‘balancing of competing interests, a balancing performed at the rule-making level’.<sup>421</sup> Schauer then goes on to argue that this is a prior substantive legal rule in which the Supreme Court chose to protect freedom of speech.<sup>422</sup>

Thus Schauer describes the chilling effect not as predictive, but as a real method of looking at the first amendment.<sup>423</sup> He states that in the absence of convincing evidence, the “transcendent value” of free speech means the presumption must be to safeguard it.<sup>424</sup> He concludes that ‘[b]y comparing rather than measuring, the behavioural imprecision of the

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<sup>411</sup> Ibid, 701.

<sup>412</sup> Ibid, 705.

<sup>413</sup> Ibid, 704.

<sup>414</sup> Ibid, 705. He also applies it to obscenity and incitement: 714, 721.

<sup>415</sup> 376 U.S. 254 (1964).

<sup>416</sup> Ibid, 285-86.

<sup>417</sup> Being knowledge that the statement was false or with reckless disregard of whether it was false or not: *ibid*, 279-80.

<sup>418</sup> See n. 409 above, 685-6.

<sup>419</sup> Ibid, 707.

<sup>420</sup> Ibid, 709.

<sup>421</sup> Ibid, 710.

<sup>422</sup> Ibid 712. No further procedural modifications were necessary, as this would be ‘double-counting’ to compensate for first amendment interests.

<sup>423</sup> Ibid, 731.

<sup>424</sup> Ibid.

chilling effect concept become irrelevant.<sup>425</sup> Schauer's conclusion is basically that the chilling effect idea has become a conceptual doctrine, a rule which in constitutional law, must give priority to speech.

The approach taken outside the USA differs from Schauer, but still gives a form of priority to speech. In the majority of the non-US cases discussed above, the judges were prepared to accept the unproven assumption of the chilling effect doctrine that human beings will be deterred from certain activities not just by being forced to defend defamation actions, but simply through fear of potential action.<sup>426</sup> However, while those same judges were prepared to alter or 'interpret' the substantive law on the basis of predictive chilling effects, generally they only did this for the benefit of a *responsible* press functioning in the public interest. The cases also demonstrate the other purpose of the doctrine which has judicial acceptance in non-US jurisdictions, where the courts retain a right to recognise and give effect to benign or 'valid' chilling effects. The word 'benign' does not relate to the effects per se, but to the overall acceptability of them. Actual effects can be and *are* intended to be significant, because damages awards, sometimes quite large ones, can encourage responsible media behaviour by punishing and deterring irresponsibility.

It is through the development of lists or guidelines containing ethical and normative journalistic standards that the non-US courts have begun to outline what a responsible media is. However, the question of the public interest element also has to be addressed. As we have seen, this issue is inextricably connected to a developing western jurisprudence which attempts to address the concept of freedom of expression and its place in democratic political systems. The question of what role freedom of expression now plays and should play in defamation cases in New Zealand is addressed in detail below.<sup>427</sup> Before I address that issue, however, it is appropriate to present the results of my 2001 survey of the media in the three chapters which follow. These chapters reveal much about just what sort of chilling effect, if any, actually exists in contemporary New Zealand. As we have seen, it is this element which is often missing in the judicial analysis.

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<sup>425</sup> Ibid.  
<sup>426</sup> Ibid, 730.  
<sup>427</sup> See Chapter Nine.

## Chapter Five – The media survey

### 1. Introduction

The media survey was devised to be at the centre of my study, and it produced significant data. This was a postal survey carried out in an essentially conventional manner and was intended to find out what the media thought and experienced – in other words, to produce both qualitative and quantitative data. In the first half of 2001, approximately 800 confidential surveys were sent to every identifiable member of the New Zealand media. This included newspapers, television and radio broadcasters, magazines, book publishers, independent writers and journalists, information service providers and advertising agencies and public relations firms. A follow-up letter was sent some time later to encourage the completion and return of the surveys. Responses were received from 52 newspapers, 6 television broadcasters including the state-broadcaster and its largest private rival, 31 radio broadcasters, 26 magazines, 9 individual writers and journalists, 24 book publishers, 68 advertising agencies or public relations firms, 2 information service providers and 7 multi-media interests.<sup>428</sup> The response rate overall was just over 28%. However, this figure does not include a response from the New Zealand section of the Commonwealth Press Union, which voluntarily submitted its views on some of the questions contained in the media survey.<sup>429</sup>

The media survey was broken down into five parts. The first part sought background information such as what form the media respondent took, what sort of enterprise was involved, what sort of circulation the respondent had,<sup>430</sup> did they have defamation insurance, what sort of training they had, and what sort of risks of defamation they faced. The second part investigated pre-publication procedures, how they worked and if these were always complied with. The third part of the survey asked for information as to actual experience of statements of claim (writs) in the years 1996-2001, and the fourth part investigated the

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<sup>428</sup> See Chapter One, 2. Survey Methodology, above. In 1976, the Committee on Defamation (the McKay Committee) sent 101 confidential questionnaires to 71 newspapers, 18 magazines and 13 radio and television stations in an attempt to determine the practical effects of the law of defamation on the media in New Zealand at that time. The survey was sent to every daily newspaper, and every weekly newspaper which had a national distribution, a selected number of weekly, bi-weekly, and tri-weekly newspapers and a cross-section of magazines by subject matter. The two television corporations and Radio New Zealand also received the material, as well as every private radio station. Seventy-one of the questionnaires were completed, made up of responses from 51 newspapers, 13 magazines, and 7 radio and television stations, which the Committee regarded as pleasing: *Recommendations on the Law of Defamation, Report of the Committee on Defamation*, December 1977, 15.

<sup>429</sup> The CPU has as its members all editors of daily and Sunday newspapers in New Zealand.

<sup>430</sup> This information was used to determine a business profile for the respondents: the results are discussed in Chapter Two above.

experience of threats of action which did not proceed to trial for the same period. The final part of the survey sought the views of the respondents on aspects of the law, such as defences, delays, technicalities, damages, and injunctions, and invited any general comments or suggestions for reform. The results are analysed below.

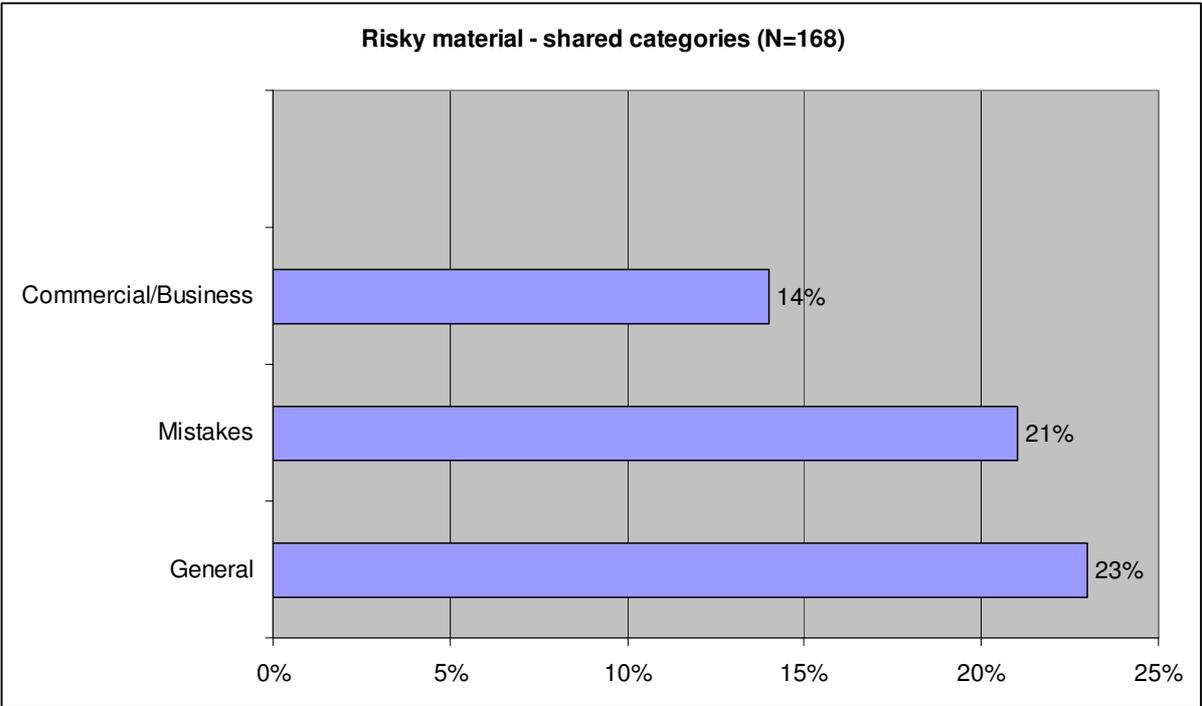
**2. Analysis of media responses**

*2.1 Factors regarded as creating risks associated with defamation*

In this section of the survey, media were asked what the particular risks of defamation in the industry were, and could identify more than one category of risk. The question was open, in that no list of suggested categories was supplied.

Nearly 75% of all media respondents identified the particular risks of defamation in their area. The replies varied as between media. However, significantly, three things appeared in all lists. Twenty-three percent of all these respondents identified their media as being subject simply to general risks of defamation. Twenty-one percent chose inadvertence or inaccuracy as creating risk. The category chosen by the next largest number was commercial or business material, which was referred to by 14% of these respondents. (See Fig. 23 below).

Fig. 23



The general media responses were broken down to find out which issues associated with risk arose most often for each media. Forty percent of newspapers responding identified general

risks as being most problematic and two-thirds of television respondents identified news stories as risky. By far the strongest trend to emerge from radio respondents was the real risk arising from live broadcast, such as live interviews, off-the-cuff remarks by announcers or callers responding on talk-back, and comment and opinions broadcast live. Nearly 43% identified this category as creating the most concern. Nearly half of magazine respondents chose inaccuracy in photos, statements, or technical information. Publishers identified both individuals mentioned in books or biographies, and inadvertent mistakes or inaccuracy, (28%).

For the advertising agencies which responded, the particular risk identified by the largest group was commercial defamation, including comparative advertising, and attacking competitors, which was identified by 32% of the advertising agencies which responded to this question. Of the public relations firms which responded to these questions, 30% thought the problems were only of a general kind. Overall, it seems fair to say that while advertising agencies clearly identified the risk of commercial defamation as of concern, and public relations firms were more concerned about the risk of making mistakes, half of the advertising agencies had no particular concerns, as did two-thirds of the public relations firms.

Forty percent of journalist and writer respondents identified business/professional matters and the same figure indicated that inaccuracies were a risky category. The largest number of the multi-media respondents (43%) saw material about business matters as risky. Neither of the ISP respondents identified any risks of defamation in their area.

It will be apparent that 'mistakes' is not, in fact, a category of risky subject matter. Mistakes do not cause risk, but rather, constitute a risk. However, the responses clearly identified mistakes as being of significant concern. As a category of actual risk, mistakes breaks down into inadvertent mistakes and inaccuracy. It is often said that the media cannot protect itself against inadvertent mistakes, thus justifying a defence of innocent mistake.<sup>431</sup> This has not been accepted, although the law allows mistakes made under the umbrella of qualified privilege to be protected because the occasion, not the publisher of the statement, deserves protection.<sup>432</sup> However, as to simple inaccuracy, the media itself can improve its training and work ethics to reduce the incidence of this sort of problem, thus lowering the risk of defamation. The question of training is addressed directly below. If reasonable care is taken,

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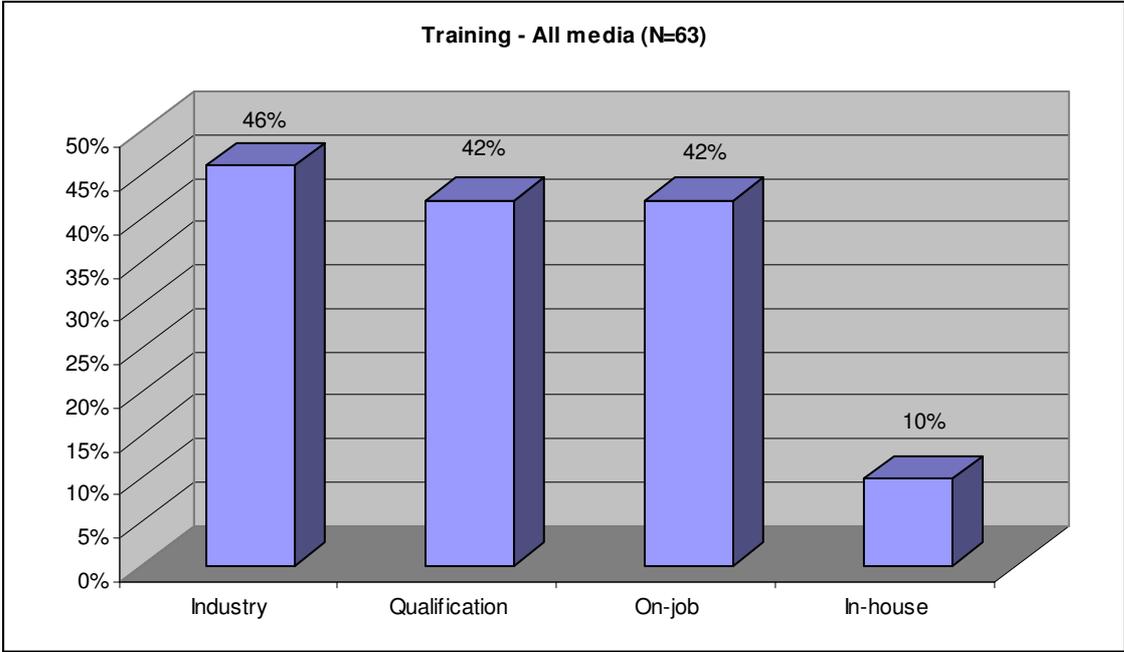
<sup>431</sup> See Recommendations on the Law of Defamation, *Report of the Committee on Defamation*, December 1977, 57.

but a mistake still occurs, then the extended defence of qualified privilege now offers some protection which did not exist before in most common law jurisdictions, at least in relation to publication about political matters.<sup>433</sup>

2.2 Training

Fifty percent of all media respondents answered questions about training in defamation law. Of these, 71% had some kind of training. Therefore, it cannot be said that of those who responded to this question that there was a lack of training – in fact, the majority did get it. Yet at the same time, a significant proportion (nearly one-third – 29%) had no training at all.<sup>434</sup> While the figure which did receive training is quite high, it is important to assess how it was broken down. Respondents could identify more than one form of training. The largest sub-group, nearly half (46%), had attended industry courses or seminars. This group was closely followed by 42% who had an actual qualification (legal or in journalism), or who had taken professional courses. The same proportion (42%) had had on-the-job training. This was a combination of ‘bush lawyering’ after building up years of experience, using books, and taking the advice of colleagues. Ten percent had received in-house training. It appears, therefore, that there was a fairly even spread between formal and informal training. (See Fig. 24 below).

Fig. 24



<sup>432</sup> See *Lange v Atkinson* [2000] 3 NZLR 385 and the discussion in Chapter Nine below.  
<sup>433</sup> Ibid.

Looking at the data more closely, it seems that there was a high rate of training within broadcasting, particularly television. Eighty percent of television broadcasters who responded reported some sort of training within the organization and nearly 86% of the radio respondents had some sort of training. The group within print media with the highest rate of training was magazines, which reported that 100% of respondents had some form of training. Forty-two percent of these had a qualification or had attended professional training courses. Of the newspaper respondents, 75% indicated they had received some form of training. The group which appeared to have the lowest rate of training was book publishers. Fifty-eight percent had training and for 80% of these, it was informal (bush lawyering, on-the-job training, books).<sup>435</sup>

A number of things might be surmised about this data. First, the provision or existence of training may reflect the levels of perceived risk within the industry. Therefore, nearly three quarters of those responding to this question apparently thought the risk of being sued in defamation was worth seeking training to avoid. By doing so, these media also reduced the actual risk.

Second, the existence of training might also have an effect on how claims or threats are dealt with – lack of training or confidence about legal matters may encourage self-censorship, early settlement or capitulation to threats. However, self-censorship effects might in fact be cancelled out somewhat, in that lack of awareness of risk could result in artificial over-confidence as to what is publishable. What might be inferred, then, about the almost a third of the media who had no training is that lack of training may not increase any chilling effect to any great degree. In any event, lack of training was reported by under a third of media.

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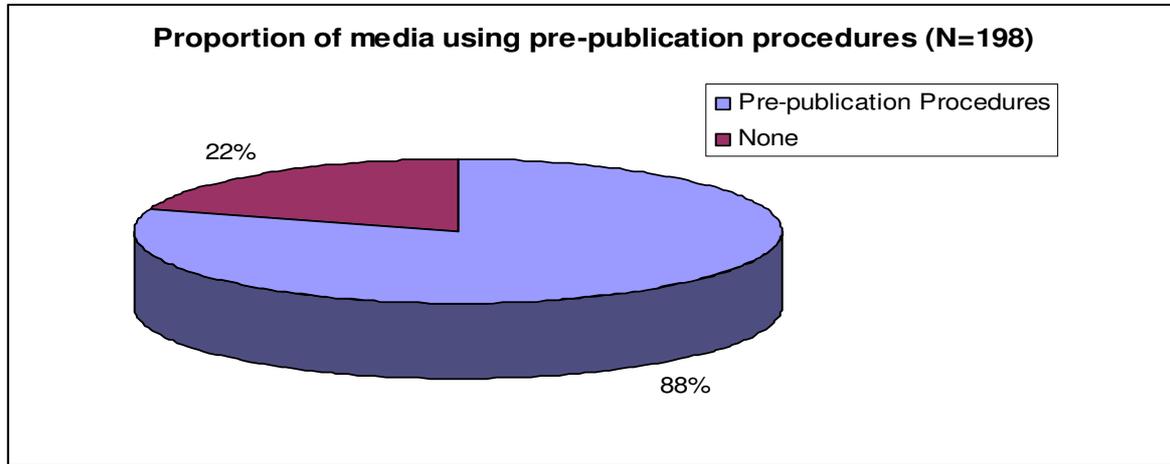
<sup>434</sup> While it could be argued that the presence of advertising agencies in these figures has the potential to skew the results, in fact only 4 ad agencies answered the question, and three-quarters of these had had some training.

<sup>435</sup> Although the data cannot be directly compared, the McKay Committee reported that in the mid-seventies, 32% of the New Zealand daily and weekly newspapers responding to its survey gave ‘considerable’ training to staff on defamation law, 53% gave ‘some’ training, nearly 8% gave ‘little’ and nearly 6% gave ‘none’. The majority of bi-weekly and tri-weekly newspapers and nearly all of the radio and television stations responding gave at least ‘some’ training. However, 61% of magazines responding gave no training to their staff. This data does not identify whether staff already had training of some sort which had been acquired outside the organisation: Recommendations on the Law of Defamation, *Report of the Committee on Defamation*, December 1977, 19 and 140, Table S.

### 2.3 Pre-publication procedures

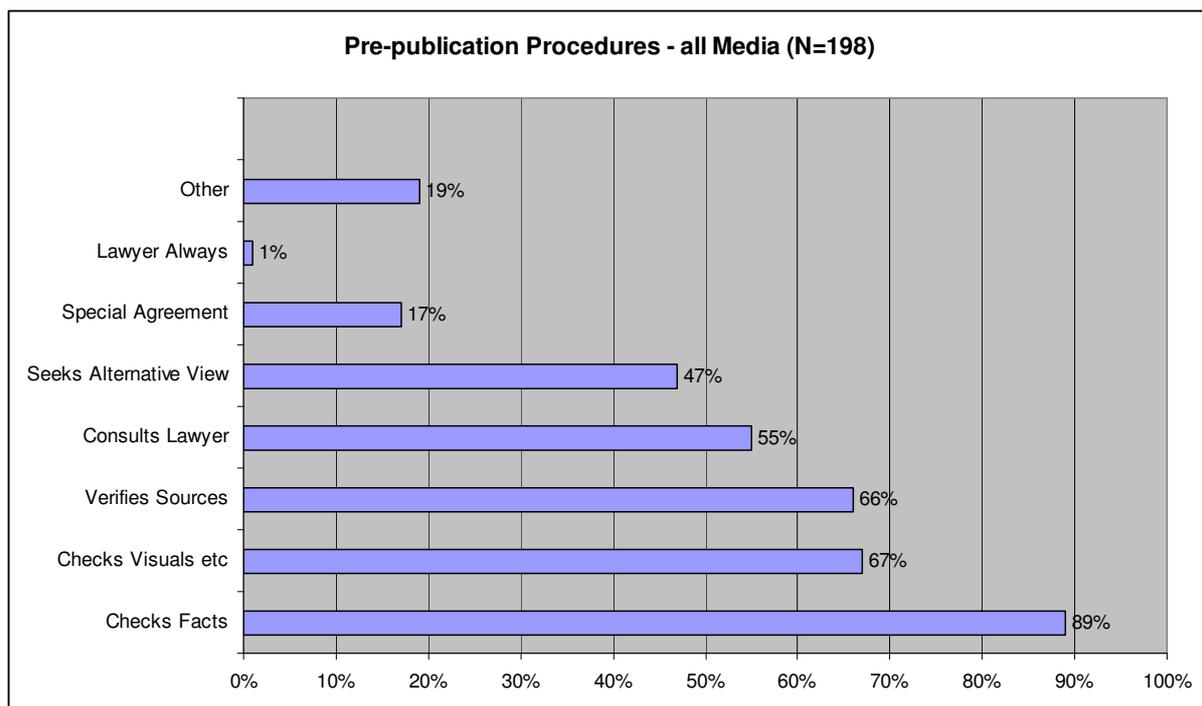
Eighty-eight percent (198) of all media respondents answered the question whether they had pre-publication procedures to prevent defamation arising. Of these, 88% (175) had some sort of procedures. (See Fig. 25 below).

Fig. 25



Of those who had a procedure, 89% (156) checked facts, 67% (118) checked visuals and captions, 66% (115) verified sources, 55% (97) consulted a lawyer (sometimes), 47% (83) obtained an alternative point of view, 17% (29) had a special agreement conferring liability on an independent party, and 1% (2) always consulted a lawyer. Nineteen percent (33) used a variety of other methods. (See Fig. 26 below).

Fig. 26



Therefore, high numbers had some sort of pre-publication procedure. The most popular procedure was checking facts, followed by checking visuals and captions, and verifying sources. While it could be said these results point to the existence of a reasonably high consciousness of defamation risks, they also illustrate a simple understanding of the rules of good journalism, in which defamation is only one risk which can be countered by such procedures.

### 2.3.1 *Was the pre-publication procedure always followed?*

Media who had stated that they had pre-publication procedures were asked whether pre-publication procedures were always followed. Forty-five percent (22) of newspapers answered 'yes' and nearly 48% (23) answered 'no'. Six percent (3) did not answer. Of those who answered in the negative, 65% (15) gave lack of resources as a reason, 83% (19) referred to time constraints, 61% (14) trusted their employees to get it right, 44% (10) did not follow procedures when unable to get the other side of the story, 13% (3) when the material was of a kind the public should know about and 30% (7) gave other reasons, such as:

- *Subject of story dictates need or otherwise for checking detail.*
- *Detailed verification not necessary in the majority of cases involving general news reporting.*
- *Reporters/subs forget to send copy via an editor.*
- *If I'm unable to verify something I tend not to publish it. I err on the side of caution.*
- *Difficult when story is contributed. Cost of consulting a lawyer for a very small business.*
- *Cost – legal vetting costs money and time.*
- *My judgement.*

To the question whether the procedures they had used are always followed, two-thirds (4) of television broadcasters indicated 'yes', half (3) 'no', and one that procedures are not required for routine stories. The fact that the answers outnumber the respondents indicates that some responded both negatively and affirmatively. Therefore it appears that in the main, procedures are not always followed. This conclusion is borne out by the responses to the next question, which sought the reasons why a procedure might not be followed. All of the television broadcasters responded to this question. Two identified time constraints as relevant, two

trusted their employees, and two identified situations where they were unable to get the other side of the story.

Seventy percent (14) of radio broadcasters who had them stated that pre-publication procedures were always followed, while 30% (6) said that they were not. Respondents were then asked to identify the reasons why procedures were not followed. Because some of the choices attracted more than six responses, it seems clear that more than 30% do not in fact always follow procedures. Sixty percent (12) cited time constraints as causing departure from checking procedures, 50% (10) referred to trusting their employees, a quarter (5) mentioned lack of resources, 15% (3) cited occasions when the material was such that the public should know about it, and the same number referred to being unable to get the other side of the story.

Nearly 43% (9) of magazine respondents who had procedures always followed them, while 57% (12) did not. Reasons given by the latter for not following procedures were: lack of resources (42% or 5), time constraints (75% or 9), employees trusted (41% or 5), the material is material that the public should know about (8% or 1), unable to get the other side of the story (8%) and misjudgement (8%). Nearly 17% (2) noted uncontroversial material did not require checking.

Seventy-four percent (14) of publisher respondents stated that the procedure was always followed while 26% (5) said it was not. The reasons given here for not following procedure were lack of resources (16% or 3), time constraints (11% or 2), employees trusted (21% or 4), the material is material the public should know about (11% or 2), unable to get the other side of the story (5% or 1), and the nature of the book was harmless (11% or 2).

To the question, 'Is the procedure always followed?', 39 of the ad agency and public relations firms answered yes and 16 answered 'no'.<sup>436</sup> Where the procedure was not followed, 31% (5) gave lack of resources as a reason, 44% (7) identified time constraints, a further 31% stated that their employees were trusted and 12.5% (2) stated that the material was of the sort that the public should know about. Nearly 69% (11) identified other reasons, which were illustrative of why this group of respondents did not report many difficulties with defamation generally:

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<sup>436</sup> This number is 6 greater than those indicating they had a pre-publication procedure, which means that 6 of these respondents who did not have such a procedure did not understand the question and should not have answered it.

- *Defamation seldom (if ever) an issue*
- *Reliance on ethics of clients*
- *Most information is technical and/or available as public information. We are indemnified under contract.*
- *It is very rare in advertising that we do something defamatory intentionally or get sued so we don't check that much.*
- *Liability rests principally with client/appro – not agent*
- *Our client has authorised publication and accepts liability for their claims*

To the question whether procedures were always followed, six of the journalist and writer respondents indicated 'yes', and two 'no'. When asked for the reasons why a procedure might not be followed, one chose lack of resources, the fact that employees were trusted, that the material had a high public interest, that they were unable to get the other side of the story and that an opinion column did not require alternative points of view. Both respondents also identified time constraints as relevant.

To the question whether procedures are always followed, two) multi-media respondents who had a procedure indicated 'yes', and four 'no'. When asked for the reasons why a procedure might not be followed, one chose time constraints, two chose lack of resources, and all four noted that employees were trusted.

One ISP stated the procedure was always followed.

Unfortunately, the inconsistency of responses to this question indicates some confusion by respondents about the question. The results are therefore unreliable, and have not been summarised, but simply presented as returned by each media.

### 2.3.2 *Who had the final decision about whether material is published?*

All media were asked who had the final decision about whether material will be published or not. Some respondents nominated more than one party. Ninety-two percent (48) of newspapers answered the question. Of that number, 92% (44) stated that the editor made this decision, though 11% (5) of these would heed legal advice. Eight percent (4) stated such decisions rested with the manager, the executive director, clients or the owner.

All of the television broadcasters identified who had the final decision about whether material would be broadcast or not. Five identified the news editor or equivalent as having the last word. One respondent referred to the CEO as filling this function.

Seventy-four percent (23) of radio broadcasters identified who has the final decision about whether material will be published or not. Twenty-six percent (6) of these identified the station manager as the final decision-maker, nearly 22% (5) identified the programme director, 17% (4) identified the managing director or operations manager, nearly 9% (2) chose the CEO as the ultimate arbiter, with staff below taking initial decisions, the same number identified other categories, such as relevant staff members, and 17% (4) did not give clear answers.

Ninety-six percent (25) of magazine respondents answered this question. Of that number, 36% (9) nominated the editor, 12% (3) the director/manager, 24% (6) the publisher, 16% (4) were unclear and 12% (3) nominated the editor and publisher.

Ninety-two percent (22) of publisher respondents answered the question who had the final say about whether publication would go ahead or not. Eighty-one percent (18) answered that it was the director/publisher, 9% (2) identified the managing editor or editor, 4.5% (1) chose the lawyer and the same number (1) chose the publisher/author.

Eighty-eight percent (61) of ad agency and public relations firms respondents answered this question. Forty-eight percent (29) of these respondents were advertising agencies and 52% (32) were public relations firms. In both groups, the largest group of respondents identified the client as being in control. Thirty-eight percent (11) of advertising agencies and 37% (12) public relations firms identified the CEO or boss as having the final say, 62% (18) advertising agencies and 47% (15) public relations firms selected the client, 10% (3) of advertising agencies and 12% (4) public relations firms named the media to whom the material was sent, and 16% (5) public relations firms identified lawyers.

The question as to the final decision was answered by six journalist and writer respondents. Three identified themselves as having the final word, while five chose the editor of whatever publication they were working for.

The question was answered by six multi-media respondents. However, results were too unclear to be of use for this analysis.

The question as to the final decision about publishing material was answered by one of ISP respondents. This party chose the Managing Director or the office administrator.

### 2.3.3 *Alteration of material*

Media were asked in what circumstances was material altered prior to publication and what sort of alterations were made? This question was asked to determine whether a chill factor might exist, and if so, what avoidance mechanisms were employed to deal with it.<sup>437</sup> Respondents could give more than one answer. Three-quarters of all media respondents answered this question, although the content of the replies was patchy. It can safely be said that the three common reasons given for alteration or deletion of material were factual accuracy and fairness (41%), legal advice (14%), and opinion (5%). What is also clear is that alterations appeared to be preferred over deletions, although this may not be so for live radio, and was less so for magazines and book publishers.

The most interesting aspect of the newspaper responses was that well over half (59%) indicated that the general approach is to alter or amend doubtful material rather than delete it altogether, in order to preserve the story. The following statements are illustrative:

- *Material is frequently deleted or rewritten to minimise the risk. Sometimes this is on a lawyer's recommendation but often it's our own call.*
- *If it is felt the story is important in terms of public interest but alternative comment is unable to be sourced or it is unable to be checked, the story would probably be toned down to ensure our legal safety (unless we were very sure it was okay to print as is)*
- *We usually get our facts right. A good lawyer will say something like 'say it that way and you are likely to get sued. Say it this way and you should be safe.' The*

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<sup>437</sup> The McKay Committee researchers asked a different but related question: Have you excluded material from your [publication] because of the defamation laws which you felt would have been in the public interest to publish? Of the 55 members of the media which replied, nearly 80% answered 'yes': See above n 4, p 134. These results do not determine the prevalence of a practice of deletion, but simply that it occurred. The question included in my 2001 survey was intended to be more neutral and to determine the overall practices of the media in more detail.

*object is to present the facts to the public. If there is a safer way to say the same thing – and there often is – they will use it*

- *Defamatory statements that cannot be defended are edited out. Defamatory statements that cannot be held as honest opinion, or are potentially driven by malice are often unnecessary anyway. Smart writers can paraphrase and still retain impact.*

It appears rare that material will be expunged by newspapers altogether, and the only areas of difficulty which were identified were editorials and letters to the editor, which were cited by 3% as more likely to be ‘dumped’, ‘abridged’ or ‘rejected’.

For television, it was clear from the responses that editing occurs right up until the time of broadcast. Forty percent referred to the need for accuracy and fairness. However, one of the larger broadcasters also focussed on the need to comply with the standards of the Broadcasting Standards Authority and identified the need for balance, and the requirements to respect privacy and avoid overly graphic material as justifying alteration prior to broadcast.

For radio, the category creating the greatest difficulty was accuracy and fairness, with nearly 42% making reference to these circumstances. News, police news in particular, was seen as problematic, as were commercials or material reflecting on businesses. Comment pieces were also seen as problematic. As with newspapers, it again seemed clear that radio broadcasters seek to amend rather than expunge material unless they have to. Forty-seven percent referred to editing material or amending or toning it down. Further, one response also identified the particular problems faced by this media in that considerable material can be broadcast live:

- *Potential defaming comments edited without changing context of program (pre-recorded) or delay unit used to dump material.*

Some of the radio pre-publication procedures may therefore be the result of a chilling effect arising from live radio broadcast. It is reasonable to assume not all of the material which is dumped because there is no time for legal ramifications to be tested actually justifies such a radical response.

The most common responses as to when and how alterations are made to magazine publications prior to publication broke down into two categories, which were where the facts are wrong (36%), or opinion is too strong or unbalanced (27%). The responses indicated a

number of interesting things about the avoidance behaviour of magazines and whether a chill factor can be detected. The following responses are illustrative:

- *Sometimes comments were rephrased. Sometimes text was omitted altogether. Very careful with personal comments. Often gave the other party a right of reply in that issue or the next. (A small publication)*
- *If the content is obviously a personal attack or upon contacting the other party it is obvious the author hasn't researched properly – chances are we'd pull the story. (A small publication)*
- *...feedback from sources and those asked to comment on the draft. This process is very valuable as it usually elicits additional information from sources who would otherwise be loathe to comment; 2) legal advice. Usually minor changes – a word here, a word there.*
- *If in doubt, leave it out. So everything that's really interesting gets left out.*
- *...If the material is thought to be potentially defamatory. Statements such as "I believe" and "it is said" and so forth may be added to reiterate that the points made are the writer's opinion.*
- *...facts obviously wrong; advertising client very unhappy. It's a balance between maintaining editorial credibility and advertising revenue.*
- *If editor, manager believes he could successfully be sued or we are not serving our readers well, the offending words may be removed.*
- *... Material would be toned down if highly questionable or identities further 'masked.' Happens rarely however.*
- *If risk of consequent legal action is deemed to be high. If potential legal action is not worth the fight due to insignificance of issue. We edit / cut / amend copy.*

Once again, as with other media, the predominant approach appeared to be to 'tone down', rewrite and edit, before deleting material. However, it seems fair to say that smaller magazine publications were more inclined to delete or omit material than larger businesses which can afford legal advice as to how to safely re-word material. Furthermore, a particular problem identified for magazines generally is the conflict between maintaining the source of funding for publication, which is generally advertising, and telling stories which need to be told. Advertisers, in fact, have some control over general content in magazines. As noted in Chapter Two, this can be described as a commercial chill factor and appeared to be a

particular problem for smaller publications and those just entering the market. The magazine replies also revealed a strong awareness of the honest opinion defence, indicating it is still seen as valuable.

The responses of book publisher respondents revealed that alterations happened quite often and especially if there was any doubt. Deletion occurred where facts were wrong and could not be checked (31%), and where statements were inflammatory (16%). However, in this group, alterations were made even if the material was low risk, if it was considered to be of little overall importance to the work. The larger publishers deleted or altered material if advised to by the lawyer, and made alterations as required, which ranged from changing or removing a single name to partial or total re-write. Sometimes, though more unusually, a manuscript might even be rejected and a contract terminated. It appeared that book publishers are quite risk averse, which is consistent with the increased financial risk they face from the possibility of injunction proceedings to prevent a book being published, or having to remove it from shelves if it has already been published. Therefore, risk for book publishers appears to be related to the high cost of producing their product.

While 35% of advertising agencies and 23% of public relations firms altered material to correct inaccuracies, and 26% of the advertising agencies and 13% of the public relations firms advised that material was altered to avoid risk, some of the comments which accompanied these results demonstrated that advertising agencies were perhaps more willing to follow legal advice than public relations firms, and also illustrated the well-known divide between journalists and public relations professionals:

- *PR Firm Alter to satisfy – so done by negotiation. Will not accept dictation by legal advisor in most instances as counsel generally do not appreciate objectivity or subtlety of item*
- *Ad agency Rarely altered. If legal complication inferred, it is not published*
- *PR Firm News media put their own spin on material*
- *PR Journalists often use press releases as a story idea. They call the subject then write their own story and it can be quite different to the press release. This can affect the subversive messages and change the story in favour of parties other than our clients*

A majority of the journalists and writers who responded to this question identified risky or unreliable material as being subject to alterations, while responses of the multi-media group

indicated little concern about the process. Four of the latter indicated that the need for accuracy was the most common incentive for alterations. However, the complete removal of material was seen as rare and a last resort. One ISP indicated that the only changes made prior to publication were minor.

The commercial chill factor identified generally in the responses above is a significant reason why the media may pull stories of public interest or judge them not to be newsworthy at all. The data collected shows that magazines and smaller media businesses were very aware of it. Of course, newspapers and broadcasters also rely on advertising clients to fund their product, and must suffer similar effects as well. However, newspapers can resist such pressure to a degree because the focus of publication is generally on news rather than entertainment, and with this go the traditional methods of journalism and associated requirements of codes of practice – objectivity, fairness and balance. Broadcasting is subject to the BSA and its codes of practice which require objectivity, fairness and balance and it might be expected that advertising would not seriously affect programming content. Nonetheless, it is clear in that sector that with the increasing tabloidisation of broadcasting, there has been a blurring of the distinction between news coverage and advertising which the BSA at least, has found troublesome.<sup>438</sup> This does not mean necessarily that stories are pulled because advertisers desire it, but that real news stories might be elbowed out by advertising posing as news stories.

To summarise, these unfortunate effects downgrade the quality of news coverage, but cannot be described as a chill factor caused by operation of the law. Commercial chill is not the same as chill created by defamation law which is too strict or technical or just plain unjust. Again, the former has to be separated out from the latter. When this is done, the data shows that on the whole, the media looked to find ways to get the story told, if at all possible. Often, of course, this would involve costs associated with getting legal advice. Costs clearly, in themselves, create a chill factor, particularly for smaller media enterprises. Book publishers stand out as being risk averse because of the nature of their business, and magazines suffer a

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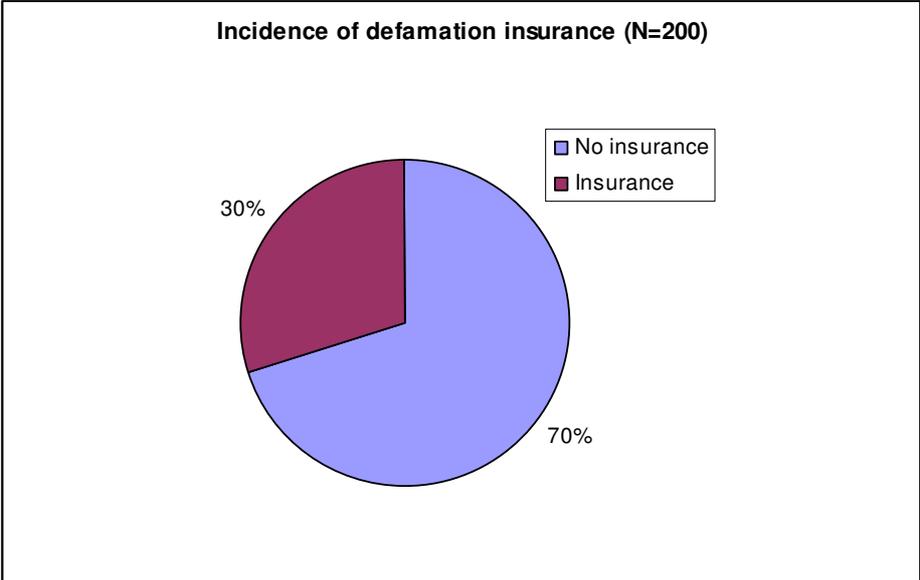
<sup>438</sup> See BSA decision *Pharmaceutical Management Agency Ltd (Pharmac) v Television New Zealand Ltd* 2000-082 which involved a complaint that a named drug was promoted on a current affairs programme of the state broadcaster as being the cure for acne. The BSA did not have jurisdiction because the report did not fall into any balance category as it was not a political matter, did not report on any new development or elaborate on any current news, and did not deal with a question of a controversial nature, but simply provided information about a long-standing treatment regime which was in most cases effective. Noting this technical obstacle to its jurisdiction, the Authority nevertheless signalled its concerns about programmes which deal with therapeutic products.

commercial chill arising from the juxtaposition of the industry reliance on advertising and the possibility of legal action. Radio faces problems associated with live broadcast.<sup>439</sup>

2.4 Defamation insurance

Media were asked if they had defamation insurance and if so, what form it took. Eighty-nine percent of all media respondents answered the question. A large majority (70%) had no defamation insurance, while about a third (30%) did have some sort of cover. Knowledge of the nature of cover by those who had it was not extensive.( See Fig. 27 below).

Fig. 27



Sixty percent of newspapers answering the question did not have such insurance. The majority of the 40% who answered in the affirmative were community newspapers and were, on the whole, very vague about the extent and conditions of cover. Half of the television broadcasters had defamation insurance and half did not. Fifty-seven percent of the radio broadcasters who responded did hold such insurance. Seventy-seven percent of magazine respondents did not have defamation insurance, whereas 23% did. Seventy percent of the publishers did not have defamation insurance. The 30% who did appeared to have a very good understanding of their cover. Seventy-one percent of the journalists and writers had no such insurance and 29% did, while 71% of the multi-media respondents had no such insurance and 29% did. Only 12% of the public relations firms and ad agencies had cover, all but one being public relations firms. Neither ISP respondent had defamation insurance.

<sup>439</sup> These results are similar to those reported by Barendt et al, *Libel and the Media: The Chilling Effect* (1997), which noted the differential impact of the law on the different media sectors: 182.

These results are consistent with previous studies. In the Barendt study on the impact of defamation law on the mass media in the United Kingdom, the authors noted that many national newspapers did not take out libel insurance, and were therefore not influenced by insurance costs or the requirements of cover when deciding whether to settle or fight proceedings.<sup>440</sup> When the matter was investigated previously in New Zealand in the period 1970-1975, it was found the number of newspapers carrying defamation insurance dropped over the period, and that only a small number of magazines, radio and television stations carried such insurance.<sup>441</sup> Comments made by the media as part of the current survey support this. A number of publisher respondents commented that insurance is too expensive, possibly because for most companies, insurance was US based and had ‘colossal premiums.’ One newspaper also commented that carrying insurance could threaten editorial autonomy and described a case where papers were joined in a defamation action over a syndicated column. Several of the editors were confident there was a winnable case and one worth fighting. However, two papers that had defamation insurance were pressured by their insurers to cut their losses and go for an out-of-court settlement. This was seen as an entirely pragmatic decision rather than a principled one, which placed no value on editorial freedom. In this case, insurance was seen to wreck the solidarity of the papers and induce the eventual settlement.

Therefore, although it might be said that the media can reduce any chill created by defamation laws, if it exists, by holding defamation insurance, the survey revealed not only that such cover appears to be rare, but that there are good reasons for media not to carry defamation insurance. One reason is financial - premiums are expensive. However, two other reasons are themselves tactical responses to how to deal with the risk of defamation claims. Some media do not want to be constrained in dealing with threats or claims and therefore do not seek cover because insurance companies exercise power through the policy to influence how claims are dealt with. Other media wish to deflect claims before they arise, and believe that in openly refusing to hold such cover, they may bolster the image of the relevant publication as claims-resistant and therefore unattractive to sue.<sup>442</sup> These latter two approaches therefore mediate the lack of insurance and in fact indicate a robust, rather than an offhand, media approach to risk.

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<sup>440</sup> Ibid, 183.

<sup>441</sup> Recommendations on the Law of Defamation, *Report of the Committee on Defamation*, December 1977, 18 and 139, Table P.

<sup>442</sup> At least one of the business publications in my study in 2001 took this approach, and let it be known that no insurance was held and that flimsy claims would be fought or resisted.

## *2.5 Impact of decisions of regulatory bodies*

The final question on pre-publication procedures in the survey sought information on the influence of regulatory bodies on media behaviour. The relevant body for the print media is the Press Council and for the broadcast media, it is the Broadcasting Standards Authority.<sup>443</sup> The number of responses was disappointing as only just over a third (35%) of all media respondents answered this question. Nearly two-thirds (64%) of these said that the decisions of the relevant bodies did affect them and they attempted to take them into account. However, there were marked differences in these results as between the approach to the BSA and the Press Council.

Almost all broadcasters who responded replied that the BSA did have an effect on them and their procedures. Answers in the negative only appeared in replies from the print media subject to Press Council regulation. Thus, not surprisingly, it appeared that the self-regulatory regime of the Press Council was not taken as seriously as the statutory, quasi-judicial code-based system implemented by the BSA. Just over a third (36%) (which included no broadcasters) thought regulatory bodies had no or little effect on pre-publication procedures.<sup>444</sup>

Sixty-six percent of newspapers which responded indicated they tried to keep abreast of decisions of the self-regulatory Press Council, and to incorporate them into procedures where possible (although one response noted that staff sometimes have short memories). Twenty-two percent stated that Press Council decisions had no effect on pre-publication procedures (the strongest comment being that: 'They are so 'slap on the wrist with a wet bus ticket' as to be non-threatening.') Twelve percent of responses indicated that Press Council decisions rarely or only sometimes affected pre-publication procedures. Therefore a third of newspapers which responded to this question thought that the decisions of the Press Council were of no or little effect.

Only 19% of magazine respondents indicated that the decisions of the Press Council<sup>445</sup> had any impact on pre-publication procedures. However, none of these mentioned the Press Council directly (though this was referred to in the question) and the replies indicated that it

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<sup>443</sup> See the discussion of media regulation above, Chapter Two.

<sup>444</sup> The responses from advertising agencies were not included in this summary, as these would skew the results because of the special regimes for regulation of that sector of the media.

<sup>445</sup> Which might not have jurisdiction in any event, as its coverage is voluntarily adopted.

has no greater relevance than other legal requirements. The following responses are illustrative:

- *Not directly. But we are aware of debate and legal decisions which influence (and hone) our early warning system.*
- *Yes but common sense and journalistic experience are considered more relevant.*
- *No more than legal considerations.*

Six of journalist and writer respondents answered the question and half of these thought the decisions of regulatory bodies had little or no effect on them. One comment is illustrative and picks out the Press Council in particular:

- *The Press Council doesn't affect me much, though I am familiar with the statement of principles. They are too vague to be of much use; I think my own ethical standards are much more vigorous.*

The other half of these journalist and writer respondents thought there was some impact from regulatory bodies, but one of these replies referred to the BSA, not the Press Council:

- *The broadcasting codes impact on me much more heavily (when I'm producing radio): and in particular the requirements for balance and fairness.... They're inclined to make me go the extra mile to give people a full chance to respond – even in the marginal situations where they are not being criticised much or it is an opinion piece.*

Overall, the impact of the BSA seemed to weigh more with these respondents than that of the Press Council.

A majority of television broadcasters responding to this question, including both of the largest television broadcasters, stated that the BSA is taken quite seriously, with one of the large broadcasters indicating that the BSA has more effect than defamation law, because its standards such as those relating to privacy, good taste, and decency are restrictive. The remaining two of these respondents always kept the BSA in mind, or looked at its decisions to see the 'colour of current trends'. Therefore all of the television broadcasters who answered this question thought the BSA decisions had some serious effect.

While only about a third of radio broadcasters answered the question of the impact of the Broadcasting Standards Authority on pre-publication procedures, all were aware of the regulatory body and took some notice of its decisions, even if only indirectly. Additionally, one broadcaster's answer to the previous question about how and when material is altered prior to publication can be included in this category and is quite revealing:

- *Just once about 10 years ago the BSA upheld a complaint about a particular programme. For about 6 months we vetted the programme scripts and on some occasions altered them.*

Together with that response, nearly 40% of radio broadcasters responding took some notice of the complaints procedure and the decisions of the Broadcasting Standards Authority.

Multi-media respondents could be affected by both the BSA and the Press Council. Four stated that the Press Council and BSA had little or no effect on their pre-publication procedures. (However, one of these respondents thought the BSA was a form of state-censorship, indicating that while the form of regulation was rejected, it was regarded as too effective). One multi-media respondents answered yes, in that the decisions were monitored and procedures adjusted accordingly.<sup>446</sup>

To summarise, it is not surprising that the regulatory bodies are regarded in this way. The degree of respect accorded each body appears to correlate to the power of sanction invested in each. The Press Council administers light-handed self-regulation and hence has the stated purpose of impacting as little as possible on the freedom of expression exercised by the print media. Conversely, although the BSA is required to take account of freedom of expression because of the New Zealand Bill of Rights Act 1990, its power to override this where appropriate and its significant powers to penalise after broadcast have given it a high, and often negative, profile with some broadcasters.

However, the response to this part of the survey, or rather, lack of response (two-thirds of media did not answer the question), is rather intriguing. The most logical reasons which might be put forward for this suggest a robust, rather than a cowered media. It may be that the two-thirds not responding knew little about the relevant bodies, or cared little about them, or

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<sup>446</sup> As most of the publisher respondents were book publishers, who are not subject to special regulatory regimes, this question was not relevant to them and they did not answer it. The responses of ad agency and public relations firms respondents are not included in this analysis as there are a number of other regulatory bodies which have impact in this sector.

simply that they had no experience of them at all. These bodies did not appear to create any serious chill factor at all. Yet they could, of course, deal with complaints covering the same ground as a defamation claim – the publication of untrue statements which are damaging of reputation.

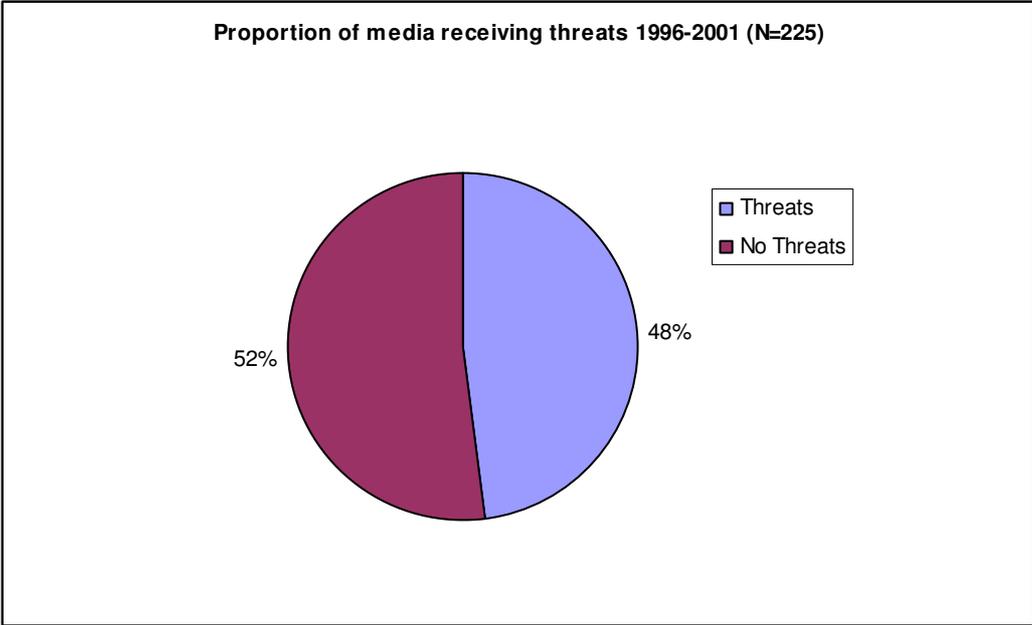
2.6 Threats

Respondents were asked to estimate how many threats of action (letters, phone calls etc, suggesting the media defendant had published defamatory material, or threatening a defamation suit, before any court documents have been filed) had been received in the last six years (1996 – 2001). This part of the survey also sought views of the media on whether threats were increasing, and what proportion of threats were regarded as serious. This part of the survey was intended to determine what the media thought happened in relation to threats.

2.6.1 Number of threats

Nearly half (48%) of all media respondents had received threats in the six year period. (See Fig. 28 below).

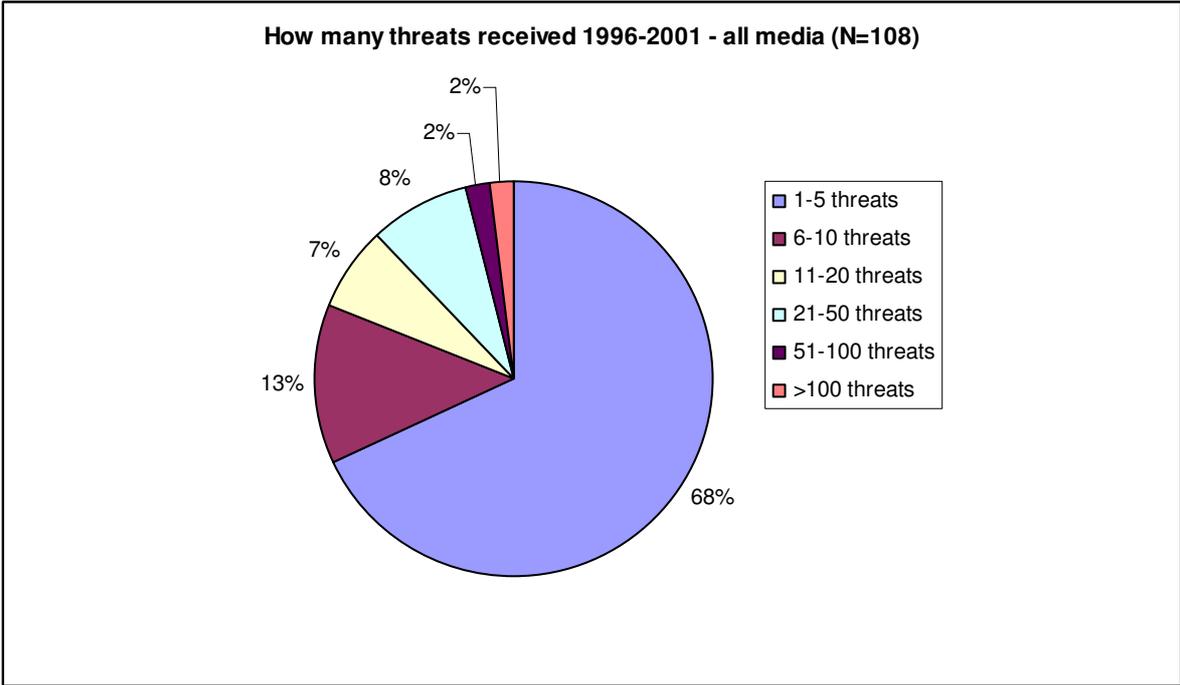
Fig. 28



The number reporting receipt of threats is less than that revealed in previous research by the McKay committee.<sup>447</sup> That study found that for the four year period 1970-1974, two-thirds of the media responding to its survey had received threats during the period. For the separate year of 1975, the figure was 62%.

Of those reporting threats in the six year period covered by my survey, a large majority of over two-thirds (68%) received 1-5 threats. The next group of nearly 13% had received 6-10 threats, while 8% had received 21-50, 7% had received 11-20, nearly 2% had received 51-100, and nearly 2% had received greater than 100 threats in the six year period. (See Fig. 29 below).

Fig. 29

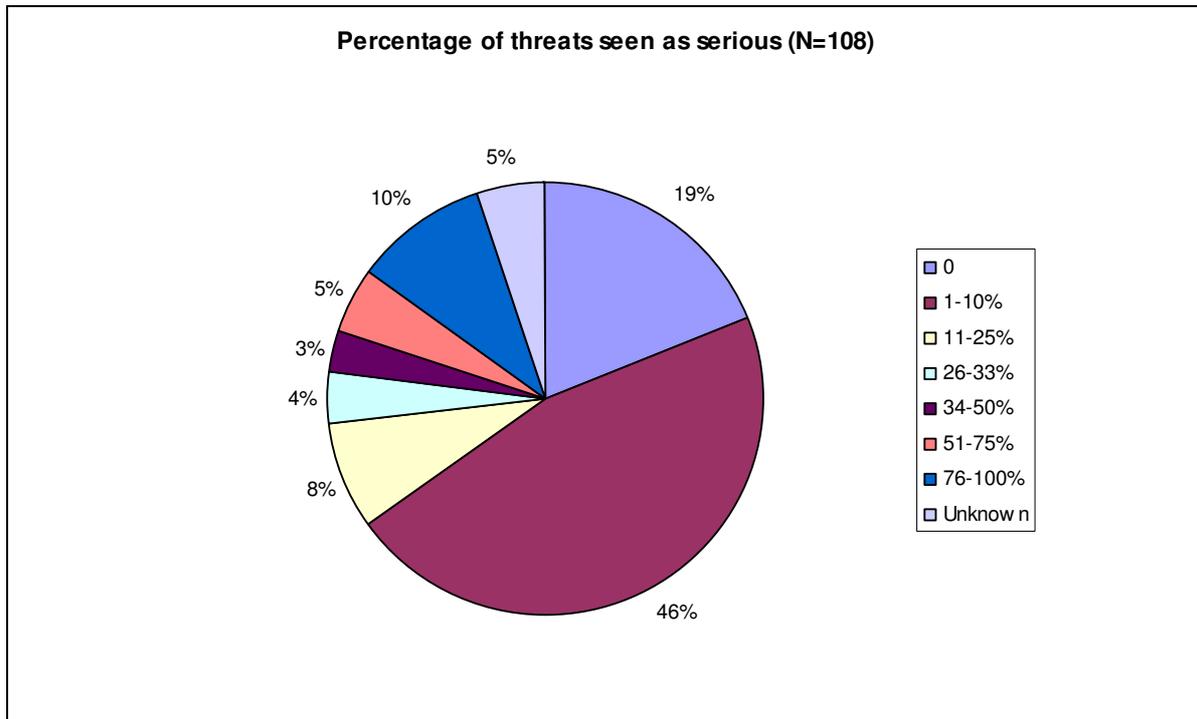


2.6.2 *Seriousness of threats*

Of those who answered the questions about threats, nearly half (46%) thought that only 1-10 percent of threats were serious. Nineteen percent thought that no threats were serious. Therefore, most (nearly two-thirds) of these respondents thought that none or only up to 10 percent of threats were serious. Only 10% thought that three-quarters to all threats were serious. Overall a large majority did not regard many threats as serious, while only 15% thought that half to all of threats were serious. (See Fig. 30 below).

<sup>447</sup> See Recommendations on the Law of Defamation, *Report of the Committee on Defamation*, December 1977, Appendix III, p 135.

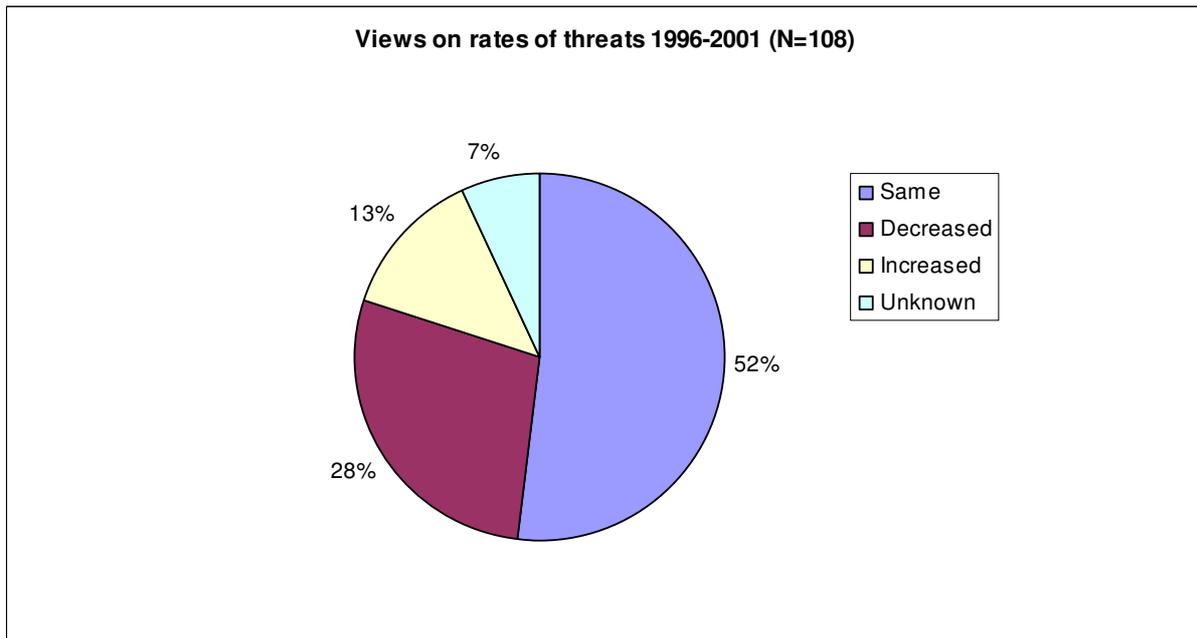
Fig. 30



### 2.6.3 Stability of threat rate

Over half (52%) of all media respondents which gave information about threats thought the number of threats had remained the same over the relevant six year period. Over a quarter (28%) thought they had actually decreased. Only 13% thought the number of threats had increased. Seven percent did not answer the question or were unclear. It was the predominant view within individual media groups also that numbers of threats had remained the same. However, the largest group (of radio broadcasters) (44%) thought the numbers of threats had decreased, and equal numbers of magazine respondents (41%) thought the numbers had stayed the same or decreased. But overall, it appeared the number of threats was seen by almost all media responding as remaining consistent in the six year period under review. (See Fig. 31 below).

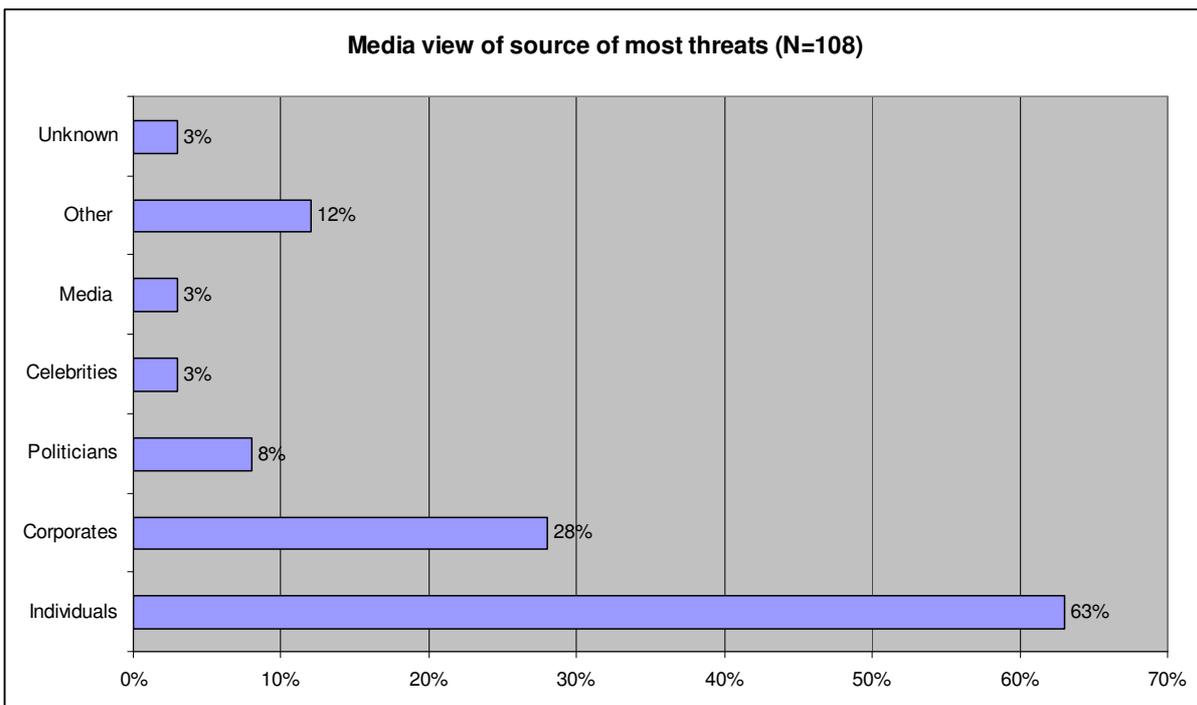
Fig. 31



#### 2.6.4 Source of threats

Nearly two-thirds (63%) of all media respondents who had received threats thought the party which made the most treats was ordinary individuals. The next largest group identified corporate bodies (28%), followed by the category designated 'other' (12%), which included iwi, lawyers, government departments and schools. Eight percent chose politicians, while 3% each chose celebrities, media or were unclear. (See Fig. 32 below).

Fig. 32

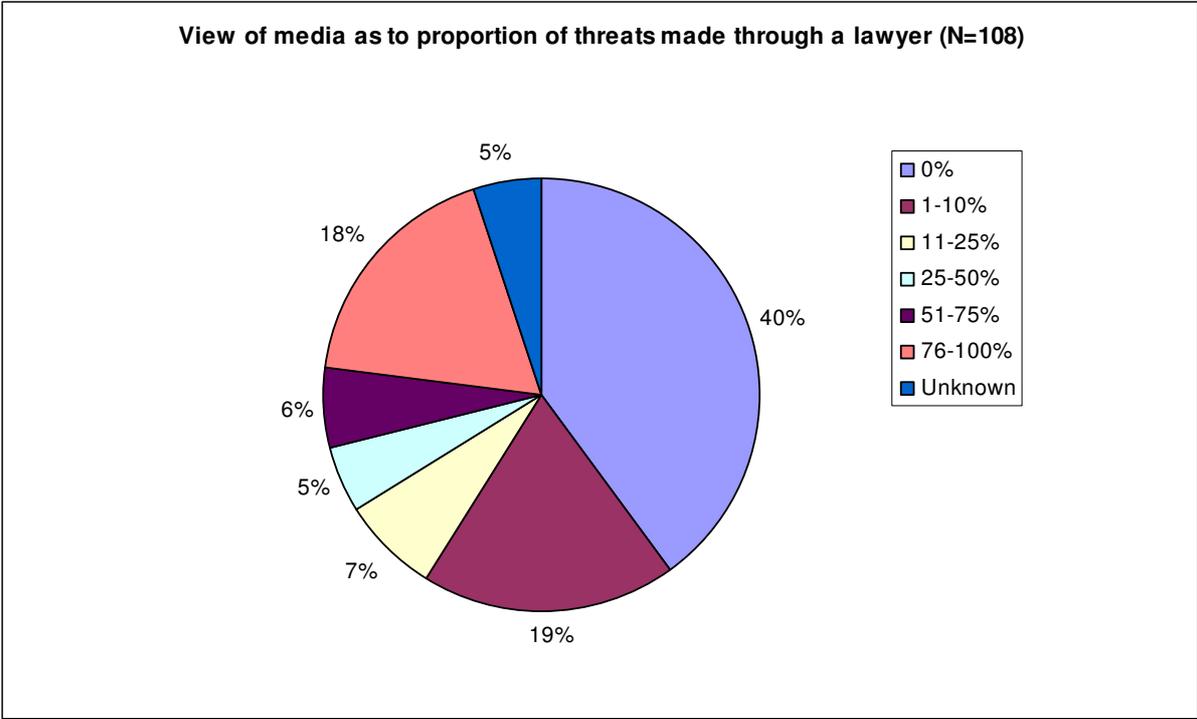


In most cases, individual media respondent groups also identified ordinary individuals as the source of the greatest number of complaints (newspapers 74%, television broadcasters 75%, radio broadcasters 75%, publishers 60%, multi-media 50%, and ISPs 100%). However, the greatest number of magazines and advertising agencies and public relations firm respondents chose corporations (magazines 53%, advertising agencies and public relations firms 50%). This result reflects the special character of publication in those sectors, which features a greater proportion of reviews and discussion of company products and services.

2.6.5 *Were threats made through a lawyer?*

Nearly 40% of all media respondents answering questions about threats received stated that no threats were made through a lawyer, and the next largest group (19%) stated that only 1-10 percent came from this formal source. Therefore, over half (59%) of all these respondents thought none or a very small proportion of threats were made in such a fashion. However, the next largest group (18%) stated that three-quarters to all of threats came via a lawyer. Seven percent (8) thought that 11-25 percent of threats came via a lawyer, while 6% stated the source of half to three-quarters of threats as being a lawyer. Five percent sourced between a quarter and a half of threats as coming from a lawyer. (See Fig. 33 below).

Fig. 33



The picture that can be painted from this data is one where about half the media calculated that they received threats, averaging at least one a year. However, the majority who did receive threats thought that most of them are not serious and this was born out by the fact that

over half of the group stated threats were not made through lawyers. Most threats were thought to come from ordinary individuals, followed by corporates. Most media did not think that the number of threats was increasing.<sup>448</sup>

### *2.7 Actual experience of threats of action received 1996-2001*

Media respondents who reported receiving some threats were asked to attempt to return details of the actual threats of action they had received in the relevant period. This part of the survey was intended to determine what actually happened to these media in the context of threats. Details of a total of 177 threats were obtained.<sup>449</sup>

#### *2.7.1 Sources of threats*

The largest group of threats made to all media, (46%), came from ordinary individuals, while 26% came from organisations or corporate bodies, the source of 17% was unclear, 8% were from politicians (national or local) and 2% came from family groups. However, although threats from ordinary individuals dominated the results, it is significant that publishers received 35% of threats from corporate bodies, while magazines received an equal number of threats from organisations or corporate bodies, and individuals, with a third from each. This reflects the special character of magazines and publishers, which feature a significant proportion of published material about products and companies. (See Fig. 34 below). These reported factual results do bear out the opinion answers given previously by media as to where threats came from.<sup>450</sup>

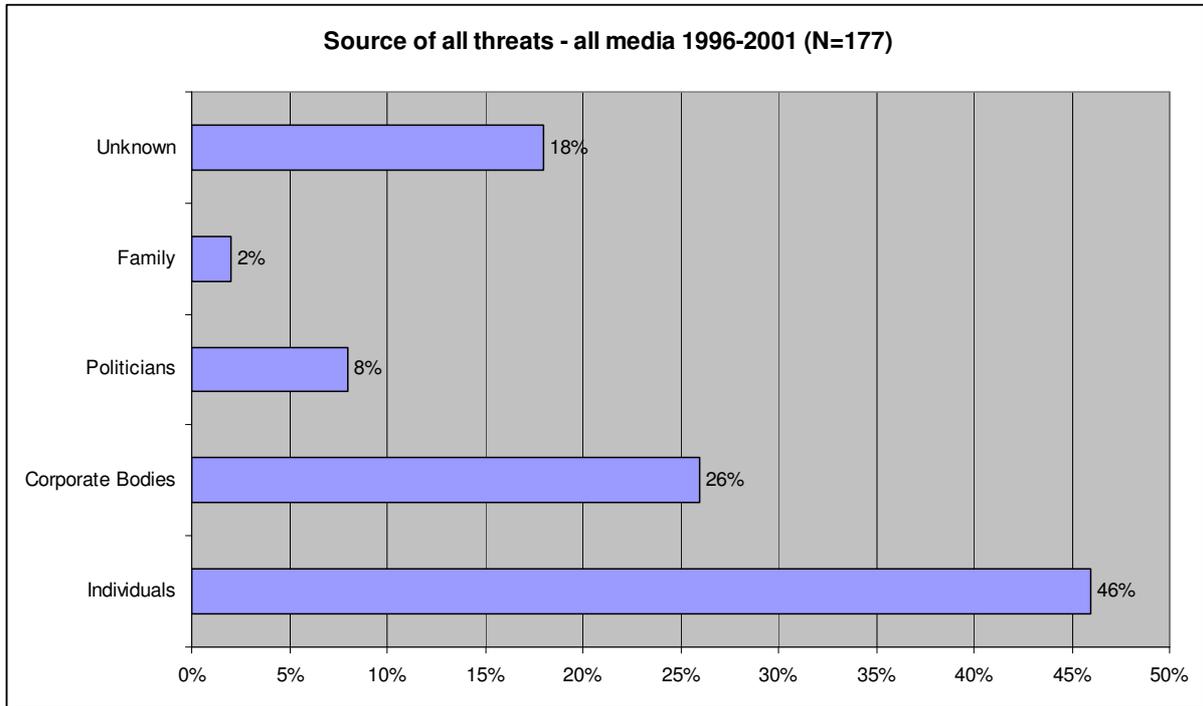
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<sup>448</sup> The McKay Committee research cannot really be used for comparison of these results. That research did ask what number of threats were regarded by media solicitors as without merit, and what number of threats were regarded as being of a gagging nature. However, the data was only collected for a period of a year – 1975, which is insufficient to disclose any pattern. It found that 51% of threats received were seen as likely to fail, and that 37% were regarded as being of a gagging nature. See Recommendations on the Law of Defamation, *Report of the Committee on Defamation*, December 1977, Appendix III, Table B, p 135.

<sup>449</sup> It is unlikely all threats were detailed. Further, the data received on threats of action actually received by television broadcasters in a six year period was limited. The two major television broadcasters, TVNZ and TV3 Network, did not keep records of such threats. Details of four threats only were received from other television broadcasters, one received in 2000 and the balance in 2001. Because of the small number of such examples, the data on threats received relating to television is not significant in any way and is no more than interesting. However, the responses of television broadcasters giving views on receipt rates and nature of threats is reasonably representative.

<sup>450</sup> See Fig. 32 above.

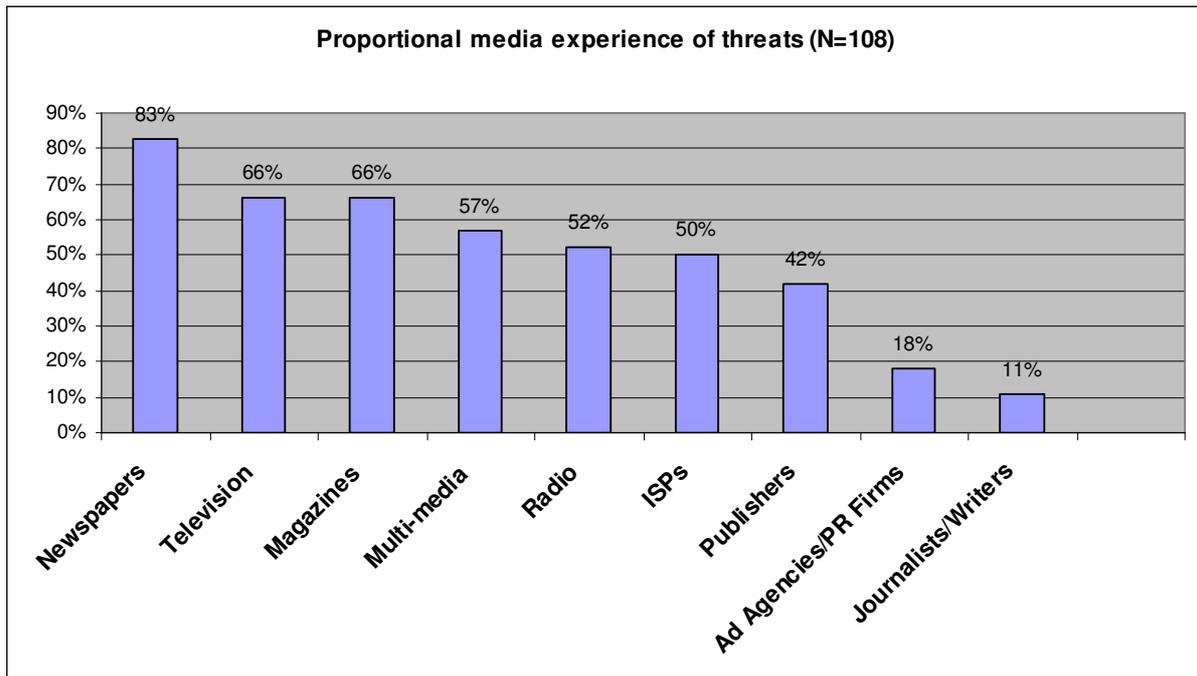
Fig. 34



### 2.7.2 Who received threats?

Proportionally, more newspapers appeared to receive threats than other media. Eighty-three percent of newspapers had received threats, while two-thirds of the television broadcasters had done so, followed closely by magazines (66%). Fifty-seven percent of the multi-media respondents had experienced threats, as had 52% of the radio respondents, and one of the ISPs. A little less than half of the publishers (42%), had experienced threats, followed by 18% of the advertising agencies and public relations firms, and only one of the journalists and writers had experienced threats. (See Fig. 35 below).

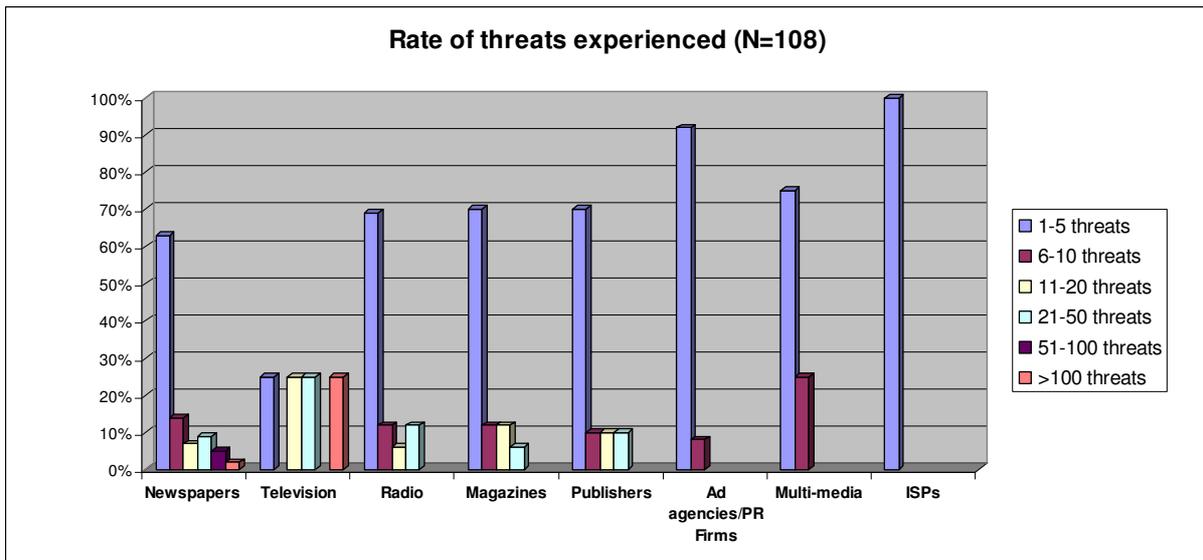
Fig. 35



### 2.7.3 Rate of threats received

Most media respondents reported receiving 1-5 threats (newspapers (63% or 27 received 1-5 threats), radio (69% or 11), magazines (70% or 12), publishers (70% or 7), multi-media (two-thirds or 3), ISPs (100% or 1). However, of the television respondents, 25% (1) reported receiving over 100 threats in the period, and a further 25% (1) reported receiving 21-50 threats. This means half of the television respondents who answered the question how many threats were received had experienced 21 or more threats in the period, and three-quarters (3) had experienced 11 or more. Television therefore reported a higher rate of threats than other media, although this is not reflected in the reporting of actual details of threats referred to below, where few television respondents contributed. The single journalist and writer who responded experienced 6-10 threats. (See Fig. 36 below).

Fig. 36



#### 2.7.4 Numbers of threats detailed

Details of a total of 177 threats were outlined by 108 media respondents. Numerically, newspapers detailed most threats (43%), followed by magazines (17%), radio (16%), publishers (11%), advertising agencies and public relations firms (5%), multi-media (3%), journalists and writers (2.5%), television (2%), and ISPs (.5%).

#### 2.7.5 Context of detailed threats

In terms of context, 51% (3) of the newspaper threats arose from news or current affairs stories, by far the largest group. Eight percent (6) arose from court reports, the same figure arose from letters to the editor, while 3% (2) arose from each of criticism or review, and pictures/cartoon. One percent (1) arose from each of an editorial, and an advertisement. For 24% (1) the context was unidentified. As to subject matter, the largest group (45% or 35) arose from material which contained allegations about business practices or professionalism. Fourteen percent (10) arose from politics (national or local), 7% (5) arose from inaccuracy, and 4% (3) from satire. For 31% (23) the subject matter was unidentified.

The context of half (2) television threats was not disclosed. However, in one case, the alleged defamation arose from a chat show, and in the other from a news report.

A significant number of threats (41% or 12 out of 29) made to radio respondents arose from news bulletin or current affairs programmes. Nearly a third (9) arose from spontaneous comment or live material. Ten percent (3) comprised a mixed category, arising from breach of

a suppression order, an advertisement and a fictitious programme. Seventeen percent (5) did not give details of the source of complaint.

As to context of the magazine threats, 47% (14) arose from articles dealing with current issues, and 3% (1) each from a letter to the editor, and a photo/cartoon. For 40% (12) the context was unidentified. As to subject matter, 23%(7) concerned products or business matters, 13% (4) arose from inaccuracy, 7%(2) from satire. For 57% (17) the subject matter was not identified.

Information detailed about the context of the publisher complaints was limited. Over a third of threats (35% or 7) arose from books, while 10% (2) arose from editorial material, and 10% from articles. However, the context of 45% (9) threats made to publishers was unclear. As to subject matter, 20% (4) threats arose from information about products, and the same figure arose from inaccuracy. The subject matter of 60% (12) of the threats was unclear.

Forty-two percent (3) of the advertising agency and public relations firms threats arose from promotional or publicity materials. Twenty-nine percent (2) arose from articles and the context of 29% were unclear.

As to context, 60% (3) of the threats made to journalists and writers arose from criticism or review, 20% (1) from current affairs and 20% from talkback. As to subject matter, 60% (3) arose from allegations relating to business or professionalism, and 40% (2) from politics.

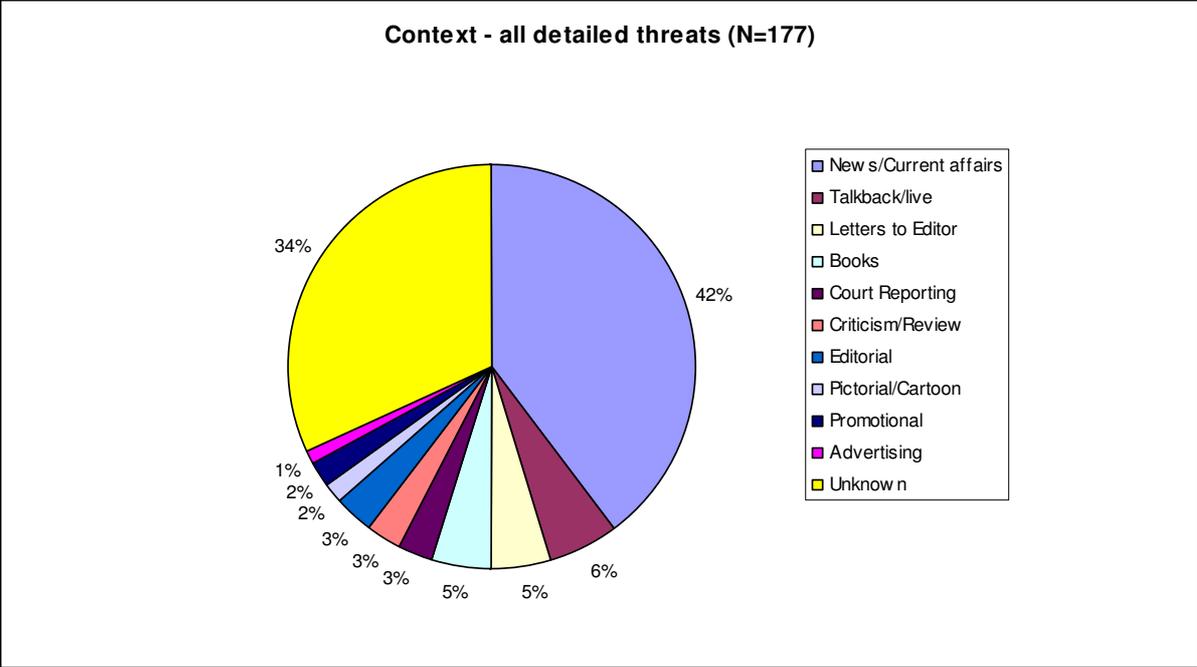
Contextual data for multi-media respondents was again somewhat limited. One third (2) of threats arose from news or current affairs, and 17% (1) each from a letter, a breach of suppression order, and a book. The context of the remaining threat was unclear.

The threat made to the ISP was about a SPAM listing on the ISP website which included the complainant's name and email address.

Although the contextual material is somewhat sketchy, it can be summarised in a limited fashion. The largest number of detailed threats for these media (42% or 72) arose in the context of general news, current affairs or documentary publication. Six percent (11) arose from talkback or live shows, and 5% (8) arose from each of letters to the editor, and books.

Three percent (6) arose in the context of each of court reporting, criticism or review, and editorial material. Two percent (3) arose in each of pictorial/cartoon, and promotional material contexts. One percent (2) arose from advertising material. The context of 34% (61) threats was unclear. (See Fig. 37 below).

Fig. 37



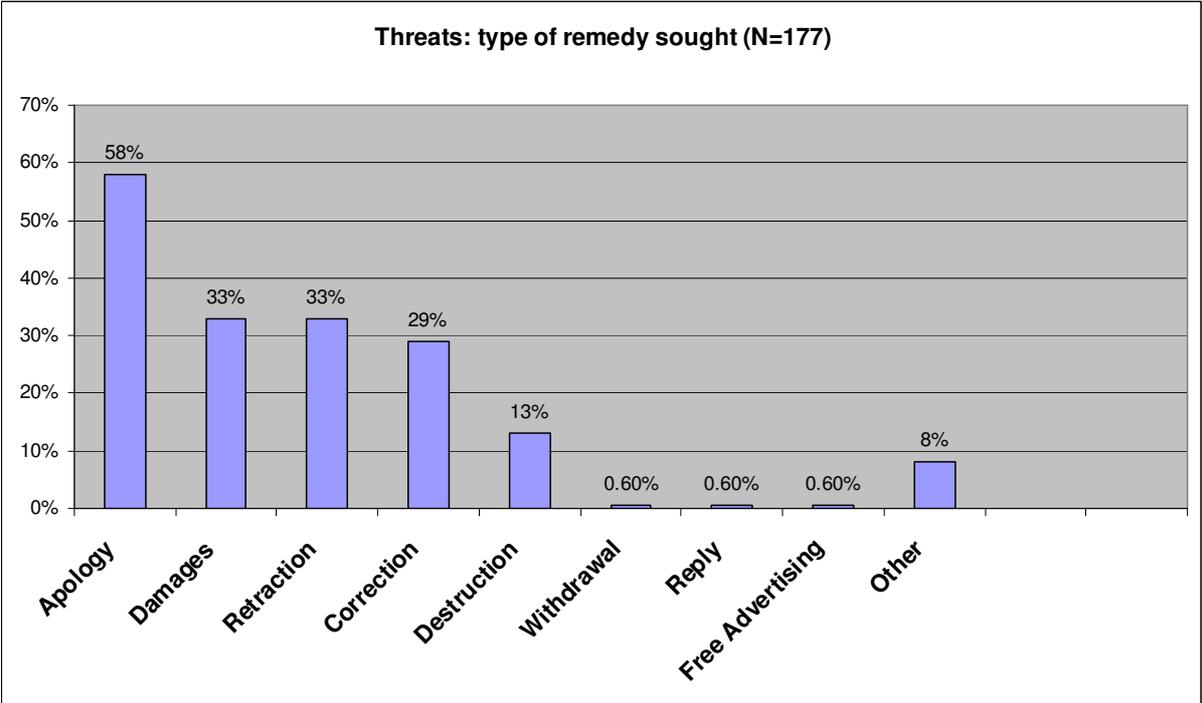
2.7.6 Impact of legal advice on detailed threats

Legal advice was sought in relation to 42% of reported threats, and was not sought in relation to 43% of threats. Therefore, legal advice was sought almost as often as it was not. It was unclear whether legal advice was sought in 15% threats. Although the results were distributed almost evenly, two groups of media respondents stand out as not tending to seek legal advice. Radio respondents did not seek legal advice in relation to 59% of detailed threats, while advertising agencies and public relations firms did not seek such advice in relation to 62% of the detailed complaints. This may be because these respondents attempt to deal with threats in informal and innovative ways, or because they receive less serious threats, or a combination of both. In contrast to radio and advertising agencies and public relations firms, the journalist who detailed threats sought legal advice on 80% of the threats received.

2.7.7 Desired outcome in detailed threats

The most common remedy sought in all of the threats was an apology, which was sought in over half of threats (58%).<sup>451</sup> The next most common remedies sought were damages and retraction, which were both sought in a third of all threats. Correction was claimed in 29% of all threats, followed by destruction/prevention of publication (13%). Withdrawal of publication, right of reply and free advertising was claimed in .6% of all threats. The remedy sought fell into a varied ‘other’ category for 8% of threatening letters. (See Fig. 38 below).

Fig. 38



The fact that an apology was the most common remedy sought is in contrast to the data for filed claims which is discussed below. This is explicable, as few claimants would proceed to court if the main remedy sought is simply an apology. It appears threatening letters are intended to achieve quick, inexpensive outcomes. This may also indicate that threatening letters do not have an unacceptable chilling effect, and that few, if any, are intended to be gagging letters, but rather, seek genuine and realistic outcomes.

Damages were still sought in a third of threats, however. Levels were identified in only 18% of these, five cases being claims against news media, in this case, newspapers. See Table 1. below.

<sup>451</sup> More than one remedy might be sought in relation to each threat.

Table 1.

**Levels of damages sought in threatening letters  
1996-2001**

<b>Figure claimed</b>	<b>Defendant</b>
1. \$ 600	Newspaper
2. \$5,000	Newspaper
3-4. \$10,000	Newspaper, Magazine
5. \$20,000	Magazine
6. \$30,000	Magazine
7. 50,000	Newspaper
8.-9. \$100,000	Publisher, Multi-media
10. \$300,000	Magazine
11. \$2 million	Newspaper

In about 45% of the threats represented on the table above, the damages sought appear to be unrealistically high. However, more importantly, in most cases (82%) where damages were claimed, the amount was unspecified. This in itself could have a chilling effect. However, the general comments attaching to these responses did not indicate greater concern where damages were not specified – in some cases, they indicated the threat was taken less seriously, because it was seen, for example, as unfocussed and vague. Furthermore, the data detailed below indicates that damages were actually paid in few cases in response to threats.

*2.7.8 Outcome of detailed threats*

The outcome of threats against newspapers was distributed remarkably evenly between outcomes in which the newspaper settled or made a concession, and where the newspaper resisted or ignored the complaint and heard no more. Forty-nine percent (36) of complaints resulted in a settlement or some other concession by the newspaper, but the same number were ignored or resisted and went away. Two percent (2) had unclear outcomes. Thus newspapers appear to successfully resist threats of legal action about half of the time.

Of the 36 newspaper threats which resulted in a settlement or concession by the newspaper, half (18) resulted in an apology, while 28% (10) resulted in a correction, 19% (7) resulted in a retraction, 11% (4) resulted in damages and the same number in right of reply or a clarification, 3% (1) resulted in an article being censored and 3% in a settlement.(A number of threats resulted in more than one of these concessions being made).

Newspaper editors were asked why threats were met by concessions (and could identify more than one answer). Thirty-eight percent (14) replied that the other party was correct, 28%(10) stated that they were advised to settle by a lawyer, 8% (3) noted that they could not afford to fight the matter because they were a small enterprise, and nearly 6% (2) stated that although they knew they were right, they could not prove it. Eight and a half percent (3) gave other reasons, including that the remedy was an opportunity to make the complainant look stupid!

The newspaper figures point to a practice of ignoring or rejecting what are seen as idle threats in the first instance, and a strategy of resisting more serious matters as long as practicalities will allow. Only smaller media enterprises seem to be in a weak and vulnerable position, consistent with other risk factors faced by such businesses.

In the case of television, three-quarters of the threats (3) were not pursued and the television broadcaster heard no more. The other threat resulted in a correction and retraction being given. However, the broadcaster in this case noted that it settled the matter because although it knew it was right, it could not prove it.

As to outcome for radio respondents, 52% (15) resulted in some sort of settlement or concession, nearly 45% (13 out of 29), were ignored or resisted by the radio station and not pursued and 3% (1) was still pending. Of the threats which resulted in a concession, 87% (13) resulted in an apology, 47% (7) resulted in a correction, 20% (3) resulted in a letter of explanation, and 7% (1) produced a retraction. The BSA featured in nearly a quarter (7) of the radio threat case histories. The complaint was upheld in nearly 29% (2) of these, and rejected in nearly 43% (3). In one further case, a party was advised of their rights in relation to the BSA, and in the other, wanted to hold open their right to complain to the BSA but this was rejected by the radio broadcaster.

Half of the total magazine complaints (15) resulted in some sort of concession by the magazine, while the other half did not proceed. The settlements or concessions resulted in an apology (47% or 7), a letter of explanation (20% or 3), damages (13% or 2), correction (27% or 4), reply or retraction (each 13% or 2), free advertising (20% or 3) and holding the publication for a time (7% or 1). It appears that the provision of free advertising as a remedy is not uncommon. This emphasises and confirms the point made by some respondents that magazines, in particular small magazines, are dependant on advertising for revenue. It is reasonable to conclude therefore, that advertisers potentially have a chilling effect on the content of magazines.

Three-quarters (75%) of the publisher threats did not proceed following either rejection or lack of acknowledgment. Fifteen percent (3) resulted in an alteration or correction, 5% (1) in an apology and in 5% the outcome was unclear. This high rate of abandonment of complaints is in contrast to the high rate of successful plaintiffs who issued statements of claim against publishers, detailed below. It implies that the complaints were not in fact serious, and that serious complaints perhaps begin life as statements of claim where publishers are concerned.

Sixty-two percent (5) of the threats to advertising agencies and public relations consultants were ignored or resisted and the firm heard no more. Of the thirty-seven percent (3) in which concessions were made, all of the threats (3) resulted in an apology, and the same figure resulted in a letter of explanation being sent. One-third (1) threat resulted in withdrawal and destruction of the publication. It is significant that although more threats were received by public relations firms, only one-fifth of these resulted in any sort of remedy, an explanation and apology, which was not the correction and retraction sought. Yet two-thirds of the threats made to advertising agencies resulted in remedies which were close to those sought.

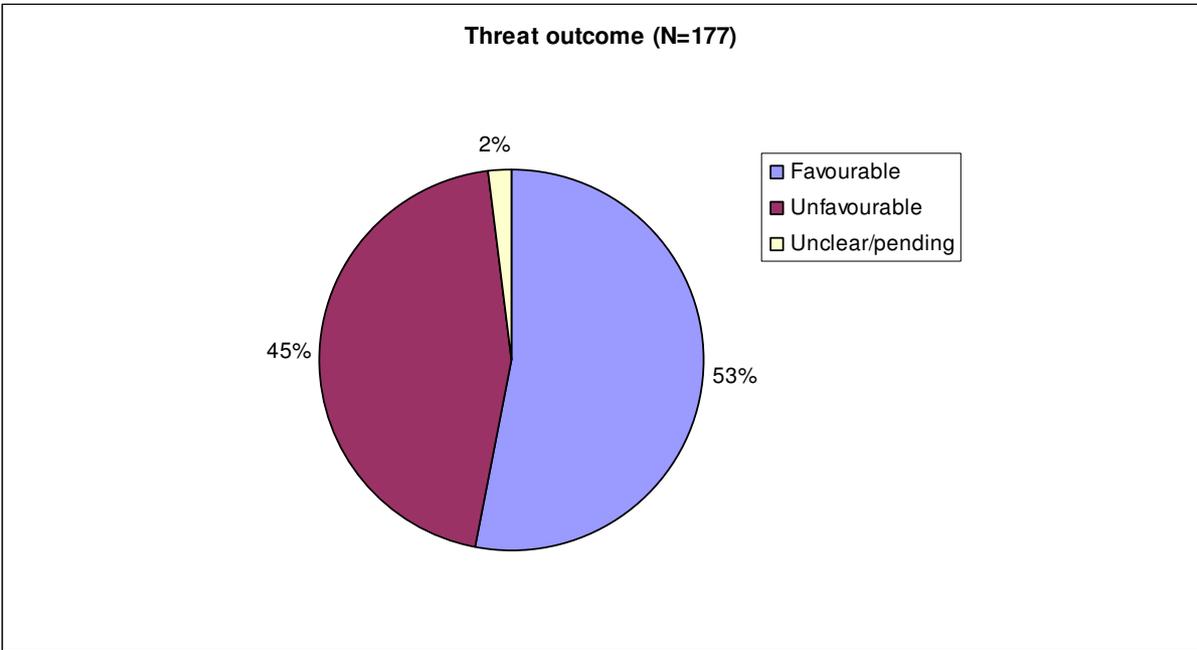
As to outcomes for the journalist who received threats, of the five threats, the majority (3) came to nothing, one resulted in a mild compromise by the journalist's employer and the other resulted in free advertising and an apology by the publisher of the journalist's comments. Thus, the journalist resisted the threats in the majority of cases.

For multi-media, of the six threats, the majority (4) came to nothing, one resulted in a right of reply being printed, and one resulted in an apology and destruction of a particular page. Thus, the multi-media respondents defied the threats in the majority of cases.

The ISP did give an apology and sent a letter of explanation in relation to the single threat detailed. The ISP settled the matter in this way because it could not afford to fight the matter in court, could not prove it was right and could not afford lawyer's fees.

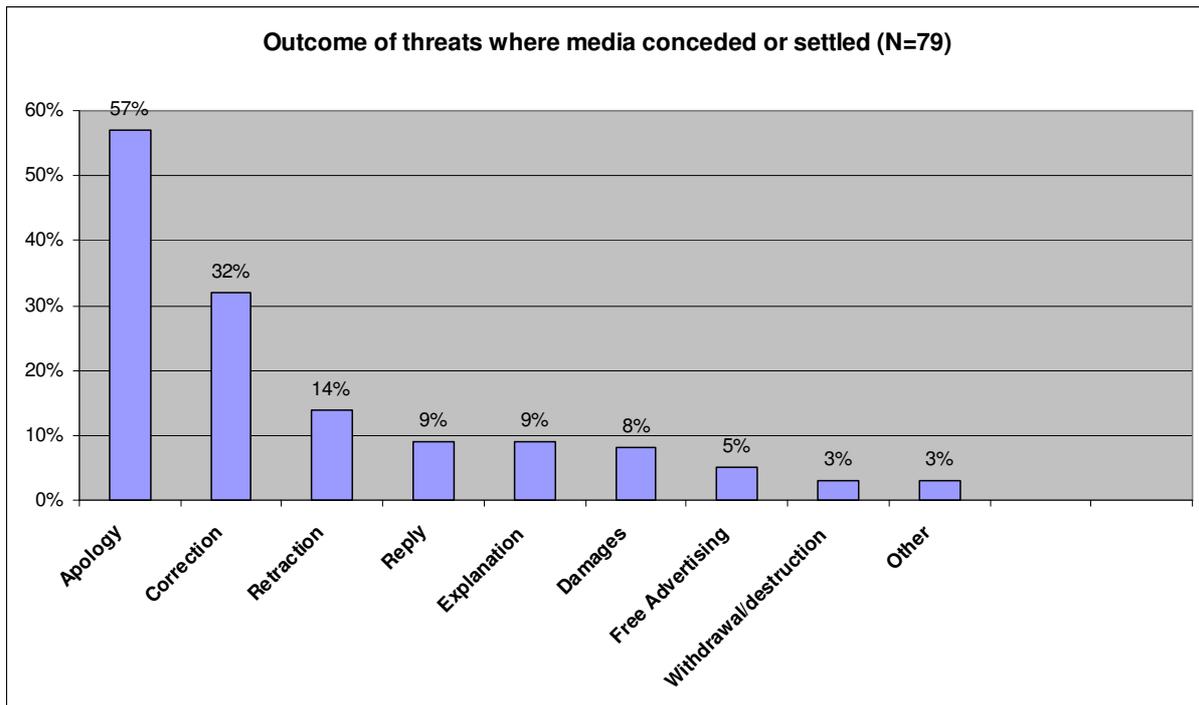
When the reported outcomes are analysed, it is apparent that of the total 177 threats reported by all media in the period 1996-2001, over half (53%) were ignored or resisted and nothing more was heard. Forty-five percent resulted in a settlement or concession of some kind by the media. Two percent of the threats had an unclear outcome or were still pending. Therefore, outcomes favoured the media in just over half of threats. (See Fig. 39 below).

Fig. 39



For the 79 threats which were settled or which resulted in some sort of concession, the most common outcome was an apology, which was made in relation to 57% of these threats. The next most common concession was a correction, which was a remedy in 32% of these threats, followed by retraction, conceded in 14% threats. Reply or clarification was allowed in 9% threats and the same proportion resulted in a letter of explanation, while damages were paid in response to only 8% of threats. Free advertising was given in relation to 5% of threats, withdrawal or destruction of the publication resulted from 3% of threats and material was censored in relation to 1% of threats. Three percent of responses to threats fell in a unique 'other' category. (See Fig. 40 below).

Fig. 40



Levels of damages paid were detailed in relation to 5 threats only and on the whole were very low when compared to the levels sought as detailed above. In only two cases did the amount claimed and the amount paid coincide.<sup>452</sup> (See Table 2. below).

Table 2.

**Levels of damages paid in response to threats,  
1996 - 2001**

Figure	Media
1. \$600*	Newspaper
2. \$2,000	Magazine
3. \$5,000*	Newspaper
4. \$7,500	Newspaper
5. \$10,000	Newspaper

It seems, therefore, that the most common remedy both sought and granted in relation to threats was the apology. However, while damages were sought in a third of threatening letters,

and were in fact, the second most sought-after remedy, they were part of the actual outcome in only 8% of the threats. Generally, outcomes show a low-level and creative response to threats, and treatment of them as part of the daily routine of the newspaper or whatever media was involved.

Some details about costs associated with threats were returned in relation to a small number (nearly 6%) of all threats. Sixty percent of these were newspapers and 40% were magazines. The levels detailed are presented in the table below. (See Table 3).<sup>453</sup> While this data is sparse and of interest only, it shows that costs in relation to threats do not appear to be high. This is consistent with the data presented above.

Table 3.

**Nature and levels of costs – all threats 1996-2001**

<b>Media defendant</b>	<b>Costs paid –Plaintiffs</b>	<b>Costs paid - Defendants</b>	<b>Unclear</b>
1. Magazine		\$3,500	
2. Magazine			X
3. Magazine	\$450		
4. Magazine	\$2,000		
5. Newspaper	\$500		
6. Newspaper	\$750	\$750	
7. Newspaper	\$5,000	\$2,000	
8. Newspaper	\$500		
9. Newspaper	\$3,000	\$1600	
10. Newspaper	\$2,500		

*2.8 Actual experience of defamation statements of claim (writs) 1996 – 2001*

This part of the survey sought detailed information about actual experience of statements of claims (previously called writs) filed against media defendants in the years 1996-2001. The section which follows details and analyses the responses received.

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<sup>452</sup> These are shown by an asterisk on the table.  
<sup>453</sup> This Table does not include free advertising, included on p. 129 above, which could be seen as a cost.

### 2.8.1 *Incidence of claims*

Ninety percent (47) newspapers answered the question seeking information about the incidence of claims. Twenty-one percent (10) of these newspapers reported having a defamation action filed against the editor or organisation in a court in New Zealand in the six year period. Seventy-nine percent (37) had not. Ten percent (5) did not answer the question. Of those which reported actions filed, 20% (2) indicated that one writ had been issued, and 70% (7) had had 2-5 writs issued. One newspaper did not answer this question.

All of the television broadcasters answered this question. Half (3) indicated they had had a defamation action filed against the organisation in a court in New Zealand in the last six years. These three were the larger players in this market. Of these, one-third (1) reported one writ issued in that period, and two-thirds (2) had had 10 to 20 writs issued.

Nearly 68% (20) of the radio broadcasters answered the question whether they had had a defamation writ filed against them in the last six years. Nearly 85% of this number (17) had not. Of the 15% (3) who had had a writ filed against them, one indicated one writ had been filed, one had received 2 to 5 writs, and one had had 5-10 writs issued in the relevant time period.

All of the magazine respondents answered the question. Seventy-seven percent (20) had not had a defamation writ filed against them in the period 1996-2001, while 23% (6) had. Two-thirds (4) of the latter had had 1 writ filed during that period, and one-third (2) had had 2 to 5 writs filed against them.

All of the book publishers answered the question. Twelve and a half percent (3) had had a defamation writ filed against them in the last six years while 87.5% (21) had not. Two-thirds (2) of those who answered in the affirmative indicated that only one writ had been filed. The remaining third (1) stated that 2-5 writs had been filed in that time.

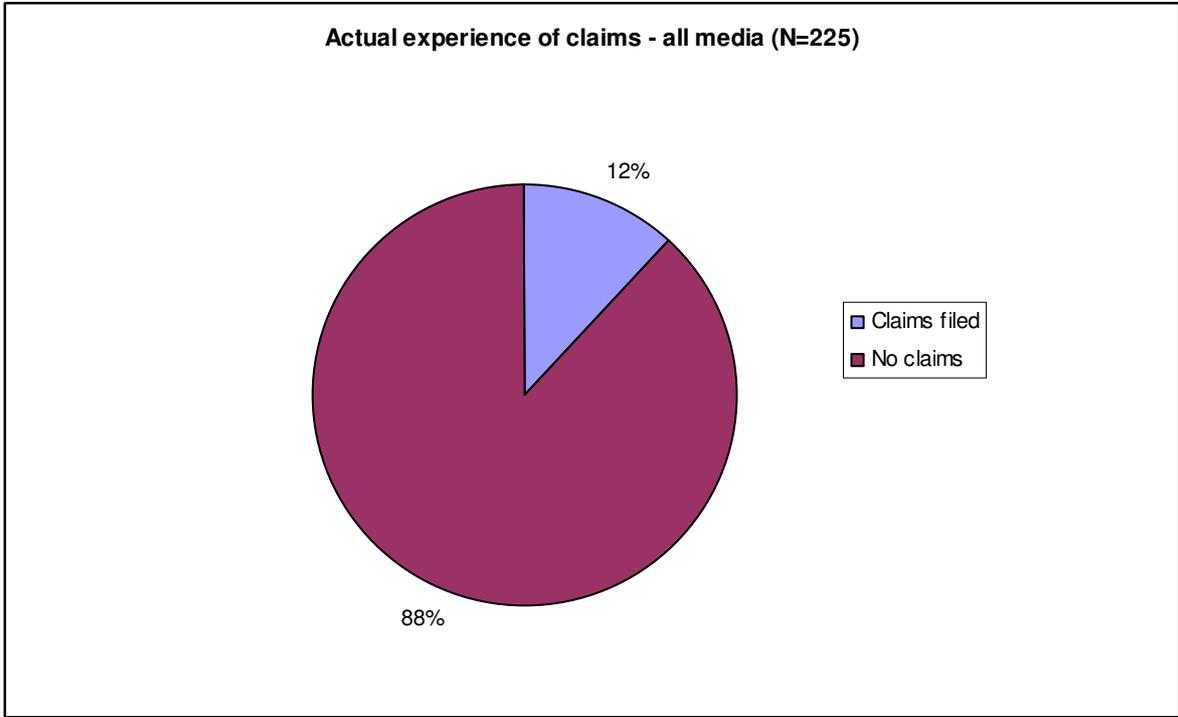
Ninety-seven percent (66) of ad agency and public relations firms respondents answered the question whether they had had a defamation writ filed against them in a court in New Zealand in the six years between 1996 and 2001. However, none had had such a writ filed against them, bearing out the general picture revealed in the previous data that defamation is not a major concern to either group.

Eight of journalist and writer respondents answered the question seeking information on their actual experience of defamation writs or claims. The majority (7) of these had not had a claim filed against them, but one had. This individual indicated that one writ had been filed in the relevant six year period.

None of the multi-media respondents had had a claim filed against them. Neither of the ISP respondents had had a claim filed against them.

Therefore, 12% (26) of all the media respondents had actual experience of a claim or claims being filed against them in the six-year period. (See Fig.41 below).

Fig. 41



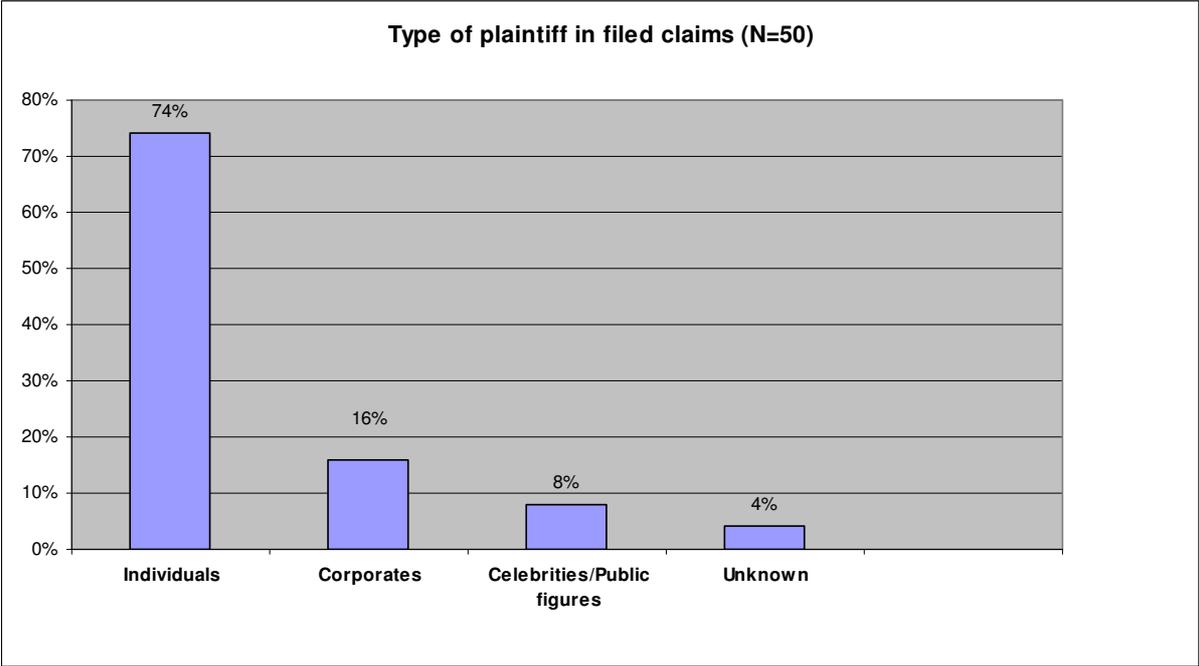
2.8.2 Source of filed claims

Of the total claims filed against newspapers, 79% (15) were filed by individuals, and 21% (4) by corporates. In 80% (12) of the reported actions filed against television broadcasters, the plaintiff was an individual. Two cases (12.5%) involved corporate plaintiffs and one report did not give details of the plaintiff. Over half (4) of the claims against radio broadcasters involved individual plaintiffs who were public figures or celebrities. Nearly 29% (2) involved plaintiffs who were ordinary individuals, and 14% (1) claim was filed by a corporate. Three-quarters of the claims against magazines (3) were filed by individuals, while for the remaining action this was unclear. Three of the claims against book publishers came from individuals

and one was filed by both an individual and a corporate. The one claim against the writer was from an individual.

Therefore, of the total number of 50 claims filed against all media, by far the largest majority, (74% or 37) were filed by ordinary individuals. The next most common plaintiff was corporates (16% or 8), followed by celebrities or public figures (8% or 4). Four percent (2) of plaintiffs were unclear.<sup>454</sup> (See Fig. 42 below).

Fig. 42

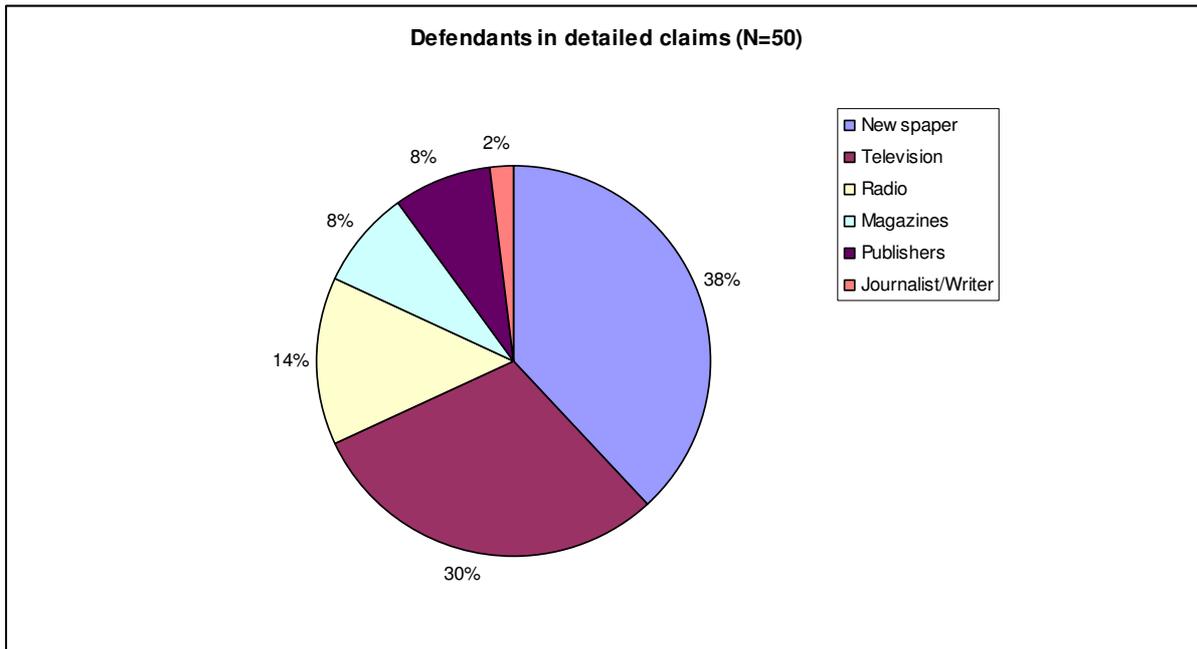


2.8.3 Defendants in filed claims

Fifty claims in all were detailed by a total group of 12% (26) media respondents. Thirty-eight percent (19) of these were detailed by newspapers, 30% (15) by television respondents, 14% (7) by radio, 8% (4) by each of magazines and publishers, and 2% (1) by a journalist and writer. (See Fig. 43 below).

<sup>454</sup> The figures add up to more than 100% because of one claim which was filed by both an individual and a corporate.

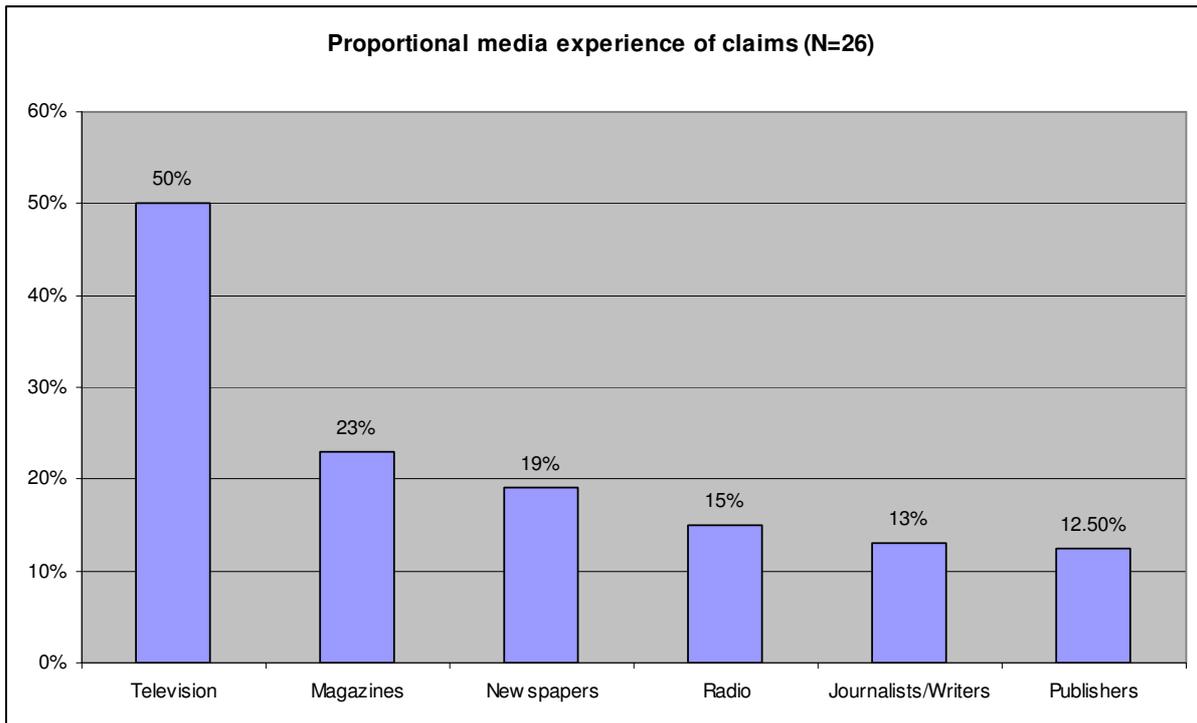
Fig. 43



Therefore, numerically overall more claims were actually detailed by newspapers (38% or 19). However, as with threats,<sup>455</sup> the situation is more complex than this for two reasons. Firstly, it is unlikely media respondents actually detailed all the claims they experienced. Secondly, when asked general questions about receiving claims without requiring detail of those claims, more television broadcasters reported experiencing claims because half (3) of them reported experiencing claims of some sort, while 23% (6) magazines did so, 19% (10) newspapers, 15% (3) radio respondents, one journalist and writer and 12.5% (3) publishers. (See Fig. 44 below.)

<sup>455</sup> See pp 119-120 above.

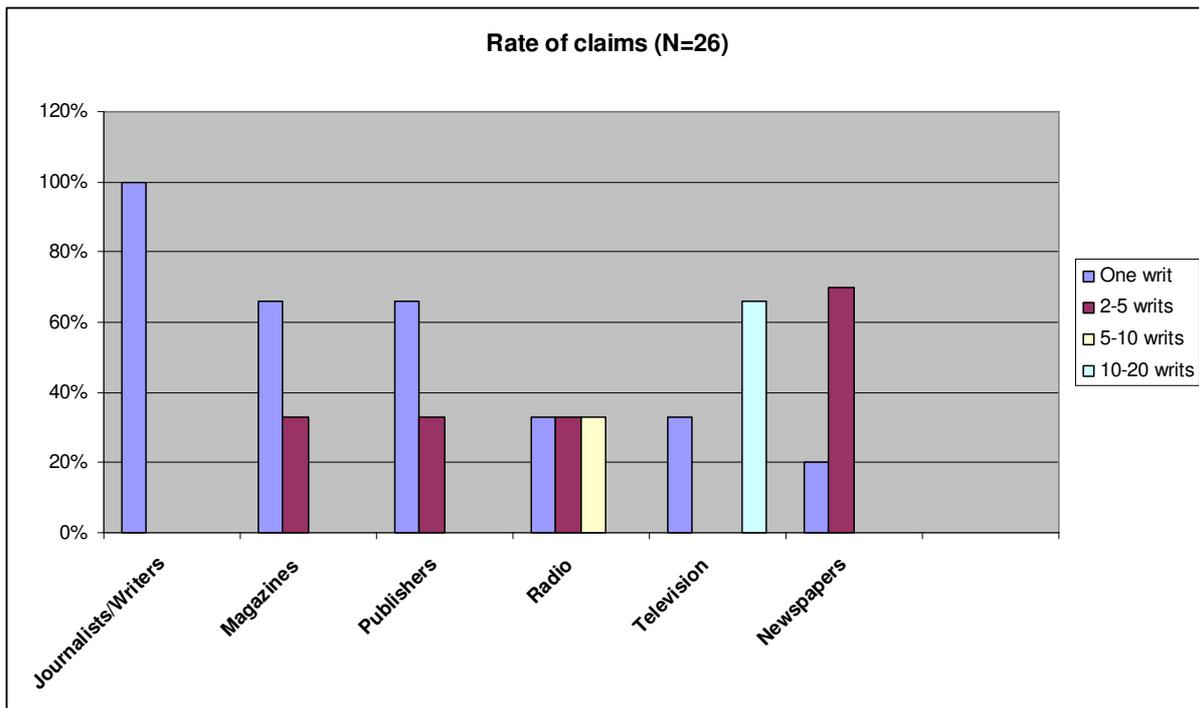
Fig. 44



#### 2.8.4 Rate of claims

As to number of writs, one journalist and writer said they received one writ, followed by two-thirds of magazines and book publishers. One-third of each of radio and television broadcasters reported receiving one writ and so did 20% of newspapers. Most of the newspapers (70%) experienced 2-5 writs and two-thirds of each of radio broadcasters, magazines and book publishers experienced the same number of writs. One third of radio respondents experienced 5-10 writs in the period. However, a majority of television respondents (two-thirds) experienced the largest number of writs, 10-20. This means it appears television reported the largest incidence of claims, although numerically, newspapers appeared to detail the most claims for the survey. (See Fig. 45 below).

Fig. 45



### 2.8.5 Context

Ten percent (2) of the 19 actions against newspapers involved politics - two actions were brought by local body councillors. A further 9% (2) were actions brought by a lawyer and a law firm respectively. These are both categories of plaintiff which have been noted as prominent in defamation actions. Ten percent (2) of the 19 actions were applications for injunctions to prevent publication of court documents, and of a disciplinary report. Ninety-four percent (18) involved written material, one being a television review, one being a letter to the editor, and the balance being general news articles. Four percent, or one action was based on a cartoon, a rare category, but one which can be successfully pursued if any satire defence is overcome. Seventy-four percent (14) of the alleged defamatory statements went to matters which affected business or professional reputation. This reflects the fact that defamation is an expensive tort to pursue, in which damage to the pocket or ability to fill the pocket in the future features strongly as an incentive to plaintiffs. In 15% (3) of the actions, the alleged defamation arose from allegations of criminal behaviour. In these cases, the defendant newspaper would have a higher burden of proof in establishing truth. Ten percent (2) of the actions arose from breach of suppression orders.

Thirteen percent (2) of the 15 actions against television broadcasters involved national politics as the plaintiff was a Member of Parliament. The other cases involving individuals (83% or

10) concerned their professional capacity. One-third of the television actions (5) related to allegations of criminal behaviour. One third of the actions (5) arose from news stories, nearly 27% (4) arose from consumer programmes, and 40% (6) from current affairs programmes or documentaries.

The context of the 7 filed claims against radio broadcasters bears out the categories identified by radio broadcasters as risky.<sup>456</sup> Seventy-one percent (5) of the writs arose out of news reports, or current affairs. One writ (14%) arose from talkback, and one had an unidentified context. Over half of these writs (4) had an element of live broadcast.

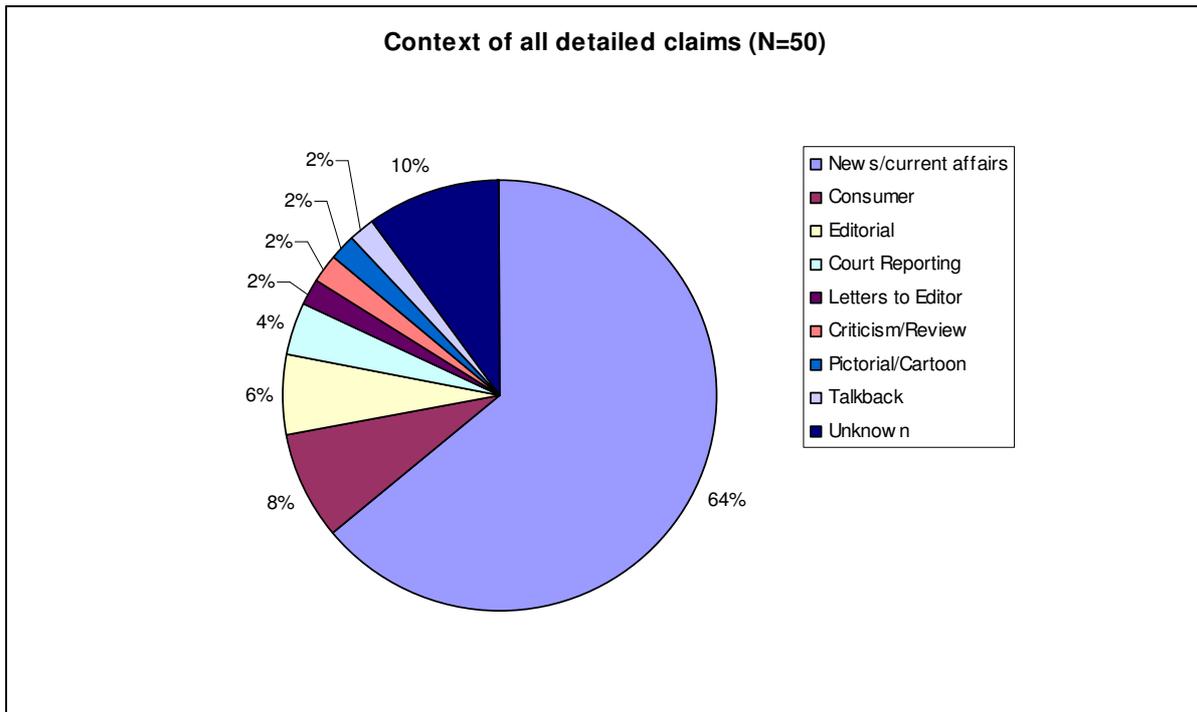
Three-quarters (3) of the magazine actions arose from an editorial or opinion piece, and one-quarter (1) arose from inaccuracy. One claim of the four claims against publishers arose because the plaintiff's professional integrity was allegedly damaged, one individual alleged a biography contained defamatory material, one individual alleged his or her actions were misrepresented and the final matter arose from a book with was said to defame a company and an individual. The context of the claim against the writer was unclear.

The majority of all the claims (64% or 32) therefore arose in the context of general news, current affairs or documentaries. Eight percent (4) arose from consumer articles or items, 6% (3) from an editorial context, 4% (2) from court reporting, each of 2% (1) from letters to the editor, criticism or review, pictorial/cartoon, and talkback. Ten percent (5) were unidentified. (See Fig. 46 below.)

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<sup>456</sup> See p 95 above.

Fig.46



The subject matter of the allegation was identified in half of the claims. Thirty percent (15) of the claims arose from allegations affecting business or professional status, while 8% (4) each arose from politics and inaccuracy. Four percent (2) of claims arose from discussion of the law. In the other half of the claims, the subject matter was not specifically identified.

#### 2.8.6 Remedies sought in detailed court claims

Damages were claimed in 63 % (12) of the newspaper claims, an apology in 16% (3), declaration and retraction in 5% (1) of the claims each, an injunction in nearly 11%(2) and summary judgment (on the basis of a statement of error and costs) in 5%(1). Sixteen percent (3) did not detail what remedies were claimed.

Two-thirds of the actions against television broadcasters (10) sought damages. One writ sought a declaration, and in the remaining four cases, no details of the remedy sought were given. In six (60%) of the actions seeking damages, the amount was unspecified, but in one of those cases, an apology was also sought. In the four cases (40%) where damages were specified, these ranged from \$1million, \$800,000, \$475,000 to \$250,000.

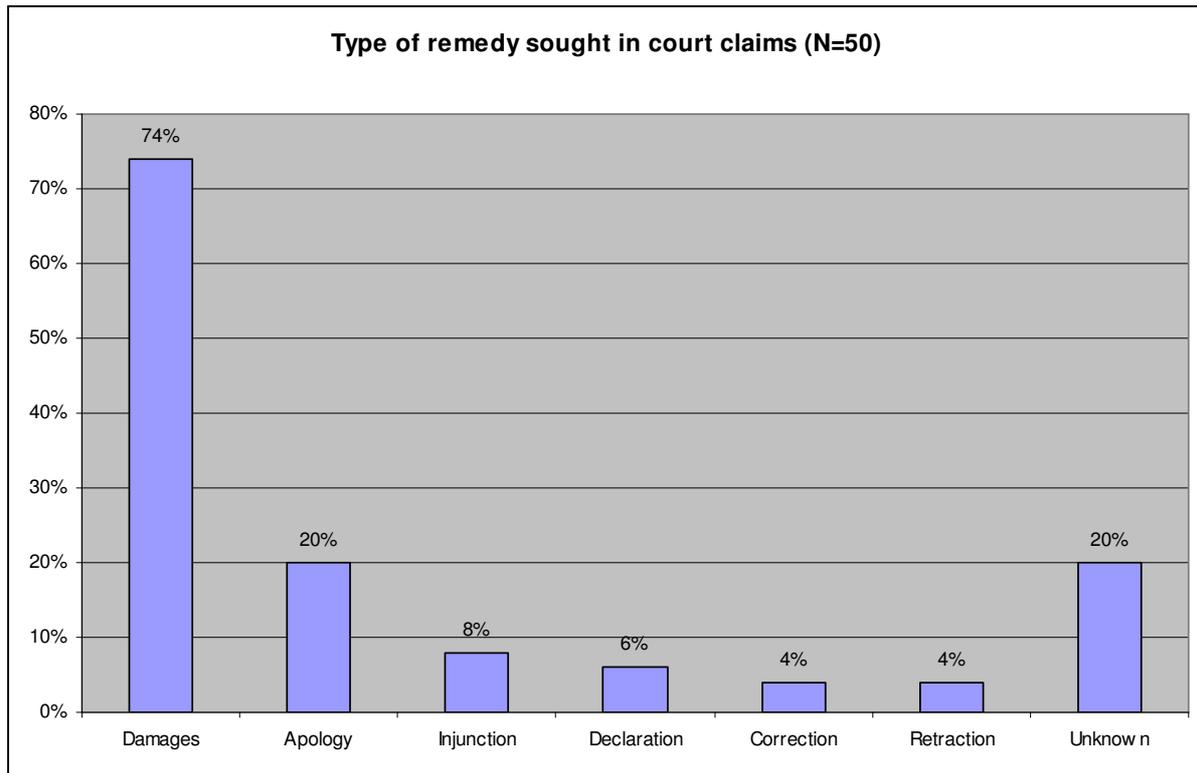
In only one claim filed against radio broadcasters were details of the remedies claimed given – in this case, damages of \$100,000, an apology and a correction. The matter was actually settled by payment of the plaintiff's costs, although costs to the broadcaster were not insignificant.

Damages were the most commonly claimed remedy, being sought in 100% (4) of the claims made against magazines, in one quarter (1) of cases alone, in 1 together with an apology, in 1 together with a retraction and in another together with costs, a correction and an apology. Levels of damages claimed were known in half of these cases (2) and were very high, being \$7.5 million and \$300,000.

Remedies sought against book publishers were significant. Damages were sought in all 4 cases, in three cases together with an apology. Damages sought were also significant, being \$50,000, \$250,000, \$450,000 and \$700,000. In two cases, injunctive remedies were also sought, being withdrawal of a book in one case and a permanent injunction in another. Two claims also sought costs, one of these also sought interest. The claim against the writer sought damages of \$130,000.

Therefore, the most common remedy sought in the total of 50 claims was damages, which were sought in 74% (32) claims. The next remedy most commonly sought was an apology, which was sought in 20% (10) claims, then injunction (8% or 4), followed by declaration (nearly 6% or 3), correction (4% or 2) and retraction (4% or 2). In 20% (10) cases, the remedy sought was unclear. (See Fig. 47 below).

Fig. 47



Seventy-two percent (23) of the claims where damages were sought were filed against news media defendants. Section 43 of the Defamation Act 1992 requires that the amount of damages claimed not be specified on the statement of claim where the defendant is a news media defendant. It would be reasonable to expect that the level of damages would therefore be unknown by the defendant in these claims. However, in over half of the claims against news media defendants, (57% or 13), the level of damages claimed was somehow known in spite of the legislative provision. It is possible that the information was disclosed through prior correspondence or negotiations, or by mistake (one lawyer who took part in the lawyer survey<sup>457</sup> identified a claim against a news media defendant in which the level of damages sought was detailed because the plaintiff was unrepresented and had disclosed the figure claimed when filing the papers.)

These results suggest that clear breaches of s 43 have occurred. What might follow from this? The primary mischief addressed by s 43 has received judicial attention since the media survey was carried out. It is clear that breach may not result in an automatic stay of proceedings or indeed any serious sanction, unless the breach was deliberate. In *Hubbard v Fourth Estate*

<sup>457</sup> See Chapter Seven, below.

*Holdings Ltd*,<sup>458</sup> the High Court confirmed that the rationale for the provision is to ensure that unrealistically large sums of damages are not specified for purposes of intimidation of a media defendant – in other words, to prevent gagging writs.<sup>459</sup> In *Hubbard*, the plaintiff was a public figure engaged in campaigning for the Mayoralty of Auckland, when a business magazine attacked his integrity in a robust article. The court accepted that the plaintiff issued genuine proceedings, but had breached s 43 by filing a statement of claim which specified the level of damages at \$1.5million. The plaintiff went on to refer to the level of damages claimed in later public statements and to the merits of his claim. The court accepted that the figure was detailed in the claim due to an error rather than by way of deliberate breach. Further, immediately the matter was drawn to the attention of the plaintiff and his advisers the error was acknowledged and an amended claim was filed within a matter of days. The breach of s 43 and the plaintiff's public comments were therefore found to be due to inadvertence and lack of appreciation of the law. Mr Hubbard also apologised and his counsel apologised to the court. Because of this and because there was no evidence the defendant was actually intimidated by the specified claim, the Court refused to stay proceedings. However, costs lay where they fell because the plaintiff's behaviour had invited the application.<sup>460</sup>

Not only may inadvertent breach of s 43 be excused, but the effectiveness of the section generally is limited because there is nothing to prevent counsel or any party referring to the amount pursued orally during the hearing itself.<sup>461</sup> Further, in *Hubbard*, the Court pointed out that a plaintiff might create future tactical difficulties by referring to the amount of damages claimed.<sup>462</sup> It is likely, then, that the effectiveness of s 43 in preventing a form of chill known as the gagging writ is limited, and further, that the courts do not consider inadvertent breach of the provision to be particularly serious. It will also be seen below that the limited information collected from defamation lawyers suggests the incidence of gagging writs is not high in any event.<sup>463</sup>

Levels of damages were detailed in 62% (29) of the claims in which damages were sought. The lowest figure claimed was \$2,000, sought from a newspaper. The highest claim was \$7.5million, made against a magazine defendant. The table below shows clearly that the

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<sup>458</sup> Unreported, High Court, Auckland, CIV-2004-404-5152, 16 February 2005, Venning J.

<sup>459</sup> Ibid, [32]-[33].

<sup>460</sup> Ibid, [56]. The possibility of alternative contempt proceedings was not ruled out: [57].

<sup>461</sup> Ibid, [[37]. See also J Burrows and U Cheer, *Media Law in New Zealand* (2005, 5<sup>th</sup> ed), 73.

<sup>462</sup> *Hubbard v Fourth Estate Holdings Ltd*, Unreported, High Court, Auckland, CIV-2004-404-5152, 16 February 2005, [37].

<sup>463</sup> See Chapter Seven below.

larger figures were claimed against television broadcasters, publishers and magazines. (See Table 4 below).

Table 4.

**Levels of damages claimed – all media 1996-2001**

<b>Claims</b>	<b>Defendant</b>	<b>Claims</b>	<b>Defendant</b>
1. \$2,000	Newspaper	11-12. \$250,000	TV, Publisher
2. \$40,000	Newspaper	13. \$300,000	Magazine
3. \$50,000	Publisher	14. \$450,000	Publisher
4. \$80,000	Newspaper	15. \$475,000	TV
5-7. \$100,000	Newspaper x2 Radio	16. \$700,000	Publisher
8. \$120,000	Newspaper	17. \$800,000	TV
9. \$130,000	Writer	18-19. \$1million	TV, Newspaper
10. \$200,000	Newspaper	20. \$7.5million	Magazine

*2.8.7 Outcomes in detailed court claims*

In 16% (3) newspaper cases, the newspaper fought the matter to a full hearing and won. In one of these cases the reason given for fighting the matter to trial was that due care was taken and the case was winnable. In the other two such cases, no reasons were given. In nearly 11% (2) cases, the newspaper fought the matter to a full hearing and lost. In one of these cases, the reason for fighting the matter was that the story was true. No reason was given in the other such case. These two cases thus lost resulted in an interim injunction in one action and an apology, correction and damages orders in the other. In nearly 16% (3) of cases the matter was settled prior to a final hearing. In 16% (3) of cases, the matter was abandoned, in one case after an apology, in one case the parties bore their own costs and in one case, the newspaper appeared to have been dropped from the proceedings. Forty-two percent (8) of actions were still pending.

Forms of settlement varied for newspapers. Two cases were settled with an apology, damages and costs, one with costs and a ‘clarification’ (correction), one with an apology and costs, and

one was a mediated settlement in which the newspaper agreed to publish an article in response and to pay the costs of the mediation. The following reasons were given for settling or agreeing to abandon:

- *Legal advice was to settle. The settlement occurred three years after the claim.*
- *Because the government would pay legal bills – we couldn't compete against the New Zealand treasury.*
- *It was costing too much at interlocutory stage. The truth wasn't important enough to justify cost.*
- *Expedient.*
- *Strong defences in this instance but the newspaper will not generally incur costs of trial most of which will not be recoverable, if settlement can be reached without admission of liability.*
- *To avoid court proceedings we were not confident of winning.*
- *Legal advice was that the case was unwinnable. The [person] had been defamed. There was no defence.*
- *Legal advice.*

The pattern of settlement or abandonment for newspaper claims demonstrates a pragmatic concern to avoid costs, perhaps even more than damages. Secondly, there appears to be a desire to admit no more liability than is absolutely necessary. Further, there appears to be openness to forms of negotiation which will facilitate settlement.

In nearly 47% (7) of claims against television broadcasters, the matter was not yet resolved and interlocutory proceedings were taking place. Of the balance, four actions (half) were abandoned, while three resulted in summary judgment in favour of the defendant based on a statutory qualified privilege defence, and a further action was struck out. The results show that the television broadcasters had not lost any of the actions which had been completed. This would place the focus for such broadcasters on liability for costs rather than damages. Little information was forthcoming about overall costs. However, in two of the outstanding cases, the television broadcaster noted that costs of \$60,000 and \$150,000 respectively had so far been incurred, not insignificant amounts.

In 71% (5) of the claims against radio broadcasters, the matter was settled. The remaining two cases were unresolved at the time the survey was completed, and therefore were still being fought. In 80% (4) of the cases settled, an apology was also given, in one case together with a

correction. In two of the cases (40%), costs given were as well as damages. Damages identified as being paid were \$28,000 and \$4,000. Costs were detailed in two cases, being \$33,000 and \$4,000 in plaintiff costs, and \$15,000 and \$18,000 in defendant costs respectively. In at least one case, the costs to the radio broadcaster were over four times greater than the damages paid.

Three-quarters (3) of the actions against magazines resulted in some sort of settlement or concession by the magazine. One case resulted in a correction, and half (2) were settled for damages and costs and in one case, an apology also. Levels of damages were identified in one case only, being \$10,000. Costs were identified in another of the settled cases, totalling \$7,000. The remaining case was abandoned by the plaintiff after a pre-hearing before a Master of the High Court indicated little chance of winning. When asked why a matter was settled, in 1 case (25%) magazine respondents accepted they were in the wrong or could not win. In half of these cases (2), the replies indicated tactical reasons for settling – to get rid of the case and save legal fees, and the lawyer said the magazine could win but the insurance company did not want to fight. Although the magazine data is limited, it is clear damages are the most sought-after remedy, and where levels were identified, they were very high. This may be because magazines are seen as having deep pockets. However, large damages claims can also indicate an intention to chill and although most of the writs produced negative results for the magazine, damages expectations proved to be unrealistic. The action claiming an award of \$7.5 million resulted in costs of \$7,000. The other writ seeking an award of \$300,000 resulted only in a correction. This may also illustrate that the large claims were intended to frighten, rather than result in the payment of real money.

Three-quarters of the claims against publishers resulted in significant settlements. One was settled by payment of the plaintiff's costs of \$15,000, and apology, correction, withdrawal of the book and redistribution of it in an altered form. A second was settled for \$100,000 damages which included costs, and an apology. The third was settled for \$10,000 costs and an apology. The final claim was ongoing and therefore no outcome was recorded. Two-thirds of the settled claims (2) were settled for commercial reasons – the publisher wished to still be in a position to distribute some form of the work and achieve some financial return. In the other case, the publisher settled for pragmatic reasons – it was clear at a judicial conference that the judge favoured the plaintiff. The claims detailed illustrate clearly the significant risks faced by publishers and that claims may have serious financial effects on their enterprises. There

appear to be high rates of success by plaintiffs and correspondingly high commercial incentives for publishers to settle. It might be arguable, therefore, that publishers are more at risk than other media, of being excessively chilled at all stages of the publication process. In this situation, size of the publishing enterprise would not offset any excessive chill to any great degree.

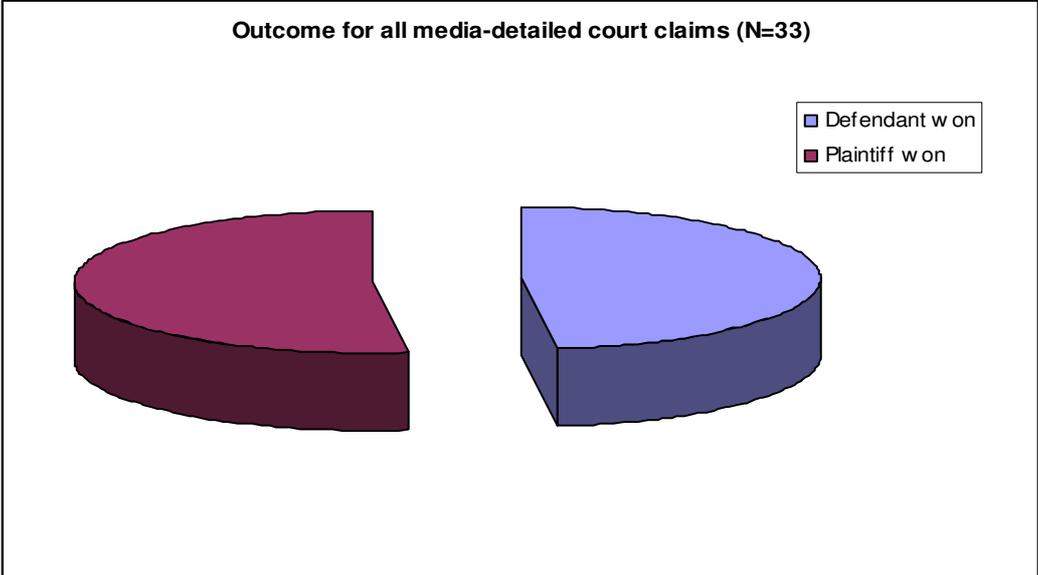
The single claim against the writer was settled for \$130,000 and was said to be a company decision.

These results show that of the total 50 claims detailed for all media, 30% (15) were settled prior to a full hearing. A further 4% (2) went to a full hearing and were lost by the media defendant. Therefore, 34% (17) or over a third of cases, were lost by the media defendant or resulted in a concession of some sort.

Sixteen percent (8) claims were abandoned, and 6% (3) each went to full hearing and were won by the media defendant or summary judgment was given in favour of the media defendant. A further 2% (1) were struck out, and the same figure was withdrawn. Therefore, 31% (16) claims were won by the media defendant or were not pursued. Thirty-four percent (17) claims were still pending.

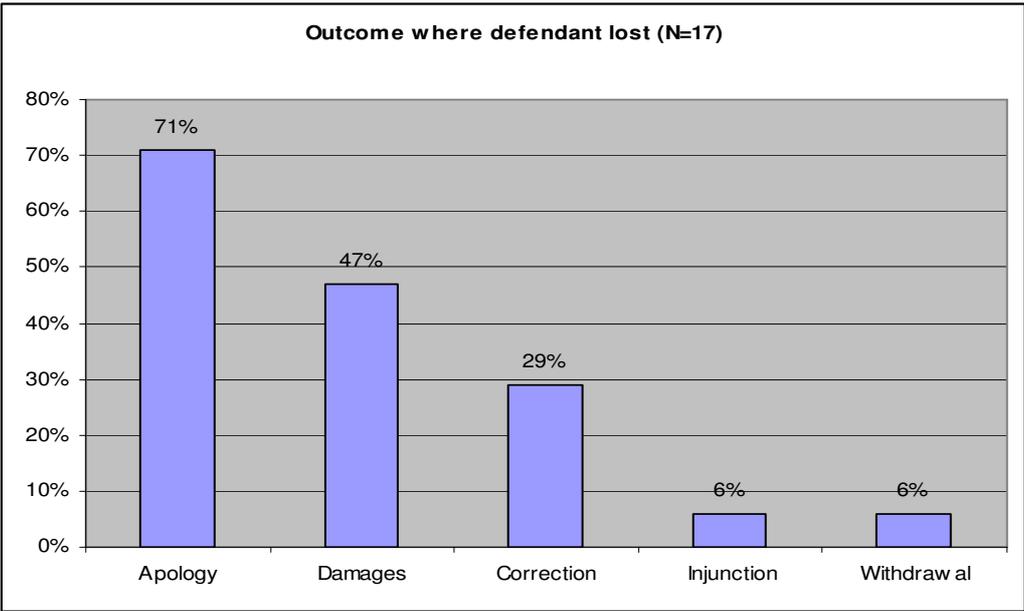
Of the 33 claims where the outcome was resolved, in just under half (48% or 16) the outcome was favourable to the media.<sup>464</sup> (See Fig. 48 below).

Fig. 48



Of the 34% (17) claims in which the outcome was unfavourable for the media defendant, 71% (12) resulted in an apology, 47% (8) resulted in damages being paid, and 29% (5) resulted in a correction. Nearly 6% (1) resulted in each of an injunction, or withdrawal of publication and re-issue in another form. It is clear that, in contrast to the most common remedy sought, which was damages, the most common remedy actually achieved was an apology. (See Fig. 49 below).

Fig. 49



<sup>464</sup> This information is compared below to the subgroup information for the period 1998-2001 for which

Levels of damages paid were detailed in 87% (7) of the cases where they were awarded. Levels awarded were much more modest than those sought. The figures are too small to detect any pattern in relation to media defendant groups.<sup>465</sup> (See Table 5 below).

Table 5.

**Levels of Damages Awarded – All Media 1996-2001**

<b>Figure</b>	<b>Defendant</b>
1. \$4,000	Radio
2-3. \$10,000	Magazine, Newspaper
4. \$28,000	Radio
5. \$65,000	Newspaper
6. \$100,000	Book Publisher
7. \$130,000	Writer

Some information about costs was provided in relation to 40% (20) claims. Forty percent (8) of these were claims against newspapers, 15% (3) were claims against television, 20% (4) were claims against radio, and 15% (3) were claims against each of magazines and publishers. Five percent (1) was a claim against a writer and journalist.

The highest set of costs paid were by a magazine (\$20,000 and \$250,000), and the lowest were paid by a newspaper (\$750 and \$250). It is clear costs can be significant, but levels can vary a great deal. The levels and incidence of costs are shown in the Table below. In 30% (18) of all claims filed, the defendant indicated some form of costs for the plaintiff were paid as well as their own. These were all the claims which were settled. Therefore, settlements appeared to invariably involve payment of costs for both parties. Furthermore, the five other cases where costs were detailed show that significant front-end costs can build up in pending cases, and defendants can face procedural costs, such as mediation. (See Table 6 below).

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court files were searched. See Fig. 57 below.

<sup>465</sup> This data is compared below to the subgroup data for levels of damages awarded against media defendants in the court file data for the period 1998-2001. See p 161 below.

Table 6.

**Nature and levels of costs – all claims 1996-2001**

Media Defendant	Defendant Costs Paid	Plaintiff Costs Paid	Pending – Costs to date	Other Forms of Costs Paid	Level Unclear But Both Paid
1.Nwspaper	\$5,000	\$12,000			
2.Nwspaper	\$3,000	\$3,000			
3.Nwspaper	\$750	\$250			
4.Magazine	\$6,000	\$1,000			
5.Radio	\$33,000	\$15,000			
6. Radio	\$4,000	\$18,000			
7. Publisher	\$15,000				
8. Publisher	\$10,000				
9.Nwspaper			\$30,000		
10.TV			\$150,000		
11. TV			\$60,000		
12.Nwspaper				Mediation	
13.TV				Security for Costs \$20,000	
14. Mag					X
15. TV					X
16. Journ & Writer					X
17.Radio					×2
18.Nwspaper					X
19.Publisher					X

**3. Conclusion on media survey results**

The data presented above appears to paint a picture of a lively, generally robust New Zealand media which accepts and is aware of the effects of defamation law to a degree. While all media sectors consider they face general risk of defamation claims, and are worried about mistakes, both inadvertent and careless, the specific area of concern common to all was the reporting of commercial and business matters. For newspapers, general risks stood out, while for television, news stories were the most risky. For radio, live broadcast was the most

problematic, for magazines inaccuracy, and for publishers, the subjects of books published, and mistakes, caused most concern. However, as noted, mistakes can be alleviated to a degree by the media taking steps to avoid carelessness where possible, while the *Lange v Atkinson* defence also offers some relief where care is taken in reporting on political matters but mistakes occur in spite of this.

About a third of the media had no training in defamation law, while two-thirds had some, with an even spread between those who received formal and informal training. Television had a high rate of training, as had magazine journalists, with newspapers not far behind. Book publishers appeared to have the lowest rate of training, which was informal when it was received, which is surprising, given the apparently high risks acknowledged in this sector. It has been surmised that training reduces risk, and adds to the robustness with which media can deal with defamation claims. Therefore, a majority of the media appeared to place themselves in a position to prevent claims occurring and to deal with them realistically when they arose.

As to alteration or deletion of material in stories to be published, it appeared the media alters material rather than delete it if possible, and will amend to maintain accuracy and fairness, if required by legal advisers or to tone down opinion pieces. Newspapers identified editorials and letters to the editor as most likely not to be published at all if problematic. Television broadcasters amended material right up to broadcast rather than delete. Radio also sought to amend rather than expunge but found live broadcast problematic. Magazines were more inclined to ‘pull’ material completely if subject to pressure from client advertisers. Book publishers were more risk averse because of the greater financial loss they faced if a publication was injunctioned and had to be removed from shelves or destroyed. This data again confirms a generally robust and assertive media which works hard to get stories told. Magazines suffer the effects of a form of commercial ‘chill’ from advertisers, while book publishers can be said to also face a commercial chill arising from the nature of the business they are in.

A large majority of media did not hold defamation insurance. Television and radio appeared to have the highest rate of uptake, at about 50%. The reasons for not holding insurance appear to be the high cost of premiums, and tactical reasons, such as a desire to maintain autonomy when dealing with claims, and to present a tough image to potential claimants. Once again, this data reaffirms an image of a generally robust media.

As to regulatory bodies, the broadcast media appeared to take more notice of, and pay more regard to, the Broadcasting Standards Authority, than did the print media of its self-regulatory body, the Press Council. One of the large television broadcasters was in fact more concerned about the BSA than the risk of defamation. For at least the broadcast media, then, it seemed sources of potential chill other than defamation law might be of greater current concern.

Not quite half of all media had received threats of defamation actions over a six year period, and most had received 1-5 threats. However, two-thirds regarded most of the threats as not serious and three-quarters thought the numbers of threats had stayed the same or had actually decreased. Newspapers received the most treats, probably followed by television, then magazines, radio and publishers. Over half of the threats (54%) came to nothing. Where the media capitulated, which was in 45% of the threats, the most common outcome sought and obtained was an apology. Damages were sought in a third of threats but were only paid in relation to 8%. Threats were dealt with at a low level and creatively in some cases. The data indicates that threats are regarded as part of the daily routine of the media and that they are generally not seen as serious, fall by the wayside over half of the time, and are resolved at a low level the rest of the time. Any chilling effect must then arise from the time and cost involved in dealing with these matters. The data on costs received was patchy, but revealed that costs associated with threats did not appear to be high.

As to media experience of actual claims which went to court, 12% of all media respondents reported that claims had been filed against them. Details of 50 claims were collected, the majority of which were filed by ordinary individuals (74%), with corporates being the second most common plaintiff (16%). Newspapers reported details of the most claims, however, it appeared that television broadcasters experienced the greatest rate of filed claims (two-thirds reported experiencing 10-20 writs in the relevant time period, although they did not detail this many comparative to newspapers). This data largely mimicked that collected in relation to threats.

The majority of filed claims arose from general news stories, current affairs or documentaries (64%). The most common remedy sought was damages (74%), while an apology was sought in 20% of the claims. The lowest figure claimed was \$2,000 and the highest was \$7.5 million. Higher levels of damages tended to be sought from television broadcasters, publishers and magazines.

Just over a third of the total 50 claims resulted in a loss or concession by media. Just under a third of the claims resulted in a win for media or the claim fell away. This means that just under half of the resolved cases resulted in a favourable outcome for media. Where the outcome was unfavourable to media, it was clear that although damages were the most common remedy sought, an apology was the most common remedy actually achieved. Levels of damages awarded were much more modest than those sought, with most awards being below \$100,000 and half of them below \$50,000. It appeared that costs associated with actions *could* be high but varied a great deal, and nevertheless tended to be under \$20,000. Settlement appeared to invariably involve payment of costs for both parties.

It is clear that the media success rate in relation to threats was higher than for court claims – however, not by much. Media still successfully resisted just under a half of the latter. While damages and costs were also higher for successful court claims than for threats, nonetheless the levels of damages awarded were not outlandish, and apology was the most common remedy achieved rather than damages. Not unexpectedly, then, court claims were more serious for media, though not as serious as might be predicted to support a pervasive chilling effect. The overall impression arising from this data was still, I believed at this point in the study, of a dynamic, healthy media, coping well with the restrictions imposed by the law. It was with great anticipation, then, that I turned to consider the results of the court file search, to determine whether my conclusions from the first part of the media survey were more than simply an impression. Those results are presented in Chapter Six, which follows.

## Chapter Six – the court file search

In this chapter, I present the results of extensive civil claim file searches carried out in the most important New Zealand High Court registries. This data proved most significant because it was not collected from media, and therefore could be used as independent control data against which to test the results of the media survey outlined in the previous chapters. Further, the court file search disclosed a more accurate picture of numbers of filed claims than that reported by media. In the event, the court file data tended to corroborate and endorse the media survey data referred to.

### 1. Methodology

As discussed previously, the media surveys were augmented by a separate study based on the collection of information about defamation statements of claim (writs) involving media defendants filed in a significant sample of High Court registries in New Zealand, for the four-year period 1998-2001. This part of the study involved collecting statistical information about the proportion of defamation statements of claim filed in the High Court and what proportion of those claims were filed against media defendants. Information was also recorded on the context of the claim, who the defendant was, the remedies sought (including levels of damages), and how the matter was resolved. The data collected proved to be very rich indeed.

Throughout 2001 and at the beginning of 2002, searches were carried out by research teams<sup>466</sup> in the largest New Zealand High Court Registries, being Christchurch, Wellington, Hamilton and Auckland.<sup>467</sup> The researchers examined all files for civil claims for the years 1998-2001. This part of the survey sought statistical information as to what proportion of writs filed were defamation writs, and what proportion of the defamation writs were filed against the media. The researchers also recorded descriptive information about the class of plaintiff and of media defendant, the remedies claimed, the outcome of the claim if recorded, whether the matter was tried by judge alone or judge and jury, whether any other claims were

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<sup>466</sup> The teams were made up of various combinations of me, and my research assistants, Ms Moka Ritchie, Ms Kim Rigby and Ms Rosemary Kennedy. This part of the research was carried out with the valuable assistance of the Department of Justice. I would also like to thank the Registrars of the four High Court registries, and their staff, who provided patient and invaluable assistance.

<sup>467</sup> The High Court registries in Dunedin and Invercargill were not searched because, following discussion with the Justice Department, they were judged not to receive a significant number of defamation claims. No District Court files were examined because few defamation cases were then filed there and because of the limited resources available to carry out the research.

filed to protect reputation, whether there were any summary judgment applications and any other special features of the claim.

**2. Results of the court file search**

*2.1 Overall numbers of defamation claims*

In the four year period 1998-2001, a total of 4183 civil claims were filed in the High Courts at Christchurch, Wellington, Hamilton and Auckland. Approximately 2% of those claims were defamation claims. Of the defamation claims, 59% were filed against media defendants, the majority being filed in Auckland. These figures are broken down in the table below. (See Table 7).

Table 7.  
**Numbers of defamation claims filed 1998-2001**

<b>Year</b>	<b>Civil Claims</b>	<b>Defamation Claims</b>	<b>Claims against Media (and as a % of defamation claims)</b>
1998	1322	27	16 (59%)
1999	1175	27	13 (48%)
2000	1105	31	19 (61%)
2001	1081	15	11 (73%)
<b>Total</b>	<b>4183</b>	<b>100</b>	<b>59 (59%)</b>

The number of claims against media defendants does not appear to be very high and is less than reported in earlier surveys. Palmer, augmenting the period covered by the McKay Committee research, looked at reported defamation judgments from Australia and New Zealand for the period 1969-1978, and reported that 79% of defendants in these cases were media defendants.<sup>468</sup> Newcity examined 435 defamation suits which came before the Sydney Supreme Court in the period February 1979 to June 1981, and reported that just over two-thirds were brought against media defendants.<sup>469</sup> Neither cohort is reliably representative or directly comparable to that used in the present study. However, a generalised conclusion

<sup>468</sup> See Palmer G, 'Defamation and Privacy Down Under' 64 *Iowa Law Review* 1209 1978-1979, 1216.  
<sup>469</sup> See Newcity M, 'The Sociology of Defamation in Australia and the United States' (1991) 26 *Tex. Int'l L.J.* 1, 31.

which could be reached is that claims against the media consistently make up the majority of all defamation claims.

The table above does not show any overall increase in the number of claims filed in the period examined. Nineteen ninety-eight and 2000 were years in which numbers were higher, but the lowest number recorded for the sample is for the latest year, 2001. Civil claims generally reduced over the four year period and defamation claims halved in 2001 compared to previous years. However, defamation claims against the media might be said to have increased proportionally over the period. In 1998, the number of claims against the media was 59% of all defamation claims. By 2001, it was 73% of all defamation claims.

However, if the data for each registry is analysed as well, it appears to confirm there is no discernible trend downwards or otherwise. In the largest registry, Auckland, a reduction of claims against the media in 1999 may have been reversed, Hamilton remained consistent, and Wellington and Christchurch each appeared inconsistent. (See Table 8 below).

Table 8.

**Defamation claims against the media 1998-2001 – by registry**

<b>Year</b>	<b>Christchurch</b>	<b>Wellington</b>	<b>Hamilton</b>	<b>Auckland</b>
1998	4	1	1	10
1999	5	1	1	6
2000	2	8	2	7
2001	1	1	1	8
<b>Total</b>	<b>12</b>	<b>11</b>	<b>5</b>	<b>31</b>

Another way of looking at the matter is to ask what proportion of the media face claims. It will be recalled that responses to the media survey from the media itself indicated that 12% of all the media respondents had actual experience of a claim or claims being filed against them in the six-year period covered by that survey (the court file data discussed in this section covered the most recent four years of that six year period). Again, as part of an overall picture, this figure does not appear to be very high.

By way of further comparison, the United Kingdom Law Commission has noted that the number of claims issued in defamation in that country (London often being referred to as the

defamation capital of the world) was 220 in 2001.<sup>470</sup> This had halved from a figure of 452 in 1997.<sup>471</sup> The figures indicate that the number of New Zealand defamation claims appear to be about 6-7% of the number filed in the United Kingdom, and that New Zealand may have suffered a similar reduction in numbers. An increase in court fees, a change in procedure (in the United Kingdom) and the general cost of civil litigation may be reasons for this. The ongoing change in style of the media may be another, in that more intrusive and dramatic methods of gathering and reporting the news and current affairs may have produced greater tolerance of media content than existed previously.

## 2.2 Who made the claims?

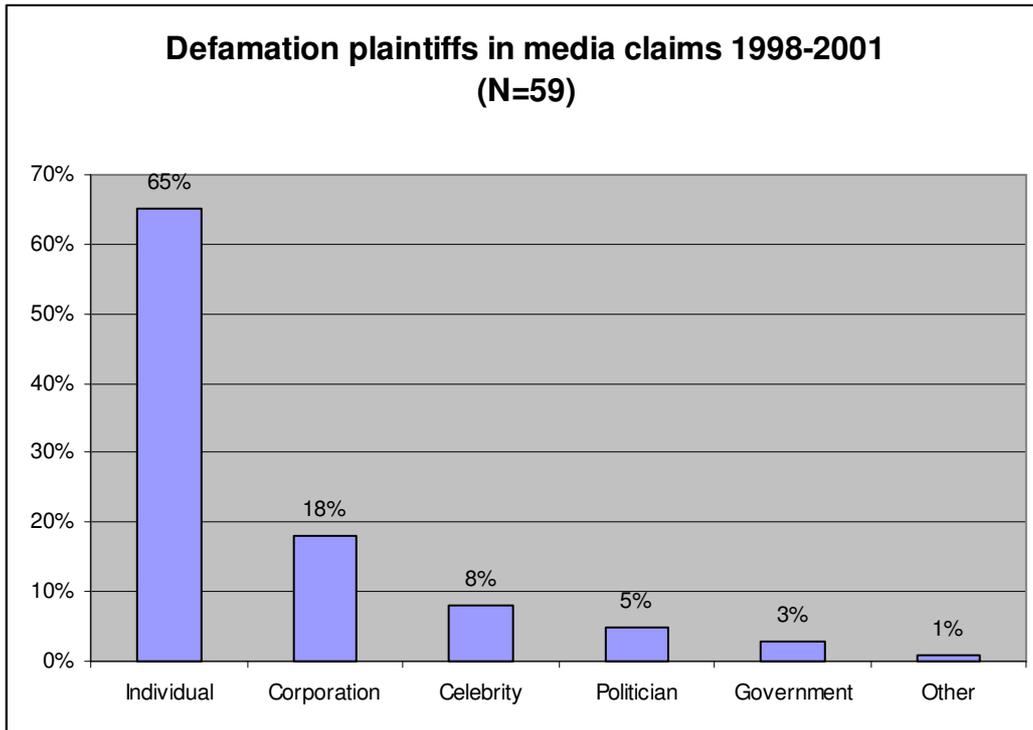
The most common plaintiff in the claims against the media in the years 1998-2001 was the ordinary individual, while the second most likely plaintiff was a corporation. Nearly two thirds of the defamation claims made against the media in that period were made by ordinary individuals. Nearly 19% of the claims were filed by corporates. Eight percent of claims were made by celebrities and 5% were made by a politician (national or local). Three percent of claims were made by a government entity or employee and nearly 2% were made by a judge. (See Fig. 50 below). When this is compared to the parties who made threats to media, and filed claims against them, the results are very similar, with the source of the majority of threats and claims being the same in the first two largest categories.

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<sup>470</sup> The Law Commission (UK), 'Aspects of Defamation Procedure: A scoping study', May 2002, 4.

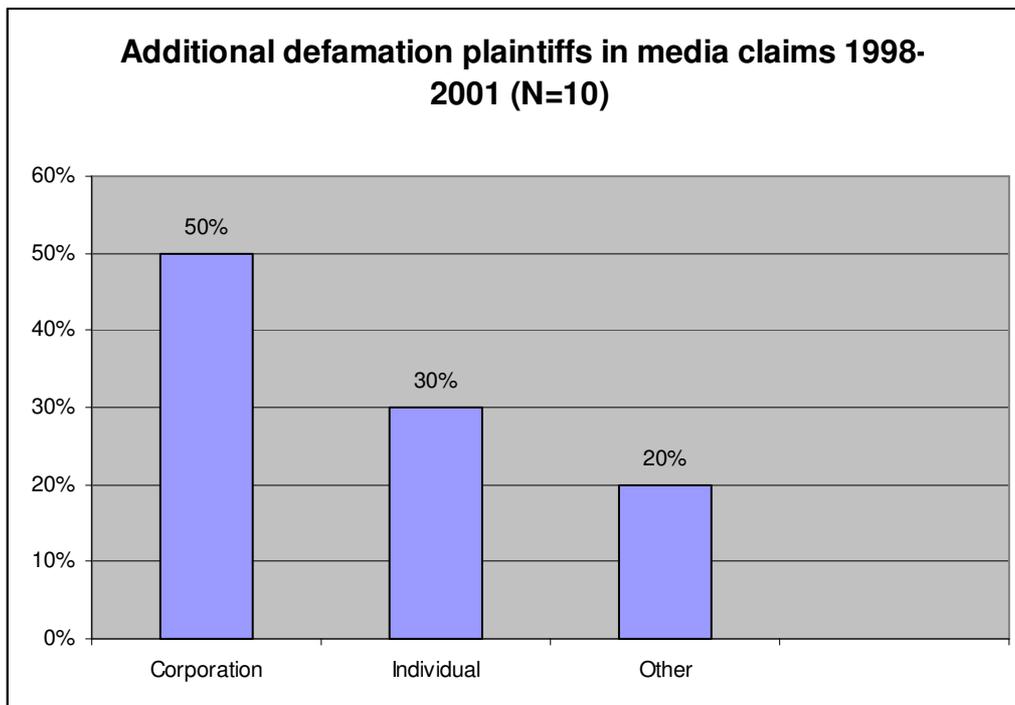
<sup>471</sup> The Commission was then of the view that procedural changes and an increase in court fees had contributed to the reduction in numbers of claims filed. It should be noted, however, that more recent concerns have been expressed from some sources about the character and effects of UK defamation law, and the numbers of claims. In July 2008, the United Nations Human Rights Committee published its concluding observations on the United Kingdom government's sixth report on human rights in that jurisdiction. It raised concerns about increasing use of UK libel laws by foreign residents (libel tourism) and the use of Conditional Fee Arrangements: *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding observations of the Human Rights Committee*, Human Rights Committee, Ninety-third session, Geneva, 7-25 July 2008, GE.08-43342, at para 25. The matter of costs and CFAs is being investigated empirically: see 'Comparative study of cost in defamation claims', *Programme in Comparative Media Law and Policy*, Oxford Centre for Socio-Legal Studies, [www.csls.ox.ac.uk/pcmlp.php](http://www.csls.ox.ac.uk/pcmlp.php)

Fig. 50



However, the court file data also revealed additional plaintiffs in thirteen percent of the defamation claims, with a total of 10 additional plaintiffs. Half of the additional plaintiffs were corporates, 30% were ordinary individuals and 20% were in the 'other' category, being a trust board, and corporation trustees. (See Fig. 51 below).

Fig. 51



The results shown in Fig. 50 are in contrast to the finding by Newcity that elected public officials (ie: politicians) were the single most litigious group of defamation plaintiffs, accounting for approximately 12% of all defamation suits filed in Sydney in 1979-1981.<sup>472</sup> Palmer, looking at both Australian and New Zealand reported defamation cases for the period 1969-1978 found that the largest group of 16% of plaintiffs were politicians and aspirants to elected office.<sup>473</sup> Care should be taken when comparing these results to my 2001 study of court files in New Zealand. Both the Palmer and Newcity studies used a much more detailed breakdown of occupational groups, and none of the cohorts used are directly comparable. If anything, my own study is closest to that carried out by Newcity, in that he also searched a selection of court files and used the occupational category of ‘elected public officials’ which is quite similar to that used by my researchers, of ‘politician, (national or local)’. However, because of the reservations I have outlined above, the most that may be suggested is simply that Australian politicians sue more often than their counterparts in New Zealand. This may say something about the nature of politics and the cultures in each country, and it is impossible to draw any useful legal conclusions from the apparent disparity.

### 2.3 *Who were the media defendants?*

The largest group of media defendants on the receiving end of defamation claims in New Zealand for the period 1998-2000 was newspapers, followed by television broadcasters. Forty-four percent of claims were made against newspapers, while 27% were against television broadcasters. A further 12% of claims were against magazines, and 8% were against radio broadcasters. Seven percent of claims were against publishers and 2% represented a claim against an Internet entity. (See Fig. 52 below). All relevant studies seem to confirm the predominance of newspapers as defendants in defamation.<sup>474</sup>

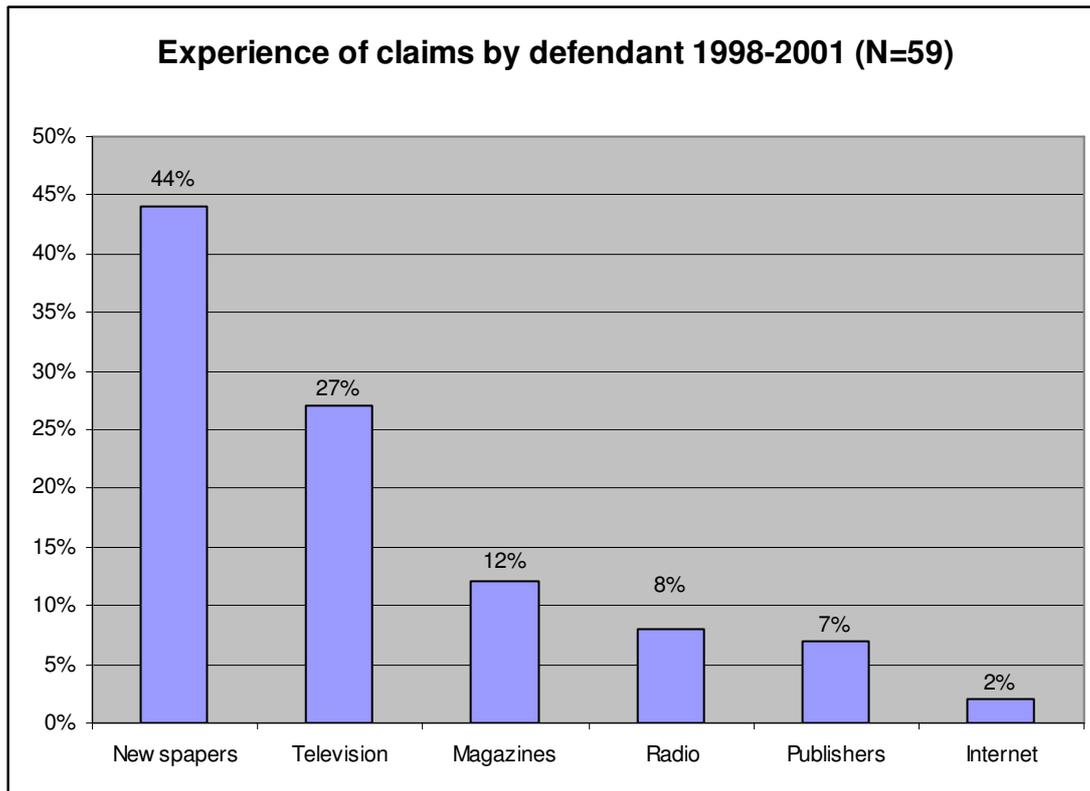
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<sup>472</sup> See Newcity, above, n. 469, 17. The figures are not directly comparable, in that Newcity dealt only with claims filed in Sydney, and his figures apply to all defamation claims, not the subset of claims made against the media.

<sup>473</sup> Palmer, n. 468 above, 1215.

<sup>474</sup> See Newcity, above, n. 469, 36; Recommendations on the Law of Defamation, *Report of the Committee on Defamation*, December 1977, Appendix III, Tables C and D, 136, Barendt et al, *Libel and the Media: The Chilling Effect* (1997), 38-41.

Fig. 52

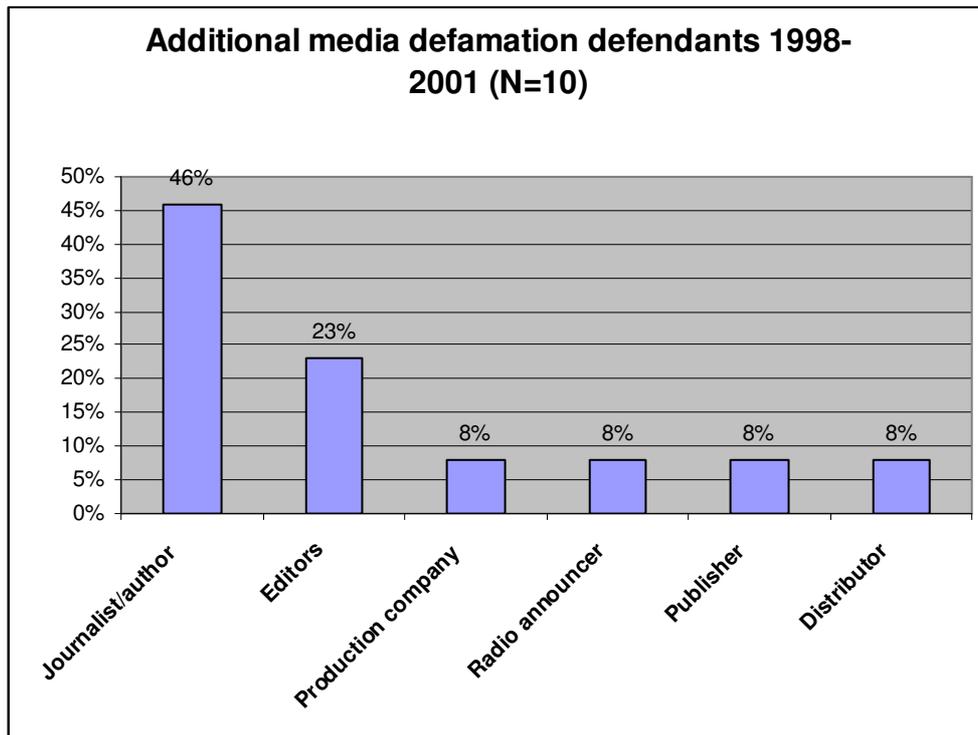


Once again, when compared to the data on threats and court claims, the most common defendants are mirrored. I have noted previously, however, an ambiguity in my results in that television broadcasters appeared to report a higher *rate* of claims than newspapers, though they did not detail a higher number of actual examples.<sup>475</sup> Given the data revealed by the court survey, it may be that television broadcasters exaggerated their response to the general question about rates of threats or claims.

To complete the picture on defendants in the court files, the court file data also revealed 13 additional defendants in nearly 17% of the claims. Of this group, individual journalists or authors were most likely to be pursued as additional defendants while editors were the next most popular additional defendant. Forty-six percent were individual journalists or authors, 23% were editors, and nearly 8% were each of a production company, an individual radio announcer, a publisher and a distributor. (See Fig. 53 below).

<sup>475</sup> See Figs 36, 44 and 45 above.

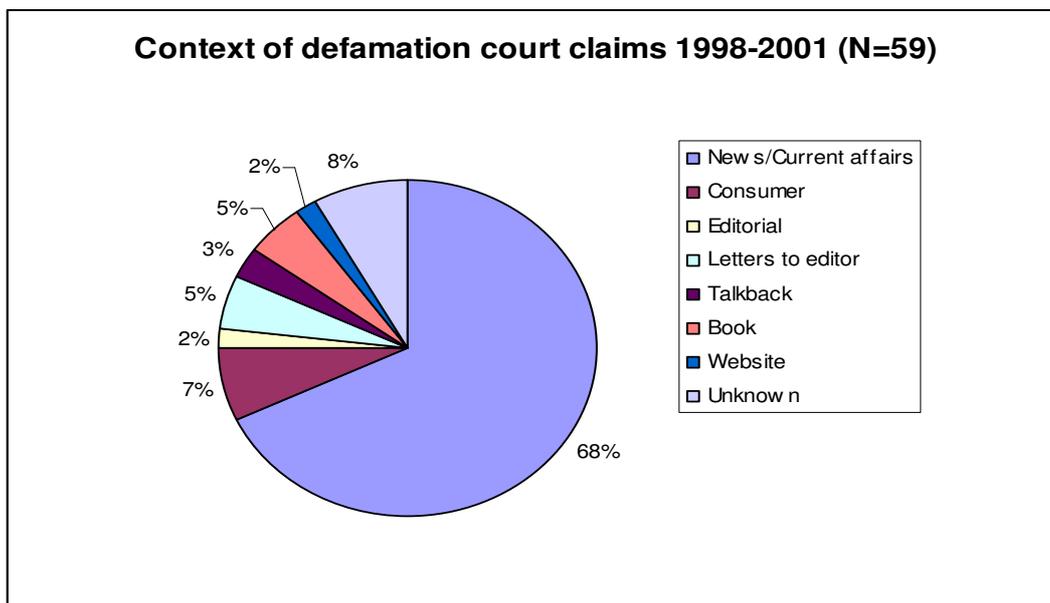
Fig. 53



#### 2.4 Context of claims

A majority of 68% of court claims arose in the context of news, current affairs or documentaries, while 7% arose in the context of consumer publications 2% in the context of editorial material, 5% in the context of letters to the editor, 3% in the context of talkback or live material, 5% from a book, 2% from a website, and the context of 8% court claims was unclear. (See Fig. 54 below).

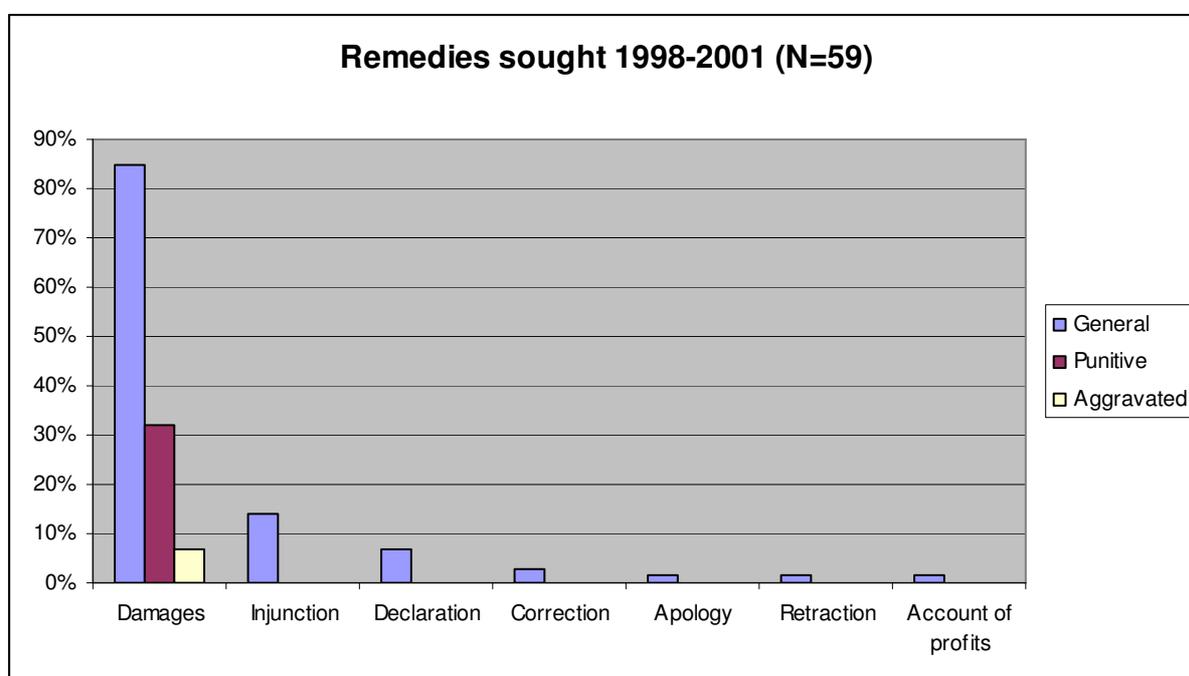
Fig. 54



## 2.5 Remedies sought

The most common type of remedy claimed was general damages, which were claimed by 85% of claimants. Seven percent plaintiffs additionally claimed aggravated damages, while 32% also claimed punitive damages. (The proportion of those who claimed aggravated damages does not mean much because typically counsel will plead aggravating circumstances but what these are worth will be undifferentiated from the general figure claimed). Fourteen percent of all claimants sought an injunction and 7% sought a statutory declaration.<sup>476</sup> Three percent sought a correction order, while 1.7% of claimants each sought an apology, a retraction or an account of profits. (See Fig. 55 below).

Fig. 55

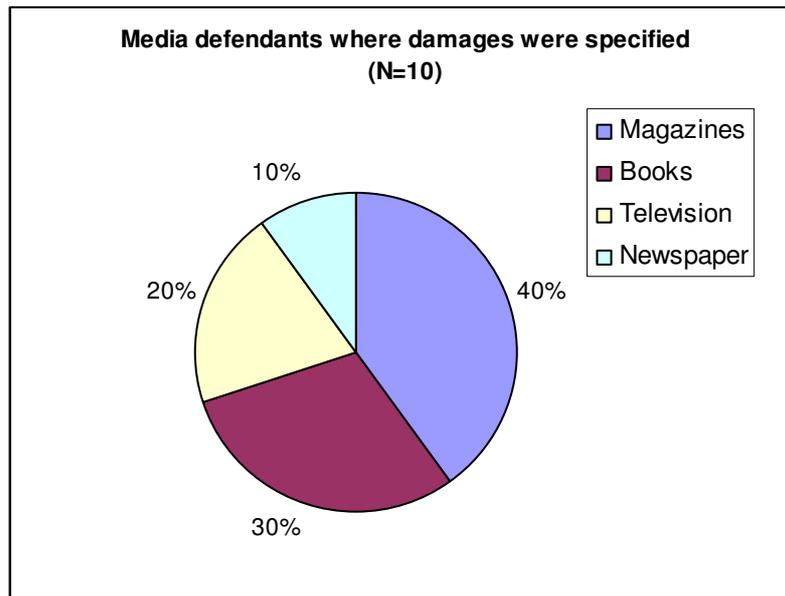


Levels of damages sought were recorded in 20% of cases where damages were claimed. Forty percent of these were claims against magazines, and 30% were claims against book publishers. Thirty percent were against news media defendants, which means the specifying of the amount of damages on the statement of claim was in breach of s 43 of the Defamation Act 1992.<sup>477</sup> Two-thirds of these news media cases were against television broadcasters and one-third was against a newspaper defendant. (See Fig. 56 below).

<sup>476</sup> Section 24 of the Defamation Act 1992.

<sup>477</sup> See the discussion at 2.8.6 above.

Fig. 56



The discussion of s 43 in the previous chapter revealed that the media reported knowing the level of damages claimed in breach of the provision in over half of the claims reported, and suggested that this might arise from the court papers or communications between the parties outside of the court process. The court file search suggests that the occasions when levels of damages are revealed in court papers are not high. The *Hubbard* case, discussed previously, is also likely to have reduced the occasions when this will happen by giving publicity to the nature of breach, if not the sanction.<sup>478</sup> Nonetheless, it is clear the provision is of limited effect in keeping the level of damages from the media. This might be of concern, if the overall results of my study did not suggest that the New Zealand media does not feel particularly gagged to begin with, nor is it gagged in fact.

To return to the claims which detailed levels of damages, the ten claims sought the following levels of general damages<sup>479</sup> (there are twelve figures as one action involved three different claims): \$50,000 (book), \$80,000 (book), \$100,000 (newspaper and magazine), \$150,000 (book), \$200,000 (book and magazine), \$300,000 (magazine), \$450,000 (magazine and book), \$550,000 (television), \$800,000 (television). These are shown in Table 9 below. The results are rather inconclusive but it might fairly be said that the levels sought from television defendants featured at the higher end of the scale, while magazine defendants did not feature in the lower end of the scale.

<sup>478</sup> See p. 140 above.

<sup>479</sup> The type of defendant in the relevant claim is noted in brackets.

Table 9.

**Levels of damages claimed – all court claims 1998-2001**

<b>Claims</b>	<b>Defendant</b>
1. \$50,000	Book publisher
2. \$80,000	Book publisher
3-4. \$100,000	Newspaper, magazine
5. \$150,000	Book publisher
6-7. \$200,000	Book publisher, magazine
8. \$300,000	Magazine
9-10. \$450,000	Book publisher, magazine
11. \$550,000	Television
12. \$800,000	Television

The ten claims revealed the following levels of punitive damages: \$10,000 (book), \$15,000 (book), \$30,000 (book), \$50,000 (book and television), \$60,000 (magazine), \$100,000 (magazine), \$200,000 (magazine) and \$500,000 (newspaper). (See Table 10 below). Levels of punitive damages over \$100,000 are optimistic.<sup>480</sup>

Table 10.

**Levels of punitive damages sought – court claims 1998-2001**

<b>Claims</b>	<b>Defendants</b>
1. \$10,000	Book publisher
2. \$15,000	Book publisher
3. \$30,000	Book publisher
4-5. \$50,000	Book publisher, television
6. \$60,000	Magazine
7. \$100,000	Magazine
8. \$200,000	Magazine
9. \$500,000	Newspaper

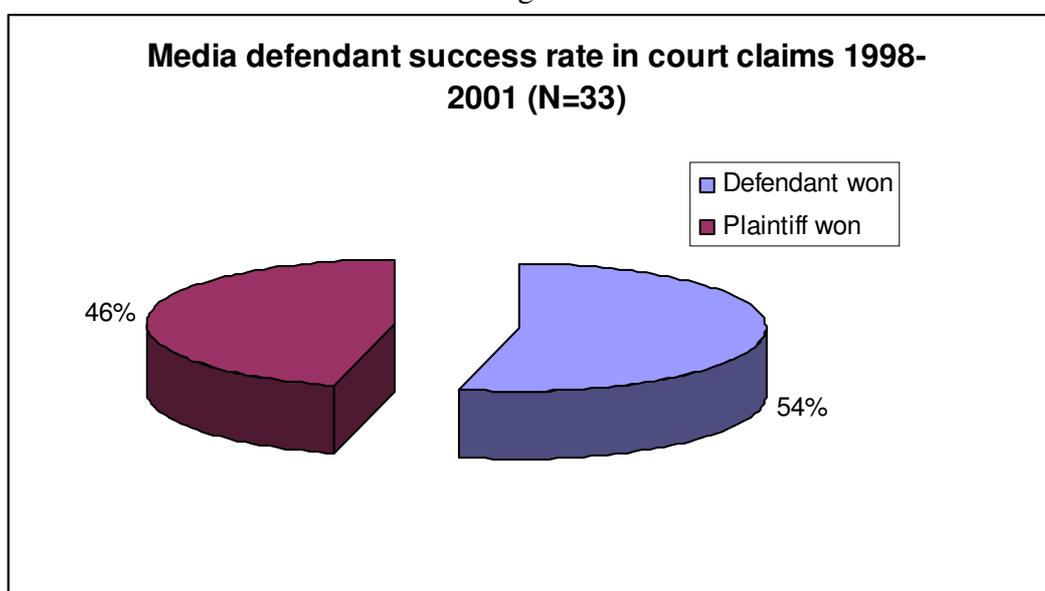
<sup>480</sup> See *TVNZ v Quinn* [1996] 3 NZLR 24.

## 2.6 Outcomes

Outcomes were final in over half (56%), of the recorded cases over the four year period. Forty-one percent of cases were still pending or appeared to be pending. The outcome in 3% of cases was unclear. Only 6% of the cases with final outcomes came to full trial. (One of those trials resulted in a finding in favour of the defendant and one resulted in a very large damages award against the defendant newspaper).<sup>481</sup>

Overall it appears that of the 33 cases which had final outcomes in the four year period, the media were successful defendants (in that there was a court decision in the defendant's favour or the matter was abandoned or withdrawn) just over half (54%) of the time.<sup>482</sup> (See Fig. 57 below).

Fig. 57



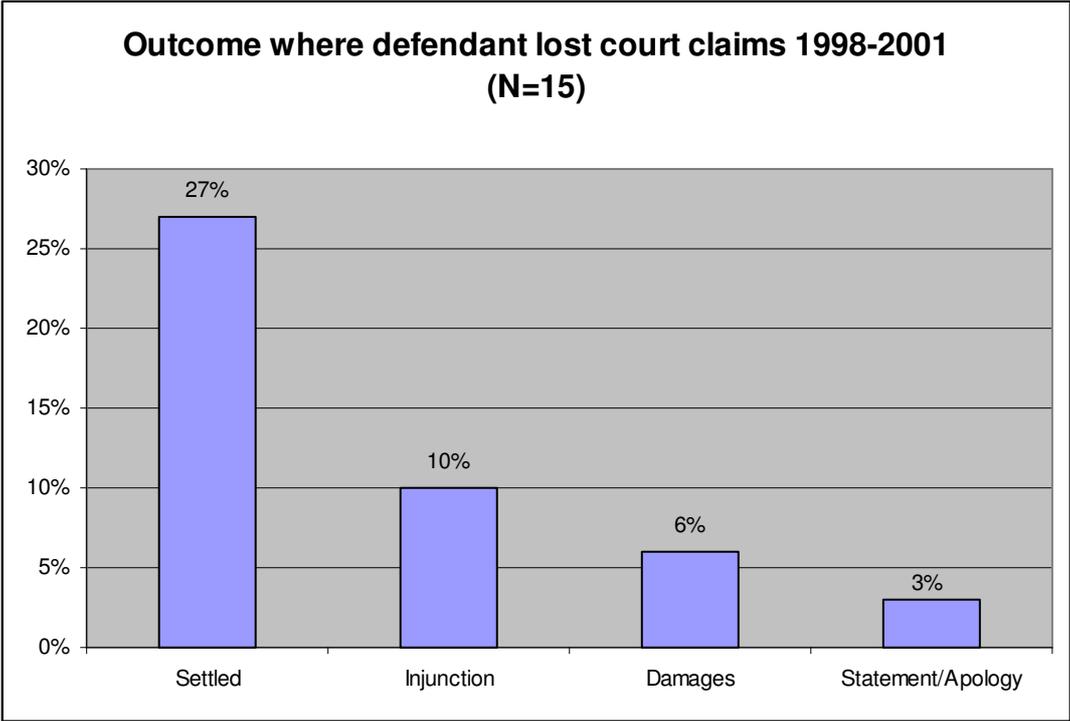
Twenty-one percent of the finalised claims resulted in a court directed resolution in the defendant's favour. One third were abandoned or withdrawn.

<sup>481</sup> The McKay Committee research found that for the period 1970-74, 32% of filed claims were settled out of court, 12% went on to trial, 38% appeared to have been abandoned and 18% were still pending: see 'Recommendations on the Law of Defamation,' *Report of the Committee on Defamation*, December 1977 Appendix III, Table C, 136.

<sup>482</sup> Trials favoured the media 50% of the time, although these figures are based on a very small sample and cannot be seen as truly representative. The figure may in reality be a little less than this. Newcity found that media defendants prevailed at trial 40.5% of the time: see n. 481 above, 55. The McKay committee research found that for the period 1970-74, New Zealand media won 43% of cases which went to trial (all trials involved claims against newspapers): see above n. 4, Appendix III, Table G, 137. Barendt et al found looking at a sample of writs set down in the Royal Courts of Justice for the period 1990-1994 that twice as many cases resulted in judgment for the plaintiff as for the defendant. The outcome at trial of 2% of writs favoured the defendant, while 4% favoured the plaintiff, 68% of writs were settled or withdrawn and for 26%, no action was recorded: see Barendt, n. 474 above, 39, Table 3.

As to the outcome where the defendant was unsuccessful, 27% were settled and discontinued or withdrawn, in one case as directed by the court. Approximately 3% of the claims resulted in a statement being read in open court and an apology. Ten percent of these cases resulted in the granting of an injunction. Six percent resulted in damages. This means of the 15 claims where the defendant lost, 60% were settled, 7% resulted in a statement and apology, 20% resulted in an injunction, and 13% resulted in damages. (See Fig. 58 below).

Fig. 58



Unfortunately, it is difficult to draw conclusions about the most common remedy, as settlement could include any combination of damages, payment of costs, apology, or other remedy. However, to recap, when the media were asked in the postal survey to detail claims for the period 1996-2001, of the 34% of claims in which it was reported the outcome was unfavourable for the media defendant, 71% resulted in an apology, 47% resulted in damages being paid, and 29% resulted in a correction. Nearly 6% resulted in each of an injunction, or withdrawal of publication and re-issue in another form. It is clear that, in contrast to the most common remedy sought, which was damages, the most common remedy actually achieved was an apology.

To return to the court file data, it revealed the defendants were more successful in defending injunction applications than plaintiffs were in getting them. Of the 8 applications in the four

year period for injunctions, 7 had been heard. Media defendants successfully resisted just over 57% of such applications.

### *2.7 Summary judgment applications*

Little information was collected from court files as to summary judgment applications. Of the 59 filed claims in the years 1998-2001, 5% (3) involved summary judgment applications. One-third (1) of these was made by the plaintiff against the defendant on the grounds that no defence could be made out, and had not been heard yet. Two-thirds (2) were made by defendants against plaintiffs on the grounds of unassailable defences. In half of these (1) the defendant was successful, while in the other half not, the defendant having to go to full trial. Thus, all that might be said is that what little data is available indicates summary judgment applications are rare, but are perhaps more popular with defendants than plaintiffs.

### *2.8 Other claims used to protect reputation*

Some data was collected as to other claims used by plaintiffs to protect reputation. Of the 59 claims filed in the period 1998-2001, nearly 7% (4) included other forms of claim. One-half (2) of the claims included actions under the Fair Trading Act. One-quarter (1) included a claim for contempt of court, one-quarter included a claim for breach of contract, one-quarter included a claim for breach of economic freedom, and one quarter also claimed for breach of a duty in negligence. In half of these claims (2) the plaintiff successfully obtained an injunction against a television defendant. In the claim involving the additional action for breach of contract the court ordered the parties to settle, and in the final claim, the three additional actions (breach of economic freedom, breach of the Fair Trading Act and breach of negligence) were struck out. These results appear to indicate that additional forms of action are pleaded in the weaker cases in an attempt to make them look more substantial.

### *2.9 Non-media claims which could have been filed against the media*

Non-media claims were examined to determine how often plaintiffs had chosen not to pursue the media as defendant.<sup>483</sup> Of the 33 files examined, nearly 40% (13) were claims where the alleged defamatory statement had been published in the media, but which had only been filed against non-media defendants. This is a not-insignificant proportion and it implies that a reasonable number of plaintiffs bring claims against non-media defendants for personal satisfaction rather than seek out the defendant with deep pockets. However, a closer

examination of the defendants in these claims reveals a more complex situation. Thirty percent (4) of these claims were against MPs, 30% (4) were against corporates or associations, 23% (3) were against individuals and 30% (4) had unidentified defendants (some claims were brought against more than one defendant). Therefore, 60% of these claims were in fact brought against defendants who would be seen to have at least adequate, if not deep, pockets. However, the fact that the competing deep pockets of the media were not preferred does appear to suggest some level of personal satisfaction is reflected in the choice of defendant.

The other interesting statistic here is the significant group of non-media claims against politicians (nearly a third). Although the media had also published in these cases, the fact that only the politicians were sued implies that plaintiffs seek to sheet home responsibility to their elected representatives and get personal satisfaction from that. It is unlikely that MPs are seen as easy targets, as they may be state-funded and have the defences of absolute or qualified privilege available to them. This data suggests that media are not automatically at a disadvantage when plaintiffs are determining who they will sue.

### **3. Conclusion**

The data on court claims over the four year period showed that the number of claims filed in New Zealand stood at about 6% of the number in the United Kingdom and that the number could then have been decreasing. There was certainly no apparent increasing trend. As with threats and court claims reported by media in Chapter Five, newspapers experienced the most claims, followed by television, magazines, radio and publishers. Just over half of the time, the outcome of the case favoured the media, either because the case was abandoned or withdrawn, or the court gave a decision which favoured the media. The most common remedy sought was damages, while the most common remedy obtained was an apology. Media successfully resisted injunction applications just over 57% of the time. Levels of damages sought appeared much higher than for threats, but not excessive, ranging from \$50,000 to \$800,000. Therefore, it may be said that the media faced a stable or decreasing risk of defamation claims, with newspapers and television experiencing the greatest likelihood. The media was likely to successfully defend or force abandonment or withdrawal of just over half these claims. Where it lost, it might have to pay damages about half the time. It successfully defended injunction applications just over half the time.

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<sup>483</sup> Christchurch files were not included in this cohort as the decision to seek this information was made

Although the data for the court survey related to a shorter time period than that relevant to the media survey, the results are clear. This chapter confirms the picture painted by the media in relation to actual court claims detailed in Chapter Five, but it is also actually reveals a slightly better success rate for media defendants. Furthermore, it very clearly establishes a low rate of claims overall, and a better success rate for New Zealand media as opposed to the United Kingdom and Australia. This is good news for media in this country. When the figures from the court file survey were first made public, one commentator concluded after looking at the results that ‘it’s hard to put the chill factor above...drafty’.<sup>484</sup> Hence, I felt confident in concluding after analysing this data that it appeared to crystallise the impression hitherto recorded, that New Zealand’s media is a tough, lively one which does not feel excessively chilled by our defamation laws. More than this, however, it did not appear to be chilled *in fact*. Furthermore, the difference in success rates between jurisdictions suggests that there is some credence in the view that New Zealand media did not, at least in the period up to 2001, manifest the worst excesses of its overseas counterparts.

The court file data proved to be most significant. But further data from the study remained untouched, and it could bolster or challenge the conclusions reached so far. Chapter Seven, which follows, addresses the experience of defamation lawyers, to determine whether the responses are consistent with those in the media survey and the court file search.

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after those files were examined.

<sup>484</sup> Steven Price on ‘Mediawatch’, *National Radio*, 4 December 2005.

## Chapter Seven – the experience of defamation lawyers

In this Chapter, I present and analyse the results of interviews and surveys completed by media lawyers. The data presented here is largely of qualitative value only.<sup>485</sup> Nonetheless, it does tend to confirm the results presented in previous chapters.

### 1. Methodology

As part of the study, separate adapted surveys were sent out to lawyers listed in the then current Law Register as carrying out defamation work.<sup>486</sup> Because the response was poor, the postal survey was followed up by targeted requests for interviews with 3 of the most prominent defamation lawyers. Those interviews were carried out at the end of 2001 and the beginning of 2002.

Ultimately, responses were obtained from 10 leading defamation lawyers, some of whom acted for both plaintiffs and defendants. The content of these responses varied, as those who were interviewed were only able to give their views on aspects of the law, and did not supply details of any cases except anecdotally. Therefore, some of the statistical data arising from this part of the study is weak and cannot be regarded as necessarily being representative of what is happening in practice.<sup>487</sup> Nonetheless, in this part of the paper, I have summarised information provided by leading lawyers arising from their practice in defamation matters, and also extracted some of the views offered on aspects of the law. These summaries do give a ‘feel’ for the attitudes and experience of this group. They therefore have qualitative value.

Of the group of 10 lawyers, 4 responded to both the plaintiff and the defendant lawyer surveys. However, all 10 had experience of both plaintiff and defence work, although half acted for defendants in over 80% of their defamation practice, four-fifths of these in over 90%. Arguably, the shared experience of working on both sides of the fence gives a reasonable balance to the views which were offered.

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<sup>485</sup> For that reason, no graphs have been compiled from the data.

<sup>486</sup> Forty-four surveys were dispatched. However, not all those written to were still practising in the area.

<sup>487</sup> There is also the possibility that the outcome in the cases reported by both plaintiff and defendant lawyers tended to favour the practitioner – in other words, that the lawyers’ success rate in defamation cases was higher than normal, because of the lawyers’ expertise.

## **2. Defendant lawyers' general experience of defamation claims**

### *2.1 Introduction*

Eight defence lawyers were surveyed or interviewed. All had acted also for plaintiffs, although half of them were currently defence lawyers over 90% of the time. One acted for defendants 80% of the time, one 60% of the time and two 50% of the time.

All but one of these lawyers answered a question asking them how long they had been carrying out defamation defence work. One quarter had been practising in the area for 5-10 years, nearly 40% answered 10-20 years and one quarter had been defending defamation claims for longer than 20 years. This group therefore appeared to have a wealth of experience.

### *2.2 Vetting pre-publication*

The defence lawyer group was asked a series of important questions not asked of plaintiff lawyers, and this was intended to gain a picture of the practice of legal vetting in order to make a comparison with the responses received from the media about pre-publication procedures.<sup>488</sup> Three-quarters of this group vetted for clients, although two of these only vetted on an occasional basis. The group who vetted regularly gave some information about vetting for eight clients, four of which were newspapers, two were book publishers, one was a broadcaster and one was a magazine.

Vetting for the broadcaster appeared the most stressful, with the time for vetting ranging from as little as 30 seconds to a month before publication, and the comment was made that the judgment call was increasingly difficult to make the less time there was to complete the task. For newspapers, the time could also be small, ranging from 6/12 minutes, to an hour, or possibly weeks before publication. Magazine vetting allowed 24 hours. Book publishing allowed the longest time to vet, being weeks or months, however, the task was greater, involving perusal and examination of the whole book.

Advice for the broadcaster was usually given orally by reference to a script. For newspapers, articles usually arrived by fax and advice was given on the phone or perhaps by faxing back an altered document. Advice about a book manuscript was usually given by letter. These methods clearly reflect the time available for the vetting process.

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<sup>488</sup> See Chapter Five, 2.3 above. In that Chapter, I concluded that the media survey revealed a generally robust and assertive media, working with or without legal advice, to get stories told rather than deleted

These lawyers gave various reasons for asking for changes to material. The responses demonstrate that the vetting brief is wide and included not just the risk of defamation, but also contempt, privacy, human rights issues, press council complaints, statutory prohibition and court orders against publication, and where a lawyer considered there was no proof for facts stated, poor journalism, or was simply responding to instinct.

The same defence lawyers were asked how often they had to ask for changes. It appeared to be standard practice to request changes. The lawyer vetting for the broadcaster stated that changes were requested frequently. One of the four lawyers vetting for newspapers stated that changes were asked for in half, and another put this figure at 90%, of the copy looked at, although the lawyer acting for the latter newspaper emphasised that some changes are minor. One other newspaper lawyer stated that changes were almost always made, but that this reflected the reason for sending the material for vetting in the first place. The other newspaper lawyer stated that changes were not requested too often. One of the two lawyers who vetted for book publishers said they frequently asked for changes, while the other reported that usually 4 or 5 passages would be altered in a book which is topical or controversial. Magazine articles were also reported as generating changes about 90% of the time.

In contrast, the answers to the question whether these lawyers asked for material to be withdrawn altogether indicate that this is rare. The lawyer vetting for the broadcaster had never done this, while half of the newspaper lawyers answered 'never', and half answered only in 1% of cases. The two lawyers advising book publishers answered 'never', while the lawyer vetting magazine articles also answered infrequently or in 1% of cases. One of the newspaper lawyers commented that usually the story can be changed (albeit an interesting part may have been deleted). However, this lawyer added that he might not always know if a story had become so interesting that in the end it was not published. Generally, these responses mirror almost exactly those of the media when asked if they were forced to remove material altogether.<sup>489</sup> It remains clear that both media and media lawyers work together to get stories told somehow or other.

In all cases except that of the lawyer doing broadcasting vetting, the final decision about whether material would be published or not lay away from the lawyer, with the editor or

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altogether. Magazines did suffer a form of 'commercial chill' arising from dependence on advertising, and book publishers also faced a form of 'commercial chill' arising from the high costs associated within the sector.

<sup>489</sup> See Chapter Five, 2.3.3 above.

publisher of the particular publication. In the case of broadcasting, however, the decision was a joint one between the lawyer and the editor/executive director. This possibly reflects a greater reliance on the lawyer arising from the time pressures associated with breaking stories in broadcasting.

The lawyer advising the broadcaster also gave advice about Broadcasting Standards Authority requirements, while all of the newspapers except one also received advice from their lawyers about the Press Council guidelines. In relation to the latter, one lawyer mentioned that this involved giving advice about lack of taste, rather than legal advice.

## *2.3 Threats*

### *2.3.1 Number of threats*

Some limited material on actual threats was extracted from some defence lawyers. Six estimated how many threats they dealt with annually. Two of these dealt with 3-5, one dealt with 6-8 and three dealt with greater than 20. Five of these six commented on whether numbers of threats they had dealt with had changed in the last six years. Two thought numbers had increased although one of these indicated this was because he had increased his practice in this area. One thought the number of threats dealt with had decreased, and two thought numbers had stayed the same. When asked why such a change had occurred, one defence lawyer who reported an increase suggested that members of the public have a wrong perception that successful defamation actions result in telephone number damages, beginning a case only to let it go when they find out just what it takes. This lawyer also suggested that there is greater awareness of defamation as a cause of action due to publicity. The lawyer who reported a decrease in the number of threats dealt with thought it might be due to the fact that editors and reporters are better educated about defamation and know how to minimize or reduce risk and when to send an article for vetting.

These responses are varied and unrepresentative, but it can at least be suggested that there is nothing to indicate a dominant view in the defence lawyer group that threats of defamation action are increasing.

### *2.3.2 Experience of threats*

Five of the defence lawyers supplied information as to how they dealt with a total of 18 threats. One threat was from 1998, two from 2000, twelve from 2001 and for three, the year of

the threat was unspecified (however, respondents were asked to detail the most recent threats they dealt with).

Two-thirds of the threats arose from the written word. One-sixth arose from pictorial representations, 5% arose from spoken words and pictorial representation, 5% from the spoken word and 5% from the written word and pictorial representation.

Sixty-one percent of the threats reported were made against newspapers, while nearly 28% were made against television broadcasters. One threat arose from an industry newsletter and one from a written stock exchange announcement.

The defence lawyers were asked to detail what remedies were sought in relation to the threats. Most threats sought more than one remedy. The most common remedy sought was an apology, which arose in nearly 78% of threats. It was closely followed by damages and corrections, which were both sought in two-thirds of the threats. Retractions were sought in nearly 39% threats. The least common remedies sought were prevention of repeat publication, and a threat to complain to the Press Council. In one case, the remedy was unspecified. In one case only, damages were the only remedy sought, and although apology was not sought in any case on its own, in two cases, it was sought together with a correction. The most common combination of remedies sought was made up of an apology, correction, retraction and damages (nearly 28% of cases).

As to level of damages sought, little information was forthcoming on this. In two-thirds of the 12 letters seeking damages, the level was noted as being unspecified. In two of the letters, damages of \$5,000 were sought, and in one letter, the damages sought were specified as being between \$3,000 and \$6,000.

This group of lawyers was asked what initial advice they gave in relation to the threats. The most common advice was to send a letter rejecting the claim and outlining the legal elements and issues, which arose in relation to 28% of threats. Similarly, a common response was to send a letter simply rejecting the claim (nearly 17% of threats). In 22% of threats, a letter was sent rejecting the claim but offering a limited concession of some sort, being a correction, a statement in reply, an explanatory note, and an offer of a letter to the editor. In one case, the advice was to ignore the threat, and in another, a letter of explanation and apology was

dispatched. In four cases, the initial advice was not detailed. Of the 14 threats where the response was detailed, over half (57%) rejected the threat. The other responses showed strong resistance and a desire to limit the effect of the threat and concede as little as possible.

The defence lawyers were asked what sort of negotiations were involved in dealing with the threats. The most common response was that the matter involved either straightforward (39%), or little, correspondence (nearly 28%). Five percent involved only one telephone call. A majority of these threats, therefore, required little from the lawyer. Only 11% of threats involved protracted correspondence and difficult negotiations. In three cases, the nature of lawyer involvement was not detailed.

As to ultimate outcome of these detailed threats, in two-thirds of cases, the complaint appeared to have been abandoned, in that the lawyer had heard no more (in one of these cases, the police had attempted to arrest the complainant for the behaviour outlined in the publication, and the latter had become a fugitive!). In 28% of the threats, the defendant had made some concession, ranging from publication of an apology, a retraction and a correction, publication of a correction and retraction, publication of a correction, to publication of an explanatory note. The outcome of one threat had not yet been determined. Damages were not paid in relation to any threat.

These responses suggest that most threats were made against newspapers and arose from the written word.<sup>490</sup> Apology was the most common remedy sought, although damages, together with corrections, followed close behind as the second most popular remedy. However, damages were not conceded in relation to any threat, and in fact, the majority of threats appeared to be abandoned. The few concessions made were limited and robust. Most threats dealt with by the lawyers were low level and straightforward, and a reasonable supposition to make from the data is that the cost of legal involvement in resolving them would not have been high.

While not quantitatively robust, the defence lawyer responses are of value as qualitative data, because they reveal clear patterns of behaviour from the experience of leading defamation defence lawyers in relation to threats received against media clients. The results also mirror

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<sup>490</sup> It should be noted, however, that this result could be due, in part, to the nature of the clientele seeking legal advice from the lawyer, in other words, to the sort of defamation defence practice operated by the lawyer.

and reinforce, to a remarkable extent, the responses of the media in the media survey to similar questions about threats.<sup>491</sup>

#### *2.4 Experience of defamation statements of claim which did not come to a full hearing*

Five defence lawyers supplied information detailing the experience of dealing with a total of 18 claims which did not come to a full hearing. One lawyer had detailed 7 cases, one detailed 4, two detailed 3 and one defence lawyer detailed 1 such case. The lawyers were defending media defendants in most, but not all, of these cases.

It will be recalled that the court file search revealed that 100 defamation claims were filed in the main registries over a four year period.<sup>492</sup> Over the four year period, defamation claims averaged 25 a year. Extrapolating this, it is reasonable to estimate that 150 defamation cases would have been filed over the longer six year period. The defence lawyers detailed cases from the same period but also from a period two years earlier (1996 and 1997). Therefore, the 18 cases detailed by the defence lawyers arguably represent approximately 12% of a likely total for the period 1996-2001. However, because almost all of the cases detailed by the defence lawyers involved a media defendant as defined in this survey,<sup>493</sup> it is likely that the subset is more representative of cases involving media defendants.<sup>494</sup> In the court file survey, media defendant cases arose 59% of the time.<sup>495</sup> Fifty-nine percent of the projected 150 defamation cases occurring in the six year period would be 88 media defendant cases. Therefore, arguably, the 18 cases reported below represent close to 21% of the likely total of 88 media defendant cases filed in the six year period.<sup>496</sup>

##### *2.4.1 Nature of the claims*

Four cases detailed were from 2001, five were from 2000, four from 1999, one from 1998, two from 1997, one from 1996 and the date of one case was not detailed. In two-thirds of the 18 cases, legal advice had been sought prior to the statement of claim being issued. In 22% of cases, no such advice had been sought. In two cases, this information was not supplied. In

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<sup>491</sup> See Chapter Five, 2.7 above.

<sup>492</sup> See Chapter Six, 2.1 above.

<sup>493</sup> See Chapter One, 2. above.

<sup>494</sup> Only one defendant in these reported cases was perhaps not a media defendant – the case involved a defamation which arose from a brochure.

<sup>495</sup> See Chapter Six, Table 7. above.

<sup>496</sup> In fact, defence lawyers detailed a further 4 claims which went to a full hearing for determination, and these are analysed in the next section (see p. 174 below). Only two of these occurred in the six year period under review, one of which may not have involved a media defendant. If the remaining case is added to the 18 detailed

61% of the cases, the defamation arose from the written word, while in nearly 17%, it arose from written words together with photos/cartoon/illustration. In 22% of cases, the defamation arose from the spoken word together with pictures. Two-thirds of the claims were filed against newspaper defendants, while 22% were filed against television broadcasters. Five percent of the claims were brought against each of a magazine, the publisher of a brochure and an Internet provider.<sup>497</sup>

#### 2.4.2 Remedies sought

As to remedies sought, the results were starkly drawn. Damages were by far the most popular remedy sought in these formal claims, being claimed in almost all cases (95%). Apology was sought in nearly 17% of cases, while a correction was sought in one-ninth and a retraction in 5%.

The levels of damages sought were undisclosed in over half (56%) of the 18 cases, as the defendants were news media defendants and disclosure of a figure in the statement of claim was prohibited under s 43(1) of the Defamation Act.

Of the seven cases where levels of damages claimed were detailed, two were claims for \$1-\$5,000, one was a claim in the range of \$30,000 - \$50,000, one was a claim for \$50,000-\$100,000, one was for \$100,000-\$500,000 and two were claims for over \$500,000. One claim at the latter end of the scale involved a newspaper in a South Pacific jurisdiction and the claim was believed by the lawyer to be political and therefore intended to chill. The other claim for over \$500,000 was against an ISP defendant as well as a newspaper defendant and the figure may have been a total claimed for both publications. The next largest claim (\$100,000 - \$500,000) was against a brochure, a non-media defendant, and the claim below that in the range of \$50,000 - \$100,000 was against a magazine. This information is presented in Table 11 below.

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above, the total of 19 claims detailed by the defence lawyers therefore represents nearly 22% of possible media defendant defamation claims in the period 1996-2001.

<sup>497</sup> The percentages add up to more than 100 because one claim was against both a newspaper and an ISP.

Table 11.

**Levels of damages claimed in court cases which did not come to a hearing –  
reported by defence lawyers  
1996-2001**

<b>Claims</b>	<b>Defendant</b>
1-2. \$1,000 - \$5,000	Newspaper x 2
3. \$30,000-\$50,000	Newspaper
4. \$50,001-\$100,000	Magazine
5. \$100,000- \$500,000	Brochure
6-7. Over \$500,000	Newspaper, newspaper and Internet
9-18. Undisclosed	Newsmedia (TV x 4, newspaper x 6)

Of the seven cases where the damages figure claimed was known, four cases involved news media defendants. In two of these cases, that situation was explicable – one involved a claim also against an ISP as well as a newspaper and the figure would have been disclosed in relation to the non-news media defendant. The other involved a claim arising in a South Pacific jurisdiction which had no such controls on disclosure. However, for two of the cases filed against news media defendants, in both cases a newspaper, the disclosure appeared to be in breach of s 43(1) of the Defamation Act.<sup>498</sup> This was confirmed in one case, where the defence lawyer noted that the plaintiff was unrepresented and had breached the provision. The reason for the other apparent breach was not disclosed.

#### *2.4.3 Complexity of proceedings*

The defence lawyers were asked what defences they pleaded or defensive arguments they made, and most had put forward a robust collection of these. The most popular pleadings were truth, honest opinion and that the words were not defamatory. Two-thirds pleaded truth, while the same figure pleaded honest opinion. Sixty-one percent pleaded that the words were not defamatory. Twenty-two percent pleaded the plaintiff's bad reputation, one-sixth used

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<sup>498</sup> See the discussion at Chapters Five, 2.8.6, and Six, 2.5 above.

qualified privilege based on *Adam v Ward*<sup>499</sup>, and 5% each pleaded qualified privilege based on *Lange*,<sup>500</sup> statutory qualified privilege,<sup>501</sup> and that the plaintiff could not be identified. Twenty-two percent did not identify the defence arguments raised.

Defence lawyers were asked if the cases involved interlocutory proceedings, in an effort to determine how protracted and difficult the cases were to defend. The most common interlocutory procedure was discovery, which occurred in one-third of the cases. Five percent each involved payment into court, joinder and publication of the same matter in different media. One-sixth of cases did not answer this question. It seemed that 22% of cases involved difficult and protracted proceedings (one was described as ‘protracted,’ one involved ‘lots of interlocutories’, one involved an unrepresented plaintiff and one involved three interlocutories).

#### 2.4.4 Outcomes

Details were given as to outcome for nearly all cases (89%). Nearly a third of these cases (31%) were successful for the media defendant, in that they resulted in a summary judgment, or the actions were abandoned, abated or dropped. These claims involved two television broadcasters and two newspapers.

Sixty-nine percent of the cases resulted in a settlement prior to a full hearing. The settlement data is quite revealing, as more information was disclosed by lawyers than could be retrieved from the court file search,<sup>502</sup> in particular about the incidence and levels of costs associated with settlements. Eighteen percent of the settlements resulted in an apology (together with monetary payments), and the same proportion resulted in a retraction (again, together with a monetary payment). One settlement resulted in a correction, together with a monetary payment.

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<sup>499</sup> Here it is argued the defendant has made a communication on an occasion where they have a legal, social or moral duty to make it to the party to whom it is published, and that party has a corresponding interest or duty to receive it: *Adam v Ward* [1917] AC 309. See J F Burrows, *The Law of Torts in New Zealand* (2005, 4<sup>th</sup> ed; Gen ed, Stephen Todd), 706.

<sup>500</sup> See Chapter Nine, 1.1 below. See J F Burrows, *The Law of Torts in New Zealand* (2005, 4<sup>th</sup> ed; Gen ed, Stephen Todd), 709.

<sup>501</sup> Based on the operation of the Defamation Act, ss16-18 and the 1<sup>st</sup> Schedule to the Act. See J F Burrows, *The Law of Torts in New Zealand* (2005, 4<sup>th</sup> ed; Gen ed, Stephen Todd), 716.

<sup>502</sup> See Chapter Six, 2.6 above.

Nearly 64% of the settlements involved a payment of damages, the majority of these (71%) being \$15,000 or under. The largest payment, \$250,000 - \$500,000, was against a newspaper, but did not involve any payment for costs. The next largest payment, \$50,000 - \$100,000, was against a television broadcaster, but was a payment which was inclusive of costs.

Plaintiff costs were paid in relation to 45% of the settlements, although two of these payments were inclusive of damages. Of the three exclusive costs payments, none were over \$5,000 and two-thirds appeared to be nominal only. These results are shown in Table 12 below.

Table 12.

**Settlements: defence lawyer data 1996-2001**

<b>Defendant</b>	<b>Unspecified</b>	<b>Apology</b>	<b>Correction</b>	<b>Retraction</b>	<b>Damages</b>	<b>Costs</b>
1. Newspaper		X		X	\$5,000	
2. Magazine	X					
3. Brochure	X					
4. Television			X		\$50,000 – \$100,000 Inclusive	
5. Television					\$0-\$5,000	Small
6. Newspaper		X				\$500
7. Newspaper					\$5,000- \$15,000	
8. Newspaper					\$250,000- \$500,000	
9. Newspaper						\$0- \$5,000
10. Newspaper				X	\$5,000- \$15,000	
11. Newspaper					\$5,000-\$15,000 Inclusive	

The defence lawyers were also asked for reasons for the settlement outcome and gave some information in relation to nearly 82% of the settled claims. In relation to nearly 78% of these claims, a reason given was that the litigation risk did not favour the defendant, usually

because settling would be cheaper than fighting. For 54% of the claims, one explanation given was that the claim had some merit and so the litigation risk was too high. In one case, one detailed reason was that there were many defendants, which would prolong proceedings. In another case, the sole reason was that each party had agreed to walk away, and in a further case, the reasons given were that publication was negligent, indirectly identifying the plaintiff, the slur was serious, and the litigation risk very high even though the plaintiff was sympathetic. The problem in this case was clearly identified as poor journalistic practice. This claim was settled for the highest award of damages (\$250,000 - \$500,000) detailed above. The data suggests that two-thirds of the settled cases involved claims with some merit or great merit. Arguably in these cases, settlement arose not predominantly because of any chilling effect of the law, but for sensible tactical reasons.

### *2.5 Experience of defamation statements of claim which came to a full hearing*

Three defence lawyers detailed a total of four claims which came to a full hearing. These appeared to be quite rare in that two of the claims arose before the six year period for which data was sought (one arose in 1992 and one in 1993). One case arose in 1996 and one in 1997. In two of these cases, legal advice had been sought prior to the statement of claim being filed, and in the other two, it had not. Three of the claims arose from written words, while one arose from spoken words and pictures. The defendants in two of the cases were newspapers, in one case a television broadcaster and in the other case, the publisher of a newsletter.

In all cases, damages were sought, and in three of the cases, the levels of damages were high. Two of the cases involved claims in the range of \$100,001-\$500,000, and one case involved a claim of over \$500,000. One claim was undisclosed.

Two cases involved news media defendants, but in only one of these was the claim undisclosed, as the other case arose before the 1992 Act when the s 43 requirement of non-disclosure came into force. Therefore, the undisclosed claim was made against the television defendant, the two claims of \$100,001-\$500,000 were made against a newspaper and the publisher of the newsletter, and the largest claim of over \$500,000 was made against a newspaper.

### 2.5.1 *Complexity of proceedings*

Once again, the defendant lawyers pleaded a robust collection of defences. In all the cases, the lawyers pleaded truth, and in three they also pleaded honest opinion. In two of the cases, *Adam v Ward* qualified privilege was pleaded, and in the same number of cases, the lawyer pleaded that the words were not defamatory. In one case, the lawyer pleaded that limited publication should mitigate damages and in another, the plaintiff's bad reputation was pleaded.

As would be expected in cases that went to trial, these examples involved numerous procedural issues. All four of the cases had involved discovery, while half involved joinder, half involved publication of same matter in different media, and payment into court and interrogatories also arose in half of the cases. One case involved an issue as to mode of trial which had to be resolved. However, in only one case was there an indication that proceedings were deliberately prolonged by a plaintiff for tactical reasons, and in another case, the lawyer specifically noted that all the procedural points raised by the other side were relevant.

### 2.5.2 *Outcomes of trials*

The outcome of these trials clearly favoured the defendants. Three of the trials resulted in wins for the defendant. In the other case, damages were awarded to the plaintiff, but were only in the range of \$1,000-\$5,000. Furthermore, in this case, the lawyer had made a well-judged payment into court, and because the damages awarded were less than the payment in, costs were awarded to the defendant. An appeal by the plaintiff was abandoned.

### 2.5.3 *Mode of trial*

Three of the cases were heard by judge alone, in one case, a District court judge.<sup>503</sup> The remaining case was heard by a judge and jury at the plaintiff's request.

### 2.5.4 *Reasons for defending to trial*

Reasons for defending the matter to a full trial varied. More than one reason could be given. In one case, the lawyer stated bluntly there was no defamation. In another, commercial considerations determined the defence. In two cases, the defendant's character drove the defence in that a client refused to publish an apology and stuck to a 'businessman's principle,' or had 'very strong views'. In the third case, (where small damages eventually had to be paid)

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<sup>503</sup> There are no District court juries for civil matters: s. 58 District Courts Act 1947.

the lawyer exercised quite subtle judgment. That lawyer considered there were reasonable defences, had judged correctly that the claim was high but the award was likely to be low, and clearly perceived the plaintiff as unreasonable. Once again, the data does not indicate the presence of an excessive chilling factor in these cases. Although the cases involved high damages claims, the claims were fought to trial and the majority were won. In those cases, in all likelihood, at least some of the defendant's costs would be paid by the plaintiff. The only damages award was very small compared to the claim and no costs were paid in that case. Such results would be encouraging to the media.

#### *2.5.5 Length of proceedings*

The defence lawyers who had taken matters to full trial were asked how long it took to determine each proceeding. This question was answered in relation to three cases. In one of these cases the matter had taken 2-3 years from beginning to end. In two of the cases, the matter had taken 3-5 years. There was no indication that this was seen as unusual or unacceptable.

#### *2.6 Defence lawyers' general experience of remedies*

This part of the investigation sought experiences and views relating to damages, to other remedies and about procedural matters such as judicial conferences and trial before judge and jury.

##### *2.6.1 Damages*

Seven of the eight defence lawyers answered the question asking in their experience, what percentage of plaintiffs and potential plaintiffs did not seek damages. Four thought only 1-10% did not do so, one thought that 11-25% did not, and two thought that 26-50% did not. Therefore, seeking damages appeared to be a preference for a majority of plaintiffs. The majority of the seven respondents also thought, however, that more plaintiffs are seeking remedies other than damages than in the past, although one noted that the increase was not by much. Two did not think there had been any change.

Five of the defence lawyers answered the question whether they thought levels of damages claimed were rising. Four of these did think levels were rising, but three attributed the rise to inflation and half of them offered other reasons, such as the publication of awards in other jurisdictions, the level to which the media was seen to be invasive, and higher defence costs

attributable to more complex civil litigation and longer trials. (The latter reason can only apply to actual damages awarded, not to claims made). One defence lawyer did not think levels of damages claimed had risen overall. The majority of the defence lawyers, then, did not think levels of damages claimed were rising other than to take account of inflation.

Defence lawyers were asked what proportion of writs they suspected were gagging writs and five of the eight lawyers offered views on this issue. All those respondents thought that gagging writs do exist. However, the majority (60%) put the figure at between 10% and 20%. One indicated that only 1%-5% of writs had a gagging element, while another simply indicated that some writs have this function. Therefore, the incidence of gagging writs was not seen as high.

The defence lawyers were asked if the requirement that there be no reference to a figure of damages claimed in statements of claim where the media is involved<sup>504</sup> had made any difference to the incidence of gagging writs. Four of the lawyers responded, and three of these replied in the negative. The remaining respondent replied 'yes', but thought that the gagging writ has been replaced by attempts to obtain interim injunctions.

### 2.6.2 *Injunctions*

The defence lawyers were asked about the incidence of actions seeking interim injunctions. Seven expressed views on this issue, and all thought that such claims were rare, although one of these thought that such applications had replaced gagging writs. Reasons for this were the costs involved, and the high threshold test which makes successful applications very difficult.<sup>505</sup> Applications for permanent injunctions were seen as even rarer than claims for interim orders because the effluxion of time renders permanent orders pointless.

Ex parte injunctions<sup>506</sup> were also considered by these seven respondents and none saw them as a problem. Four thought such orders were difficult for plaintiffs to obtain, while nearly two thought this was impossible, and the remaining respondent referred to the task as 'not very easy'. Two of the lawyers commented that a media defendant could always be served with the papers somehow, and a further defence lawyer thought that ex parte applications should not be successful. It appeared then, that the defence lawyers did not regard the injunction

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<sup>504</sup> Section 43 of the Defamation Act 1992. See Chapters Five, 2.8.6, and Six, 2.5 above.

<sup>505</sup> *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129.

<sup>506</sup> Applications for prevention of publication made without notice to the defendant.

jurisdiction, including that relating to *ex parte* applications, as problematic or other than rarely successfully invoked.

### 2.6.3 *Declarations*

Five of the defence lawyers commented on the sort of circumstances in which plaintiffs sought declarations. Examples given were where a plaintiff was a partnership or a company principally motivated to avoid proving loss, where a speedy correction was the desired outcome, where the plaintiff was a politician in a claim funded by Government and under Cabinet rules, any damages would go to the Crown, where damages would be low but costs high, and where an ordinary individual was suing an ordinary individual.

### 2.6.4 *Retraction or reply*

The defence lawyers were asked in what circumstances they would recommend a defendant client agree to make a retraction or reply. Six of this group indicated they would make such a recommendation if the defendant got it wrong and after weighing up the relative costs versus possible damages and the risk of the litigation. However, two of these commented that they would negotiate this remedy as part of a settlement in the usual way rather than use the procedure in the Defamation Act, because the defendant is at risk as to costs and expenses.<sup>507</sup>

### 2.6.5 *Corrections*

When asked about corrections, seven of the defence lawyers indicated that it was not unusual for these to be sought, but that it was also not unusual for defendants to make corrections without prompting. The remedy was seen as valuable to set the record straight and was often sought by public figures. However, once again, there was reluctance from two of the lawyers to use the procedures set out in the Defamation Act, as these put the defendant at risk of costs or increased damages.<sup>508</sup> The lawyers preferred to recommend negotiated corrections where there was a clear error. This course of action was seen as ‘the best possible defence available’ as (together with an apology) it halted any further action, or mitigated damages, helped defend any subsequent case, or avoided a Press Council complaint.

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<sup>507</sup> See s 25(2) of the Defamation Act 1992.

<sup>508</sup> See s 26(3) of the Defamation Act 1992.

### *2.7 Judicial Conferences*

Six defence lawyers commented on their experience of judicial conferences. All saw these as valuable but the level of success depended on the willingness of the parties seek resolution, the comparative strengths of the parties and on who was presiding.

### *2.8 Judge and jury*

One of the most experienced defence lawyers offered views on when trial by judge alone would be sought. Reasons given included where there is a difficult, unattractive plaintiff, there are technical legal issues or a difficult case, such as one involving corporate issues or complicated accounts, and where the defendant is legally right.

### *2.9 Conclusion on defendant lawyer data*

The data collected from the defence lawyers appears to mirror and reinforce that collected from the media and the court survey data.<sup>509</sup> It does not suggest the presence of an excessive chill factor arising from New Zealand's defamation laws.

The defence lawyers who pre-vetted material indicated that the process involved a joint effort between legal adviser and the media defendant to ensure that stories could be told rather than expunged. Although amendments and changes were made to the content of publications, defence lawyers said it was extremely rare for material to be deleted altogether.

The views and experiences collated about threats of legal action reveal no indication that the number of threats is increasing or unmanageable. It is apparent that most threats were low level, and were dealt with on that basis. Apology was the most common remedy sought, although damages and corrections were not far behind. But in any event, over half the threats received by the defence lawyers were rejected and the others strongly resisted. Ultimately, two-thirds of the threats went away or were abandoned and a limited concession only was made in under a third. No damages were paid in relation to any threat dealt with by these lawyers.

The cases reported which involved filed proceedings that did not come to a full hearing also point to lack of excessive chill. Only a quarter of the total were difficult or protracted proceedings. Nearly a third of the cases were dropped. Of the two-thirds of cases which

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<sup>509</sup> See Chapter Five, 3. Conclusion, and Chapter Six, 3. Conclusion, above.

settled, 64% resulted in a payment of damages. However, most of those payments were under \$15,000. Plaintiff costs were paid in less than half of the settlements and appeared to be low. Although the cost of litigation was one reason for settling in most of the claims, in two-thirds of them, the reason for this litigation risk being regarded as too high was that the claim had some merit or great merit. In short, the defendant was being told, 'it is not worth you fighting on because the plaintiff has a realistic chance of winning on the merits.' These were not baseless or speculative claims, intended to chill.

Most of the cases going to full trial which were detailed were successfully defended. Even the case that was not could be seen as a tactical victory for the defendant because it resulted in low damages and no costs being paid.<sup>510</sup> In the outright win cases, significant costs of the defendant could be recovered from the plaintiff.

Generally, it seems the defence lawyers did not think damages claims were rising and were not concerned about the incidence of gagging writs. Furthermore, attempts to pre-censor publication by applying for injunctions, ex parte or otherwise, were seen as rare and difficult to achieve.

### **3. Plaintiff lawyers' experience**

Six lawyers acting for plaintiffs in defamation matters were surveyed or interviewed about their experience of defamation claims. Four members of this group gave information about their level of experience in defamation practice. Half of these had been carrying out such work for 5-10 years, one had been practising in the area for 10-20 years and one had longer than 20 years experience. This group therefore appeared to have considerable experience in defamation law.

#### *3.1 Threats*

Five of the plaintiff lawyers supplied details of a total of 11 letters before action they had sent on behalf of clients. Three of the letters were sent in 2001, while the year the others were sent was not identified (although respondents were asked to detail the most recent letter they had sent). The 11 threatening letters were sent on behalf of more than 11 clients. The largest category of client was that of the individual, the complainant in relation to 72% of these

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<sup>510</sup> The lawyers may have tended to report successes rather than failures. However, the reporting of settlements does not suggest this, and lawyers were asked simply to detail the most recent claims they dealt with in order.

claims. In over a third of the letters, the client was a private company, while in 18% they were a celebrity. One letter before action was sent on behalf of a politician.

Nearly 55% of the letters before action complained about defamation arising from the written word, while 27% arose from 2 separate incidents involving written and spoken words. One letter arose from a combination of spoken words and a pictorial combination, and one arose from spoken words only. The letters were sent to more than 11 potential defendants because there were some incidences of publication of the same words in different media. Nearly 64% of the publications arose in newspapers, while over a third involved a broadcaster. Eighteen percent of the publications arose from Internet providers, the same number arose in a book, and one in a magazine. Two publications arose from other non-media individuals. Most of these threatening letters were therefore sent to media defendants as defined in this survey.

In all cases, more than one remedy was sought in the letter before action. An apology and damages were the most popular remedy sought, arising in relation to nearly 82% letters each (not necessarily always together). The next most popular remedy sought was a correction, which arose in nearly 73% letters. Retractions were almost as popular, being sought in nearly 64% of the letters. Prevention of publication was sought in 9% of the letters. In no case was an apology or damages sought as the only remedy.

Levels of damages sought were identified in relation to five claims, although one of these involved two potential defendants, so six different levels were identified. One case involved a claim greater than \$500,000, two involved claims between \$100,001 - \$500,000, two involved claims between \$50,001 - \$100,000 and one specified a claim between \$30,001-\$50,000.<sup>511</sup> These results are shown in Table 13 below.

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<sup>511</sup> Section 43 of the Defamation Act 1992 does not prevent a letter before action specifying the level of damages claimed. See pp. 140 above.

Table 13.

**Levels of damages claimed by plaintiff lawyers in letters before action  
1996-2001**

<b>Claims</b>	<b>Defendant</b>
1. \$30,000-\$50,000	Newspaper
2-3. \$50,001-\$100,000	Broadcaster. Newspaper
4-5. \$100,000 - \$500,000	Newspaper, broadcaster, book (one claim appears to be a total against all three defendants). Newspaper

Plaintiff lawyers were asked whether the work involved in dealing with the letters before action was complex or otherwise, in an attempt to determine how this might have affected the defendants. The majority of cases appeared not to be complex. Over a third (36%) of letters involved straightforward correspondence, while half that figure again involved little correspondence and a further letter involved straightforward negotiations. Only 18% involved difficult negotiations. The complexity of the dealings was not identified in relation to 18% cases.

As to outcome, this data was inconclusive, as in just over half of the claims, matters were still proceeding, and in one further case, the outcome was not recorded. In the four cases remaining, all resulted in some sort of concession to the plaintiff. One letter resulted in an apology, retraction, correction and settlement, one in a retraction, a correction and a settlement, one in a settlement and a decision not to publish further, and one in a correction. Therefore, three cases had known outcomes which involved a settlement of some kind. No details of settlement were captured.

*3.2 Experience of defamation statements of claim which did not come to a full hearing*

Three plaintiff lawyers supplied details relating to a total of five claims which went to court, but did not result in a full hearing. One of these claims was from 1998, two were from 1999 and for two, the date of the claim was unknown, although the respondents were asked to detail the most recent claims they had dealt with.

The majority of claims were made by individuals (three), while one was made by a private sector company, one was made by a celebrity and in one case, the plaintiff was unidentified.<sup>512</sup> The majority of claims arose from the written word (four), while one claim arose from spoken words. The defendants reflected this breakdown, in that four claims were filed against newspapers and one against a broadcaster (television).

One of the claims sought damages in the range of \$15,001 - \$30,000, and the same number sought damages in the range of \$250,000 - \$500,000. The majority (three) sought damages in the range of \$50,001 - \$100,000. The highest claim was against a newspaper and the lowest against the television broadcaster. No other remedies were specified as being claimed.

### 3.2.1 *Defences*

The defendants pleaded a mixed bag of defences, none on their own. In all cases, truth was pleaded, and that the words were not defamatory. Honest opinion was the next most popular defence, arising in four of the five proceedings. The plaintiff's bad reputation was pleaded in relation to two of the claims, (although strictly speaking this is a mitigating factor, not a defence), as was the *Lange* form of qualified privilege. The *Adam v Ward* form of qualified privilege was pleaded in relation to one of the claims.<sup>513</sup>

### 3.2.2 *Complexity of proceedings*

Little information was forthcoming as to the complexity of these proceedings. Discovery had arisen in two of the cases, and publication of the same matter in different media had occurred in one. In three of the cases, no information was given or the proceedings were too young to have given rise to interlocutories as yet.

### 3.2.3 *Outcome*

One case was still continuing (this was the largest damages claim). All of the remaining cases had resulted in a settlement. However, half of these involved no damages, but rather a correction and retraction. In these cases, damages claimed had been in the medium range, of \$50,001 - \$100,000. In the two settlements where damages were paid, these were not particularly high. One payment was in the \$5,001 - \$15,000 range and the other was in the \$30,001-\$50,000 range. In both these cases, the amount settled for was in a range about half that which had been claimed. In all of the settlements, no costs were paid.

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<sup>512</sup> The figures add up to more than 100% because one claim was made by two plaintiffs.

### 3.2.4 *Reasons for settling*

In the two cases where the settlement involved a correction and retraction, it was the satisfactory nature of these remedies which made the settlements acceptable. In one of the cases where damages were paid, the client's desire to settle was the reason given. In the final case where the smallest award of damages was accepted, the lawyer had weighed up the likely costs of fighting on against the maximum damages which were likely to result.

### 3.3 *Experience of defamation statements of claim which came to a full hearing*

Four of the plaintiff lawyers were able to supply details of a total of six cases which were resolved by a full court hearing. One of these cases arose in 1996, two in 1998, one in 1999 and in two of the cases, the date the statement of claim was filed was not identified.

The six cases were filed by a total of 9 plaintiffs. All of the cases involved a plaintiff who was an individual, and one third involved celebrity plaintiffs. One case also had a plaintiff which was a private sector company. All of the claims arose from written words, and one claim also involved the spoken word as well. The defendants once again reflected this breakdown, being a newspaper in all of the cases, and additionally in one case, a broadcaster.

#### 3.3.1 *Remedies sought*

In all cases, damages were sought, in half of them, without other specified remedies. In two of the cases, the level of damages were unspecified. In one case, the level of damages claimed was in the \$30,001 - \$50,000 range, while in one other claim, the range was \$50,001 - \$100,000. In two of the cases, the level of damages claimed was in the \$100,001 - \$500,000 range. In two cases, an apology, correction and retraction were sought as well as damages. In one other case, a declaration was sought together with damages.

#### 3.3.2 *Defences*

In two of the cases, defences pleaded were not specified. In the remaining four cases, an extensive collection of defences was filed. In all, truth, honest opinion, and an argument that the words were not defamatory, were raised. In three of them, *Lange* qualified privilege and the plaintiff's bad reputation were pleaded. In half of these cases, statutory qualified privilege based on the Defamation Act 1992 Schedule was raised.

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<sup>513</sup> See Chapter Two, 1.9.1 above.

### *3.3.3 Complexity of proceedings.*

Once again, plaintiff lawyers were asked to identify the interlocutory proceedings involved. In two cases, these were not identified. Of the remaining four cases, all had involved discovery.

### *3.3.4 Outcome*

In one case, the outcome was not detailed. In the remaining five, all outcomes appeared to favour the plaintiff. In one case, a correction and retraction was agreed after the full hearing but prior to a damages hearing. (Damages claimed in this case had been in the \$50,001 - \$100,000 range and a declaration had also been sought.)

In the other four cases, damages had been paid. Levels of damages paid varied. In one of the cases where damages were paid, the amount was specified as \$50,000. In one case, the level paid was in the range \$50,001-\$100,000, in another it was over \$100,000 and in the final case, the level was unspecified. In most of the cases, it appeared the level of damages paid was in a range which was about half that claimed. However, one of these cases was unusual in that the plaintiff appeared to have been awarded more at trial than originally claimed (this case against a newspaper resulting in an award in the \$50,001 - \$100,000 range had involved a claim in the \$30,001-\$50,000 range. The plaintiff's lawyer did note that the matter was fought to trial because of the defendant's stupidity).

In two of the cases where damages were awarded, plaintiff costs were paid by the defendant, but they were not more than the damages. In the case settled before the damages hearing with a correction and retraction, no plaintiff costs were paid. No information on the matter of costs was given in relation to the other half of the cases.

### *3.3.5 Mode of trial*

Insufficient information was given of the mode of trial for these cases.

### *3.3.6 Length of proceedings*

In half of the six cases detailed, no information was given as to length of proceedings from beginning to end. The other three had apparently not taken too long. One case was finished within 6 months to 1 year. Two of the cases had taken 18 months to 2 years from beginning to end.

### *3.4 Plaintiff lawyers' general experience of remedies*

The six plaintiff lawyers were also asked about their general experiences and views relating to damages, to other remedies and about procedural matters such as judicial conferences and trial before judge and jury.

#### *3.4.1 Damages*

Four of the plaintiff lawyers responded to a question asking what percentage of clients do not wish to seek damages initially. Two of these thought only a small group (1-10%) did not seek damages at the outset, while one chose 26-50% and one thought 51-75% did not. One practitioner who thought the seeking of damages was common additionally commented that there was a perception that damages will gag the defendant.

When asked if they always advised plaintiffs to seek damages, two said 'no', one noting that trial can be as damaging as the initial publication, while another stated they might seek a declaration or correction. One was of the view that damages were the traditional remedy, implying that advice to this effect was given.

This group of plaintiff lawyers was asked how they went about selecting the figure of damages to be pursued as a remedy. Four responded, some nominating more than one reason. Three took into account the severity of the words used, half stated that they took into account extent of publication, and half also investigated the behaviour of the defendant to see if the damage had been aggravated, or if there was ill will involved. One used the schedule of awards of the last 20 years, and one used financial quantification if relevant. One simply stated that case experience determined the figure.

When asked if they had any special approach to remedies where the defendant is a media defendant, three of the plaintiff lawyers replied. Two said no, however, one of these stated a belief that media should correct when wrong and defend otherwise. Corrections also featured for the remaining plaintiff lawyer, who stated that a correction would be sought first, followed by court action. This indicated that corrections are seen as valuable.

These lawyers were asked whether they thought levels of damages were rising. Four answered the question. Three of these answered yes, but suggested that the rise might simply be due to inflation. One plaintiff lawyer did not think levels of damages were rising.

To the question whether claiming a large award persuaded defendants to settle, the replies were generally negative. Of the four who answered the question, one stated settlement of a large award might occur earlier if the defendant was insured, one stated that both private plaintiffs and defendants faced funding dilemmas, one stated that the strength, not the size of the claim was determinative, and one simply answered in the negative.

#### *3.4.2 Injunction*

This group was asked how easy they thought it was to obtain an ex parte injunction. Four responded and all stated that this was difficult to impossible, or very rare.

#### *3.4.3 Declaration*

Plaintiff lawyers were asked in what circumstances they would seek a declaration as a remedy. Four responded to this question and some offered more than one suggestion. Three would seek the remedy where the plaintiff did not want money because the declaration was more valuable, for example, as a speedy correction. Other individual reasons given were where a company could not prove it had suffered damage, but could show it was likely, where the defendant was impecunious or a public entity, or where there was a point of principle. One respondent thought declarations could achieve a gagging outcome because the defendant would bear the costs under the Defamation Act if they failed to resist the remedy.

#### *3.4.4 Retraction or reply*

The lawyers were asked how often and in what circumstances they sought a retraction and reply for plaintiff clients. Five responded, although one had never tried this. One stated they rarely sought anything associated with a reply because it connoted a continuing argument, while a retraction and apology connoted acceptance of a wrongful statement by a defendant. Three said they often or regularly sought this remedy, one of these stated that it was found useful where two competitors were in dispute over a statement.

### *3.4.5 Corrections*

When asked how often and in what circumstances they sought a correction, four plaintiff lawyers responded. Two stated they did so very often or almost always, while one noted they do so increasingly, about 30% of the time where the desire is to set the record straight, for example, where the plaintiff was a public figure.

### *3.5 Judicial conferences*

The lawyers were asked about their experience of judicial conferences and whether they thought the process had assisted the resolution of the matter. Only three responded, and all of these appeared to think that the potential of such conferences to assist resolution was limited. One thought conferences might come too late in the process, one thought that there had to be willingness of the parties to resolve, which was absent 50% of the time, and one thought that the presiding judge had to be experienced in defamation matters.

### *3.6 Judge and jury*

Four of the plaintiff lawyers gave reasons why they would seek a trial before judge alone as opposed to a judge and jury, and offered more than one suggestion. The reasons given were where the matter is very technical, where the plaintiff has a bad reputation, for example from previous convictions, where the plaintiff cannot afford a jury trial, where the issue may be populist, and where some other feature suggests it, such as the relevant city is parochial.

### *3.7 Conclusion on plaintiff lawyer data*

The plaintiff lawyer data is of less assistance in 'getting a feel' for what happens in practice than that collected from defendant lawyers, in part because fewer lawyers representing plaintiffs were surveyed or interviewed, fewer cases were detailed by them and more of the outcomes in the claims they detailed were incomplete. Furthermore, the plaintiff lawyer detailed cases could not be added to those of the defence lawyers to establish some percentage of possible defamation claims against the media, because there might have been an overlap in the data – in other words, the plaintiff lawyers might have been reporting some cases which were the same as those detailed by the defendant lawyers, but from a plaintiff point of view. Nonetheless, an attempt to summarise the data is made below.

The most popular remedies sought in threatening letters by plaintiff lawyers were apology and damages. Where damages were sought, they tended to be either in the \$50,000-\$100,000 or

\$100,000 - \$500,000 range. In the few claims for which outcomes were known, plaintiffs succeeded in obtaining some concession, three-quarters of which involved a settlement of some kind. Whether these involved damages and what levels were paid was unknown. In the majority of cases, the process of dealing with the claim was apparently not complex.

For the small number of claims which did not come to a full hearing detailed by plaintiff lawyers, all appeared to involve claims for damages, but the majority were in the \$50,000 - \$100,000 range. Although the majority of the claims had resulted in a settlement, only half of these involved payment of damages and levels were about half that claimed, in no case being over \$50,000. No costs were paid as part of these settlements.

The majority of the six cases detailed which involved full court hearing had outcomes which favoured the plaintiff, two-thirds of the six involving a payment of damages. Levels paid were about half that claimed in these cases, and the largest award was over \$100,000. One of these cases appeared to have considerable merit in that it resulted in an award which was greater than that claimed, although it is possible that the defendant's behaviour during the trial aggravated the damage and hence increased the award. Little useful information on costs in the cases which went to a full hearing was obtained.

When views on general aspects of remedies were sought, the plaintiff lawyers shared the view of defendant lawyers that levels of damages were not rising, except due to inflation. It appeared that while damages were popular as a remedy among plaintiff lawyers, clients were not automatically advised to seek them, and seeking a larger award was also not automatic. The majority of these lawyers also thought that ex parte injunctions were difficult to impossible to obtain. It seemed clear that these plaintiff lawyers saw the value of other remedies such as declarations, retractions and corrections in appropriate circumstances.

#### **4. Conclusion**

Although I have noted that the data obtained from lawyers is of limited value, there are compelling reasons to take proper account of the results of this part of the study, particularly those relating to the experience of defendant lawyers. Finding out how these experienced defamation lawyers set about defending the media, and asking them to detail actual threats and claims they dealt with did produce significant findings. In particular, the defendant lawyer data on the breakdown of settlements did provide detail previously missing from the media

survey and the court file study. But perhaps the strongest feature of these results is the degree to which they did, in fact, replicate or coincide with those of the media in the media survey and the data from court files I have discussed in the previous chapters.<sup>514</sup>

The lawyer data demonstrates like the media survey data that pre-vetting allows stories to be told, and that threats are dealt with at a low level and creatively in some cases. Threats are regarded as part of the daily routine of the media and are generally not seen as serious, fall by the wayside over half of the time, and are resolved at a low level the rest of the time, even where lawyers are involved. Costs associated with threats do not appear to be high.

The history of court cases detailed by these lawyers appears to suggest that gagging writs are rare, settlements are realistic and generally made where the claim has some merit, and damages are not excessive when they are paid out or awarded. This is in line with the court file search data.

Once again, it can be said that on the whole, the data in this chapter mirrors and reinforces that set out previously, and the picture of a largely unchilled New Zealand media persists and inures. Only one aspect of the empirical data remains unaddressed at this stage. In Chapter Eight, I examine the views of both media and lawyers on New Zealand's defamation laws.

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<sup>514</sup> See Chapters Five and Six above.

## Chapter Eight – Views on the law

The final part of the study sought opinion data from media and defamation lawyer respondents on various aspects of New Zealand's defamation laws.<sup>515</sup> Particular topics were raised specifically in the first three questions. In the next question, a list of topics was suggested although no specific question was asked about them. The final question was completely open, and allowed space for respondents to raise or comment on any other defamation topic they wished.<sup>516</sup> This part analyses views arising from questions about the defence called constitutional qualified privilege, and whether a special media defence is necessary, and discusses responses which raised the matter of costs in defamation actions. It also deals with unsolicited responses expressing the view that the balance of the law is currently about right. The response rate to this part of the survey was not as high as for the previous sections. It is therefore acknowledged that these responses are of value in a qualitative sense only. Where appropriate and useful, actual quotes have been extracted and isolated in the analysis.

### 1. Views of the media on the law

#### 1.1 *The defence of Constitutional Qualified Privilege*

As outlined previously, in 1998 and 2000 the New Zealand Court of Appeal outlined a form of qualified privilege defence available in defamation where the actions of politicians (past, present, or future) are being discussed.<sup>517</sup> The defence is available where the occasion justifies privilege for political speech, where there is no ill will by the publisher, and where the publisher has not taken advantage of the opportunity to publish. Media respondents were asked to comment on the defence, which allows the media more access to a qualified privilege defence than in the past. Respondents offered comments on both advantages and disadvantages they perceived.

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<sup>515</sup> In this Chapter, results from both the media survey and from the lawyer survey and interviews are presented, though in separate sections.

<sup>516</sup> The media responses include those of the Press Freedom Committee of the Commonwealth Press Union (the Committee).

<sup>517</sup> See *Lange v Atkinson* (1998) 3 NZLR 424, [2000] 1 NZLR 257, [2000] 3 NZLR 385, otherwise known as 'the Lange defence'. Cf *Reynolds v Times Newspapers* [1999] 3 WLR 1010 in the United Kingdom and *Lange v. Australian Broadcasting Corporation* (1997) 71 ALJR 818 in Australia. See Chapter Two, 1.9.1. above.

Forty-four percent of all 225 media respondents commented on the *Lange* defence. A majority of 59% (133) of these welcomed the defence. However, 34% (76) also expressed reservations about it.<sup>518</sup> These were variations of the following:

- The defence should be extended to all holding public office;
- The uncertainties associated with the defence give rise to extra costs and have a chilling effect;
- The defence imposes requirements on the media to establish responsible behaviour;
- The defence is too difficult for juries to deal with;
- The defence could be abused by the media.

### 1. 2 *A special media defence*

In the light of the developing constitutional qualified privilege, respondents were asked whether they still thought there should be a special media defence. Thirty-eight percent (85) of all 225 media respondents commented on the suggestion that a special defence be created for the media. Forty percent of these answered ‘yes’ while nearly half (45%) answered in the negative. Fifteen percent were unclear. The reasons of those who did answer in the affirmative tended to be rather simplistic:

- Media are chilled by defamation laws;
- The public has a right to be informed.

Those who answered in the negative offered a greater variety of reasons for rejecting such a defence:

- The media is professional and should be responsible;
- The laws are adequate;
- Free speech should be available to all;
- The media has a greater duty of care than ordinary people.

### 1.3. *General views on the advantages and disadvantages of the laws of defamation in New Zealand.*

Media respondents were asked to express brief views on the advantages or disadvantages of New Zealand’s defamation laws, and to include suggestions for reform where appropriate. A significant number, 37% (84), of all media, responded. Thirty-two percent of newspapers commented on aspects of the law, while half of the television respondents participated in this

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<sup>518</sup> Twenty-two percent made comments which indicated they were unclear about the defence.

section of the survey. Thirty-five percent of the radio respondents offered their views, as did forty-two percent of magazine respondents. One third of publisher respondents offered their general views on specific aspects of New Zealand's defamation laws, as did 50% of ad agency and public relations firm respondents, six of the journalist and writer respondents, and four of the multi-media respondents. No Internet Service Provider commented on the defamation laws generally. Representative comments have been included in this part, as they give the real flavour of these qualitative responses.

### 1.3.1 Costs

Fifty-three percent of newspapers responding to this part of the survey commented on the cost of defamation proceedings. Responses indicated that costs encourage or force settlement but also that small publications in particular feel disadvantaged. The following comments are illustrative:

- *Exorbitant for a small publication like us so we would look at all other options ie apology, out of court settlement, before going to court.*
- *Far too high.*
- *Protects large papers but can discriminate against ordinary person.*
- *As a student [publication] we often offend people but there is little we can do when threats are made except apologise, even when we haven't actually done anything wrong. It is too expensive just getting legal advice. We have tried getting insurance but no company is interested. This limits our ability to critique things even if we have the evidence because we simply could not afford to defend ourselves if someone really wanted to have a go. It makes us very vulnerable and we have to protect ourselves in other ways, ie not printing things that could cause trouble (self censoring.)*
- *Any litigation is going to cost money but the uncertainty of what it could cost encourages settlement out of court if possible.*
- *The cash register starts ticking straight away. But such costs serve as a reminder that we should [not] trifle with people's reputations. Our responsibility is considerable and a 'gung ho' approach is in no one's interests.*
- *Cost is of course a big factor and may influence smaller newspapers particularly to settle with an apology and a retraction rather than pursue a case which they are likely to win.*

The Committee of the CPU thought the cost of proceedings was notoriously expensive. It reported that even in relatively straightforward cases, costs of \$80,000 to \$120,000 could be incurred. The committee stated that the expense of defending unmeritorious cases pushed up the cost of newspapers, and regional and community papers found costs especially daunting. Settlements were attractive where the outcome, and the quantum of damages were uncertain, and the proceedings were lengthy. The Committee thought economic contingencies often outweighed editors' concern for the truth.

Two of the television broadcasters responding to this part of the survey highlighted the cost of proceedings, without giving more detail.

Fifty-five percent of radio broadcasters responding to this part of the survey identified the cost of proceedings as a disadvantage. The comments below illustrate the issues raised in connection with cost by this group:

- *The cost of proceedings (especially if they are prolonged) and the threat of ever increasing damages can dissuade investigative journalism for all but the most powerful of media interests. Stories with the potential to reveal corruption, conflict of interest, misuse of public funds, and influence peddling etc may remain untold because of intimidation of those able to afford legal means to threaten costly and sometimes drawn out defamation actions.*
- *[The laws are often used to 'gag' legitimate stories and prevent them going into the public arena by use of threats. Tends to intimidate smaller news organisations.*

Fifty-five percent of magazines responding to this part of the survey commented on the cost of proceedings as being too high. Typical comments follow:

- *I am becoming practiced at deflecting legal attacks without involving lawyers or other professionals. Quite simply, if a decent challenge is levelled against us the cost of defence will be too great for us to bear. In the case where my company was challenged in the High Court we were able to (through excellent actions by my lawyer) embarrass the complainant who was ordered to go back to the District Court. When he did not pursue this further we could have gone for costs as his action was 'frivolous'. We did not because costs were too high for us to pay and it was easier just to let it drop.*

- *As a small company, we are very careful to avoid defamation writs. This arguably could be at the detriment of the content of the magazine. The cost of defending any court action would pretty much bankrupt the company as we found with the first legal action. We believed we were correct but because the company suing us was so much bigger we had to settle.*

Eighty-seven percent of publisher respondents responding to this question made comments to the effect that the cost of defending defamation actions had negative effects. The following comments are illustrative:

- *There is a great temptation to simply settle in order to limit substantial legal costs. Costs and delays make it easy to bring a weak or frivolous case.*
- *If legal advice suggests that we are at risk we will always try to settle in the most economic fashion. In the cases I have experienced the publisher has also been joined by the author in the action. However as the authors are usually individuals with limited resources they tend to go along with whatever course of action is determined by the publisher.*

These publisher respondents also commented that insurance is too expensive:

- *Most small publishers (ourselves t/o of \$4M + 18 staff) simply cannot afford insurance or to take risks by way of outspoken comment – except on a general basis.*
- *More importantly and worryingly, insurance against defamation. Libel (insurance) is too expensive for most companies as it is mainly US based and therefore with colossal premiums.*

Half of the ad agency and public relations firms responding to this question raised the issue of cost of proceedings. Nearly 59% of these were public relations companies and 41% were advertising agencies. In general, these responses noted that costs were too high. However, this did not necessarily mean the respondent thought costs might have a chilling effect on media defendants. Only 24% specifically mentioned chilling effects. Forty-one percent focussed on costs as generally being a bad thing, while 35% thought that costs made it hard for *plaintiffs*, especially small plaintiffs, to bring proceedings.

Four of the journalist and writer respondents identified costs as chilling the media and freedom of expression, as did three of the multi-media respondents.

To summarise, fifty-one percent of media giving their views on the law identified costs as a cause for concern. The main reasons given were:

- Costs are too high;
- Costs are exorbitant for small publications;
- Insurance costs too much;
- The uncertainty of the cost of litigation has a chilling effect.

The concern about costs and their effect on small publications was by far the most common issue raised, being identified by 20% of these respondents.

### 1.3.2 *No significant difficulties with the law/ the balance is about right*

Nearly 29% of newspapers responding to the part of the survey seeking open-ended commentary made general comments indicating that the current law did not create significant difficulties, or had the balance about right. One respondent commented that the developing law of privacy was more of a concern. Illustrative comments are set out below:

- *Generally speaking, threats of defamation are a niggling irritant to us rather than a crushing burden. Our policy is to minimise them by taking all possible care prior to publication eg by having senior editorial executives vet problematic stories and where necessary, submitting them to our lawyers (which we do frequently). By far the majority of defamation threats are dealt with either by a simple clarification or correction, or simply lapse.*
- *From a practical point of view, I don't have major problems with the law of defamation. If the material is true, accurate and published without malice – which is what we should be doing – where are the problems?*
- *I think that current law in practice is about right. It seems to be achieving a good balance between the rights of the individual and the public right to know.*
- *We personally accept that defamation is subjective and always accidental, in essence an occupational hazard. If you set out to be provocative then you accept the risk. However a lot of people see media as a fair target for mercenary or political spin reasons.*
- *Currently constructed laws on defamation seem reasonable provided one has the defences ie the truth, qualified privilege etc. The biggest growing problem is going to be in the area of PRIVACY and its definition or interpretation by judges.*

Eighteen percent of magazine respondents responding to this part of the survey thought that the laws created no problems for magazines. The quote which follows is illustrative:

- *I believe that the defamation law as it stands is not too bad. With due care and professionalism, it is possible for the media to cover virtually any story without serious risk of a defamation action. Reputations are important and the right of individuals to defend them should not be eroded just because major publishers want to be freed to publish emotive stories about celebrities, politicians and other newsmakers for the publishers' financial gain. 'Freedom of the press' is being intoned to support changes in the defamation law at a time when major news media are running down their serious news resources. This lobbying should be seen for what it really is – commercial self interest. It has nothing to do with freedom of the press.*

One of the journalists and writers responding to this part of the survey saw no real problems with the laws of defamation. This view was predicated on recognition that the media should behave responsibly:

- *... as someone who has worked in newspapers for more than 40 years with a special interest in media law, I have never found it a hardship to work within the parameters set by the existing defamation law set up by defences etc – working within the parameters or around the law if necessary!*  
*Truth I regard as an effective defence. Turning the usual media complaints on their head I would say “if you are going to run it, make sure you can prove it. Don't say if you can't.*  
*Privilege is a great tool for revealing information and any expansion of its breadth or scope is to be welcomed. Eg: Court reveals much which is protected by privilege. But we must be there. No use bleating about cost of reportage. If we want info, be there!*  
*Honest opinion (formerly fair comment) is a complex, but useful defence. But again, it must be based on true facts and I regard that as important.*  
*I do not believe that the news media should be able to make allegations against people and not be held responsible if they are wrong or careless.*

One multi-media respondent commented on the problems faced by smaller organisations but appeared to believe overall that any problems could be overcome if the media did its job properly. This comment has therefore been added to that of another multi-media respondent

who saw no real problems with the laws of defamation, with the result that half of these respondents commenting on problems with the law saw no real problems. This view was also predicated on recognition that the media should behave responsibly:

- *The courts and justice are far too expensive for a small business to entertain. Still uncomfortable stories need to be told. Sticking to verified facts has generally served over 45 years in the trade. Facts must be dug for, not given up on or freedom of information suffers.*
- *Personally I think the requirement to get facts right is very important and shouldn't be reduced. I also think most media organisations are gutless, easily intimidated, more interested in multi-million dollar profits than pushing the envelope, and, quite frankly, contemptible. No other publisher in NZ is as heavy hitting as we are. Advertisers or old-boys network pressure has a more chilling effect on free speech than the defamation laws.*

To summarise, eleven percent of all media responding to the part of the survey seeking general comments about the law made statements that indicated they thought the balance of the law was acceptable or manageable to the media. These views can be summarised as follows:

- Care and responsibility can overcome most problems;
- The balance between the public right to know and the rights of the individual is about right;
- Privacy is a greater problem.

Although this result is not useful in a quantitative sense, I suggest it is has some qualitative value, because the comments were unsolicited, and are thoughtful, strongly-reasoned and lack self-interest. The comments are also consistent with the reported experience of media defence lawyers on vetting.<sup>519</sup>

## **2. Views of defendant and plaintiff lawyers on the law**

The final part of the lawyers' survey sought the views of both plaintiff and defendant lawyers on the same aspects of the law as had been raised with the media. The 10 lawyers were asked specifically about the *Lange* qualified privilege defence, whether there was a need for a

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<sup>519</sup> See Chapter Seven, 2.2 above.

special defence for the media, and the issue of costs. The lawyers could also nominate and give views on any other aspect of the law of defamation which concerned them

### 2.1 *The defence of constitutional qualified privilege*

Seventy percent of lawyer respondents indicated that they welcomed the extended defence generally. A sample of these views is set out below.

- *It's a god send to the media. Politicians used to benefit from this area of the law more than most. Now, there is a greater degree of protection for the media commenting on a politician's record. ...I think it's a great defence "in name" for the media because it will make politicians a little more wary about suing the media.*
- *In my view, Lange has extended the defence of qualified privilege from that previously understood. The extension should benefit freedom of expression (information) and the media.*
- *In my view this type of defence should be available in a robust democracy.*
- *Provides a defence with some degree of certainty.*
- *I support the decision overall. [In] a small country like New Zealand where MMP is the system, politicians too long getting mandates etc, it allows deeper scrutiny.*
- *I believe the defence is very useful.*

However, strong reservations were also expressed by 60% of respondents and these are set out below:

- *I see serious proof problems, ... For example, when it is "political". What measure governs "responsibility". It's difficult to know when it will be applied and when it won't!! For example, when will it be "political" and when will it not? By what measure are the acts of the journalist to be considered responsible or irresponsible?*
- *The concept of responsibility does not sit well with the concept of qualified privilege which you only need when you are wrong.*
- *The second Lange decision was wrong. Justice Tipping's judgment was wrong. A conservative view had been taken of the position of the media by importing other areas of tort law. Only lip service was paid to s. 14 values, as opposed to a possible chill of freedom of expression.*
- *In purist terms, unattractive for courts (or Parliament for that matter) to import concepts of fault into this cause of action but to restrict it to the public figure.*

- *Lack of certainty on what will be “irresponsible” and effect on newspaper sources remains to be seen.*
- *...so long as it does not turn the defence of honesty into one of reasonableness*

Thus, it is apparent the main objection to the defence from defamation lawyers was that raised by the media,<sup>520</sup> a fear that the defence imposes something like a duty of responsibility on the media, which may result in investigation of its working methods. However, one fifth of the defamation lawyers saw no difficulty in this:

- *I think duty of care should be on the media. It is the only profession with immunity. Care means reasonable care, looking at a balance from both sides. The press can ensure this is done. Good journalists take care anyway.*
- *I think it is good that media methods are investigated, so long as it does not turn the defence of honesty into one of reasonableness.*

One other response also looked forward to future development of the defence, implicitly recognising that its ambit would be further litigated:<sup>521</sup>

- *It will be interesting to see whether there are further extensions beyond the type of publication named in Lange.*

These views mirror those of the media to a large degree,<sup>522</sup> except that there was no suggestion that the defence is too difficult for juries to deal with or that the defence could be abused by the media.

Just how far *Lange* can be extended in New Zealand still remains to be tested. There has been a paucity of case law, and the only other Court of Appeal decision so far is *Vickery v McLean*.<sup>523</sup> However, it is clear from the responses to the interviews discussed in this chapter that the defence was being used in a number of claims which had not come before the courts almost immediately after the *Lange* litigation was finally concluded. I consider the *Lange* case to be the most significant development in modern New Zealand defamation law. I discuss in Chapter Nine below what that significance is and also make some suggestions as to what future direction this emerging common law doctrine might take.

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<sup>520</sup> See 1.1 above.

<sup>521</sup> As has indeed occurred: see Chapter Nine, 1.1 below.

<sup>522</sup> See 1.1 above.

<sup>523</sup> Unreported, Court of Appeal, CA 125-00, 20 November 2000.

## 2.2 A special media defence

Seventy percent of lawyer respondents answered the question whether there should be a special defence for the media. Over half of these replied in the negative. Of the three who suggested that some sort of special protection was required, two put forward special adaptations of the *Lange* defence discussed above:

- *Yes but I wonder whether “responsibility” should be replaced with more easily and objectively understood parameters eg publication is made (a) with the personal approval of the editor or director of news; and (b) designed to contradict either a statement, policy, principle or action of the particular (solicitor) individual about whom the statement is published.*
- *It would be nice for the media to have a wider public interest/qualified privilege defence as seems to be the effect of the English decisions. I believe that Lange and any wider defence will be tagged with a constraint that the defence will be lost unless the defendant proves it acted reasonably (which would normally include putting the defamatory matter to the defendant for comment). The precedent is in S10 where the defendant must prove genuineness.*

The other was concerned simply to preserve confidentiality of sources. Thus, these views were directed more at developing the *Lange* defence or controlling it, rather than at suggesting there was a real need for a special defence for the media.

## 2.3 Costs

Sixty percent of the defamation lawyers made comments about costs associated with defamation actions. All were of the view that proceedings were costly. However, only half of these had strongly negative views, one of these being focussed on the cost of court fees:

- *Juries are costly and will be even more costly if the proposed changes to the scale of H.Ct. fees goes ahead unchanged! In fact the whole cost of this litigation will increase by 20 – 25% solely on account of fees/rates.*
- *Defamation proceedings are costly for all parties and the outcomes are quite uncertain (more so than many other areas).*
- *I believe the cost of proceedings is high.*

The other half of these respondents did not think that the high cost of proceedings was a feature only of defamation proceedings:

- *All proceedings need to cost less.*
- *Defamation proceedings in the District Court or the High Court can be expensive but no more or less than other similar litigation.*
- *[Costs are] high but not enough thought goes in at an early stage, therefore declaration should be used more. Need to weigh up the costs more.*

#### 2.4 *No significant difficulties with the law/ the balance is about right*

Five lawyer respondents made detailed comments about the state of defamation law generally and whether it had a chilling effect on the media. Two of these respondents carried out almost exclusively defendant work, one acted for defendants 60% of the time, another for 50% of the time, and the other did plaintiff work 80% of the time.

One defendant lawyer expressed a strong view that an unacceptable chilling effect exists and affects television in particular:

- *the public perception of the media is that it was big and powerful and has lots of money... Only lip service is paid to s. 14 values, as opposed to a possible chill of freedom of expression... A further chill factor is that the courts are more conservative and more anti media at the moment. There is a failure by the judiciary to understand how the media operates. None of the members of the judiciary have acted for the media. Most have acted for corporate or done family law cases and jury cases. Television is seen as having a “deep pocket”. [Large damages] have a chilling effect in that [they create] a general feeling of “why try investigative journalism?” In the last ten years, there has been a definite chill effect from awards of damages. A general retreat from media freedoms in both the United States and New Zealand.*

However, the majority of these respondents did not think defamation laws had an excessive chilling effect:

- *There is no need to give [freedom of expression] any extra importance, nor to claim that the threat of a defamation claim gives a “chilling effect” to the media. Responsible, accurate and careful media reporting needs to be emphasised, rather than the promotion of freedom of expression per se.*

- *It should be very seldom that an article vetted by a lawyer is spiked for defamation. In many cases the message in an article can be conveyed by way of honest opinion – thus having a defence to a defamation claim. Also in many cases a small alteration in the language can eliminate defamation or reduce the risk to an acceptable level, without losing the message. It should be very seldom that a defamatory article is published without the journalist and the editor being aware of the defamatory content and making appropriate decisions in relation to its publication. It should be very seldom that an article which has been vetted will give rise to a defamation claim – except where the risk has been advised and has been accepted by the editor... I appreciate that these views are from someone who has trained in and specialized in the defamation field. It may be that the common reporter and the ordinary editor of newspapers in New Zealand do not have such a knowledge of the law and that they are, therefore, inhibited to what they perceive they can publish. I think research would show that in many cases the defamation has arisen from a publication in which neither the editor or reporter recognized any defamatory content. Thus, in those circumstances, there has not been chilling effect on that publication – as the defamatory content was not seen.*
- *Media interests value the boundaries. They are robust and courageous. For example the Independent. Warren Berryman from the NBR is well seasoned and will not let the threat of litigation stop him. There is therefore no chill when you issue proceedings. An attempt to gag has the reverse effect. Using the affirmative defences for finding other ways, cut out salacious bits and refer to proceedings if issued as much as possible. However, I sense broadcasters are more easily dissuaded if threatened, although there is more money there. The courts will not injunct to prevent broadcasts however. I think the state broadcaster backs off more than TV3.*
- *Yes! There is a chilling effect arising from our defamation laws in New Zealand. Whether it is inappropriate is another question. I am not totally convinced it is inappropriate. I cannot recall an occasion when a newspaper or television did not publish if it had the evidence required to publish. It would usually alter words if they were defamatory. I believe the vast bulk of defamations happen accidentally and they relate to identity, meaning, fact, or carelessness. The question of chilling effect is irrelevant to those. No real investigations have been prevented by any chilling effect as far as I am concerned. I constantly make decisions about television programmes. I*

*look for a bit of supporting evidence and generally speaking there will be enough to show that the programme is right or right enough.*

### **3. Conclusion on views on the law**

The further data presented in this chapter, giving selected significant views of media and media lawyers on the law, although only qualitatively useful, further confirms the apparent lack of any excessive chilling effect in the law. It is clear that both media and media lawyers value the new defence opportunities presented by the *Lange* decision, but have significant reservations about whether it will impose some sort of duty of care on media in order to claim the defence. However, a significant minority view from both groups of respondents recognised that some sort of duty or requirement to behave reasonably might not be too onerous on the media at all. These results were complemented by the responses to the question seeking views on the need for a special defence for media. In both media and lawyer groups, a majority did not think a special defence was necessary. Such results point to reasonable satisfaction with the current state of affairs.

As to the question of costs, the views of media and media lawyers once again coincided. Both groups identified costs as too high and as leading to uncertainty and therefore a chilling effect, particularly on small enterprises. The lawyer respondents additionally identified court fees as problematic in particular.<sup>524</sup> However, half of the lawyers responding on this issue thought that high costs were a feature of all proceedings, or could be kept at manageable levels. The lawyers did not identify their own charges as adding to costs, nor suggest that legal fees might be lowered. These results confirm that further investigation of this issue would be useful. However, the issue of costs is one of access to justice generally, and any study of defamation law and costs should be part of a more general study of the costs of civil litigation overall.

A notable unsolicited view emerged from both media and lawyers indicating that the current balance in the law is about right. This seemed predicated on the idea that care and responsibility could overcome most problems the media face in telling stories of public importance. In particular, even some defendant lawyers thought the media could be robust and

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<sup>524</sup> The New Zealand Law Society and the New Zealand Bar Association complained about the fees in August 2004: Complaint to the Regulation Review Committee on the Civil Court Fee Increases Effected by Regulation, August 2004. The Committee investigated and reported in 2005: Investigation and complaint about civil court fees regulations 2004 *Report of the Regulations Review Committee February 2005*. It recommended that the Government undertake a review of the regulations that set civil court fees: *ibid*, 5.

courageous, and that no real investigations were prevented by a chilling effect of defamation laws. A shared view also emerged that most defamations arise from accident or carelessness, in which case, any chilling effect cannot operate because the danger of defamation has never been identified at all.

It will be very apparent to the reader at this point that the results of my empirical study have remained fairly consistent, and indeed, have become clearer over time. In the next, and final substantive chapter of this thesis, I attempt to enhance my empirical analysis with a theoretical analysis of the impact of New Zealand's developing constitutional law on the law of defamation.

## Chapter 9 - Defamation and freedom of expression: the way ahead

To recap, when I first analysed the data presented above, I surmised it tended to show that the operation of defamation law on a dynamic, generally assertive New Zealand media, backed by strong foreign ownership, does not produce excessive chilling effects, although clearly it produces some falling more heavily on small media enterprises, and on particular sectors such as magazines and book publishers. Even now, the findings still seem somewhat surprising. While the study was developed to test a positive assertion, nonetheless I was struck by the results. This is because the chilling effects argument has a powerful emotive appeal and has been strongly advanced by the media. The media is in an excellent position to promulgate and reinforce such a message and has a valid self-interest in doing so.<sup>525</sup> Hence, arguments going the other way tend to receive little coverage in the mainstream media.<sup>526</sup> In contemplating this, I concluded that the empirical results of the study would be enhanced by further theoretical examination of the growing influence on New Zealand law of the right of freedom of expression.

In this chapter, therefore, I examine how the New Zealand Bill of Rights Act 1990 is having and might go on to have, an impact on defamation law. I investigate how the common law could be and is being, modified in ways which also minimise any potential chilling effects. This involves an examination of the recent extension of the defence of qualified privilege, and development of the procedural requirements relating to prior restraint and speculative claims.<sup>527</sup> I conclude that these modifications of both the substantive and procedural law should be fully extended and applied. I then go on to suggest that a more transparent and consistent application of the Bill to freedom of expression issues arising in defamation cases is possible and desirable, and I develop a possible model which could inform such a process. I conclude that a combination of these strategies will mediate, ‘repair’ and limit possible chilling effects inherent in New Zealand defamation law, such as they are.

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<sup>525</sup> M David Lepofsky “Making Sense of the Libel Chill Debate: Do Libel Laws Chill the Exercise of Freedom of Expression?” (1994) 4 *NJCL* 168.

<sup>526</sup> My own experience tends to confirm this view. The findings of my study received no media coverage, critical or otherwise, other than by a state broadcaster, through Radio New Zealand’s Media Watch programme: interview with Colin Peacock, 4 December 2005.

<sup>527</sup> A similar approach was taken in the Weaver study: R Weaver, A Kenyon, D Partlett, & C Walker, *The Right to Speak Ill — Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006).

Lepofsky correctly identifies that there are competing and complimentary values at stake in any defamation chill debate,<sup>528</sup> indeed in any defamation claim. Unfortunately, the media often presents such claims as a simplistic stand-off between a selfish, personal right to protect good name and reputation, and the public's right to freedom of expression. However, Lepofsky unpacks this rather crude approach and identifies public interest values on both sides of the equation. He suggests the value of a person's good name and reputation goes to personal dignity and worth as a human being,<sup>529</sup> but also that reputation allows us to interact socially,<sup>530</sup> to survive economically, and to maintain self-image and worth.<sup>531</sup> Democratic values are also served by defamation law because there is a public interest in not deterring good candidates for public office from seeking office by leaving them vulnerable to defamation.<sup>532</sup> As to freedom of expression, the values underlying it have been identified as its role in facilitating the emergence of truth in the marketplace of ideas, in maintaining and supporting open democracy, and in promoting the ultimate good of a liberal society where citizens are able to say and publish to others what they want as an expression of their liberty.<sup>533</sup> Some courts recognise these distinctions,<sup>534</sup> but this is not commonplace.

One complaint made by media is that in defamation (and other) cases, insufficient weight is given to freedom of expression, or that it is not addressed and weighed at all. The advent of the New Zealand Bill of Rights Act 1990 (the Bill), with freedom of expression enshrined in s 14, presents a legal device to which the chilling effects doctrine can be allied in some way and perhaps enhanced. However, once again, such an approach may be too simplistic. In this chapter, I examine how freedom of expression and the Bill have already influenced New Zealand defamation jurisprudence, both indirectly and directly. I suggest that our courts are moving in the right direction, but that there is yet more distance to cover. I also make some suggestions as to the future interaction of the common law, freedom of expression and the Bill.

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<sup>528</sup> See Lepofsky, n. 525 above, 197.

<sup>529</sup> Ibid, 197.

<sup>530</sup> Ibid.

<sup>531</sup> Ibid, 198.

<sup>532</sup> Tipping J in *Lange v Atkinson* [1998] 3 NZLR 424, 474 (*Lange No 1*).

<sup>533</sup> Tipping J in *Hosking v Runting* [2005] 1 NZLR 1, [233], Rishworth, Huscroft, Optican and Mahoney, *The New Zealand Bill of Rights*, (2003, OUP), 309.

<sup>534</sup> Eg: Elias J in the High Court in *Lange v Atkinson* [1997] 2 NZLR 22, 31.

## 1. The impact of freedom of expression on the common law

Of course, freedom of expression existed as a right prior to the enactment of the Bill,<sup>535</sup> but this ‘über-right’ and indeed, all of the rights in the Bill, were both confirmed and preserved by it.<sup>536</sup> More than this, bills of rights can and should be transformative,<sup>537</sup> moving areas of the law which impact on rights in directions hitherto neglected, or allowing development of more sophisticated principle to occur at a speedier pace. In short, although freedom of expression could have been taken account of by the courts prior to 1990, the enactment of the Bill has elevated the rights consciousness of the general public, the media and the legal fraternity in New Zealand. This has flowed through into the case law, although not consistently, as will be shown. I turn first to examine a number of cases where important strides have been made in terms of freedom of expression.

### 1.1 *Constitutional qualified privilege*

It will be obvious that the *Lange* litigation is the strongest recent example of development of the common law motivated by concerns about freedom of expression. Remarkably, *Lange* privilege has been slow to consolidate and grow from there, with only two significant reported cases so far, years apart. In *Vickery v McLean*<sup>538</sup> the Court of Appeal refused to apply the defence to statements about local council employees, but the judgment contains obiter dicta that it might apply to local as well as national politicians.<sup>539</sup> As many predicted, the subject matter of the defence is apparently open to expansion. However, the Court also stated a limitation, that allegations of serious criminality did not attract the defence, because they should not be disseminated too widely. Overall, the judgment is cautious.

More recently, *Osmose New Zealand v Wakeling*<sup>540</sup> surprised many commentators, because the High Court appeared to extend the defence, and to treat it as one of public interest, like *Jameel v Wall Street Journal* in the United Kingdom.<sup>541</sup> Osmose made and supplied timber preservative products, and it alleged two individuals, Dr Wakeling and Dr Smith, made false and damaging statements about those products. Although some of the statements were published in the media, unusually, Osmose did not pursue any media interests, alleging

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<sup>535</sup> See *Lange No 1*, n. 532 above, 460-461. See also s. 28 of the Bill.

<sup>536</sup> See the long title to the Bill: ‘a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand;’ also s. 2 and Paul Rishworth in Rishworth et al, n. 533 above, 31.

<sup>537</sup> Ibid.

<sup>538</sup> Unreported, Court of Appeal, CA 125-00, 20 November 2000.

<sup>539</sup> Ibid, [17], per Tipping J.

<sup>540</sup> [2007] 1 NZLR 841.

<sup>541</sup> [2006] UKHL 44, [2007] 1 AC 359. See the discussion at Chapter Four, 2.2 above.

instead that the first and second plaintiffs were responsible for the chain of publication. However, Wakeling and Smith joined Television New Zealand, Radio New Zealand, APN New Zealand and Fairfax New Zealand as third parties, in a procedure rarely used for defamation. This decision of Harrison J dealt with applications by the media to have the third party notices set aside.

The judge made a strike out order, because he was in no doubt that the articles published by the newspapers were published on an occasion of qualified privilege, and that the broadcasters which published would be protected by the defence of qualified privilege if the plaintiff had sued them directly. Harrison J found the articles were published on occasions of qualified privilege because the material published was of public concern. This was based on the fact that New Zealand has significant home ownership, and in recent years has had to confront a high national incidence of leaky homes suggesting some systemic failure in the building industry which has justified government intervention. Furthermore, the government had endorsed Osmose's product following an inquiry into leaky homes. The finding of public interest appears to break down the limitation imposed in *Lange*, that the subject matter to which the defence of constitutional qualified privilege can apply is discussion about politicians, past, present or future.<sup>542</sup> Harrison J did not justify his decision on the basis of extending *Lange*, but spoke instead in generalised terms about public interest, as if that were already sufficient to trigger the defence. However, it is a significant jump from *Lange* to *Osmose*, and the latter does not appear to take the leap on the basis of precedent.

The case against the media was settled in *Osmose*, but in spite of the lack of detailed reasoning in the High Court judgment, I do support this aspect of it. This is because if more than lip service is to be paid to freedom of expression, the political discussion defence should not be interpreted in a restrictive way. There was genuine public interest in the *Osmose* publications, and the topic of leaky buildings is exactly the sort of subject matter to which the defence should be extended in New Zealand, thus drawing our law closer to that in the United Kingdom. It was accepted in *Lange* that our media is more responsible than that in the United Kingdom, and so it is incongruous for our law to be more restrictive of freedom of expression than that jurisdiction.

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<sup>542</sup> *Lange v Atkinson* [2000] 3 NZLR 385, at 390-391, and 400 (*Lange No 2*).

The other aspect of *Osmose* which is striking is the treatment of the question of loss of the privilege. Under s 19 of the Defamation Act 1992, and as discussed in *Lange*, a defendant must not be motivated by ill-will against the plaintiff, must not take improper advantage of the occasion of publication, and should not be reckless, in the sense of irresponsible, in publishing the statements. On the question of misuse of the occasion, Harrison J accepted that the content of the publications by TVNZ, APN and Fairfax contained a range of views, not just those of Dr Wakeling and Dr Smith, and therefore this did not indicate misuse of the opportunity to publish. An alternative argument was raised that the media might have known that Dr Wakeling had previously been engaged by *Osmose*'s leading competitor and that Dr Smith was politically motivated. The judge thought that such arguments, if accepted, amounted to admitting that the defendants themselves had ulterior motives, which would deprive them also of qualified privilege as a defence to the main action. A final argument sought to establish that the media third parties had published with reckless indifference to the truth or otherwise of the statements of Wakeling and Smith. Here the judge considered the defendants faced the same problem of being themselves tainted by such arguments, which suggested they were not trustworthy and reliable despite being an apparently well-qualified scientist and a senior politician. The judge would not deprive the media of the defence.

Unfortunately, this approach absolves the media of any responsibility at all, is inconsistent with media ethics, and allows the character of the originator of allegedly defamatory statements to determine the question of irresponsibility of the media, when it is the specific behaviour of the media which should determine the issue. *Lange* made it very clear that the privilege must be responsibly used: 'There is no public interest in allowing defamatory statements to be made irresponsibly – recklessly – under the banner of freedom of expression'.<sup>543</sup> The first duty of the media is to get the facts right if at all possible, not simply to republish press releases, whether they come from reputable sources or not. The question of the defamatory nature or otherwise of the statements in *Osmose* has yet to be determined at trial, and even reputable parties are perfectly capable of getting things horribly wrong, so it may clearly be irresponsible not to check the reliability of sources. The Broadcasting Standards Authority in fact found so in dealing with separate complaints from *Osmose* about TVNZ's coverage, holding that the items lacked balance and the broadcaster had not taken steps to ensure that its sources were reliable.<sup>544</sup> Further, other areas of the law, such as the law

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<sup>543</sup> *Lange No 2*, at [48].

<sup>544</sup> See *Osmose New Zealand v Television New Zealand*, BSA Decisions 2005-115, and 2005-140. Standard 4 of the Free-to-Air Television Code of Broadcasting Practice requires reasonable efforts to be made to

of contempt, do not give leeway for publishing in reliance on apparently reputable parties<sup>545</sup> The contempt convictions of the media in that case arose from the specific acts of adoption and embellishment by the media, not from repetition of Dr Smith's publication.

The court in *Osmose* was prepared to accept that none of the media third parties conducted any inquiries. The Court of Appeal has recently noted that qualified privilege 'is concerned with the terms and circumstances in which the defamatory statement came to be repeated.'<sup>546</sup>The question which should then have been asked by the High Court in *Osmose* was not how apparently reputable the defendants were, but what it was reasonable for the media in question to do in all of the circumstances. The reputation of the defendants would be but one feature of this inquiry. The issues which should also have been considered were the degree of public interest in the story and any risk of public alarm it might cause, the risk to the commercial and reputational interests of the plaintiff, and how easy it would be to check accuracy and get the other side of the story. Taking such matters into account in *Osmose* may have made a difference to the eventual outcome. From the BSA complaint, it appears that TVNZ actively refused to give Osmose an opportunity to participate in the programme even though it requested this,<sup>547</sup> and this is a feature of media behaviour which should not have been ignored.

Had the plaintiffs in *Osmose* pursued Dr Wakeling and Dr Smith and the media parties jointly, I believe these difficulties with the qualified privilege defence would not have arisen. All defendants would have raised the qualified privilege defence, and it would have fallen to the plaintiffs, not Wakeling and Smith, to plead particulars of ill will or misuse of the opportunity to publish.<sup>548</sup> The Defamation Act recognises that the ill will of a joint defendant does not infect another so as to lead to loss of qualified privilege,<sup>549</sup> and the approach of the court should reflect this. Because of the unusual form the proceedings took in *Osmose*, it is arguable the judge treated the behaviour of media and non-media parties as too much alike

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achieve balance in preparation and presentation of news, current affairs and factual programmes, Standard 5 requires accuracy, with Guideline 5(e) requiring reasonable steps to be taken to ensure sources are reliable, and Standard 6 requires fairness.

<sup>545</sup> *Solicitor General for New Zealand v Smith* [2004] 2 NZLR 540.

<sup>546</sup> *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350, [92].

<sup>547</sup> *Osmose New Zealand v Television New Zealand*, BSA Decision 2005-115, paras 5, 6 and 11.

<sup>548</sup> Defamation Act 1992, s 41.

<sup>549</sup> *Ibid*, s 20(2).

and in too generalised a fashion – in other words, he failed to give due weight to the special position of the media as the fourth estate.<sup>550</sup>

It is my hope, therefore, that our senior courts will take the opportunity to open out the *Lange* defence to become available for publication of material which is the public interest generally, and, when required to investigate media behaviour under s 19 of the Defamation Act, will do on an individual basis but also in a generous manner which does not involve retrospective editorialising and which is based on a realistic view of contemporary newsgathering,<sup>551</sup>

For the same reasons, it is my view that New Zealand courts should adopt the concept of reportage, allowing the neutral reporting, even without verification, of both sides of political and other disputes of public interest, so long as there is no adoption or embellishment. The defence should be interpreted liberally, allowing for the nature of the publication and devices of language which give colour, such as sarcasm or strong description, so long as this does not amount to adoption of one side's position over the other.<sup>552</sup> Unlike the *Lange* defence, reportage should also be capable of applying to serious allegations, including criminality,<sup>553</sup> because it requires the position of both sides to be presented in a neutral way. The reportage defence is likely to be applied restrictively, in part because on one view it modifies the repetition rule,<sup>554</sup> but also because although some leeway should be allowed, it requires rigorously balanced reporting.

### 1.2 *The approach to prior restraint*

The Bill has directly influenced the approach to the equitable discretion to order prior restraint in New Zealand. Since 1990, it has been emphasised by the Court of Appeal that it is not part of the function of the court to act as a censor, and that the jurisdiction to restrain is exceptional. In *TV3 Network Services Ltd v Fahey*,<sup>555</sup> the Court of Appeal affirmed its view that an interim injunction will not be granted readily in a defamation case because of the need

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<sup>550</sup> In *Simunovich*, the Court of Appeal noted that where media repeat what is said by others, many more people are likely to think badly of a plaintiff, partly because they will assume the media would not have reported unless there was something in the story: n. 546 above, [90]. Although the Court was discussing the repetition rule in this context, this observation also supports the media responsibility limb of the *Lange* qualified privilege defence.

<sup>551</sup> I have no doubt that legal counsel are now advising media defendants to plead the defence as one of public interest generally: for example, this was the advice of William Akel, leading counsel on media law, at New Zealand Law Society Media Law Seminar, 15 April 2008.

<sup>552</sup> See *Roberts v Gable* [2007] EMLR 457, [61].

<sup>553</sup> *Ibid.*

<sup>554</sup> See eg: Sedley LJ in *Roberts v Gable*, n. 552 above, [74]. But cf, Ward LJ in the same case, who thought the two do not conflict: [54] – [59]. See also *Simunovich*, n., 546 above, [74].

to preserve freedom of expression. The jurisdiction to prevent publication is 'of a delicate nature' and 'ought only to be exercised in the clearest cases'.<sup>556</sup>

In *Fahey*, following broadcast of a television programme containing allegations of sexual misconduct by a prominent doctor against his patients, a former patient of the doctor attended his rooms for a consultation. In reality her purpose was to secretly film him while confronting him with allegations of sexual misconduct carried out on her some years before. The hidden camera she carried was supplied by the appellant. The doctor, who had issued defamation proceedings following the first programme, obtained an ex parte interim injunction preventing broadcast of a second programme, which used the film surreptitiously obtained. That decision was overturned on appeal. The respondent argued that broadcast would interfere with the administration of justice in the existing defamation proceedings and with a possible later action for trespass and invasion of privacy. The court emphasised that restraint should only be exercised for clear and compelling reasons and noted that where the competing rights of freedom of expression and the right to a fair trial could not be balanced, it might be appropriate to curtail media expression temporarily.<sup>557</sup> However, it declined to do so in this case. There was no evidence to convince the court that screening of the programme would have a real likelihood of prejudicially affecting the fair determination of the issues in a later defamation trial.

Furthermore, the Court of Appeal was prepared to overlook unlawful behaviour by the broadcaster in refusing to exercise its equitable jurisdiction in this case. This was largely because of the high public interest in the broadcast. The Court balanced the competing rights and values by addressing the context, public interest in the broadcast, and the adequacy of damages as an alternative remedy. Although it considered that TV3 may have had mixed motives in obtaining and showing the film, the Court concluded this was an understandably pre-emptive course of action because the respondent had attacked the patients who had accused him in the first programme, and there was a legitimate interest in the exposure of public misconduct. The film gave the programme credence because in it the respondent went some distance to acknowledging misconduct. This considerably increased the public interest in broadcast. Finally, there was no harm not reparable by an award of damages. Although the

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<sup>555</sup> (1998) 12 PRNZ 443. See also *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46.

<sup>556</sup> *Wm. Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846 at 846 per Lord Esher MR.

<sup>557</sup> *TV3 Network Services Ltd v Fahey* (1998) 12 PRNZ 443, applying *Gisborne Herald Ltd v Solicitor-General* [1995] 3 NZLR 563, 567. See also *Solicitor-General v Fairfax New Zealand Ltd*, Unreported, High Court Wellington, CIV 2008-485-000705, 10 October 2008, [81].

approach in *Fahey* was generous to media interests and cognisant of freedom of expression, the Court emphasised that its decision should not be taken to support any general proposition that the ends of newsgathering justify the means.

*Fahey* is now the leading case on prior-restraint and freedom of expression and has influenced other areas of the law.<sup>558</sup> Unfortunately, it is sometimes not applied when it should be. For example, in *Brash v John and Jane Doe*,<sup>559</sup> Opposition Leader Don Brash successfully applied ex parte for an interim injunction restraining persons unknown from communicating the contents of emails belonging to Mr Brash which may have come into their possession. The order was very broad, requiring all copies of the emails to be given into the custody of the Registrar of the High Court by persons served with a copy of the order, although leave was reserved to any defendant to apply to the Court for rescission or variation.<sup>560</sup> What is wrong with the order is that its impact on the media and freedom of expression was not considered. These proceedings were highly unusual and arose after Mr Brash became aware some of his private emails had been leaked and were rumoured to be about to be published in a book. Although the judge referred to a previous New Zealand intellectual property case where unknown defendants had been the subject of an injunction,<sup>561</sup> that case did not involve the media as potential parties. However, Mackenzie J applied the ordinary tests for applications for interim injunctions – whether there was a serious question to be tried and whether the balance of convenience favoured the granting of the injunction. The Court did not require the applicant to proceed on notice because that would cause undue delay and prejudice.

The *Fahey* decision requires the Court to go further than applying the ordinary tests, and instead look to the plaintiff to show *clear and compelling* reasons why an injunction should be granted. One effective way to do this would be in the context of a Bill of Rights analysis, whereby the limits imposed on freedom of expression by granting the application must be ‘reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’<sup>562</sup> The Court might have done this by hearing from the media as a clear potential defendant in the *Brash* case. Media interests had been recognised about a week earlier by Mr Justice Eady in the United Kingdom in an application to vary a ‘John Doe’ order he had made

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<sup>558</sup> See eg, *Hosking v Runting* [2005] 1 NZLR 1 (privacy).

<sup>559</sup> Unreported, High Court, Wellington, CIV-2006-485-2605.

<sup>560</sup> *Brash v John and Jane Doe* Interim Injunction and Related Orders, 16 November 2006.

<sup>561</sup> *Tony Blain Ltd v Splain* [1993] 3 NZLR 185.

<sup>562</sup> New Zealand Bill of Rights Act 1990, s 5.

previously on privacy grounds.<sup>563</sup> That judge indicated that interested media parties should have been given notice of the application. The *Brash* decision is generally defective because it contains no reference to freedom of expression issues or the Bill of Rights,<sup>564</sup> and a clear and consistent approach to the *Fahey* decision in prior restraint cases would avoid such outcomes. I make suggestions as to such an approach below.

### 1.3 *Speculative cases*

Although rare, New Zealand courts have recognised arguments based on the Bill invoking available procedures to strike out ‘gagging writs’. In *Travers v Television New Zealand Ltd*,<sup>565</sup> the High Court made an order striking out defamation proceedings for want of prosecution, referring to the claim as a ‘gagging writ’ with no prospect of going anywhere. Although the power to strike out under s 50 of the Defamation Act 1992 if no date has been fixed for trial or no other step has been taken within 12 months of the date of the application, is discretionary, the onus is on the plaintiff to present adequate reasons why the matter should not be struck out.<sup>566</sup> In *Travers*, the plaintiff could not produce evidence to show he had taken active steps, and the Court found the submission of the defendant asking it to give full recognition to freedom of speech contained in s 14 of the New Zealand Bill of Rights Act 1990 to be compelling.

## 2. **The true place of the Bill of Rights in defamation law**

The cases discussed above show how freedom of expression arguments can produce both substantive and procedural changes in the common law and therefore, defamation law, which, in turn, must logically limit and reduce any potential chilling effects. However, as discussed, those changes do not yet go far enough. While it is clear that judicial acceptance of well-presented arguments about freedom of expression, or judicial willingness to fill the gaps where such arguments have not been made, do make a difference to the outcome, the approach has not been consistent. In some cases, there is brief but general reference to freedom of expression, in others, this is tied to the Bill but still dealt with in rather a shallow way, and in yet others, detailed arguments based on the Bill are addressed. I now intend to

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<sup>563</sup> See *X & Y v Persons Unknown* [2006] EWHC 2783 (QB).

<sup>564</sup> CanWest Mediaworks indicated that it intended to challenge the order. However, Mr Brash asked the Court to withdraw it as soon as it became clear that an author, Nicky Hager, was intending to publish a book which contained information from emails provided by members of Mr Brash’s party. In a press release, Mr Brash stated that this book was a surprise to him and was not the target of the injunction. Mr Brash resigned as Leader of the National Party following the publication of Mr Hager’s book.

<sup>565</sup> Unreported, High Court, Auckland, CP 92-SD00, 4 September 2001.

<sup>566</sup> *Mountain Rock Productions Ltd v Wellington Newspapers Ltd* [1997] 3 NZLR 31.

examine in more detail how our judges have been attempting to deal with the Bill of Rights in defamation cases, and to make some suggestions as to a more consistent, transparent approach. Before turning to this analysis, however, it is necessary to briefly consider how the Bill might even apply to the common law generally to begin with.

### 2.1 *Can the Bill apply to defamation cases?*

As I have observed elsewhere in relation to the developing tort of privacy,<sup>567</sup> there is no statutory requirement to carry out a human rights or bill of rights analysis in relation to actions between private citizens. New Zealand's Bill was intended to have only vertical effects: it applies to the three branches of Government and bodies exercising public functions,<sup>568</sup> and thus in general only protects private citizens from the state.<sup>569</sup> In spite of this, it is clear that a process of constitutionalisation of our private law has begun. Although there is ongoing disagreement,<sup>570</sup> the New Zealand judiciary appears to accept it must take account of the rights in the Bill somehow when resolving disputes between private citizens and when developing the common law.<sup>571</sup> Because this process does not produce directly enforceable rights, the horizontal effect is usually regarded as weakly or strongly indirect.<sup>572</sup> It is given content in two ways: by arguing that judges are simply bound by the Bill as the judicial arm of the state, or by arguing that judges are implicitly required to take account of the values expressed in the Bill of Rights. The judiciary often appears to endorse or use both approaches.

The question of horizontal effect of New Zealand's Bill of Rights cannot be fully explored in this broad paper about defamation. However, I consider that the argument of Rishworth and others that indirect horizontality in the common law is not only inevitable, but desirable,<sup>573</sup> is compelling, and opposing arguments to be rather arid. Defamation claims are suffused with a

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<sup>567</sup> See 'The Future of Privacy: Recent Legal Developments in New Zealand', (2007) 13 *Canta LR* 169.

<sup>568</sup> The New Zealand Bill of Rights Act 1990, s 3.

<sup>569</sup> See Rishworth, 'Human Rights', (2005) (1) *NZLRev* 87.

<sup>570</sup> *Ibid.*, and see Andrew Geddis, 'The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runtig*', (2004) 4 *New Zealand Law Review* 681.

<sup>571</sup> Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, (2007, 3<sup>rd</sup> ed), 1176. See also *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350, [89]. Various approaches seem to have been accepted in the United Kingdom also – see eg: Jonathon Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble,' [2003] *Cambridge LJ* 444; Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act', (2003) *Modern Law Review* 726, *McKennitt v Ash* [2005] EMLR 10, para [49], *Murray v Express Newspapers plc (2) Big Pictures (UK) Limited* [2007] EWHC 1908 (Ch), para [18], and see Phillipson's view of *von Hannover* in 'The 'right' of privacy in England and Strasbourg compared', *New Dimensions in Privacy Law* (2006, CUP, Andrew Kenyon and Megan Richardson, eds) 184, 185.

<sup>572</sup> Jane Norton, '*Hosking v Runtig* and the Role of Freedom of Expression', (2004) 10 *AULR* 245, 249.

<sup>573</sup> Rishworth, n. 533 above, 104.

very high level of public interest,<sup>574</sup> and the Bill will be relevant to interpretation of the Defamation Act, to development of the common law, and in some cases, to both. The common law develops incrementally, and for it to do so without taking account of the Bill of Rights in some way would be to ignore a profound form of public interest,<sup>575</sup> would produce distorting effects within constitutional law, and would also be seriously out of step with other common law jurisdictions.<sup>576</sup> And as a matter of practice, the Bill can apply. Joseph has noted that although common law principles lack the precision of statutes, they are settled and ascertainable,<sup>577</sup> and might thus engage with rights in the Bill. Furthermore, our Supreme Court has in fact recognised this in another context by noting that the need to protect reputation may restrict the scope of freedom expression.<sup>578</sup> Therefore, it is my thesis that in every defamation case, at the very least, some sort of application of s. 5 of the New Zealand Bill of Rights Act should be openly articulated to balance freedom of expression and the right to protect reputation and the relative public interests which exist in both. Section 5 suggests a useful way of balancing the interests involved because it requires that the rights and freedoms contained in the Bill may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>579</sup> I will now briefly examine how the provision has been treated in defamation cases.<sup>580</sup>

## 2.2 *The Bill of Rights and previous defamation cases*

In *Lange*, Blanchard J noted that two previous cases had dealt with the Bill in relation to defamation law.<sup>581</sup> They were *TVNZ v Quinn*,<sup>582</sup> where the issue of damages arose, and *Awa v Independent News Auckland Ltd*,<sup>583</sup> where the defence of fair comment (now honest opinion) was considered. In the former, the approach to the Bill is rather unfocussed and unsatisfying. Cooke P considered the matter more as an afterthought, not as part of his reasoning process.

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<sup>574</sup> See the discussion at p 207 above.

<sup>575</sup> In *Lange* [1997] 2 NZLR 22, 30, Elias J quotes Lord Woolf in *Spring v Guardian Assurance plc* [1995] 2 AC 296, 352, where he stated that freedom of expression ‘...is a consideration as least as important to the common law as it is under the international conventions by which it is also protected.’ See also Philip Joseph, *Constitutional and Administrative Law in New Zealand*, (2<sup>nd</sup> ed, 2001), 1031-1032.

<sup>576</sup> See Jane Norton, n. 572 above, 250-252, and Rishworth et al, n. 533 above, 104-105. This is so in spite of the differing constitutional arrangements in those jurisdictions.

<sup>577</sup> See Joseph, n. 571 above, 1166.

<sup>578</sup> *R v Hansen* [2007] 3 NZLR 1, [18]. See also, A Butler and J Shaerf, ‘Limiting fundamental rights: How on earth is s 5 supposed to work in practice?’ *Using the Bill of Rights in Civil and Criminal Litigation* New Zealand Law Society Seminar Series, July 2008, 26, 35.

<sup>579</sup> See Andrew Butler, ‘Limiting Rights’, (2002) 33 VUWLR 537, 537-540, for a discussion of the history and purpose of the section.

<sup>580</sup> For discussion of s 5 in the context of other common law actions, see eg: *Duff v Communicado Ltd* [1996] 2 NZLR 89, and especially the judgments in *Hosking v Runting* [2005] 1 NZLR 1.

<sup>581</sup> *Lange No. 1* [1998] 3 NZLR 424, 466-467.

<sup>582</sup> [1996] 3 NZLR 24.

He concluded the Bill did not require a new approach to summing up on damages. After briefly noting the requirements of s 5 of the Bill, Cooke P moved quickly to a conclusion that damages would operate as a reasonable limit of freedom of speech if they were ‘no more than what is necessary for proper compensation and punishment.’<sup>584</sup> Furthermore, he considered the current balance in defamation law in relation to directions as to damages should not be altered, in part because acting to increase speech carried risk of abuse by the media.<sup>585</sup>

However, there is more structure in the approach of McGechan J, who stated as a general proposition that he endorsed alignment between jury directions and dictates of the Bill of Rights, and saw this as an inevitability. Furthermore, he went so far as to suggest it was ‘the Court’s duty to support freedoms in the Bill of Rights, not to frustrate them.’<sup>586</sup> But he did not wish to import arguments of interpretation based on other jurisdictions and Human Rights conventions, such as the European Convention on Human Rights. McGechan J saw the problem as domestic and needing a domestic solution. Therefore, local Bill of Rights policy was to be kept in mind and local juries were to be given local guidance.<sup>587</sup> He then considered whether there was a trend to increased awards of damages which might have a chilling effect on freedom of the press,<sup>588</sup> and whether any chilling should be automatically stifled, and concluded that ‘...Bill of Rights considerations are in balance. If there is a trend as asserted, it may need some control over aberrations, but it is not necessarily to be stifled.’<sup>589</sup> Further, using Bill of Rights language, he did not see ‘a pressing need for any radical new approaches to quantum directions.’<sup>590</sup>

In *Awa*, the Court simply appealed to the Bill very briefly to support its finding that the defence of fair comment could protect culturally insensitive statements, and said: ‘If it were otherwise, freedom of expression, a right affirmed by s 14 of the New Zealand Bill of Rights Act 1990, would be seriously in jeopardy.’<sup>591</sup>

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<sup>583</sup> [1997] 3 NZLR 590.

<sup>584</sup> See n. 582 above, 37-38.

<sup>585</sup> Ibid, 38. McKay J. was also inclined to this approach: 45.

<sup>586</sup> Ibid, 58.

<sup>587</sup> Ibid.

<sup>588</sup> Ibid, 73.

<sup>589</sup> Ibid.

<sup>590</sup> Ibid 74.

<sup>591</sup> N. 583 above, 596. Thomas J did not disagree with the approach to the Bill, brief as it was, but thought the law should not define what it was responsible to publish in the area of race relations: 598.

In the High Court in *Lange*, Elias J did not set out a detailed approach to the Bill, but saw s 5 as requiring a balancing of rights in defamation cases and as allowing the common law to prescribe limits to freedom of expression when it is balanced with rights of reputation.<sup>592</sup> To do this, Elias J considered such broad issues as the value of speech and protection of individual dignity,<sup>593</sup> whether the Bill can apply horizontally,<sup>594</sup> the requirements of the law of defamation in New Zealand,<sup>595</sup> the different approaches in other jurisdictions, the chilling effects doctrine,<sup>596</sup> the position and power of the news media,<sup>597</sup> the political background,<sup>598</sup> matters relevant to remedies,<sup>599</sup> and the state of the privilege defence in New Zealand.<sup>600</sup> Similarly, in the Court of Appeal, a balancing of values within the whole of the law of defamation was carried out, although in discussing the Bill of Rights, it was emphasised, as in *Quinn*, that ‘principles, freedoms, international texts and comparative experience must in the end be assessed in a local context.’<sup>601</sup>

More recently, in *Television New Zealand Ltd v Haines*,<sup>602</sup> the Court of Appeal considered the meanings which could be pleaded by a defendant in relation to the defences of truth and honest opinion, and what limits the plaintiff’s pleaded meanings could place on this. Although the issues were preliminary ones, their resolution clearly involved a possible limitation on freedom of expression, in this case, of the media. However, the judgment contains no indication that any Bill of Rights argument was raised or considered at all in the Court of Appeal, even though it involved interpretation of both statute<sup>603</sup> and common law. The judgment does refer to an argument based on s 14 of the Bill rejected by Venning J in the High Court, but does not take this any further.<sup>604</sup> However, an examination of the High Court decision reveals that Venning J devoted two brief paragraphs to a Bill of Rights analysis before concluding that the argument did not assist the defendant.<sup>605</sup> I examine *Haines* further below, but use it here to show that the approach to freedom of expression and the Bill in these

<sup>592</sup> *Lange v Atkinson*, n. 575 above, 45.

<sup>593</sup> *Ibid*, 31.

<sup>594</sup> *Ibid*, 32.

<sup>595</sup> *Ibid*, 32-36.

<sup>596</sup> *Ibid*, 36-37.

<sup>597</sup> *Ibid*, 43.

<sup>598</sup> *Ibid*, 45-46.

<sup>599</sup> *Ibid*,

<sup>600</sup> *Ibid*, 43-44.

<sup>601</sup> *Lange (No. 1)* n. 581 above, 467. In *Lange No 2* [2000] 3 NZLR 385, a similar, though more specific approach is taken, as the Court was revisiting issues referred to it by the Privy Council: [2000] 1 NZLR 257.

<sup>602</sup> [2006] 2 NZLR 433. See also *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350, [88]-[92].

<sup>603</sup> Defamation Act 1992, s 8.

<sup>604</sup> See n. 602 above, [33].

<sup>605</sup> *Haines v Television New Zealand Ltd* [2004] NZAR 513, [53]-[54].

cases appears to lack consistency, transparency and coherence. This is typical of our Bill of Rights jurisprudence, which is still in its infancy.<sup>606</sup> However, I believe this developing status should not stand in the way of stating a number of simple propositions to clarify how the Bill should be applied to defamation cases. I conclude this chapter by describing below a number of such propositions.

### 2.3 A methodology for applying the New Zealand Bill of Rights Act to defamation cases

Having traced the current state of the law, it is now possible to make a number of suggestions as to the normative application of the Bill in defamation cases. First, as already stated, it is both valid and desirable for the Bill of Rights to apply to defamation law, even though this appears to be giving it weak horizontal effect. The identified public interests which clash in defamation cases are very strong, and the public interest in their method of reconciliation compels a Bill of Rights analysis. Such an approach would also be consistent with overseas developments and with the leading New Zealand decisions.

Second, the starting point must be that, as with statute law, development and application of the common law should be consistent with the rights and freedoms in the Bill, to the extent that any limits imposed by the common law on those rights must be reasonable and justified. This means that in every defamation case, some sort of application of s. 5 of the Bill should be attempted where the issue is more than a purely procedural one which has no impact on freedom of expression.<sup>607</sup> The Bill should therefore apply where the court is being asked to fill a gap in the law,<sup>608</sup> or to interpret the law so as to extend it<sup>609</sup> or limit it.<sup>610</sup> It should also apply to decisions which are a result of the application of defamation law, the most obvious illustration being where levels of damages are challenged.<sup>611</sup> Furthermore, the Bill of Rights

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<sup>606</sup> In *Zdrahal v Wellington CC* [1995] 1 NZLR 700, an early case dealing with offensive display and the Resource Management Act 1991, the Bill of Rights analysis is sparse. More recently, compare the attempts to clarify the judicial approach to the Bill in the censorship jurisdiction in the *Moonen* saga: *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (*Moonen 1*), *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (*Moonen 2*), to that of the Broadcasting Standards Authority in relation to complaints arising from the Codes of Broadcasting Practice: *MacDonald v TVNZ* 2002-071/072, *TVNZ v Viewers for Television Excellence Inc.* [2005] NZAR 1, *The Prime Minister (Rt Hon Helen Clark) v TV3* 2003-077/081, para. 61. The Authority has developed its own approach. The issue of flag burning has received detailed Bill of Rights analysis in the High Court in *Hopkinson v Police* [2004] 3 NZLR 704. *Hansen v R* [2007] 3 NZLR 1 and *Brooker v Police* [2007] NZSC 30 reveal a Supreme Court bench with differing views on the correct approach.

<sup>607</sup> In answer to Geddes, above n. 570, 704-705.

<sup>608</sup> Arguably, the cases arising from use of the Internet, eg: *Dow Jones v Gutnick* [2002] CLR 575.

<sup>609</sup> As in *Lange*, n. 581 above, and *Awa*, n. 583 above.

<sup>610</sup> As in *Haines*, n. 602 above.

<sup>611</sup> *Quinn*, n.582 above, *Steel and Morris v the United Kingdom* [2005] ECHR 103, and *The Gleaner Co Ltd v Abrahams* PC 86/2001, 14 July 2003, [2003] EMLR 32.

analysis should form the centre of, or an inextricable part of, the reasoning in the case, rather than an afterthought.

Third, the analysis should attempt to apply s. 5 as directly and explicitly as possible. Depending on what is being argued, this may be more effective where the Defamation Act is being interpreted, but can still be attempted in relation to the common law.<sup>612</sup>

Fourth, in carrying out this analysis, a court is entitled to look at all matters which have a bearing, including social, political, legal, moral, economic, administrative, cultural, ethical, linguistic and comparative material.<sup>613</sup>

Fifth, the defendant carries the initial burden of establishing a prima facie interference with freedom of expression in a defamation case. The onus then shifts to the plaintiff to demonstrate that the limit is reasonable, justified and prescribed by law.<sup>614</sup>

Sixth, the process is best applied as a series of explicit steps rather than a generalised blended or continuum approach. It is self-evident that in seeking to render statute or the common law consistent with the Bill, any Bill of Rights analysis should itself comply. This requires precision and clarity.<sup>615</sup> The steps which suggest themselves are:<sup>616</sup>

(a) The objective of the relevant rule of defamation law - for example, the rule that the intention of the publisher of the alleged defamatory statement is irrelevant to liability - should be identified, and its importance, and the public interests or values in it within

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<sup>612</sup> For example, Rishworth suggests that it is difficult to test the common law under the s 5 requirement of prescription by law, using the criteria 'identifiable, adequately accessible and sufficiently precise', because the common law is often unknowable before it is declared by the judges: Rishworth et al, n. 533 above, 175. However, if, as required, a common law doctrine is interpreted so that it is consistent with the Bill, it should be rendered identifiable, adequately accessible and sufficiently precise. And a clear and precise explanation of how this is so will assist. Joseph describes this as a 'rights-centred' approach emphasising the need for transparency, which in turn promotes the accountability and legitimacy of judicial power: see Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, (2007, 3<sup>rd</sup> ed), 1176.

<sup>613</sup> Counsel should present the court with the relevant material, which will require some discrimination, in order that the inquiry into the public interests at stake does not become too protracted: see Butler, n. 579 above, 552-554. This is no more onerous than any other form of litigation. Butler points out that many matters are implicated by freedom of expression, but do not call for the same measure of review in a s. 5 assessment: *ibid*, 561. As litigators' experience of dealing with the Bill increases, evidential issues will recede. See also Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, (2007, 3<sup>rd</sup> ed), 1160.

<sup>614</sup> See Butler, n. 579 above, 540, 549, 550-551; Joseph, n. 612 above, 1162.

<sup>615</sup> Butler similarly supports a transparent approach, in order to create a 'culture of justification' where citizens are able to understand when and why their rights have had limits placed on them: see Butler, n. 579 above, 543, 554.

<sup>616</sup> These are based on the approaches in *Hopkinson*, n. 606 above, *Hansen v R* [2007] 3 NZLR 1, Butler, n. 579 above, 542-543, and that described by Rishworth, n. 533 above, 177, which he distilled from the Canadian case, *R v Oakes* [1986] 1 SCR 103.

the whole of the law of defamation, assessed. One way of doing this is to ask whether there is a pressing social need for the doctrine.

(b) Next, any rights in the Bill which are or may be affected by the relevant rule, and the public interest in them, should be identified. Inevitably, this will be some manifestation of freedom of expression.

(c) Any limits which the relevant rule of defamation law then imposes on freedom of expression must be able to be justified in the light of the objective. This will usually mean assessing the effectiveness of the doctrine and weighing it against the value of the speech. The higher the public interest in the speech, the harder it will be to justify a limit on it.<sup>617</sup>

(d) The limits should also be assessed to ensure they minimally impair the freedom. This does not mean that they can only impair in the least possible manner, but that impairment is what is reasonable in the circumstances.<sup>618</sup> Ambiguities should be resolved in favour of the freedom.

(e) The limitations must be proportionate in the circumstances. The more severe the impact of limiting the right, the more important the objective identified at (a) must be.<sup>619</sup>

(f) It should then be explained why, overall, the doctrine as interpreted is identifiable, adequately accessible and sufficiently precise, in which case it will be prescribed by law.<sup>620</sup>

Arguably, step (f) will be complied with if all of the other steps have been applied. However, in keeping with the explicit nature of the suggested method of application, the final step requires a form of summary of what has gone before, and will act as a final check and a method of completing the s 5 analysis. This should also ensure that the analysis itself is accessible and precise.

It must be conceded that the suggested approach requires a level of judicial subjectivity to be effective – in short, it requires balancing and judgment at almost every level – what Joseph

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<sup>617</sup> Joseph points out that the limits imposed by common law doctrine can be more vigorously challenged than those imposed by legislation: see Joseph, n. 612 above, 1164, and *Solicitor-General v Radio NZ Ltd* [1994] 1 NZLR 48 (HC) (law of contempt).

<sup>618</sup> See Joseph, n. 612 above, 1163.

<sup>619</sup> Butler sees this ‘proportionality enquiry’ as the most important stage in applying s 5, and suggests that New Zealand courts will take a broad-brush approach to it: A Butler and J Shaerf, ‘Limiting fundamental rights: How on earth is s 5 supposed to work in practice?’ *Using the Bill of Rights in Civil and Criminal Litigation* New Zealand Law Society Seminar Series, July 2008, 35.

refers to as asking whether ‘the social costs of unrestricted enjoyment [of freedom of expression] exceed its benefits?’<sup>621</sup> The outcome of application in each case therefore can never be entirely predictable. But there is nothing new in this. This feature of much of the common law flows in part from a tension between distributive and corrective justice theories, and is the very reason why we have judges. The value of the approach set out above is that it does give some predictability to defamation law which is currently missing. This is because it is directional, in that it specifies a series of Bill of Rights questions which should always be asked, and it is aspirational, in that there is an overall aim of achieving consistency with the Bill, and there are guidelines as to how to go about doing this.

How might such an approach make a difference in defamation cases? I refer again to the *Haines* decision in the High Court, where Venning J addressed the Bill in two short paragraphs.<sup>622</sup> The first paragraph quoted observations of Tipping J in the *Moonen* case,<sup>623</sup> while the second concluded that s 14 of the Bill does not require a different interpretation of s. 8 of the Defamation Act because the latter provides for the defence of truth, the defence exists and is provided for by statute. Venning J therefore thought that it was not a question of limiting the rights or freedoms under the Bill of Rights, but interpreting the application of the defence. With respect, for the reasons set out above, such reasoning is deficient. It appears Venning J only went so far as to apply the first step in the process, of identifying the objective of the relevant part of defamation law and its importance, described above at (a). As Rishworth has pointed out, where a s. 5 analysis of legislation is involved, there is usually judicial deference to governmental decisions about harm which should be protected against by legislative provision.<sup>624</sup> Venning J’s conclusion on this aspect is therefore not surprising. But that did not determine the issue, because the other steps were not applied. The result is that freedom of expression was not weighed at all in the process, and neither was it weighed by the Court of Appeal. Had it been, the decision may have been different.

Another example which illustrates where an explicit application of the Bill might make a difference to the media in defamation cases is where there is a claim that levels of damages are too high. Here, the method of dealing with minimal impairment at (d) above would allow

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<sup>620</sup> *Solicitor-General v Radio NZ Ltd* [1994] 1 NZLR 48, 63.

<sup>621</sup> Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, (2007, 3<sup>rd</sup> ed), 1160.

<sup>622</sup> See n. 605 above.

<sup>623</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, [15] and [16].

<sup>624</sup> Rishworth et al, n. 533 above, 177.

a court to investigate, as was done by the European court in *Steel and Morris*,<sup>625</sup> whether an award of damages falls too hard in the particular media defendant. If the defendant is a small, financially insecure member of the media, it would be possible for a court to find that while levels of damages generally are not too high,<sup>626</sup> in the particular case, they are disproportionate. This would ameliorate one of the few chilling effects identified in my study.<sup>627</sup>

### 3. Conclusion

This chapter of my thesis has attempted to suggest a method whereby freedom of expression can be weighed in a Bill of Rights analysis in defamation cases in New Zealand. Because of our constitutional arrangements, and the views of our judiciary on the value of speech and the position of the media, it is currently unlikely that speech will be given as much priority as that accorded it in the United States. Chapter Four has shown that our judiciary inclines to the European balancing approach which does not protect irresponsible media.<sup>628</sup> It may be that in the future, speech will be given more primacy in New Zealand. However, that is part of a general debate about the status of the New Zealand Bill of Rights which is yet to be had, and which should involve the general public as well as the media and the judiciary.

In the meantime, the constitutionalisation of the common law should continue in the manner I have suggested above in relation to the qualified privilege defence, and in the approach to prior restraint and gagging writs. More than this, if an explicit Bill of Rights analysis such as that I have also outlined above is carried out in every relevant defamation case, the presumption in these cases will be to safeguard speech by limiting it as little as possible. In each case, limits will be weighed and tested properly. This could be seen as a form of buffer-zone of protection, although not as extensive as that suggested by Schauer.

Chilling effect arguments will of course, be weighed in this process. However, I have attempted to demonstrate in this chapter that any *real* chilling effects will actually be reduced if the Bill of Rights is applied properly and consistently, because common law doctrine interpreted consistently with the Bill must then become accessible and reasonably certain. In turn, this will reduce one of the main premises on which the chilling effects doctrine is based.

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<sup>625</sup> See n. 611 above.

<sup>626</sup> As in *Quinn*, see n. 582 above.

<sup>627</sup> See pp. 148-151 above.

<sup>628</sup> And even in the United States, speech is subject to a form of defamation law and media methods are investigated when the question of malice arises.

This outcome, combined with the assurance that ambiguities in the common law of defamation should be resolved in favour of freedom of expression, would reduce any vestigial chilling effect to less than marginal.

## Chapter 10 - Conclusion

It is now both timely and possible to outline some conclusions from the chapters set out above. I break down this final analysis into two parts containing conclusions on the empirical data and a general conclusion to this thesis.

### 1. Conclusions on the empirical data

It will be recalled I surmised at an early stage in my empirical study that the data demonstrated the operation of defamation law on a dynamic, generally assertive New Zealand media, backed by strong foreign ownership, does not produce excessive chilling effects although clearly it does produce some. As the study proceeded, and I analysed all of the data, this early impression was confirmed as having a sound basis in fact. This conclusion appeared to suggest that no compelling case could be made for major reform of the law in New Zealand.

While my study was not designed to directly compare New Zealand to other jurisdictions, its results were not out of line with previous studies. Although the authors of the comprehensive study carried out in the United Kingdom in the 1990's concluded that there were both direct and structural chilling effects arising from the operation of defamation laws there,<sup>629</sup> they noted different impacts in different sectors of the media,<sup>630</sup> and ultimately acknowledged that their findings did not establish a knock-down case for reform.<sup>631</sup> In the late 70's, Palmer noted that despite the vitality of the tort of defamation in New Zealand, the McKay committee research and his own had revealed that media did not view the law as unduly burdensome even though many had received threats and most had altered content because of fear of legal consequences.<sup>632</sup> He suggested such views arose from the media's conception of its role in contrast to that of the US media which had a clearer understanding of the 'fourth estate' and its function in furthering freedom of speech.<sup>633</sup> Barendt put forward a version of this argument some twenty years later when he suggested that the approach of English journalists to their 'trade' as Andrew Marr has referred to it,<sup>634</sup> has been influenced by what the operation of the

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<sup>629</sup> Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson in *Libel and the Media: The Chilling Effect* (1997), 191.

<sup>630</sup> For example, the practice of omitting material altogether did not affect national newspapers to any significant degree, in contrast to book publishers and broadcasters: *ibid*, 191-192.

<sup>631</sup> *Ibid*, 194.

<sup>632</sup> See Palmer G, 'Defamation and Privacy Down Under' 64 *Iowa Law Review* 1209 1978-1979, 1223.

<sup>633</sup> *Ibid*.

<sup>634</sup> Andrew Marr, *My Trade, A Short History of British Journalism* (MacMillan, 2004).

law allows them to say, resulting in an unrecognised form of self-censorship.<sup>635</sup> On this view, one might argue that any chilling effect is always hidden because media internalise the laws which regulate each jurisdiction.<sup>636</sup> Barendt thought that such an effect was empirically unmeasurable, but considered it had a ring of truth for the United Kingdom.<sup>637</sup>

In thinking about this, I have had to acknowledge that an internalising effect in New Zealand is certainly possible. However, ultimately I suggest that any such effect is very small in this jurisdiction. This is because I have concluded that the *factual* data given to me by media about claims and threats, and more importantly, the *independent factual* data from the court file search carried out as part of my study which revealed low numbers of court claims and no rampant success rate, challenge any assumption about internalisation effects in New Zealand. In completing the analysis of my raw data, therefore, I have been able to conclude finally with some confidence that not only do the New Zealand media continue to regard defamation law as irksome but not unduly burdensome, but that this view reflects the reality as well. In short, it is my view that the data collected in my survey suggests that *on the whole*, the media not only thinks it can manage and deal with threats and claims arising from alleged defamation, but that it *does* manage and deal with them in practice while contemporaneously making sure that important stories are told. The data supports a view, therefore, that the balance the law currently seeks to achieve between preserving the right to reputation and preserving freedom of speech and information in New Zealand is about right.

The media can take heart from this. Furthermore, it can take heart from another implication in the data. The benign levels of threats and claims against the media, the apparent proportionality and reasonableness of outcomes, and the comparative lack of claims without any substance, suggest that on the whole we do indeed, in New Zealand, have a media which behaves responsibly, as accepted previously by our Court of Appeal.<sup>638</sup> A robust, responsible media is in a much better position to protect and preserve freedom of expression than one which faces a threat of increased regulation because of its perceived excesses.

However, the results I have summarised above do not mean that any chilling effect of our defamation laws can be ignored. The balance which exists is one in which media and the judiciary must remain vigilant to protect freedom of expression in the public interest when

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<sup>635</sup> See n. 629 above, 193.

<sup>636</sup> See also A Kenyon, *Defamation: Comparative Law and Practice*, (UCL Press, 2006) 15.

<sup>637</sup> See *Lange v Atkinson* [1998] 3 NZLR 424 (*Lange No 1*), 193.

appropriate. The potential for an excessive chilling effect will always exist and must be guarded against. Furthermore, in stating this conclusion, I do not, of course, suggest that the cost to the media of maintaining the current position is not excessive or conducive of a particular form of chill. Unfortunately, despite best efforts, the data recovered on costs in my study was not substantial, and the issue of whether levels of costs in defamation actions combined with the operation of the law are excessive when compared to other forms of civil action and to the rights and values being protected is deserving of further empirical study.<sup>639</sup>

## 2. General conclusion

Having reached these conclusions on the empirical data, I have nevertheless been forced to push my analysis further. This is because in 1990, New Zealand enacted a Bill of Rights which recognised freedom of expression 11 years before my investigation of media practices and views was carried out.<sup>640</sup> Although not supreme law, the rights in the Bill are slowly having life breathed into them by our judiciary on a daily basis, and have become part of the consciousness of New Zealand citizens, including the media. The defamation law which formed the backdrop to my empirical study in 2001 was not the same as that investigated by researchers contracted to the McKay Committee in the late 70's. Therefore, in contemplating the overall results of my study, I was obliged also to consider the role of freedom of expression in a democracy which also chooses to protect reputation, and hence the potential impact of the New Zealand Bill of Rights on defamation law. I turn now to conclude this thesis by addressing this issue.

My 2001 study of the New Zealand media demonstrated that the chilling effects of defamation law have been somewhat overstated in this jurisdiction. Nonetheless, I have reached a further conclusion that freedom of expression is of such importance it must be accorded a proper place in the interpretation and application of defamation law. In the last part of this thesis, I identified how the common law has begun to develop along these lines and suggested that this development should be fully extended. I therefore argued robustly that there is a need for explicit application of s 5 of the New Zealand Bill of Rights in every defamation case. I concluded that manifest, considered and consistent treatment of the Bill

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<sup>638</sup> *Lange v Atkinson* [2000] 3 NZLR 385, at 398.

<sup>639</sup> This was also a conclusion of the English study referred to above, n 635: Barendt et al, n. 629 above, 189. Costs are currently being empirically investigated in the United Kingdom: see *Comparative study of costs in defamation claims*, Programme in Comparative Media Law and Policy: PCMLP, Oxford Centre for Socio-Legal Studies, [www.cslls.ox.ac.uk](http://www.cslls.ox.ac.uk)

<sup>640</sup> This Bill was promoted by the Right Hon Geoffrey Palmer, Minister of Justice.

will in turn protect against any potential chilling effect which might exist, so that such effect is, in the end, rendered entirely proportionate.

What then, is the future for New Zealand defamation law? There is ample anecdotal evidence that defamation is becoming less of a concern to the media than the developing tort of privacy.<sup>641</sup> Furthermore, Palmer goes so far as to suggest that the tort of defamation might even fall into disuse in the next 30 years, as a relic of a previous media age.<sup>642</sup> He also notes the growing influence of privacy. Therefore, it is intriguing to see hints in a recent prominent English privacy case, *Mosley v News Group Newspapers*, of a possible future form reputational interest might take. In March 2008, the *News of the World* in London published a story headlined: “FI BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS.” Mr Max Mosley, the President of the FIA, sued the newspaper for breach of privacy, and for the accompanying information placed on the newspaper’s website, including video footage secretly obtained of the alleged orgy. He was awarded the highest damages to date for a privacy claim in Britain - £60,000.<sup>643</sup> Mr Mosley is now suing in some European jurisdictions in defamation and privacy, some of which are criminal proceedings.<sup>644</sup>

In *Mosley*, Justice Eady raised the possibility of having regard to the concept of ‘responsible journalism’ in the privacy tort and said:

There may be a case for saying, when “public interest” has to be considered in the field of privacy, that a judge should enquire whether the relevant journalist’s decision prior to publication was reached as a result of carrying out enquiries and checks consistent with “responsible journalism”.<sup>645</sup>

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<sup>641</sup> This non-empirical observation is based on my regular discussions with New Zealand media representatives. In the United Kingdom, it has recently been reported that the number of libel cases continues to decline, even though media content is increasing. Discussion of the issues has been somewhat confused. One media lawyer has commented that the increase may have occurred because the UK media is much more used to interacting with its audience and dealing with complaints as they arise. In that jurisdiction, Conditional Fee Arrangements, which allow lawyers to take libel cases on a no-win, no-fee basis, are also perceived as making media companies more likely to settle cases out of court. Thus, CFAs are identified as having a ‘chilling effect’. However, a commercial chilling effect can also be observed in a reported increase in claims brought by celebrity plaintiffs. It has been suggested this development reflects a strong consumer appetite for celebrity stories, with competition to deliver such coverage resulting in increased factual errors: See ‘Fewer libel cases reaching a verdict’, guardian.co.uk, 9 October 2008, [www.guardian.co.uk/media/2008/oct/09/medialaw.pressandpublishing](http://www.guardian.co.uk/media/2008/oct/09/medialaw.pressandpublishing) See also *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding observations of the Human Rights Committee*, Human Rights Committee, Ninety-third session, Geneva, 7-25 July 2008, GE.08-43342.

<sup>642</sup> Rt Hon Sir Geoffrey Palmer, ‘The Law of Defamation in New Zealand – Its Recent Evolution and Problems’, *Law, Liberty, Legislation: In Honour of John Burrows QC*, LexisNexis, (2008), 339, 357.

<sup>643</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (24 July 2008).

<sup>644</sup> He is also bringing action against the British government in the European Court of Human Rights seeking the passage of a law to force editors to contact subjects before printing: ‘Feel my pain’, *the Guardian*, 20 October 2008, [www.guardian.co.uk/media/2008/oct/20/mosley-privacy](http://www.guardian.co.uk/media/2008/oct/20/mosley-privacy)

<sup>645</sup> *Mosley*, n. 643 above, paras [140]-[141].

This test, borrowed from the *Reynolds/Jameel* developments in defamation law,<sup>646</sup> suggests journalists could claim a public interest defence in privacy whether they get their facts right or not, so long as they can demonstrate responsible behaviour. If it is to be applied to the privacy tort, significant distinctions between defamation and privacy begin to disappear.<sup>647</sup> The orthodox understanding has been that defamation provides a remedy for untrue statements while privacy provides a remedy for true intimate statements. Justice Eady's approach would take the emphasis off the truth or untruth element in each tort and put it instead on the public interest defence based on responsible journalism. If these torts move closer together in this fashion, what do we have then? One possibility is a form of rights-based jurisprudence which is a claim for loss of autonomy, dignity and integrity, based on either publication of true or untrue facts, which may be defended on the basis of public interest. The latter will be clearly satisfied if the material contributes to an important public debate or the functioning of a democracy, and the journalism involved is responsible. The publication of untrue facts will probably attract higher damages. Whether this metamorphosis will occur, whether it will occur in New Zealand, how long it will take, and whether any 'chilling effects' might result, are the tantalizing questions I must leave for another day, and for further empirical study.

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<sup>646</sup> See Chapter Four, 2.2 above.

<sup>647</sup> Judge Patrick Moloney QC recently commented that in future it is likely an increasing number of claims will be brought jointly in both causes of action: 'Privacy: The New Libel?', *Protecting the Media 2008*, IBC Conference, (UK) 1 September 2008.

# **Appendix**

## **Media Survey**

(Edited to minimise repetition)

# **Defamation Project**

## **Questionnaire for Media**

NOTE: you are invited to participate in the research project Study of the Law of Defamation by completing the following questionnaire. The aim of the project is to discover whether New Zealand's laws inhibit the media from disseminating information of public interest. The project will examine the behaviour of newspapers, broadcasters, book and magazine publishers, independent journalists and writers, public relations firms, advertising agencies, and internet publishers in New Zealand to determine whether avoiding possible defamation actions causes such publishers to amend or suppress stories, or seriously impedes freedom of expression.

The project is being carried out by Ursula Cheer, Senior Lecturer, Faculty of Law, Canterbury University, who can be contacted at (03) 364 2693 or email [u.cheer@laws.canterbury.ac.nz](mailto:u.cheer@laws.canterbury.ac.nz). She will be pleased to discuss any concerns you may have about participation in the project.

The questionnaire is anonymous and you and your organisation will not be identified as a participant without your consent. You may at any time withdraw your participation including withdrawal of any information you have provided.

**By completing the questionnaire, however, it will be understood that you have consented to participate in the project, and that you consent to the publication of the results of the project with the understanding that anonymity will be reserved.**

# MEDIA QUESTIONNAIRE

## General Instructions

Please consider and answer carefully the questions which follow which are relevant to you. You will know by glancing at the Summary of Contents set out below which sections will be relevant to you.

The survey is made up of a mixture of multi-choice and short answer questions. You may answer the multi-choice questions by circling more than one box if appropriate. For other questions, please supply brief answers in the space provided.

Do not be put off by the apparent size of the survey. It is hoped that it should not take you long to complete. You will probably not have to answer all of the survey and many questions are multi-choice.

If you have any queries as you are completing the survey, please don't hesitate to contact Ursula Cheer at [u.cheer@laws.canterbury.ac.nz](mailto:u.cheer@laws.canterbury.ac.nz) or phone 03 364 2693.

# **MEDIA QUESTIONNAIRE**

## **Summary of Contents**

### **Section A - Background**

Questions 1 – 18. This section contains eighteen questions seeking general information about your media work or organisation.

### **Section B – Pre-publication Procedures**

Questions 19 – 29. This section contains ten questions seeking information about any procedures used by you to vet material prior to publication.

### **Section C – Actual Experience of Defamation Statements of Claim (Writs)**

Questions 30 – 32. This section seeks information about your actual experience of defamation writs. Question 32 allows space to record general factual material about the writs filed against you or your organisation in the last six years.

### **Section D – Threats of Action**

Questions 33 – 38. This section contains five questions seeking information about your experience of dealing with threats of action. Question 38 allows space to record general information relating to threats of action you have received in the last six years.

### **Section E – Your Views**

Question 39 - 41. This section seeks your views and opinions on particular aspects relating to the media (question 39), the advantages or disadvantages of the laws of defamation in relation to particular topics or topics of your choice (question 40) and seeks your comments on any other matter that has not already been covered in the survey (question 41).

## **Media Questionnaire**

Please answer all questions relevant to you or your organisation. Answer multi-choice questions by circling the answer (or answers) which appear most correct. Answer all other relevant questions by supplying brief comments in your own words. Attach extra sheets of paper where necessary.

### **Section A**

#### **Background**

**Question 1** (Multi choice) **What form of media are you or your organisation?**

- A** Newspaper
- B** Broadcaster
- C** Magazine
- D** Book publisher
- E** Individual journalist
- F** Individual writer
- G** Information service provider or other exclusive Internet publisher
- H** Advertising agency or consultancy
- I** Public relations firm
- J** Other (please briefly describe)

**Question 2** (Multi choice) **If you are a newspaper what sort of circulation do you have?** (If you are not a newspaper, go to Question 5)

- A** National
- B** Regional
- C** Community / Free
- D** Other (Please briefly describe)

**Question 3** (Multi choice) **If you are a newspaper how often are you published?** (If you are not a newspaper, go to Question 5)

- A** Daily
- B** Weekly
- C** Bi weekly
- D** Monthly
- E** Bi annually
- F** Other (Please briefly describe)

**Question 4** (Multi choice) **If you are a newspaper, what sort of newspaper are you?**  
(If you are not a newspaper, go to Question 5)

- A Broadsheet
- B Tabloid
- C Business
- D Professional
- E Student
- F Other (Please briefly describe)

(Now go to question 13)

**Question 5** (Multi choice) **If you are a broadcaster are you:**  
(If you are not a broadcaster, go to Question 7)

- A Television
- B Radio
- C Satellite
- D Cable
- E Other (Please briefly describe)

**Question 6** (Multi choice) **If you are a broadcaster are you:**  
(If you are not a broadcaster, go to Question 7)

- A State
- B Private
- C Community
- D Other (Please briefly describe)

(Now go to Question 13)

**Question 7** (Multi choice) **If you are a book publisher, what sort of books do you publish?** (If you are not a book publisher, go to Question 8)

- A Fiction
- B Non-fiction
- C Pictorial
- D Professional
- E Other (Please briefly describe)

(Now go to Question 13)

**Question 8 (Multi choice) If you are a single magazine what is your circulation?**

(If you are not a magazine, go to Question 10)

- A National
- B Regional
- C Community / Free
- D Business / Inhouse / Professional
- E Student
- F Other (Please briefly describe)

**Question 9 (Multi choice) If you are a single magazine how often are you published?**

(If you are not a magazine, go to Question 10)

- A Weekly
- B Bi weekly
- C Monthly
- D Quarterly
- E Bi annually
- F Other (Please briefly describe)

(Now go to Question 13)

**Question 10 (Multi choice) If you are a magazine publisher what sort of magazines do you publish? (If you are not a magazine publisher, go to Question 12)**

- A Consumer (men/women/lifestyle/business/specialist)
- B Trade/Professional
- C Special (particular clients, in-house)

**Question 11 (Multi choice) If you publish consumer magazines, what subject matter is included in those magazines? (If you are not a magazine publisher, go to Question 12)**

- A Men / Women
- B Lifestyle
- C Business
- D Specialist
- E Other (Please briefly describe)

(Now go to Question 13)

**Question 12** (Multi choice) **If you exclusively publish material on the Internet (as an Information Service Provider (ISP) or similar), how long have you been publishing?**  
(If you are not an Internet publisher, go to Question 13)

- A One year
- B Two years
- C Three - five years
- D Five - ten years
- E Other (Please briefly describe)

**Question 13** (Multi choice) **Are you:**

- A A Parent Company
- B A Subsidiary
- C A Partnership
- D Other (Please briefly describe)

**Question 14** (Multi choice) **Please indicate a range of figures that includes your annual turnover:**

- A 0 to \$30,000
- B \$30,000 to \$50,000
- C \$50,000 to \$100,000
- D \$100,000 to \$200,000
- E \$200,000 to \$1 million
- F Greater than \$1 million

**Question 15** (Multi choice) **Please indicate a description for the size of your undertaking:**

- A Single individual
- B 2 to 10 employees
- C 10 to 50 employees
- D 50 to 100 employees
- E Greater than 100 employees

**Question 16 (Multi-choice) Is any of your published/broadcast material republished on the Internet in one or more of the following forms?**

- A** On your own website by live broadcast
- B** On other websites broadcast live (with permission)
- C** On other websites broadcast live (without permission)
- D** On your own website by delayed broadcast
- E** On other websites by delayed broadcast (with permission)
- F** On other websites by delayed broadcast (without permission)
- G** On your own website (written material reproduced in full)
- H** On other websites, (written material in full, with permission)
- I** On other websites, (written material in full, without permission)
- J** On your own website (written material, excerpts only)
- K** On other websites, (written material, excerpts only, with permission)
- L** On other websites, (written material, excerpts only, without permission)
- M** Other (Please briefly describe)

**Question 17 What are the particular risks of defamation in your area, if any?  
(Please describe briefly)**

**Question 18 Do you have or have you had, any training in defamation law?  
If so, what form of training is involved?**

## Section B

### Preventing Defamation Using Pre-publication Procedures

(Don't forget to circle more than one option if appropriate)

**Question 19** (Multi choice) **Do you have procedures for checking material before publication to prevent defamation occurring?**

- A Yes
- B No

**Question 20** (Multi choice) **If you have a pre-publication procedure, does it include any of the following?**

(If you never have material checked prior to publication, go to Question 24)

- A Checking facts
- B Obtaining an alternative point of view
- C Checking visuals and captions
- D Verifying sources
- E Specialist agreement with authors which makes them responsible
- F Consulting a lawyer (sometimes)
- G Consulting a lawyer (always)
- H Other (Please briefly describe)

**Question 21** (Multi choice) **Is the procedure always followed?**

- A Yes
- B No

**Question 22** (Multi choice) **If a procedure is not always followed, what are the reasons for this?**

(If publication procedures are always followed, go to Question 23)

- A Lack of resources
- B Time constraints
- C Employees trusted
- D The material is material which the public should know about
- E Unable to get the other side of the story
- F Other (Please briefly describe)

**Question 23** If you do consult a lawyer to get material checked prior to publication please describe briefly the reason why:

**Question 24** Who has the final decision about whether material will be published or not?

**Question 25** In what circumstances is material altered prior to publication and what sort of alterations are made?

**Question 26** (Multi choice) If you receive material from independent sources (parties who are not employed by you) is there a special procedure for getting that material checked?

A Yes (Please briefly describe)

B No

**Question 27 Do you have defamation insurance?**

**A** Yes (Go to Question 28)

**B** No (Go to Question 29)

**Question 28 If you have defamation insurance, what does it cover and what conditions of cover are imposed, if any?**

**Question 29 Do the decisions of the Broadcasting Standards Authority, or the Press Council, have any impact on your pre-publication procedures?**

## Section C

### **Actual Experience Of Defamation Statements of Claim (Writs) In The Last Six Years (1995 – 2001)**

**Question 30** (Multi choice) **Have you had a defamation writ filed against you or your organisation in a court in New Zealand in the last six years?**

- A** Yes (Go to Question 31)  
 **B** No (Go to Question 33)

**Question 31** **Please indicate the number of writs that have been issued against you or your organisation in the last six years:**

- A** 1  
 **B** 2 to 5  
 **C** 5 to 10  
 **D** 10 to 20  
 **E** 20 to 50  
 **F** 50 plus

**Question 32** **For each of the writs issued against you or your organisation in the last six years please supply the following information, starting with the most recent:**

**(THERE IS SPACE FOR DETAILS OF SIX WRITS. IF YOU REQUIRE MORE SPACE TO COMPLETE DETAILS OF OTHER ACTIONS PLEASE PHOTOCOPY EXAMPLE 32(i) BELOW AND ATTACH SEPARATE SHEETS.)**

**32(i) Experience of writs filed in last six years:**

**Year of writ** \_\_\_\_\_

**Legal advice sought prior to this writ being issued?**

- A** Yes  
 **B** No

**Brief detail of claim**

**Amount of damages claimed?** \$ \_\_\_\_\_

**What other remedies were claimed?**

**32 continued**

**Result?** (Use approximate figures for damages if necessary).

- A** Settled prior to full hearing,  
damages\$ \_\_\_\_\_ costs(*theirs*)\$ \_\_\_\_\_ (*yours*)\$ \_\_\_\_\_
- B** Apology
- C** Correction
- D** Declaration
- E** Fought matter to full hearing and won
- F** Lost full hearing, paid damages of  
\$ \_\_\_\_\_ costs(*theirs*)\$ \_\_\_\_\_ (*yours*)\$ \_\_\_\_\_
- G** Matter struck out
- H** Action abandoned
- I** Injunction
- J** Other (please briefly describe)

**If the matter went to trial, was it heard before:**

- A** A judge alone
- B** A judge and jury

**If the matter went to trial, why did you fight it?**

**If the matter settled, why did you settle it?**

**If damages were paid, what types of loss were they for?**

**If damages were paid, were they paid from insurance?**

Please continue on back of sheet if you run out of space for this example 32(i)

PLEASE NOW GIVE DETAILS OF NEXT MOST RECENT EXAMPLE...

[FORMAT REPEATED SIX TIMES IN ORIGINAL SURVEY]

## Section D

### Letters Before Action

**Question 33 (Multi choice) Please estimate how many threats of action (ie: letters, phone calls etc, suggesting you have published defamatory material, or threatening a defamation suit, before any court documents have been filed) you have received in the last six years (1995 – 2001).**

**(If you have not received any threats of action in the last six years, go to Question 39)**

- A 1-5
- B 6-10
- C 11-20
- D 21-50
- E 51-100
- F Greater than 100

**Question 34** (Multi choice) **What percentage of these threats have been serious threats?**

- A 0%
- B 1-10%
- C 11-25%
- D 26-33%
- E 34-50%
- F 51-75%
- G 76-100%

**Question 35** (Multi choice) **In the last six years have the numbers of threats of action:**

- A Increased
- B Decreased
- C Stayed the same

**Question 36** (Multi-choice) **In the last six years, which group has the majority of threats of action come from?**

- A Ordinary individuals
- B Companies
- C Politicians (national or local)
- D Celebrities
- E The media
- F Other (Please briefly describe)

**Question 37** (Multi-choice) **In the last six years, what proportion of threats of action have been made through a lawyer?**

- A 0%
- B 1 – 10%
- C 11 – 25%
- D 26 – 35%
- E 36 – 50%
- F 51 – 75%
- G 76 – 100%

**Question 38** Please complete the following brief details relating to the threats of action you have received and can recall from the last six years. Remember – these matters did NOT go to court, and no court documents were ever filed.

**THERE IS SPACE FOR DETAILS OF SIX THREATS OF ACTION. IF YOU REQUIRE MORE SPACE TO COMPLETE DETAILS OF OTHER THREATS OF ACTION, PLEASE PHOTOCOPY EXAMPLE 38(i) BELOW AND ATTACH SEPARATE SHEETS.**

**(Remember to circle more than one option if applicable).**

**38(i) Experience of threats of action received in last six years:**

**Year threat received:** \_\_\_\_\_

**Brief details of threatened action:**

**Remedies sought:**

- A** Apology
- B** Correction
- C** Retraction
- D** Damages to the value of \$\_\_\_\_\_ (Briefly describe what type of loss damages were said to be for)
- E** Destruction or withdrawal of publication after publication
- F** Prevention of publication
- G** Other (Please briefly describe)

**38(i) continued (Experience of threats of action)**

**Your response to threat**

- A Ignored threat and heard nothing more
- B Ignored threat and received a further threat
- C Consulted within the organisation and/or sought advice of friends
- D Consulted academic lawyer
- E Consulted lawyer
- F Sent letter rejecting allegations
- G Sent letter of explanation and apology
- H Other (Please briefly describe)

**Ultimate outcome:**

- A Heard nothing more
- B Apology
- C Retraction
- D Correction
- E Decision not to publish
- F Withdrawal of publication from circulation after publication
- G Destruction of publication
- H Settlement, \_\_\_\_\_ damages \_\_\_\_\_ agreed \_\_\_\_\_ of\$ \_\_\_\_\_  
costs(*theirs*)\$ \_\_\_\_\_ (*yours*)\$ \_\_\_\_\_  
(Briefly describe what types of loss covered by damages)
- I Other (Please briefly describe)

**If you settled the matter, why did you settle?**

- A The other party was correct
- B Advised to do so by lawyer
- C Couldn't afford to fight the matter in court
- D Although we knew we were right, we could not prove this
- E Could not afford lawyer's fees
- F Other (Please briefly describe)

**If any damages were paid, were they paid by insurance?**

NOW GIVE DETAILS OF NEXT MOST RECENT THREAT OF ACTION ON NEXT PAGE...

**[FORMAT REPEATED SIX TIMES IN ORIGINAL SURVEY]**

**Section E**

**Your Views**

**Question 39** In 1998 and 2000 the Court of Appeal outlined a form of qualified privilege defence available in defamation where the actions of politicians (past, present, or future) are being discussed. The defence is available where the occasion justifies privilege for political speech, where there is no ill will by the publisher, and where the publisher has not been irresponsible. If the matter is heard before a jury, it would decide if the facts show the publisher has been irresponsible.

**Please comment of any advantages / disadvantages you consider arise from this defence.**

**Do you consider there should be a special media defence? If so, why and what form should it take?**

**Question 40** Please use the space provided to express briefly your views on the advantages or disadvantages of the Laws of Defamation in New Zealand. A list of suggested topics follows but you may, of course, wish to comment on issues which are not included in that list. Where you believe the law should be reformed in some way, please suggest how you might think that would best be done.

**Suggested Topics**

- A Cost of proceedings
- B Delay in proceedings
- C Procedural issues
- D Summary judgment procedure
- E Defences
- F Injunctions
- G Trial before Judge / Jury
- H Levels of damages
- I Technicalities in the Law

**(Question 40 continued)**

**Question 41 Other Comments**

**Please use this space to comment on any matter which has not already been covered.**

**End of survey. Please return your completed survey in the stamped addressed envelope enclosed as soon as possible. Thank you for taking the time to complete the survey. As a participant you will receive a copy of the summary of results as soon as it is available.**

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