A FAIRLY GENUINE COMMENT ON HONEST OPINION IN NEW ZEALAND

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This paper discusses the defence of honest opinion in relation to New Zealand's Defamation Act 1992. Two key issues are addressed: the place of the common law "public interest" requirement in the New Zealand context, and the concept of "genuineness" under section 10 of the Act. It is argued that the public interest requirement should be abolished, and that the relevant statutory provisions be redrafted to achieve this. The redraft would also clarify a potential flaw in the wording of the defence that may render it unavailable to some defendants who are quoting the opinions of others.

I INTRODUCTION

The defence of honest opinion has received a great deal less academic attention in recent years than the dramatically unfolding qualified privilege.[1] This is despite the defence, previously known as "fair comment", having evolved from qualified privilege in the latter half of the nineteenth century. This article examines some of the recent developments in this defence, and considers possibilities for its reform.

After a background to honest opinion in New Zealand and the key principles of the defence are set out, the public interest requirement of the defence is examined in light of both the Defamation Act 1992 and subsequent dicta from the New Zealand courts. The article then addresses some thorny issues surrounding the core "genuineness" requirement of honest opinion, as provided for in section 10 of the Defamation Act 1992. A potential flaw in the drafting of the section, which could place the defence out of reach of some defendants, is highlighted. Ultimately a redrafting of section 10 is suggested, which would clarify the availability of the defence and expressly abolish the public interest requirement.

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1 See for example *Lange v Atkinson* [2000] 3 NZLR 385 (CA); *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).

II THE DEFENCE IN NEW ZEALAND

There is no shortage of helpful summaries of honest opinion in New Zealand,[2] but a brief overview of the defence provides a good starting point. The common law defence of fair comment was partially codified in New Zealand through section 8 of the Defamation Act 1954:

> 8 Fair Comment
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> In an action for defamation in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

The "fairness" element of the defence was still assessed at common law, and looked to whether the "honest man" could have held the opinion expressed.[3]

In light of the recommendations of the Committee on Defamation in 1977,[4] the statutory component of the defence was expanded as part of the Defamation Act 1992.[5] The new title of "honest opinion" was instated after a prominent lawyer wrote to the then Minister of Justice with the suggestion that the key criteria of honesty and opinion both be included in the title to avoid confusion.[6] The common law concept of fairness was replaced with a new requirement of genuineness:

> 10 Opinion must be genuine
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> (1) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is the author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion.

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2 See for example *The Laws of New Zealand* (Butterworths, Wellington, 1994) Defamation, 97-105, para 131-140; John Burrows and Ursula Cheer (eds) *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 86-99; Stephen Todd (ed) *The Law of Torts in New Zealand* (3 ed, Brookers Ltd, Wellington, 2001) 843-855.

3 *News Media Ownership v Finlay* [1970] NZLR 1089, 1096 (CA) North P.

4 Committee on Defamation *Recommendations on the Law of Defamation* (Government Printer, Wellington, 1977).

5 Defamation Act 1992, s 9-12.

6 Thomas Goddard to Hon Geoffrey Palmer, Deputy Prime Minister (7 June 1985) letter (obtained under Official Information Act 1982 request to the Ministry of Justice); Defamation Act 1992, s 9.

(2) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is not the author of the matter containing the opinion shall fail unless—

(a) Where the author of the matter containing the opinion was, at the time of the publication of that matter, an employee or agent of the defendant, the defendant proves that—

(i) The opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant; and

(ii) The defendant believed that the opinion was the genuine opinion of the author of the matter containing the opinion:

(b) Where the author of the matter containing the opinion was not an employee or agent of the defendant at the time of the publication of that matter, the defendant proves that—

(i) The opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant or of any employee or agent of the defendant; and

(ii) The defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author of the matter containing the opinion.

(3) A defence of honest opinion shall not fail because the defendant was motivated by malice.

The common law still plays an important role in the law of defamation, and other jurisdictions' interpretations of the defence are of assistance to any examination of the New Zealand position.

III UNDERLYING PRINCIPLES

Common to all such jurisdictions is the major tension in the law of defamation between freedom of expression and the individual's right to reputation. The defence of honest opinion holds a key position within this tension, and is based on a set of principles that have remained more or less intact throughout both its common law development and later statutory enactments. The key concept of the defence, which protects statements of opinion as opposed to fact, is not difficult to grasp. It is essentially that people should be able to express their own opinions on the facts before them, even when those opinions are critical of others.

A Whose Honest Opinion and Why?

As a result, honest opinion is aimed at a broad range of defendants, and is certainly not limited to those expressing reasonable or orthodox views. The defence enshrines "the right of the crank to say what he likes",[7] and is open to commentators with exaggerated, obstinate or prejudiced

7 *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 All ER 516, 520 (QB) Diplock J.

opinions.[8] In practice the defence is especially useful to media defendants, journalists and others who frequently evaluate and comment on the actions of others. However, with the rapid growth of the internet and other readily accessible means of mass-communication, the likelihood is that a growing number of people from all walks of life will be publishing opinions and relying on the defence.

The broad availability of the defence of honest opinion is closely linked to freedom of expression. Section 14 of the New Zealand Bill of Rights Act 1990 affirms the "freedom to seek, receive and impart … opinions of any kind in any form." By protecting the freedom of expression of those who publish defamatory opinions, over and above those who suffer damage to their reputation, honest opinion occupies a noble place in the law as "… one of the fundamental rights of free speech and writing … and is of vital importance to the rule of law on which we depend for our personal freedom … ."[9] In principle, honest opinion promotes freedom of expression by enabling people to pass judgment on other people in society without the fear of being stung by the sharp end of defamation suits.

However, various limitations have been placed upon the principled position that the defence should be broadly available to those exercising their right to impart opinions.

B Limitations on the Defence

Several criteria must be met by defendants intending to rely on honest opinion to ensure the just application of the defence. This article addresses only two of the three key limitations outlined below. While they present their own challenges at trial, the "factual" limitations of honest opinion generally serve the defence well, and are not analysed further.

1 Honesty

The key limitation on honest opinion is the honesty requirement, the "cardinal test" of the defence.[10] Ironically, the term "honesty" is only occasionally used to discuss this limitation.

Under section 10 of the Defamation Act 1992, a successful defence of honest opinion requires that the opinion in question be the "genuine opinion" of the person who expresses it. This requirement, previously discussed in terms of "fairness", is aimed at preventing people from abusing the defence by falsely claiming that a defamatory statement is their own honestly held belief. The basis for this principle is straightforward: honest opinion protects genuine views, not deceitful ones.

The genuineness requirement has introduced more subjectivity to the defence, when compared to the objective assessment of whether an opinion was 'fair' at common law, and placed more

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8 *Merivale v Carson* (1887) 20 QBD 275, 281 (CA) Lord Esher MR.

9 *Lyon v Daily Telegraph Ltd* [1943] KB 746, 753 (CA) Scott LJ.

10 *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 170 (CA) Lord Denning MR.

emphasis on the defendant's honesty. An opinion can now be recognised as genuine even where the defendant has gone so far as to attribute corrupt motives to the plaintiff.[11] At common law such attributions may have defeated even an honest defendant's defence.[12]

2 Supporting facts

Conviction alone, however, is of little use to those who express opinions without facts to back them up. Potentially damaging opinions must generally be substantiated by true facts referred to in the publication. This prevents people from rattling off defamatory opinions without providing a factual matrix in support. If listeners or readers are able to hear the facts and the opinion together, there may be less damage to a plaintiff's reputation, because the audience can choose to disagree with the defendant's views and perhaps put forward their own. This allows public debate, as opposed to one-sided slurring, to take place:[13]

> The very basis of the defence is that a reader or listener should be able to assess the commentator's opinion and compare it with his or her own. Thus the reader or listener must know what it is the commentator it commenting on.

The facts relied on must be true, because there would effectively be no limitation in force if a defendant could invent their own, although if some facts turn out to be untrue the defence may still succeed.[14] Similarly, a successful defence of honest opinion can be based on untrue facts that are sourced from privileged publications, such as court judgments.[15] There is no need to state the facts referred to if they are common knowledge.[16]

3 A matter of public interest

Another limitation is that the commentator must be commenting on a matter of public interest. The following section examines, and ultimately argues for the abolition of, this requirement.

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11 Defamation Act 1992, s 12.

12 "[O]ne man has no right to impute to another … base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation." *Campbell v Spottiswoode* (1863) 3 B & S 769; 122 ER 288, 290 (QB) Cockburn CJ.

13 Todd, above n 2, 844.

14 Defamation Act 1992, s 11.

15 *Mangena v Wright* [1909] 2 KB 958 (KB).

16 *Mitchell v Sprott* [2002] 1 NZLR 766, para 22 (CA) Blanchard J for the Court.

IV PUBLIC INTEREST

Reference to any leading common law text on defamation will invariably highlight the requirement that, for a defence of honest opinion to be successful, the opinion expressed must be on a matter of "public interest".[17]

The New Zealand position is not so clear. The phrase "fair comment on a matter of public interest" is a recurring one in actions that predate the Defamation Act 1992.[18] However, since the passing of the Defamation Act 1992 the place of the public interest requirement has been called into question. Some texts argue that the requirement remains,[19] while others, notably *The Laws of New Zealand*, state that the requirement has been abolished by the Defamation Act 1992.[20]

This section of the article will examine the ways in which academics and judges in New Zealand have interpreted the Defamation Act 1992's silence on the subject of public interest. I will then analyse the arguments for and against the public interest requirement in relation to New Zealand's contemporary law of defamation, ultimately asking whether the requirement is an underlying principle of the defence, or merely an unnecessary limitation.

A Background to Public Interest

The term "public interest" is a wide concept that escapes precise definition. Lord Denning MR once described it as being satisfied:[21]

> Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make a fair comment.

The above statement is also authority for the point that mere curiosity on the part of the public does not necessarily give rise to a matter of public interest. Whether or not a subject is a matter of public interest is a question for the judge.

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17 Patrick Milmo and W V H Rogers (eds) *Gatley on Libel and Slander* (10 ed, Sweet and Maxwell, London, 2004) 311; David Price *Defamation Law, Procedure & Practice* (2 ed, Sweet and Maxwell, London, 2001) 71.

18 See for example *Awa v Independent Newspapers Ltd* [1997] 3 NZLR 590, 594 (CA) Richardson P, Gault, Keith and Blanchard JJ; *Davies v Wellington Newspapers Ltd* (1995) 8 PRNZ 429, 430 (HC) Master Thomson.

19 Burrows and Cheer, above n 2, 97-98; Todd, above n 2, 854.

20 *The Laws of New Zealand*, above n 2, 97-105, para 131-140; see also Michael Gillooly *The Law of Defamation in Australia and New Zealand* (The Federation Press, Sydney, 1998) 128-129.

21 *London Artists Ltd v Littler* [1969] 2 QB 375, 391 (CA) Lord Denning MR.

Opinions dealing with matters such as the operation of local and national government, the running of public institutions, public entertainment and the conduct of the professions have all been found to be in the public interest.[22] However, if a person extends their comments beyond the work/institution in question and attacks the private character of a person involved, then they stand to lose the protection of honest opinion.[23]

The public interest requirement is seen by many as an important protection of personal reputation in those matters concerning a person's private life. It is the common law's way of saying that, while debate around public matters should not be discouraged or curtailed, an individual's personal affairs should not leave them open to defamatory comments. Ferguson argues that without the requirement freedom of expression would be given too much weight at the expense of reputation and "damaging attacks on personal matters of no legitimate interest to the public could go unchecked."[24]

B Interpreting the Defamation Act 1992

The Defamation Act 1992 does not specifically mention a public interest requirement as part of the defence of honest opinion but, as the long title of the Act states, it is only in place to "*amend* the law relating to defamation" (emphasis added). It does not necessarily follow that the public interest requirement has been excluded. Burrows argues that the Defamation Act 1992 renames and modifies the common law defence of fair comment without replacing the public interest requirement.[25] Ferguson also argues that: "There is no suggestion that [the Defamation Act 1992] is a code."[26] This view is supported by the Parliamentary debates from the Defamation Bill's time before the House.[27]

The counter argument, as expressed obiter in *Shadbolt v Independent News Media (Auckland) Ltd*, is that there is no additional requirement beyond what is expressed within the provisions.[28] Considering its position as a major requirement of the defence at common law, the fact that public interest is not specifically referred to in the provisions could suggest that Parliament intended to abolish it. However, the same could be said for the requirement that the opinion must be based upon

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22 See for examples Milmo and Rogers, above n 17, 311-324.

23 *Wilson v Manawatu Daily Times Co* [1957] NZLR 735 (SC).

24 Judith Ferguson "Honest Opinion and Public Interest" [1998] NZLJ 14, 16.

25 John Burrows "Media Law" [1998] NZ Law Rev 229, 244.

26 Ferguson, above n 24, 14.

27 "The legislation is not a code. It does not cover all the important rules that relate to defamation, but it does express most of them." Hon David Caygill MP (17 November 1992) 531 NZPD 12332.

28 *Shadbolt v Independent News Media (Auckland) Ltd* (7 February 1997) HC AK CP 207/95, 11 Tompkins J.

facts, and this is still described as a key aspect of the current New Zealand defence.[29] Also relevant are the specific provisions introducing genuineness and removing malice, which suggest that any major changes to the defence were intentionally made by statute. *The Laws of New Zealand* section on honest opinion reads: "Under the statutory defence of honest opinion, however, there is now no requirement that the opinion be on a matter of public interest."[30] Sections 9 through 12 of the Defamation Act 1992 are cited in support of this view.

The Committee on Defamation did not provide a great deal of assistance in determining this point. Although it did not discuss the subject in detail, nor mention public interest in its recommendations, the report stated that: "The existence of the defence of fair comment *on a matter of public interest* is generally regarded as essential to freedom of speech … ." (emphasis added).[31] It can therefore be argued that the Committee on Defamation, being well aware of the public interest requirement, had no intention of removing it from New Zealand law. This is not to suggest, however, that it was not prepared to make dramatic alterations to the defence, as evidenced by the removal of malice and the introduction of the genuineness requirement.

Supporting this view is the lack of an explicit public interest requirement in section 8 of the Defamation Act 1954, another statute aimed at amending the common law without replacing existing requirements of the various defences. Public interest was still a requirement for cases decided while this Act was in force.[32]

C Subsequent Dicta

Although this background to the Defamation Act 1992 suggests that the public interest requirement is still a key consideration for any defendant contemplating a defence of honest opinion, the courts in New Zealand have not been uniform in their approach to this component of the law.

In *Shadbolt v Independent News Media (Auckland) Ltd* Tompkins J stated that: "There is nothing in the [Defamation Act 1992] to indicate that for the defence of honest opinion to arise, it must be an honest opinion on a matter of public interest."[33] This conclusion was based on the lack of any express mention of public interest in the Defamation Act 1992, and the statement of the law from *The Laws of New Zealand*. Particular emphasis was placed upon the fact that the editor of the relevant paragraphs was Justice McKay, who had chaired the Committee on Defamation back in

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29 *Mitchell v Sprott*, above n 16, paras 22-23 Blanchard J for the Court.

30 *The Laws of New Zealand*, above n 2, 99, para 133.

31 Committee on Defamation, above n 4, para 140, see also para 137.

32 See for example *Davies v Wellington Newspapers Ltd*, above n 18.

33 *Shadbolt v Independent News Media (Auckland) Ltd*, above n 28, 10 Tompkins J.

1977. The point concerning McKay's editorship carries some weight, but McKay was only one voice of reform, and the law ultimately enacted is significantly different from the Committee's recommendations. Moreover it is a very dangerous practice for courts to place too great a weight on such summaries of the law when dealing with complex legal issues.

A similar view was very briefly stated, in parentheses, by the Court of Appeal in *Awa v Independent News Auckland Ltd*: "(In defamation proceedings under the new Act it is now unnecessary for a defendant relying on honest opinion to prove that the matter was of public interest or to prove absence of malice.)"[34] No authority is given in support of this statement.

The High Court asserted the need for opinions to be on matters of public interest in *Lange v Atkinson*, a case that dealt primarily with qualified privilege.[35] Yet the first Court of Appeal judgment in that case refuted this position: "There is no requirement stated in the statute that the matter on which the opinion is expressed has to be of public interest: *Awa v Independent News Auckland Ltd*."[36]

The more recent Court of Appeal decision of *Mitchell v Sprott* is ominously silent on the subject in its discussion of the "legal principles" behind honest opinion, although it mentions all other major requirements of the defence.[37]

D Current Position

While statutory interpretation arguments suggest that the courts have not interpreted the Act in line with Parliament's intent, which was to amend the common law without removing the requirement, the line of cases just mentioned presents a strong argument that public interest is no longer required for a successful defence of honest opinion in New Zealand.

However, even if the courts have assumed that the public interest requirement has been done away with, the discussion has been brief and obiter. There is still no New Zealand case directly on point, and development of the common law, at least in the United Kingdom, has been slow.[38] There is a distinct lack of New Zealand cases in which the public interest requirement is the chink in the defendant's armour. A detailed analysis of its pros and cons is merited.

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34 *Awa v Independent News Auckland Ltd*, above n 18, 595 Richardson P, Gault, Keith and Blanchard JJ.

35 *Lange v Atkinson* [1997] 2 NZLR 22, 33 (HC) Elias J.

36 *Lange v Atkinson* [1998] 3 NZLR 424, 436 (CA) Richardson P, Henry, Keith and Blanchard JJ ["*Lange v Atkinson* 1998"].

37 *Mitchell v Sprott*, above n 16, paras 16-24 Blanchard J for the Court.

38 See Milmo and Rogers, above n 17, 311-312.

E Key Tension

The strongest argument in favour of the public interest requirement is that it protects both the reputations and the privacy of individuals who might otherwise be subject to defamatory comments on their private lives.[39] This is reasonably straightforward. However, it is arguable whether this is the correct place to strike the balance between private reputations and the major countervailing factor – freedom of expression.

The Court of Appeal in *Lange v Atkinson* stated, in relation to the obiter statement in *Awa v Independent News Auckland Ltd*, that: "This apparent relaxation of the common law requirement of public interest would seem to be consistent with s14 of the New Zealand Bill of Rights Act 1990."[40] Putting aside the question of whether the Court was correct in its interpretation of the Defamation Act 1992 and ready adoption of the reasoning in *Awa v Independent News Auckland Ltd*, its argument is correct. Removing the public interest requirement promotes freedom of expression by expanding the subject matter protected by honest opinion. But once again, is this where the balance should lie?

F Current Challenges

One approach to the question of where to draw the line is to begin by looking at what a defendant is already up against when pleading honest opinion. Firstly, and most significantly, the onus is on the defendant to prove that the opinion expressed was genuine.[41] Secondly the defendant must satisfy the various factual requirements of the defence.

If these factors can be satisfied, the defendant can then point to a genuine opinion based on true facts. Why should a person not be allowed to hold a genuine opinion based on true facts in some situations? Can we justify removing the right to express an opinion on some subjects, or is the public interest requirement an underlying principle of the defence that must remain?

G Privacy Versus Freedom of Expression

Some authors would answer such questions with support for the limitation, highlighting the potential for the public interest requirement to protect people's privacy.[42] By denying the defence of honest opinion to comments concerning people's private lives, the law will not be seen as giving shelter to mere gossip.

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39 See for example Burrows, above n 25, 244; Ferguson, above n 24, 15.

40 *Lange v Atkinson* 1998, above n 36, 436 Richardson P, Henry, Keith and Blanchard JJ.

41 Defamation Act 1992, s 10.

42 See Burrows, above n 25, 244; Ferguson, above n 24, 16.

However, if this is the case then there is some irony at play. The term "public interest" is most commonly associated with the *protection* of freedom of expression – as in the law of copyright for example, where a defendant may be able to justify infringement of a copyrighted work if such an infringement is in the public interest.[43] In the context of honest opinion public interest is being used to *restrict* free speech.

Another distinction between honest opinion and the bulk of the privacy debate is that comments, not facts, are at the heart of the defence. Defamatory facts are dealt with through the defence of truth,[44] but it is unclear whether a statement of opinion can be a breach of privacy. Arguably the principal damage to a person's privacy would take place where a defendant attempted to satisfy the factual limitations of honest opinion, rather than as a result of their subsequent commentary on the facts divulged.

And once facts are out in the public domain, is it desirable to deter people from expressing their opinion on them by denying them a defence of honest opinion? For the reasons outlined above, it can be seen that the concept of public interest sits uneasily amongst the usual defenders of privacy, and will provide poor protection as such.

The English courts have discussed the concept of public interest in recent privacy law decisions,[45] and have made several statements favouring freedom of expression. Hoffmann LJ in *R v Central Independent Television Plc* stated that:[46]

> [A] freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well-motivated, think should not be published. It means the right to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.

The public interest requirement in relation to honest opinion is one of the "clearly defined exceptions" mentioned above in most common law jurisdictions, but it is currently unclear in the New Zealand context. I support the thrust of Hoffmann LJ's statement, and argue that the public interest exception to freedom of expression should be removed to give that freedom more weight over countervailing considerations including privacy.

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43 See *Ashdown v Telegraph Group Ltd* [2001] 3 WLR 1368 (CA).

44 Defamation Act 1992, s 8.

45 See *A v B plc* [2003] QB 195 (EWCA); *R v Central Independent Television Plc* [1994] Fam 192 (CA).

46 *R v Central Independent Television Plc*, above n 45, 203 Hoffmann LJ.

H Drawing Bright Lines

Hoffmann LJ's discussion, quoted above, also highlights other problems with the objective judicial assessment in relation to the public interest requirement. Firstly, it is strange that the decision as to whether a matter is in the public interest should be made by a judge, rather than by a jury of laypeople who arguably have a more legitimate claim to such an assessment. Secondly, deciding whether a matter is in the public interest involves drawing a bright line in situations where it may prove difficult, and controversial, to decide either way.

In some cases, the public interest requirement will be satisfied at face value without need for further analysis.[47] But where the issue is more finely balanced, the chance for a court to deny a person the right to express their genuine opinion, based on true facts, could lead to results seen as unjust by a section of the community.[48]

Discussing the public interest requirement in the Australian context, Rares argues that: "It makes sense that the defence which is so integral to freedom of speech, should be linked to a subject-matter which warrants the exercise of the freedom."[49] This statement emphasises this particular difficulty with the public interest requirement – its application can be arbitrary. Should a judge be deciding when we are entitled to exercise our freedom to comment? As the Court in *Green v Schneller* noted:[50]

> To a very large extent, whether an imputation relates to a matter of public interest or not is determined by value judgment, by the individual perception of the tribunal charged with the task of making the decision, and current mores and attitudes.

Other courts have noted the difficulties inherent in distinguishing between "public" and "private" matters.[51] I argue that the genuineness and factual requirements provide sufficient limitations on defendants who plead honest opinion and that the public interest is an unwieldy and unhelpful addition to the defence.

I Promoting Public Debate?

Yet others argue that the restriction on freedom of expression is helpful, by focussing on the benefits of discussing matters of public interest, rather than the protection of reputation or privacy.

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47 See for example *Shadbolt v Independent News Media (Auckland) Ltd*, above n 28, 10 Tompkins J.

48 Cultural differences have surfaced in New Zealand defamation cases in the past; see for example *Awa v Independent News Auckland Ltd*, above n 18.

49 Steven Rares "No Comment: the Lost Defence" (2002) 76 ALJ 761, 769.

50 *Green v Schneller* [2000] Aust Torts Reports 81-568, para 19 Simpson J.

51 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, para 42 Gleeson CJ.

In *Lyon v Daily Telegraph Ltd* Scott LJ stated that the rationale for the public interest requirement is that the free discussion of such matters promotes the common weal.[52] In this way the defence of honest opinion could be seen as a kind of reward for those who were prepared to take part in hard-hitting public debate.

There is little weight in such arguments. While Scott LJ's statement sounds reasonable enough, it has little relevance to the public interest requirement in the context of honest opinion. The free discussion of matters of public interest will take place regardless of whether or not the requirement is a factor in the defence of honest opinion. The public interest requirement does not benefit those relying on the defence. It does nothing to encourage discussion, instead imposing a restriction on freedom of expression.

The "matter of public interest" standard, regardless of how widely it is interpreted by the courts, is unrealistic. People discuss, and express opinions on, all manner of subjects. Some of these subjects will only be of interest to them and their friends or family. Some of their opinions will be defamatory of others, but they will be genuinely held opinions and based on true facts. As one media lawyer expressed it: "If it was a defamation published to two people about a matter that was of interest to them but not the public generally then I don't see that it benefits anyone to require a public interest element."[53]

An example can be found in the facts of *Green v Schneller*, which concerned a dispute between two neighbours that was covered by a reality television show.[54] The defendant's defence of comment failed to meet the public interest requirement, but faced with a similar scenario, where a genuine opinion was expressed, I argue that a defence should be allowed. The public interest requirement in this situation in no way fosters public debate. People expressing their views on matters of importance to them, though not to the public generally, should be allowed a defence of honest opinion and not have the value of their opinions weighed up by a judge.

J Conclusions on Public Interest

The public interest requirement should be abolished. The defence of honest opinion is already a difficult one for defendants to make out, and the public interest requirement is an undesirable limitation on freedom of expression. I have argued that the justifications for the public interest requirement, such as the promotion of public debate and the protection of privacy, are not as fundamental to the defence as some authors have made them out to be. As long as people can show that their opinion was genuine, and supported by facts, they should be rewarded with the freedom to choose the subject on which to comment. There is little to suggest that the public interest

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52 *Lyon v Daily Telegraph Ltd*, above n 9, 752 Scott LJ.

53 Interview with Sarah Bacon, Partner, Izard Weston (the author, Wellington, 2 August 2004).

54 *Green v Schneller*, above n 50.

requirement is an underlying principle of the defence, which has the freedom to express honest opinions at its heart. The defence can function without the public interest limitation, something which cannot be said for the principle of honesty, or the factual limitations.

A new provision is needed to provide certainty in the law, and prevent further misinterpretation of Parliament's intentions under the current Act. Such a provision, which clearly abolishes the public interest requirement, is included in the draft "section 10" set out towards the end of this article.

V A GENUINE CHALLENGE

Section 10 of the Defamation Act 1992 provides for both the genuineness requirement and the availability of the defence to various defendants. Despite the centrality of this provision, and its being in force for over a decade, New Zealand lacks a comprehensive judicial discussion of section 10.

A Background to Section 10

The introduction of the section followed from the recommendations of the Committee on Defamation.[55] The Committee decided to adopt the reforms undertaken first by New South Wales and in turn recommended by the Faulks Committee.[56] The draft provision it recommended was as follows:[57]

> 11 Comment
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> (2) In an action for defamation in respect of any matter that includes or consists of opinion –
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> (a) A defence of comment by a defendant who is the author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was his genuine opinion; and
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> (b) A defence of comment by a defendant who is not the author shall fail unless the defendant proves that he believed that the opinion expressed was the genuine opinion of the author.

One of the basic premises was to remove the confusing and complex common law concept of malice, and replace it with the requirement that the defendant prove that the opinion was genuine.[58] The evidential onus for the defence was also shifted to the defendant.

The recommended provision also clarified the availability of the defence for those who publish the opinions of others, and outlined what they had to prove. The intentions expressed by the

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55 Committee on Defamation, above n 4, paras 148-155.

56 Defamation Act 1974 (NSW), s 32(2); Committee on Defamation *Report of the Committee on Defamation* (London, Her Majesty's Stationary Office, 1975) para 159 ["Faulks Committee"].

57 Committee on Defamation, above n 4, Appendix VII cl 11.

58 Hon D A M Graham MP (10 November 1992) 531 NZPD 12145.

Committee on Defamation, in relation to such publishers, are best reflected in the following statement:[59]

> If a defendant who is not the author of the opinion expressed is able to show that he believed that the opinion was genuinely held by the author, then the defendant should be entitled to succeed in his defence of comment.

The draft provision supplied by the Committee on Defamation is significantly different from the one that we now know of as section 10 of the Defamation Act 1992 and, as I argue below, this intention has been poorly reflected in the current legislation. While the requirements for the author of the opinion are substantially the same, the provisions relating to the publisher have been expanded to account for two different categories of author.

Section 10(2)(a) covers employees and agents of a publisher, and section 10(2)(b) covers other contributors. The standard of what a defendant must prove in terms of belief is lower when an outside contributor is involved, the defendant needing only "no reasonable cause to believe that the opinion was not the genuine opinion of the author of the matter containing the opinion."[60] The requirement that the opinion does not purport to be that of the publisher, given the context and circumstances of the publication, was also added to the mix for both groups.

B Current Section 10 Genuineness

1 Honest versus genuine

It may seem incongruous that, while the title of the defence is now "honest" opinion, the key test is whether the defendant's opinion was "genuine".[61] A very subtle difference between the two terms may exist, as the following jury directions of Anderson J suggest: "Any opinion in the book we accept is a genuine opinion … we don't accept that it's an honest opinion in the legal sense."[62]

This analysis suggests a distinction between genuine belief and a successful defence of honest opinion. In order for a person's opinion to become an "honest opinion" they must not only be genuine in what they are expressing, they must also satisfy the remaining requirements of the defence. This may provide a basis for the use of two different words, but the focus seems to be on the use of "honest" as part of the legal term "honest opinion", and the use of "genuine" as a distinct test rather than on any difference in statutory or ordinary meaning.

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59 Committee on Defamation, above n 4, para 154.

60 Defamation Act 1992, s 10(2)(b)(ii).

61 Defamation Act 1992, ss 9-10.

62 *Weir v Karam* (20 September 2000) HC AK CP 139-98 Anderson J.

Anderson J was dealing with a situation where the plaintiff had not challenged the genuineness of the defendant's opinions, preferring to attack the defendant's case on different grounds. In such a scenario it could be very confusing for the jury if both the title and test for the defence used the term "honest". The jury would have to be told that there was no question of whether the defendant's opinions were honest. But they may still not be honest opinions overall. The use of the two different words, albeit with very similar meanings, in such a scenario shows that such a distinction can be useful.

Otherwise no distinction between the terms is made, and "honest" and "genuine" are even used interchangeably. The Court of Appeal has stated, in relation to the genuineness requirement, that: "The test is the honesty of the opinion, not its reasonableness."[63] The Court even uses the term "honest" throughout its discussion of the genuineness requirement.[64] The Committee on Defamation had originally recommended that the defence in New Zealand be renamed "comment".[65] The eventual appearance of the term "honest" in the title was not surprising given the word's long association with the defence.[66]

2 Proving genuineness

When it comes to looking at the honesty of an opinion before the courts, the onus is on the defendant to show that the opinion expressed was their genuine opinion.[67] This is a more difficult requirement than the test at common law, which was an objective assessment of whether an honest person *could* have stated that opinion, regardless of how extreme or exaggerated it was.[68] The defence would then be successful unless the plaintiff could show that the defendant was motivated by malice. Occasionally, where the plaintiff's motives were challenged, the test was that of the "fair-minded person", which could disadvantage a defendant with extreme views.[69] Section 12 of the Defamation Act 1992 removed this distinction.

Burrows describes the changes brought about by the introduction of the new "genuineness" requirement under section 10 of the Defamation Act 1992 as "fraught with practical difficulty."[70]

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63 *Mitchell v Sprott*, above n 16, para 24 Blanchard J for the Court.

64 *Mitchell v Sprott*, above n 16, paras 44-49 Blanchard J for the Court.

65 Committee on Defamation, above n 4, para 142.

66 Committee on Defamation, above n 4, para 141; *Slim v Daily Telegraph Ltd*, above n 10, 170 Lord Denning MR; Thomas Goddard to Hon Geoffrey Palmer, above n 6.

67 Defamation Act 1992, s 10(1).

68 *News Media Ownership v Finlay*, above n 3, 1096 North P.

69 *Telnikoff v Matusevich* [1992] 2 AC 343 (HL).

70 Burrows, above n 25, 243.

Despite more than a decade of litigation under the Defamation Act 1992 the question of what a defendant must show to prove the genuineness of the opinion remains unclear. Even so, the defendant will have at least ten days to get their case in order, as section 39 of the Defamation Act 1992 requires a plaintiff alleging that the defendant's opinion was not genuine to give notice.

In *Shadbolt v Independent News Media (Auckland) Ltd* the High Court made it clear that proving genuineness is no easy task. Tompkins J rejected the defendant's submission that there should be a presumption of genuineness where there is no evidence to the contrary, although he acknowledged that there might be scenarios where the "nature of the publication itself could justify an inference that the author was genuine."[71] In that case the publication, a tabloid newspaper, was presumably not what the Judge had in mind. Perhaps opinions expressed in a letter between friends, or in a personal diary, would qualify because there is less likelihood of people expressing contrived opinions when communicating in such an intimate way.

Vague v Banks, in which an actress sued a talkback radio host who had discussed an advertisement she had featured in, also provides some clues as to what would have been taken into account had that case gone to trial with genuineness at issue.[72] The defendant's knowledge of the plaintiff's employment status, his misquotation of the plaintiff, the lack of realism in the comment, similar conduct to that of the plaintiff by the defendant on another occasion (he too had recently appeared in an advertisement), failure to allow a reply from the plaintiff and the provocative nature of talkback radio were all noted as of potential relevance in assessing the absence of genuineness.[73]

3 Challenging the genuineness of another

While a plaintiff who complies with section 39 of the Defamation Act 1992 is free to challenge the genuineness of the defendant's opinion, and may be fortunate enough to have a list of factors similar to that in *Vague v Banks* to rely on, the reality is that such a challenge will be very difficult in most cases. Section 10 of the Act places the burden of proof on the defendant, but an evidentiary burden will shift on to the plaintiff if they choose to rely on any facts or circumstances in support of their allegation,[74] and it would be a strange decision to go ahead with a section 39 notice without some evidence that the defendant had expressed a different opinion on another occasion, or had some reason to fabricate and express an opinion that was not their own. The plaintiff's job in this respect will be particularly difficult when all dealing has been at arm's length and there is no relationship between the plaintiff and defendant that might result in the availability of such

71 *Shadbolt v Independent News Media (Auckland) Ltd*, above n 28, 12 Tompkins J.

72 *Vague v Banks* [2002] DCR 782 Judge F W M McElrea.

73 *Vague v Banks*, above n 72, paras 29-32 Judge F W M McElrea.

74 Defamation Act 1992, s 39(2).

evidence, and in the absence of any compelling facts or circumstances the plaintiff may well be better off challenging the defence on other grounds.

The type of evidence used to challenge the genuineness of a defendant's opinion will probably be similar to that used to show malice at common law.[75] Malice traditionally referred to a defendant's improper motive in publishing the defamatory material, which would defeat a defence of fair comment. The term has long been derided as imprecise and too far removed from ordinary usage.[76]

Recently the place of malice within the common law defence of fair comment was dealt a radical blow. Sitting as a Non-Permanent Judge of the Court of Final Appeal of Hong Kong, Lord Nicholls (more well-known for his work in the House of Lords) held that:[77]

> [I]n my view a comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence.

Lord Nicholls came to this conclusion, after having reviewed a number of authorities, on the basis that the respective rationale for fair comment and the defence of qualified privilege, with which malice is primarily associated,[78] are fundamentally different.[79] Fair comment is based upon the right to express opinions, as opposed to the performance of a duty or the protection of an interest.

Ironically this judgment brings the common law – at least that of Hong Kong – substantially into line with the honest opinion defence of New Zealand by making the defendant's genuineness the only subjective assessment.[80]

Before the Hong Kong position was altered, the New Zealand Court of Appeal had acknowledged that malice can still play a role in the assessment of genuineness where such a

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75 Todd, above n 2, 849.

76 Faulks Committee, above n 56, paras 155-160.

77 *Albert Cheng v Tse Wai Chun Paul* [2000] HKLRD 418, "Conclusion on the law" (HKCFA) Lord Nicholls NPJ <http://www.hklii.org> (last accessed 30 August 2004).

78 See Defamation Act 1992, s 19; *Horrocks v Lowe* [1975] AC 135 (HL).

79 *Albert Cheng v Tse Wai Chun Paul*, above n 77, "*Horrocks v Lowe*" Lord Nicholls NPJ.

80 See generally Jill Cottrell "Fair Comment, Judges and Politics in Hong Kong" (2003) 27 MULR 33.

motivation may cast doubt upon the genuineness of the opinion expressed.[81] Lord Nicholls mentions that motivation may also be relevant to damages assessments.[82]

Apart from saying "we told you so" this development appears to have few implications for New Zealand's law, other than to provide more weight to the argument that the troublesome term should be steered well clear of: "The answer lies in shunning the word altogether."[83] Motivation will probably remain a factor in challenging genuineness, but perhaps the term "malice" will disappear altogether.

A plaintiff might draw on the common law in another way to challenge the genuineness of an opinion by showing that it is a view that no honest person could hold. An extreme example could be the conclusion, based on X's shoe type, that he is a fraudster. This line of argument relates to the connection between the opinion stated and the facts relied upon, similar to the common law objective assessment of an opinion's "fairness". While a commentator was entitled to "dip his pen in gall" for the purpose of criticism, the views must be germane to the subject matter criticised.[84]

Such an approach makes sense when the underlying "factual basis" principle of honest opinion is considered. There is little point in requiring someone to provide the facts upon which the opinion is based if they are entitled to pluck dubious supporting details from thin air.

Although the Defamation Act 1992, with its focus on genuineness, makes no reference to an appropriate connection between the facts referred to and the opinion expressed, the consideration is arguably still relevant. Defamation lawyer Peter McKnight argues that the requirement has been carried through with other common law elements of the defence, as implied by the Defamation Act 1992's purpose to amend the law.[85]

At the very least, a lack of clear connection between the facts referred to and the opinion expressed will go towards a finding that the defendant does not genuinely hold such views.[86] It can also be argued that courts will continue to allow very strong criticism to be covered by the defence, although sheer invective will remain outside its scope.[87]

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81 *Lange v Atkinson* 1998, above n 36, 436 Richardson P, Henry, Keith and Blanchard JJ.

82 *Albert Cheng v Tse Wai Chun Paul*, above n 77, "Conclusions on the law" Lord Nicholls NPJ.

83 *Albert Cheng v Tse Wai Chun Paul*, above n 77, "Conclusions on the law" Lord Nicholls NPJ.

84 *Albert Cheng v Tse Wai Chun Paul*, above n 77, "Fair comment: the objective limits" Lord Nicholls NPJ. The point is implied in *Mitchell v Sprott*, above n 16, para 23 Blanchard J for the Court.

85 Interview with Peter McKnight, Partner, Izard Weston (the author, Wellington, 2 August 2004).

86 *Lange v Atkinson* 1998, above n 36, 436 Richardson P, Henry, Keith and Blanchard JJ.

87 Burrows and Cheer, above n 2, 93-94.

4 Genuineness pre-trial

The influence of the common law on genuineness has already been demonstrated at the pre-trial stage. The Court in *Mitchell v Sprott* stated that a court would be reluctant to make a pre-trial finding on genuineness unless the available evidence: "… reveals conduct by the plaintiff of such a nature as would produce a comment from any dispassionate observer similar to that from the defendant… ."[88] The Court's willingness to examine the stated opinion from an objective viewpoint, similar to that of common law fair comment, goes against the test set out in the Defamation Act 1992, although the Court is clearly aware of the subjective nature of the current defence.

Nevertheless, the objective approach was adopted by the Judge in *Vague v Banks*:[89]

> The reference to "any dispassionate observer" is in my view intended to import an objective test whereby the honesty of the defendant's opinion is likely to be left to be decided at trial unless the genuineness of the opinion is clear-cut or obvious; this is unlikely to be the case if dispassionate observers might disagree amongst themselves on the topic.

The potential effect of this approach is that, at pre-trial stage, a defendant's opinion could be upheld as their genuine opinion on the basis that any dispassionate person would reach a similar conclusion. While the Courts are trying to maintain a high threshold for pre-trial determinations, this approach would allow a defendant to avoid the more challenging subjective genuineness test provided for in section 10 of the Defamation Act 1992. Although that defendant may have expressed an obvious conclusion on a matter, there would be no examination of whether it was a view genuinely held.

A better approach would be to retain the subjective genuineness assessment, while maintaining the high threshold appropriate for pre-trial determinations. The defendant's opinion could be upheld as genuine where the evidence available to the court showed, for example, the defendant had expressed a similar opinion in the past, or was well known for views of that nature. Such evidence would be more consistent with the intent of the Defamation Act 1992 than the approach outlined in *Mitchell v Sprott*.[90] A subjective assessment is also more likely to assist the defendant with extreme views who might have little chance of convincing even the most dispassionate observer of the value of those opinions.

Undermining arguments in favour of a pre-trial determination of genuineness altogether, the Court in *Mitchell v Sprott* highlighted the "logical difficulty in making a final determination on the issue of honesty of opinion when the exact meaning of [the defendant's] words remains in

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88 *Mitchell v Sprott*, above n 16, para 48 Blanchard J for the Court.

89 *Vague v Banks*, above n 72, para 26 Judge F W M McElrea.

90 *Mitchell v Sprott* above n 16, para 48 Blanchard J for the Court.

dispute."[91] This refers to the fact that honest opinion will only become relevant after a jury has found that the words expressed contain the imputations contended by the plaintiff.[92] In light of this, it might be more appropriate to dispose of genuineness pre-trial only where the defamatory meanings have not been challenged by the defendant, or have otherwise been fully dealt with at the same stage.

5 Satire and devil's advocates

Interesting questions also arise when those defamatory meanings are alleged after an author has, rather than expressing their own opinion, played the devil's advocate or satirised the plaintiff. In such situations, particularly devil's advocacy, a genuine opinion will often not be apparent. But it is desirable for newspapers to present all sides of a story in some cases, and this could involve expressing opinions that might well be genuinely held by a section of the community, although not the author.

Likewise satire is a socially desirable medium, one that helps societies look at themselves in a different light and exaggerate the foibles of prominent people in the community. It will often convey a humorous tone, but with a cogent underlying message that an ordinary reader will be able to read into the work – potentially containing a defamatory "sting". Not being able to rely on honest opinion in these situations could stifle public debate and creative writing. However, it could not be said that there were genuinely held opinions expressed. Is this a necessary risk for these authors to run? Surely the journalist pursuing a balanced story must be allowed to develop arguments without fear of retribution?

One option is for the author to find sources who will express contrasting opinions on the record. But will this always be a practical option? Perhaps another statutory provision to allow for writing of this kind would provide a solution, but it would be a challenging task to clearly outline who could rely on such a provision and when.

The Court of Appeal in *Awa v Independent Newspapers Auckland Ltd* noted that the removal of Billy T James's body against his widow's wishes could be seen as morally inappropriate by a section of the New Zealand community and that a newspaper was entitled to reflect that opinion.[93] However, that case was not decided under the Defamation Act 1992. This example demonstrates the greater flexibility of the objective test for fair comment, that an honest person *could* have held those views. The only option available to a contemporary court faced with a deserving "devil's advocate" defendant may be to stretch the genuineness requirement to its limit.

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91 *Mitchell v Sprott* above n 16, para 49 Blanchard J for the Court.

92 *Haines v Television New Zealand* (12 March 2004) HC AK CP 89-SD02 Venning J, 19.

93 *Awa v Independent Newspapers Ltd*, above n 18, 595 Richardson P, Gault, Keith and Blanchard JJ.

While the genuineness requirement may limit the ability of commentators to put forward views that are not their own, the requirement is still in line with the principles of the defence. No one is being denied the freedom to express their own opinions.

C Honest Opinion and Publishers

Nor are people necessarily being denied the freedom to publish the opinions of others. Occasions frequently arise where it is necessary for one person to publish the comments of another in order to continue debate on a subject. Lord Denning MR put forward one example in *Slim v Daily Telegraph Ltd*:[94]

> When a citizen is troubled by things going wrong, he should be free to "write to the newspaper": and the newspaper should be free to publish his letter. … The writer must get his facts right: and he must honestly state his real opinion. But that being done, both he and the newspaper should be clear of any liability.

The approach to liability for publishing the opinions of another was relatively unsettled at common law, largely due to debate over the operation of malice in such situations,[95] but the New Zealand position has since been clarified by statute. Section 10(2) of the Defamation Act 1992 allows defendants who are not the authors of the opinion in question to rely on the defence of honest opinion. In most cases this will be a media defendant.

D Flaw in Section 10

At a glance, section 10 of the Defamation Act 1992 appears to reflect the intent of the Committee on Defamation. Both an original author and the publisher have the defence of honest opinion available to them, provided they meet their respective genuineness requirements. However, there is a potential gap in the defence that may severely limit the availability of honest opinion. The following example illustrates the issue in relation to a newspaper article.[96] The scenario could equally apply to any medium in which another person's opinion is quoted within the matter concerned.

1 Cast

Although all defamatory statements necessarily involve a publication of some kind, the term "publisher" is here used in its ordinary sense to refer to a defendant who has printed or broadcast another person's opinion and is relying on honest opinion under section 10(2) of the Defamation Act 1992. In the example below this publisher is a newspaper.

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94 *Slim v Daily Telegraph Ltd*, above n 10, 170 Lord Denning MR.

95 See I D Johnston "Uncertainties in the Defence of Fair Comment" (1979) 8 NZULR 359, 387-391.

96 See for example Patrick Crewdson "Morals group wants festival film ban" *The Dominion Post* (7 July 2004, Wellington) A1. The article contains a quote that could arguably lead to defamation proceedings.

The "author" in the example below is a journalist who has written an article for the newspaper containing a quote. The person who provided the quote is referred to as the "third party". The "cast" for the following example is summarised below:

- Defendant a newspaper
- Matter the newspaper article as a whole
- Author the journalist: an employee or agent of the newspaper
- Opinion a quote from a third party

All section references in the example are to the Defamation Act 1992.

2 Example: the flaw in action

The plaintiff sues the defendant in defamation in relation to an article (as a whole) published in the defendant's newspaper. The defamatory words specifically complained of are a third party's opinion, which is quoted in the article. The third party is neither an employee nor a contributor (such as a guest editorial writer) of the defendant. The defendant newspaper attempts to rely on honest opinion by way of section 10(2). It is not material for the purposes of this example whether an employee/agent of the newspaper or an outside contributor wrote the published article. Either section 10(2)(a) or (b) can be used. It is presumed that there is no question of the opinion expressed purporting to be that of the defendant newspaper, in accordance with the requirements of section 10(2)(a)(i) or (b)(i).

The flaw in section 10 becomes apparent when the defendant attempts to prove that it believed (or had no reasonable cause to believe otherwise) the opinion expressed in the quote to be the genuine opinion of the "author of the matter containing the opinion".[97] This is because the "author of the matter containing the opinion" is the writer of the article as a whole, not of the quote with which the plaintiff has taken issue. The newspaper has no reason to believe that the quoted words form the genuine opinion of the author of the article as a whole, because they are clearly set out as the opinion of the quoted third party. So, any quotes contained in an article will not fall within the defence as drafted – even though someone's legitimate, genuine opinion may be expressed within the quotation.

3 Another potential flaw

Section 10(1) of the Defamation Act 1992 arguably contains a similar flaw to that in section 10(2), following the same reasoning as in the example above. The provision refers to "a matter that includes or consists of an expression of opinion". This time the defendant is the author of the matter

97 Defamation Act 1992, ss 10(2)(a)(ii) and 10(2)(b)(ii).

as a whole. It must show that the opinion is its genuine opinion. This is not possible if it has included a third party's quote in its article.

E Arguments Surrounding the Flaw

The flaw in section 10 of the Defamation Act 1992 would not have been avoided if Parliament had simply adopted the Committee on Defamation's draft provision for honest opinion, although it would have been a slight improvement. Clause 11(2)(a) of the recommended provision still refers to the "author of the matter" containing an opinion, while the section referring to publishers states only that "a defence of comment by a defendant who is not the author shall fail … ."[98] This still leaves confusion as to whether the author referred to in clause 11(2)(b) is the same as the author of the matter referred to in the previous paragraph, or whether the option is left open for the defence to be used in regard to any author's opinion within a single matter.

It could be argued that a court would simply ignore the flaw and apply the law in line with the intentions expressed by the Committee on Defamation, allowing the newspaper to rely on honest opinion in relation to a quote, artificially stating that the matter containing the defamation was the quote for the purposes of that enquiry. However, such an expectation is far from satisfactory for media defendants, who want to know where they stand on a point of law such as this before they make the decision of whether or not to publish a quote, and whether to rely on honest opinion if proceedings ensue. Moreover, if the court did accept an argument from a plaintiff that a newspaper could not rely on honest opinion in relation to a published quote, then a costly injustice could be done. On the facts of the scenario above, a plaintiff's strike-out application could successfully prevent a media defendant from relying on honest opinion.

More certainty is required in order to ensure that the provision is available to media defendants and other publishers in a broad range of situations, and that can be achieved through a minor adjustment to section 10 of the Defamation Act 1992. A draft provision is set out at the end of this article.

A provision of this kind, allowing publishers to rely on honest opinion in relation to another's comments, raises the question of how far the defendant will have to go to show a belief that the opinion in question was the person's genuine opinion. I agree with the concept of a subjective test for the defendant to satisfy, but there is potential for such a test to be overly challenging on a media defendant – something that the media were keenly aware of when the Defamation Act 1992 was before the select committee.[99]

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98 Committee on Defamation, above n 4, Appendix VII cl 11(2)(b).

99 "Joint Media Submission to the Justice and Law Reform Committee on the Defamation Bill 1988", 18.3-18.4.

For this reason I have opted for the lower requirement found in section 10(2)(b)(ii) of the Defamation Act 1992. A distinction is no longer made between an employee/agent of the defendant and a third party contributor. The single requirement makes the defence more straightforward and more accessible to the media defendant. It would be unfair for a defendant publisher to have to show that they believed each and every opinion to be the genuine opinion of the author. It would be too onerous for them to have to track down each person who is quoted or contributes to the article, especially in a large article where many views are expressed, or where all dealings are at arm's length.

Consequently the threshold for a publisher defendant to be put on notice should be a high one. For example, the threshold might be met if the defendant knew the author or quoted third party harboured a personal grudge against the plaintiff, or if they were well known for expressing very different views.

VI DRAFT SECTION

This draft section would replace the current section 10 of the Defamation Act 1992, clarifying the availability of honest opinion to those who publish the opinions of others, and abolishing the public interest requirement. Emphasis has been added at key points.

10 Opinion must be genuine

Draft Subsection (1) In any proceedings for defamation involving an expression of opinion, a defence of honest opinion by a defendant who is *the author of the opinion in question* shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion.

Draft Subsection (2) In any proceedings for defamation involving an expression of opinion, a defence of honest opinion by a defendant who is *not the author of the opinion in question* shall fail unless the defendant proves that –

(a) The opinion, in its context and in the circumstances of its publication (being the publication that is the subject of the proceedings) did not purport to be the opinion of the defendant; and

(b) The defendant had no reasonable cause to believe that the opinion was not the genuine opinion of its author.

[Subsection (3) remains the same as section 10(3) of the Defamation Act 1992]

Draft Subsection (4) A defence of honest opinion shall not fail because the expression of opinion was not on a matter of public interest.

VII CONCLUSION

The defence of honest opinion is a difficult concept within a difficult area of the law.[100] A measure of uncertainty currently pervades the defence in relation to both the public interest and genuineness requirements, and this should be addressed in the interests of everyone in New Zealand who values the right to have their say. If the draft section outlined above were enacted, the defence of honest opinion could more effectively fulfil its role as a mainstay of free speech within the law.

100 *Weir v Karam*, above n 62, 4 Anderson J.