REGULATING THE MEDIA: REPUTATION, TRUTH AND PRIVACY

BY SALLY WALKER*

[This speech was delivered by Sally Walker as her Inaugural Professorial Lecture at the Law School, University of Melbourne on October 31, 1993. It was also part of a series of seminars which launched the Law School's Centre for Media and Telecommunications Law and Policy. At the conclusion of the address, the Response and Vote of Thanks was made by David Flint, Dean of Law and Legal Practice, University of Technology, Sydney. In the course of his speech, Professor Flint commented that '[o]ne hundred ninety-three years ago in the US, the Harvard Law Review published a paper by Louis D Brandeis, himself a future CJ, and Samuel D Warren, 'The Right to Privacy'. This paper was generally seen as seminal in the development in the American common law of a right to privacy .... [today's lecture] has the potential, with [Sally Walker's] other works, to play a similarly significant role in the development of Australian law in this field.' The speech was submitted for publication by Professor Michael Crommelin, Dean of the Law School, University of Melbourne.]

Some of those of you who are here today will be here because this lecture forms part of one day of three all-day seminars to launch the Law School's Centre for Media and Telecommunications Law. My contribution to the seminar is to discuss 'reputation, truth and privacy'. Before I turn to that topic, I hope that you will bear with me as I spend a short time saying some things which are appropriate by way of introduction to an Inaugural Professorial lecture as this also is.

I would like to say something about William Edward Hearn. Hearn became the first Dean of the Faculty of Law at the University of Melbourne in 1873. Before this he had been Melbourne University's first Professor of Modern History and Literature, Political Economy and Logic; he had also acted as Professor of Classics. He was a prolific writer. His book *The Government of England*, which was published in 1867, influenced the likes of Dicey and was used as a textbook at Oxford. Another book, *Plutology*, was reviewed by an English writer who expressed surprise that the book, although Australian, was written in good English. Hearn wrote anonymously for many years for *The Argus* newspaper and, for a time, he edited *The Australasian*. He became a Member of the Victorian Legislative Council and, in that capacity, at different stages he was lauded or criticised by *The Age*.

Hearn believed in the need to develop courses of study relevant to Australian conditions; he was an early exponent of what we now call 'continuing education programs', arguing that there was a need for evening classes to keep 'artisans' out of the 'gin houses'. He served the University, not without some disharmony, as President of the Professorial Board and, later, as Chancellor. All his work — whether it was his project for the codification of Victoria's law or his campaign for professorial representation on the University's Council — was approached

* LLB (Hons), LLM (Melbourne). Hearn Professor of Law, University of Melbourne.

with conviction and energy.

I feel proud to have been appointed to the Hearn Chair of Law at the University of Melbourne. At the same time, I feel daunted by the knowledge that few could even hope to make a contribution such as his. My predecessor, Colin Howard, who took up his appointment as Hearn Professor of Law in 1965 did make just such a contribution. Before his appointment he had published two major books: *Strict Responsibility* and, with Norvall Morris, *Studies in Criminal Law*. In his twenty-five years at the University of Melbourne, he published six further significant works in three fields: criminal law, constitutional law and company law. His major books *Criminal Law* and *Australian Federal Constitutional Law* are widely regarded as pathbreakers in Australian legal writing. His work is characterised by the sharpness of his analysis and the exactness of his writing. Like Professor Hearn, Professor Howard became a notable commentator; he spoke on law, government and politics. He acted as special adviser to several Commonwealth Attorneys-General. Like Hearn, he served the Law School and the University in several important leadership positions. He was Dean of the Faculty of Law; he chaired the Academic Board and the Academic Committee.

The careers of Professors Hearn and Howard share some common features: the unflagging service they gave to the University; a common understanding that the University serves a wider community; the breadth of their interests, and the enormous contribution they made to scholarship, in particular by the way they examined the regulation of those institutions which reflect and mould the way we are as a society.

I wonder what Hearn would make of the appointment to a Chair named in his honour of a person whose main interest is Media Law. Of course, in 1949 Melbourne University Press published Geoffrey Sawer's *A Guide to Australian Law for Journalists, Authors, Printers and Publishers*. Sawer, who was later to chair the Australian Press Council, taught a course here at the University of Melbourne in the Law affecting Journalism.

On one level, there is no such thing as 'Media Law'; those of us who are interested in the way the law regulates the media, by restricting the publication of information and curbing the methods adopted by journalists to obtain information, must know about a whole raft of laws and some forms of self-regulation. We must know about:

- the law of contempt of court;
- contempt of Parliament;
- sedition and other 'political' offences;
- defamation law (civil and criminal);
- injurious falsehood;
- consumer protection and fair trading legislation;
- obscenity;
- blasphemy;
- incitement to racial hatred;

- broadcasting programming regulation;
- the Press Council;
- freedom of information legislation;
- trespass and nuisance;
- copyright;
- passing off; and
- breach of confidence.

There are several reasons why I find it more rewarding to focus on an applied rather than a pure approach to these laws. The application of these laws to the media provides a cutting edge which not only exposes difficult issues, but also provides a context in which the implications of the law can be better analysed. Furthermore, the application of these laws to the media raises important issues of freedom of speech and fundamental questions regarding the relationships between institutions. All these matters can best be examined by those who have a deep knowledge of all the forms of regulation of the media. The benefits of this far outweigh the one negative which those of us who describe ourselves as media lawyers must endure: the comments of the ignorant that Media Law is a 'narrow' area of the law. Media Law is certainly an area of the law which, at the current time, gives scope for breadth of scholarship. I am very grateful that Professor David Flint has agreed to be here today. Both as an academic lawyer and as Chair of the Australian Press Council, Professor Flint has made a significant contribution to the development of understanding of the regulation of the media, particularly, although not only, in relation to self-regulation.

Earlier today, other speakers at the Centre for Media and Telecommunications Law and Policy's seminar drew attention to various proposals which are currently being considered to reform some of the laws which regulate the media. I want to speak about the way defamation law regulates the media and, in this regard, to focus on reputation, truth and privacy.

On a practical level there is some connection between the concepts of reputation, truth and privacy. No doubt at one time or another most people have experienced negative feelings about the publication of particular material. A person is more likely to feel aggrieved when the article or story relates to that person. The person is concerned about the possible impact on others of the publication of the material. Where the complaint is that something has been said or implied that is untrue, the person may want to vindicate her or his reputation. Alternatively, the concern is with the very fact that the material is true, but it reveals something which the person would have preferred remained private. Possibly it is due to these practical connections that recent discussions regarding the reform of our defamation laws assume that defamation law can do a multitude of things: it can vindicate reputation, it can protect people against invasions of privacy,[1] it can discourage the publication of material which exposes groups of people (such as people of non-English speaking backgrounds)

[1] Attorneys-General of New South Wales, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law* (1990) para 7.10; Attorneys-General of New South Wales, Queensland and Victoria, *Reform of Defamation Laws Discussion Paper (No 2)* (1991) para 4.2.

to ridicule,[2] it can deter sensationalist reporting,[3] it can find the truth and it can keep the media honest.[4] In this lecture I plan to concentrate on two proposals which have been made for reforming defamation law so as to regulate the media in relation to the publication of material. First, in their Discussion Papers, which were published in 1990 and 1991, the then Attorneys-General of New South Wales, Queensland and Victoria proposed that, in the case of material relating to a person's personal life, the defence of truth should not succeed unless the material was relevant to a topic of public interest; they took the view that 'privacy and reputation are inextricably linked'.[5] In the New South Wales Law Reform Commission's Discussion Paper on Defamation published this year a proposal is put forward which would create two separate remedial regimes: in a defamation action, the plaintiff could seek a declaration but, if the plaintiff wishes to obtain damages, then under this proposal, he or she would have to prove that the imputation was false. One reason for this is said to be that it will further the flow of *accurate* information to the public.[6]

Before I turn to these proposals, I want to make some more general points about reforming defamation law and about its most fundamental concepts.

I believe that the process of reforming the law should commence with, or at least involve, an appraisal of the policies justifying it. Defamation law obviously restricts freedom of expression and a constant issue when evaluating the law is how best to balance defamation law and freedom of expression. In my view, any law which restricts freedom of expression should be made to satisfy three minimum standards:

- first, in the case of common law rules, the courts, and, in the case of legislation, the legislature, must be able to justify the law by pointing to some public interest that outweighs the public interest in freedom of speech;
- secondly, the law should go no further than is necessary to protect the interests warranting its existence; and
- finally, the law should be sufficiently clear that those who are affected by it are able to determine what is and what is not permitted by the law.

What is the public interest justifying the existence of the tort of defamation? We all know that the civil law of defamation exists to protect reputation — to prevent and redress attacks upon reputation. The law therefore reflects the weight which society places on reputation relative to freedom of expression. But what is reputation? The leading textbooks are unhelpful. They tend either simply to quote some Shakespearian reference to the importance of reputation[7]

[2] This appears to be the assumption of the Attorneys-General of New South Wales, Queensland and Victoria in their *Discussion Paper on Reform of Defamation Law* (1990) para 7.8.

[3] Attorneys-General of New South Wales, Queensland and Victoria, *Reform of Defamation Laws Discussion Paper (No 2)* (1991) para 4.5.

[4] New South Wales Law Reform Commission, Discussion Paper No 32, *Defamation* (1993) paras 2.94-2.120.

[5] Attorneys-General of New South Wales, Queensland and Victoria, *Reform of Defamation Laws Discussion Paper (No 2)* (1991) para 4.2.

[6] New South Wales Law Reform Commission, Discussion Paper No 32, *Defamation* (1993) paras 2.94-2.120.

[7] See, eg, Peter Carter-Ruck, Richard Walker and Harvey Starte, *Carter-Ruck on Libel and Slander*

or entirely ignore the issue. In the United States, since *New York Times Co v Sullivan*[8] 'constitutionalised' America's defamation laws, it has been necessary to balance the interest in compensating individuals for injury to their reputation against the First Amendment interest in protecting freedom of expression. Nonetheless, while the American courts have paid close attention to defining the First Amendment interest, less attention has been paid to the meaning of 'reputation'.[9]

Despite these shortcomings in textbooks and in the American jurisprudence, I take the view that it is essential that the concept of reputation is explored. It is only by doing this that the values supporting the law can be judged. Secondly, analysing what is meant by 'reputation' enables one to make judgments about whether the current law of defamation serves a coherent purpose. Finally, it is through an understanding of the nature of 'reputation' that various aspects of the action itself can be understood.

Spencer Bower's work, *Actionable Defamation*, is the most penetrating analysis of the meaning of 'reputation' in defamation law.[10] 'Reputation' is something acquired, regardless of one's morality or conduct justifying it. There is a connection between 'reputation' and 'opinion': 'reputation' means an attitude of mind so that a mass of such opinions go to make up the reputation which has been acquired by the person to whom the individual opinions relate.[11] Reputation is not the same as character; as Lord Denning said in *Plato Films Ltd v Speidel*, a person's 'character' is what she or he in fact is, whereas a person's 'reputation' is what other people think she or he is.[12] Thus, 'reputation' means a person's reputation for good character rather than the possession of the character itself. It is for damage to reputation — 'esteem in the eyes of others' — that a person can sue, and not for damage to a person's personality or disposition.[13]

These explanations of the meaning of 'reputation' clarify several aspects of the civil law of defamation which people often find odd (that is, people who do not understand the nature of 'reputation' find these matters odd). First, publication only to the person defamed is not enough to form the basis for a civil action: the law protects reputation rather than wounded personal pride or feelings.[14] Secondly, it explains why, for the purpose of assessing damages,

(4th ed, 1992) 1.

8 376 US (1964) 254.

9 Robert Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691, 692.

10 George Spencer Bower, *A Code of the Law of Actionable Defamation* (2nd ed, 1923) 242-4 ('*Spencer Bower*'). More recently, see Post, ibid 691.

11 In *Re T*, one of the few cases in which a court was required to analyse the meaning of 'reputation', the Supreme Court of New South Wales recognised that 'reputation' is not the same as 'character'. It was said that a person's reputation is to be found in the estimate of her or his moral character entertained by some specific group of people, such as by those who live in the same neighbourhood, those who work with her or him, or those with whom she or he associates in her or his work: see *Re T and the Director of Youth and Community Services* [1980] 1 NSWLR 392, 395, 399.

12 *Plato Films Ltd v Speidel* [1961] AC 1090, 1138 (Lord Denning).

13 Ibid.

14 *Pullman v Walter Hill and Co Limited* [1891] 1 QB 524, 527 (Lord Esher MR), 529 (Lopes LJ)

evidence may be given of the plaintiff's bad reputation, but not of particular reprehensible acts of the plaintiff.[15]

Two steps are involved in determining whether material is defamatory. The first involves determining the meaning of the material or, as this is known, the 'imputations' conveyed by the material. What the defendant intended the words to convey is generally said to be irrelevant.[16] This is consistent with the notion that defamation law exists to protect the individual's interest in her or his reputation. The second step is to decide whether one or more of the imputations satisfies the definition of what is defamatory. One of the unsatisfactory aspects of the common law of defamation is that there is no single, comprehensive definition of defamatory matter. Even the code definitions which operate in Queensland and Tasmania[17] pick up the various common law tests to which I am about to refer.

The time-honoured definition of what is a defamatory imputation is:

> [matter] ... calculated to injure the reputation of another, by exposing [her or] him to hatred, contempt or ridicule.[18]

The test favoured in most modern cases is: would the words tend to lower the plaintiff in the estimation of members of society?[19] The 'hatred' and 'contempt' parts of the 'hatred, contempt or ridicule' test and the 'lowering the estimation' test suggest that, to be defamatory, an imputation must impute blame to the plaintiff: people do not think less of a person for something for which he or she was not responsible — the imputation must be disparaging. Nonetheless, in 1934 in *Youssoupoff v Metro-Goldwyn-Mayer Pictures, Limited* it was decided that an imputation which does not involve condemnation is defamatory if it tends to make people '*shun or avoid*' the plaintiff.[20] If this test is applied, a person may be defamed by material which does not impute any wrongdoing, fault or responsibility to the plaintiff: an imputation which is defamatory on the ground that it tends to cause people to shun or avoid the plaintiff does not depend on damage to the plaintiff's reputation.[21] It follows that the publication

and 530 (Kay LJ); The Criminal Code 1899 (Qld) s 369; Defamation Act 1957 (Tas) s 7.

15 *Scott v Sampson* (1882) 8 QBD 491.

16 *The Capital and Counties Bank, Limited v George Henty & Sons* (1882) 7 AC 741, 745 (Lord Selborne LC); *Cassidy v Daily Mirror Newspapers, Limited* [1929] 2 KB 331, 354; *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181, 187 (Fox J); *John Fairfax & Sons Ltd v Hook* (1983) 47 ALR 477, 481 (Gallop and Morling JJ).

17 Criminal Code 1899 (Qld) s 366; Defamation Act 1957 (Tas) s 5.

18 *Parmiter v Coupland* (1840) 6 M & W 105, 108; 151 ER 340, 342 (Parke B).

19 *Sim v Stretch* (1936) 52 TLR 669, 671.

20 (1934) 50 TLR 581, 587 (Slesser LJ).

21 *Sungravure Pty Limited v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, 23-4 (Mason J) (*Sungravure*). Spencer Bower's definition of 'defamatory matter' takes this into account:

> defamatory matter is matter which bears a meaning, in relation to an existing person, such that the natural tendency of any publication thereof is to injure that person's reputation, *or to diminish the willingness of others to associate with him.* [Emphasis added].

According to Spencer Bower, it is necessary to add the words which have been given emphasis because many publications which are undoubtedly defamatory in law, such as imputations of insanity or infectious disease, could not, without 'unnaturally extending the definition of "reputation"', be described as injuries thereto: see *Spencer Bower*, above n 10, 2, Article 3 note (k).

of material which conveys only an imputation that a person is ill — the example usually given is of mental illness — or has been raped will be defamatory.[22] I should emphasise that, so far as my discussion regarding an imputation that a person has been raped is concerned, I am concerned with material that conveys only that imputation; sometimes material is published in such a way as to imply some responsibility for the assault, but I am not dealing with this type of material.

Should it be defamatory to publish material which conveys an imputation of some involuntary characteristic — such as mental illness — or some characteristic for which the person is not responsible such as that a person has been raped ? If the role of defamation law is to protect reputations, it should not be defamatory to publish material which does not damage the plaintiff's reputation. While there may be policy reasons for arguing that the fact that a person has been raped or suffers a mental illness should not be published, they have nothing to do with protecting reputation: people do not think less of a person's reputation for good character for something for which he or she is not responsible. Fleming argues that to say that a person is insane or has been raped should be defamatory because, although there is no suggestion of discreditable conduct, taking people as they are with their prejudices and conventional standards, assertions such as these diminish the respect and confidence in which the person is held.[23] In my view, Fleming's argument is flawed. It depends upon reading into the imputation some additional elements of aversion or mistrust which are not present in the imputation itself. Furthermore, to say that such statements are defamatory perpetuates the thoroughly undesirable stigmatisation of people. I am not sure whether the law should permit the publication of this material; I am, however, sure that defamation law is not an appropriate vehicle for resolving the issue. None of the recent reform proposals addresses the question of the test of what is defamatory. This startling omission is traceable to the failure of the various bodies to explore the policies justifying defamation law.[24]

I would like now to turn to the proposals I referred to earlier regarding truth and privacy. Here, again, the criticisms I will make of the suggestions made by the then Attorneys-General of New South Wales, Victoria and Queensland and the New South Wales Law Reform Commission can be traced to a failure to examine the role of defamation law.

As I said earlier, there is a practical connection between reputation and truth. A person may institute defamation proceedings to vindicate her or his reputa-

[22] *Sungravure* (1975) 134 CLR 1, 23-4 (Mason J); *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449, 452-3 (Hunt J).

[23] John G Fleming, *The Law of Torts* (8th ed, 1992) 526. A similar suggestion based on the tendency of the imputation to exclude the plaintiff from society was made by Mason J (as he then was) in the High Court of Australia in *Sungravure* (1975) 134 CLR 1, 23-4.

[24] Reform bodies should also consider whether the definition of what is defamatory should follow the Code definition which includes imputations that injure the plaintiff in her or his profession or trade: see Criminal Code 1899 (Qld) s 366; Defamation Act 1957 (Tas) s 5. Again, these imputations do not depend on damage to the plaintiff's reputation; they are not defamatory at common law.

tion from wrongful attack. It is, however, important to note that the concepts are not entirely conterminous. Even on a practical level it must be noted that a person may feel aggrieved about the publication of material even though the material does not directly concern that person or, to put it in the terms used in the law of defamation, it is not published 'of and concerning' the person. Furthermore, a false statement is not necessarily defamatory. Although false, it may not satisfy the definition of what is defamatory. There is no connection between truth and falsity and whether material is defamatory:

> To say that X is a glutton is just as injurious to [her or] his reputation (and thus defamatory of [her or] him) when that statement is true as when it is false .... Conversely, to say that Y is universally regarded as the best advocate at the Sydney bar is no more injurious to [her or] his reputation when that statement is false than when it is true.[25]

The law has, of course, developed so that truth, or as it is known, justification, is a defence. The reason usually given for providing that truth is a defence is that:

> by telling the truth ... [about a person, her or] his reputation is not lowered beyond its proper level, but is merely brought down to it.[26]

I doubt whether this is the real reason for the defence. Other aspects of the law as it applies to the awarding of damages suggest that defamation law concerns the reputation a person has rather than the reputation he or she deserves.[27] I suspect that the real reason for the development of the defence in relation to the civil law of defamation is that the courts simply considered it inappropriate to penalise a defendant who had published a true statement.[28]

Why is truth merely a defence rather than falsity being an element of the cause of action? For some time I toyed with the idea that falsity should be an element of the cause of action so that the plaintiff should bear the burden of proving that the material is false. The Irish Law Reform Commission has recently recommended that the definition of defamatory matter should require the matter to be untrue so that the plaintiff is required to show falsity.[29] In the United States, the burden of proving that an imputation is false rests with the plaintiff if he or she is a public figure, a public official or if a media organisation has published material of public concern.[30] For my part, I am unable to see

[25] *Aldridge v John Fairfax & Sons Ltd* [1984] 2 NSWLR 544, 551 (Hunt J). See also *Clines v Australian Consolidated Press Ltd* (1965) 66 SR (NSW) 321, 327; *Ross McConnel Kitchen & Co Pty Ltd v John Fairfax & Sons Ltd* [1980] 2 NSWLR 845, 847.

[26] *Rofe v Smith's Newspapers Ltd* (1924) 25 SR (NSW) 4, 21-2 (Street ACJ).

[27] For the purpose of assessing damages, the defendant is entitled to produce evidence of the plaintiff's bad reputation, but not evidence of specific reprehensible acts: see *Scott v Sampson* (1882) 8 QBD 491; *Mutch v Sleeman* (1928) 29 SR (NSW) 125.

[28] See *Spencer Bower*, above n 10, 335-6.

[29] Irish Law Reform Commission, *The Civil Law of Defamation* (1991) para 3.6.

[30] *Garrison v Louisiana* 379 US 64 (1964), 74; *Herbert v Lando* 441 US (1979), 153, 176; *Philadelphia Newspapers, Inc v Hepps* 475 US (1986), 767; John Bull, '*Philadelphia Newspapers, Inc v Hepps*: New Hope for Preserving Freedom of the Press' (1987) 38 *Mercer Law Review* 785.

any direct connection between, on the one hand, the fact that a plaintiff is a public figure or a public official or that material is of public concern and, on the other, the burden of proof. Nonetheless, I can appreciate that there would be at least one practical advantage in all plaintiffs bearing the burden of proving the falsity of an imputation, regardless of their status, regardless of the subject matter of the published material and regardless of whether the defendant is a media or a non-media defendant. This is that the plaintiff is better able to produce evidence to establish that an imputation is false than a defendant who is attempting to show that it is true.

As I see it, the real problem with reversing the burden of proof arises where, instead of publishing a statement of fact about a person, a publisher makes a vague statement which implies the existence of unstated defamatory facts.[31] For example, a statement that a person was 'probably corrupt'[32] or that a person has 'led a life of crime'. How does a plaintiff prove that these imputations are not true? Material of this kind cannot be proven to be false unless the underlying allegations are articulated. To deny the plaintiff a remedy where he or she is unable to prove that a vague statement is untrue threatens the capacity of the law to prevent and redress attacks upon reputation. Accordingly, it is only in those cases where a defamatory imputation is specific as to time or place, or sufficiently detailed that it is possible to disprove the imputation that one can contemplate reversing the onus of proof so that the plaintiff should bear the burden of proving that the imputation is false.

The New South Wales Law Reform Commission's Discussion Paper on Defamation published this year proposes that plaintiffs be able to choose between two separate remedial regimes, one for judicial declarations and the other for damages. Under this proposal, in a defamation action, the plaintiff would bear the onus of proving falsity if he or she wished to recover damages. If the plaintiff seeks a declaration alone, the onus would be on the defendant to prove truth.[33]

Each aspect of this dual regime is open to criticism.

Turning first to the position where the plaintiff seeks only a declaration. The New South Wales Law Reform Commission suggests that requiring the defendant to prove truth will go some way to correct the public record; this regime will, it is asserted, further the flow of accurate information to the public.[34] It should, however, be pointed out that this will occur in only limited circumstances. It is necessary that the plaintiff first establish that the material is defamatory. Defamation law offers no redress for untrue statements that are not defamatory. The material must be published of and concerning the plaintiff. Furthermore, the New South Wales Law Reform Commission concludes that

[31] See the discussion in Stephen Anthony, 'Vague Defamatory Statements and the Libel Plaintiff's Burden of Proving Falsity' (1987) 87 *Columbia Law Review* 623, 631-7.

[32] See *Rinaldi v Holt* 42 NY 2d (1977) 369; 397 NYS 2d (1977), 943.

[33] New South Wales Law Reform Commission, Discussion Paper No 32, *Defamation* (1993) paras 2.94-2.120.

[34] Ibid paras 2.95, 2.101 and 6.32.

most of the standard defences would still be available to a defendant. It is difficult to see how its assertion that an action for a declaratory judgment can be heard and resolved faster than current defamation trials can be correct.

There are very good reasons for furthering the flow of accurate information to the public, but suggesting that defamation law can provide the solution to the publication of inaccurate information asks too much of it. If the New South Wales Law Reform Commission had commenced with an appraisal of the policies justifying the law and had examined the concept of 'reputation' I think it unlikely that this suggestion would have been made.

Turning to the proposal that the plaintiff bear the onus of proving falsity if he or she wishes to recover damages. This proposal fails to recognise that the plaintiff may be confronted by a vague statement which implies the existence of unstated defamatory facts, but which is incapable of proof of falsity. The New South Wales Law Reform Commission says that reversing the current burden of proof regarding truth will bring damages claims in defamation closer to other torts where the plaintiff has the onus of proving vital elements. This assumes that the falsity of an imputation is a vital element in the action, but, as I suggested earlier, bearing in mind the objective of the action and the nature of 'reputation', falsity is not a vital element; it is more logical to characterise truth as a justification for publication.

Finally, privacy. In their 1990 and 1991 Discussion Papers, the then Attorneys-General of New South Wales, Victoria and Queensland proposed that the defence of justification should be one of 'truth plus privacy'; as a generalisation, the defence should not be available in respect of material relating to the 'health, private behaviour, home life or personal or family relationships' of the plaintiff unless the matter was relevant to a topic of public interest. The Attorneys were of the opinion that the 'truth plus privacy' concept would protect against invasions of privacy.[35] If the Attorneys had commenced with an appraisal of the policies justifying defamation law and had examined the concept of 'reputation' they would have known that, in fact, the proposal would have done little to protect privacy. 'Truth plus privacy' would be raised only as one possible defence to an action for defamation. In many cases an invasion of privacy does not involve any issue relating to defamation law. Even if the invasion of privacy involves the publication of material, not all statements regarding private matters are defamatory.

I should note that after these points had been made by academic lawyers, practising lawyers adopted them and the Legislation Committee of the New South Wales Legislative Assembly was persuaded that there was no connection between defamation and privacy protection.[36]

I take the view that a good case can be made out for legislation to protect

[35] Attorneys-General of New South Wales, Queensland and Victoria, *Discussion Paper on Reform of Defamation Law* (1990) para 7.10; Attorneys-General of New South Wales, Queensland and Victoria, *Reform of Defamation Laws Discussion Paper (No 2)* (1991) para 4.2.

[36] New South Wales, Legislation Committee of the Legislative Assembly, *Report on the Defamation Bill 1992* (October 1992) ch 4.

against the invasion of privacy by the publication of certain types of personal information, but it is asking too much of defamation law to expect it to provide this protection. The English case of *Kaye*[37] illustrates the need for legislation directed at invasions of privacy. In 1990, Gordon Kaye, the actor, suffered severe injuries to his head and brain as a result of a freak accident. He was taken to Charing Cross Hospital. Some weeks later, while Kaye was recovering, a journalist and photographer from the *Sunday Sport* newspaper went to the hospital and, ignoring notices on the door to the relevant ward, entered Kaye's room, photographed him and attempted to interview him. An action was brought to restrain the newspaper from publishing the photographs and 'interview'. The Court of Appeal recognised that there had been a monstrous invasion of Kaye's privacy, yet this alone did not entitle him to relief. The law of defamation did not enable the plaintiff to obtain an injunction. In fact the action succeeded, but this was only because the plaintiff was able to fit the action within the formal, and totally inappropriate, requirements of the tort of malicious falsehood.

To sum up. Earlier I said that any law which restricts freedom of expression should satisfy certain minimum standards. One of the minimum standards was that the law should be sufficiently clear that those who are affected by it are able to determine what is and what is not permitted by the law. Defamation law is so complex that it fails to measure up to this standard. The uncertainty surrounding the law of defamation in this country is notorious. Journalists, who are most obviously affected by the law, must be tempted either to ignore the law or to be overly cautious, self-censoring material which could, in fact, be published without infringing the law. There is an urgent need for reform, but it must be informed, rational reform. The proposals that I have discussed today would do little to resolve the uncertainty; indeed, they would add to the complexity of the law. The reason for this is that those responsible for the proposals have failed to take into account the role of defamation law: they have failed to understand the nature of reputation and its relationship to truth and privacy; they have assumed that it is possible to tinker with aspects of the law without identifying and re-evaluating the fundamental assumptions behind defamation law. There are good reasons for regulating the media in relation to the publication of material which reveals that a person suffers from a mental illness or has been the victim of a sexual assault; there are good reasons for encouraging the publication of accurate information and discouraging the media from invading privacy, but my thesis is that the civil action for defamation — an action based on reputation — is an inappropriate vehicle for this.

[37] *Gordon Kaye (by Peter Froggatt his next friend) v Andrew Robertson and Sport Newspapers Ltd* [1991] FSR 62 (Court of Appeal).