CIVIL AND CRIMINAL DEFAMATION IN WESTERN AUSTRALIA

Almost half a century has passed since the Western Australian Criminal Code[1] came into force. The Code, among other important changes in the criminal law, made substantial alterations in the pre-existing law of criminal libel,[2] and I shall endeavour in this article to show that it has in many respects affected the civil law of defamation[3] as well. Yet during that half-century there has been no reported case in Western Australia in which it has even been suggested that the civil action has in any way been modified.

The reasons for this are, I would suggest, three in number. First, Western Australia is, as is shown elsewhere in this volume,[4] a non-litigious community. The population is still comparatively small, though rapidly growing, and it may well be the case that circumstances have not arisen in which the changes made by the Code in the civil law would be material. Secondly, there is some reason to suspect that these same changes have not received the attention of the legal profession.[5] Thirdly, the Newspaper Libel and Registration Act, 1884, Amendment Act 1888 (W.A.)[6] is a strong deterrent to prospective litigants, for it provides (a) that the plaintiff may be ordered in certain circumstances (which need not be set out here) to give security for costs, (b) that an action for libel against a registered newspaper must be brought within four months of the publication of the alleged libel, and (c) that the plaintiff in an action for libel against a registered newspaper must give evidence on pain of being nonsuited.

1 The Criminal Code is set out as a Schedule to the Criminal Code Act; for convenience, I shall hereafter refer to "the Code" and "the Code Act" respectively. The original code of 1902 was re-enacted, with amendments and additions made in the meantime, in 1913 (No. 28 of 1913). A number of amendments have since been made, but the defamation sections have not been altered since the original enactment. Section numbers refer to the 1913 re-enactment.

2 A convenient short statement of the common law of criminal libel is to be found in Kenny, *Outlines of Criminal Law*, 15th ed., c. 21.

3 A good modern statement of the present English law of civil defamation is to be found in Winfield, *Textbook of the Law of Tort*, 5th ed., c. 11.

4 See A Review of the Profession of Barrister and Solicitor in Western Australia, Appendix H.

5 In *O'Brien v. Daily News Ltd.*, (1925) 28 W.A.L.R. 1, the defence pleaded was that the words complained of were a fair comment on a matter of public interest and published without malice. If the argument developed later in this article is correct, the reference to the absence of malice was quite unnecessary.

6 52 Vict. No. 18.

Before embarking on a study of the differences between the relevant provisions of the Code and the common law, we may briefly consider the history of the Code.[7] As is well known, in its original form it was copied almost *verbatim* from the Queensland Criminal Code of 1899. That Code was drafted by Sir Samuel Griffith, then Chief Justice of Queensland and later Chief Justice of the High Court. He based his draft largely upon a draft criminal code prepared by an English Royal Commission in 1878, but he departed in many respects from the English draft, and also introduced a good deal of new matter.[8] So far as defamation is concerned, a rather curious procedure was adopted. Sir Samuel had, after the English draft code had been published but before he drafted the Queensland Code, drafted the Defamation Law of Queensland, enacted in 1889. That Law was intended to amend and declare the law of Queensland as regards both civil and criminal defamation; and when he drafted the Queensland Criminal Code, Sir Samuel completely discarded the defamation provisions of the English draft code,[9] and in their place inserted all those provisions of the Defamation Law (including the definition sections) which did not deal exclusively with the civil action. At the same time the relevant provisions of the Defamation Law were repealed.

I have called this a rather curious procedure for the following reason. As it now stands on the Statute Book, the Defamation Law of Queensland contains no definition of importance, nor any references to the main defences to a civil action for defamation; it is almost entirely procedural. Yet section 44 states that "the rules of law declared and enacted by this Act shall be applied in all actions for defamation begun after the passing of this Act." How rules of law which are now repealed (although re-enacted elsewhere) are to be applied is not stated; in practice, however, the Queensland Judges

7 What follows is taken mainly from a letter dated 1897 from Sir Samuel Griffith to the Attorney-General of Queensland accompanying the draft of the Queensland Code. Extracts from this letter were printed with the 1902 edition of the Western Australian Code.

8 E.g., a large part of Chapter V of the Code, dealing with criminal responsibility.

9 I have not been able to refer to the English draft. However, its defamation provisions were adopted in New Zealand in the Criminal Code Amendment Act, 1901, now re-enacted as sections 231 to 235 of the Crimes Act, 1908. These provisions were inadvertently omitted from the New Zealand Criminal Code Act 1893 and were enacted as a result of the decision in *R. v. Mabin*, (1901) 20 N.Z.L.R. 451, in which the (New Zealand) Court of Appeal held that under the 1893 Act libel had ceased to be a criminal offence in New Zealand. See the speech of the Premier on the second reading of the Bill for the 1901 Act, *New Zealand Parliamentary Debates*, Vol. 119, at 780.

treat all the provisions of the Queensland Criminal Code as being relevant in civil actions. It is, I trust, not disrespectful to them to suggest that this result is reached not by the processes of logical reasoning, but by the inspiration afforded by the memory of their late Chief Justice.

According to its draftsman,[10] the Defamation Law of Queensland was intended to be for the most part declaratory in form, but it also made some material changes in the law. These changes were (a) the assimilation of libel and slander into a single cause of action in defamation, actionable *per se,* (b) the addition of the requirement of public benefit to justification as a defence to a civil action, thus putting the civil law on the same footing as the criminal law after the enactment of the (English) Libel Act, 1843,[11] and (c) the elimination of the element of malice, express or implied,[12] and the substitution for it of the principle that all defamation must be justified or excused, accompanied by an enumeration of the conditions under which that defence might be established.

It seems clear, however, that the "declaratory" sections of the Law went further than was intended. Thus the definition of "publication"[13] was drafted widely enough to catch the making of a statement by one spouse to the other; and it has accordingly been held in Queensland[14] that the ancient marital privilege (I use the word in its popular meaning) of holding slanderous conversations with impunity has been abolished. Furthermore, in at least one respect, if in no other, Sir Samuel misunderstood the common law. This appears from the case of *Dun v. Macintosh,*[15] a case emanating from New South Wales; we need not pause to discuss its facts, the important issue being whether the defence of qualified privilege could be raised. When the case came before the High Court on appeal, Griffith C. J. began his discussion of the legal problems involved by saying[16]:—"The law of New South Wales on this subject is the same as the law of England. I will commence what I have to say on the subject by

10 *Per* Griffith C.J., in *Hall-Gibbs Mercantile Agency Ltd. v. Dun,* (1910) 12 C.L.R. 84, 90.

11 6 & 7 Vict., c. 96 (commonly known as Lord Campbell's Act).

12 It is not clear what the learned Chief Justice meant by "malice" in this connection. The requirement of "good faith" in certain defences is for practical purposes indistinguishable from what the common lawyer would understand by absence of "express malice" (as to which see Winfield, *op. cit.* (note 3 *supra*), para. 88.)

13 See now section 349 of the Code.

14 In *Turner v. Miles,* [1912] Q.W.N. 7.

15 (1906) 3 C.L.R. 1134.

16 3 C.L.R. at 1147.

reading what is statute law in Queensland, Western Australia, and Tasmania, *which is, I think, a short statement of what was also the common law.*"[16a]

The learned Chief Justice then read what now appears as section 357 (4) of the Code, and discussed the English cases, especially *Toogood v. Spyring*,[17] which contains a classic (but now somewhat dated) exposition of the law regarding qualified privilege by Parke B. He reached the conclusion that the defence was made out on the facts of the instant case. With this his brethren concurred.

We may readily agree that the facts of *Dun v. Macintosh* fell squarely within the terms of section 357 (4) of the Code, and that had that subsection accurately stated the common law, the defence of qualified privilege was clearly established. But the case had to be decided on common law principles, and when it came before the Privy Council on appeal[18] the High Court decision was reversed. Lord MacNaghten, in delivering the judgment of the Board, indicated that Griffith C.J. had misunderstood the English cases, and that the facts of the case disclosed no possibility of claiming qualified privilege.[19] We may accordingly conclude that the "declaratory" sections of the Defamation Law of Queensland unintentionally altered the law in at least one particular; some others will be discussed later.

Apart from these criticisms of the way in which the law was codified, we may observe that codification, as a method or principle, has one great virtue and one great vice. The virtue is certainty; the vice, stagnation. Those who uphold the device of codification may well point out that it substitutes certainty where doubt existed before.[20] But against this it may be argued that the price paid for this certainty is stagnation, and that the price is too high. For life is infinitely variable, and the glory of the precedent system is that it enables the law to be moulded to fit the varying circumstances. A code, on the other hand, unless it be so widely drafted that it no longer makes for certainty, cannot, at least in theory, be moulded by

16a My italics.

17 (1834) 1 Cr. M. & R. 181.

18 *Sub. nom. Macintosh v. Dun*, [1908] A.C. 390.

19 It has been suggested (by the late Dr. Stallybrass—see *Salmond on Torts*, 10th ed., 405) that the later decision of the House of Lords in *London Association for Protection of Trade v. Greenlands Ltd.*, [1916] 2 A.C. 15, has in effect overruled *Macintosh v. Dun*. I prefer the view of Professor Winfield (*op. cit.* (note 3 *supra*), at 299, 300) that the two decisions are distinguishable. Certainly the Law Lords in the later case did not suggest that they were disagreeing with the Privy Council decision (save perhaps Lord Parker of Waddington, who was an equity lawyer).

20 *Sed quaere.* "Judicial construction" of the codifying statute may well serve to show that the belief in its supposed certainty is unfounded.

the judge to fit new and unforeseen situations. To enter into this controversy is far beyond the scope of our discussion; but we must note that, while the Code has stood still, the common law has moved on.

It will thus be seen that the Code, so far as it affects the civil law of defamation, was enacted against a very different background from that of the Queensland Criminal Code. In the one State, there was the common law; in the other, the Defamation Law of Queensland. It is doubtful whether the Western Australian legislators were fully aware of this; they understood that some changes were being made in the criminal law, but it seems fairly clear that they did not suspect that any changes whatsoever were being made in the civil law.[21] However that may be, the Judge in Western Australia is called upon to construe the Code in the light of the principle that a statute is not to be taken as changing the common law, except where a contrary intention is clearly expressed.[22] A Queensland judge is not so fettered.

We are now in a position to discuss the defamation provisions of the Code, which are now contained in Chapter XXXV. These must be read together with section 5 of the Code Act, which (omitting a saving proviso no longer material) provides that "when, by the Code, any act is declared to be lawful, no action can be brought in respect thereof". Not only is there no criminal remedy—the civil remedy, if one had previously existed, is barred.

Chapter XXXV contains twenty-five sections, nine of which in terms relate to criminal prosecutions only. Three sections, dealing with the defence of absolute privilege, state that in the circumstances set out therein "a person does not incur any liability as for defamation". By section 1 of the Code, "the term 'liable', used alone, means liable to conviction on indictment"; and accordingly, I think that these three sections would be construed as relating to criminal prosecutions only.

Section 367 raises a difficult problem. It is intended to protect the employer, whose servant sells a defamatory publication, from vicarious liability, and it opens with the words, "an employer is not responsible". This section follows two other sections, each of which begins "a person is not criminally responsible"; and certainly the omission of the word "criminally" in section 367 makes it arguable

21 See the discussion in Committee on the Bill for the 1902 Code: *Western Australia Parliamentary Debates*, Vol. XIX (New Series), 1409.
22 See, for example, *Arthur v. Bokenham*, (1708) 11 Mod. 150.

that the section applies in civil actions as well as in criminal prosecutions. But the changes in the common law which would result are so far-reaching that I think the Court would refuse to so hold, in reliance on the presumption that the common law is only to be changed by the clearest words *(supra)*.

The first six sections of Chapter XXXV are introductory, and contain mainly definitions. They are, broadly, declaratory of the common law, but if applied in civil actions they would make all slander actionable *per se,* and as already noticed would abolish an ancient 'marital privilege' of spouses. Here again, I think that the presumption against changes in the common law would lead the Court to hold that these sections relate to criminal prosecutions only.

This process of elimination leaves us with some six sections for discussion. The text of these is as follows:—

354. It is lawful—

(1) To publish in good faith, for the information of the public, a fair report of the proceedings of either House of Parliament, or of any committee of either House, or of any joint committee of both Houses;

(2) To publish in good faith, for the information of the public, a copy of, or an extract from or abstract of, any paper published by order or under the authority of either House of Parliament;

(3) To publish in good faith, for the information of the public, a fair report of the public proceedings of any Court of justice, whether such proceedings are preliminary or interlocutory or final, or of the result of any such proceedings, unless, in the case of proceedings which are not final, the publication has been prohibited by the Court, or unless the matter published is blasphemous or obscene;

(4) To publish in good faith, for the information of the public, a fair report of the proceedings of any inquiry held under the authority of a Statute, or by or under the authority of His Majesty, or of the Governor in Council, or a fair extract from or abstract of any such proceedings, or a copy of, or an extract from or an abstract of, an official report made by the person by whom the inquiry was held;

(5) To publish in good faith, for the information of the public, at the request of any Government Department, officer of State, or police officer, any notice or report issued by such department or officer for the information of the public;

(6) To publish in good faith, for the information of the public, a fair report of the proceedings of any local authority, board, or body of trustees or other persons duly constituted under the provisions of any Statute, for the discharge of public functions, so far as the matter published relates to matters of public concern;

(7) To publish in good faith, for the information of the public, a fair report of the proceedings of any public meeting, so far as the matter published relates to matters of public concern.

A publication is said to be made in good faith, for the information of the public, if the person by whom it is made is not actuated in

making it by ill-will to the person defamed, or by any other improper motive, and if the manner of the publication is such as is ordinarily and fairly used in the case of the publication of news.

The term "public meeting" means and includes any meeting lawfully held for a lawful purpose, and for the furtherance or discussion in good faith of a matter of public concern, or for the advocacy of the candidature of any person for a public office, whether the admission to the meeting was open or restricted.

In the case of a publication of a report of the proceedings of a public meeting in a periodical, it is evidence of want of good faith if the proprietor, publisher, or editor, has been requested by the person defamed to publish in the periodical a reasonable letter or statement by way of contradiction or explanation of the defamatory matter, and has refused or neglected to publish the same.

355. It is lawful—

(1) To publish a fair comment respecting any of the matters with respect to which the publication of a fair report in good faith, for the information of the public, is by the last preceding section declared to be lawful;

(2) To publish a fair comment respecting the public conduct of any person who takes part in public affairs, or respecting the character of any such person, so far as his character appears in that conduct;

(3) To publish a fair comment respecting the conduct of any public officer or public servant in the discharge of his public functions, or respecting the character of any such person, so far as his character appears in that conduct;

(4) To publish a fair comment respecting the merits of any case, civil or criminal, which has been decided by any Court of justice, or respecting the conduct of any person as a judge, party, witness, counsel, solicitor, or officer of the Court, in any such case, or respecting the character of any such person, so far as his character appears in that conduct;

(5) To publish a fair comment respecting any published book or other literary production, or respecting the character of the author, so far as his character appears by such book or production;

(6) To publish a fair comment respecting any composition or work of art, or performance publicly exhibited, or respecting the character of the author or performer or exhibitor, so far as his character appears from the matter exhibited;

(7) To publish a fair comment respecting any public entertainment or sports, or respecting the character of any person conducting or taking part therein, so far as his character appears from the matter of the entertainment or sports, or the manner of conducting the same;

(8) To publish a fair comment respecting any communication made to the public on any subject.

Whether the comment is or is not fair is a question of fact. If it is not fair, and is defamatory, the publication of it is unlawful.

356. It is lawful to publish defamatory matter if the matter is true, and if it is for the public benefit that the publication complained of should be made.

357. It is a lawful excuse for the publication of defamatory matter—

(1) If the publication is made in good faith by a person having over another any lawful authority in the course of a censure passed

by him on the conduct of that other in matters to which such lawful authority relates;

(2) If the publication is made in good faith for the purpose of seeking remedy or redress for some private or public wrong or grievance, from a person who has, or whom the person making the publication believes, on reasonable grounds, to have, authority over the person defamed with respect to the subject matter of such wrong or grievance;

(3) If the publication is made in good faith for the protection of the interests of the person making the publication, or of some other person, or for the public good;

(4) If the publication is made in good faith in answer to an inquiry made of the person making the publication, relating to some subject as to which the person by whom or on whose behalf the inquiry is made has, or is believed, on reasonable grounds, by the person making the publication to have, an interest in knowing the truth;

(5) If the publication is made in good faith for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has or is believed, on reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make his conduct in making the publication reasonable under the circumstances;

(6) If the publication is made in good faith on the invitation or challenge of the person defamed;

(7) If the publication is made in good faith in order to answer or refute some other defamatory matter published by the person defamed concerning the person making the publication or some other person;

(8) If the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair.

For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion, and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue.

358. When any question arises whether a publication of defamatory matter was or was not made in good faith, and it appears that the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith, the burden of proof of the absence of good faith lies upon the party alleging such absence.

359. Whether any defamatory matter is or is not relevant to any other matter, and whether the public discussion of any subject is or is not for the public benefit, are questions of fact.

It will be observed that each of the first three of these sections opens with the words "it is lawful", and thus links up directly with section 5 of the Code Act. Section 357 has a slightly varied wording, "it is a lawful excuse", but I doubt whether it could be succesfully argued that this wording does not link up with section 5. It would seem that the changed wording is no more than a draftsman's foible,[23] and that the acts specified in section 357 are intended to be "lawful" acts within the meaning of section 5. I shall accordingly treat section 357 as being applicable to civil actions, merely recording that the point is arguable.[24]

It will be convenient to deal first with section 356. It might be argued that this section has by implication abolished the common law defence that the words complained of were true in substance and in fact, unless it can also be shown that their publication was for the public benefit. There are two arguments against this. First, section 356 does no more than repeat in a slightly different form the defence to a prosecution for criminal libel first introduced into the law by the Libel Act, 1843;[25] its appearance in Chapter XXXV is thus easily accounted for. Secondly, to say that the presence of elements A and B together in an act makes that act lawful does not logically imply that the presence of one element without the other makes the act unlawful. When the presumption against changes in the common law is thrown into the scale with these two arguments, the scale is, in my opinion, tipped; with the result that the common law defence of justification remains unaffected by the Code.

As regards the defence of "fair comment upon a matter of public interest", section 355 has, I think, effected only one change. This is the elimination of the common-law requirement that the comment must be made without malice. It will be observed that sections 354 and 357 each require "good faith" on the part of the person publishing the defamatory matter, "good faith" being so defined that its absence is almost indistinguishable from the common-law conception of "express malice";[26] no such requirement appears in section 355. It would accordingly appear that the existence of malice is irrelevant if the comment is fair.

23 The conception of an unlawful excuse, which seems to be implied in the opening words of section 357, is one which lies outside my imagination.

24 Section 357 has been considered by the High Court, as we shall see (note 37, *infra*). The appeals were from decisions of the Queensland Supreme Court, and no suggestion was made that the section might not apply in civil actions. This may, however, have resulted from the different background of the Queensland Code.

25 *Supra*, note 11. Adopted in Western Australia by 10 Vict. No. 8.

26 *Supra*, note 12.

In this respect the Code differs from the common law, but it is proper to state that this is one of the cases in which the common law has changed in the past fifty years. The change was made in the case of *Thomas v. Bradbury, Agnew & Co. Ltd.*,[27] where the Court of Appeal held that what would be a fair comment if made by A cannot be pleaded as such by B, if B was actuated by evil motive in making it. Apart from this one instance, I do not think that section 355 in any way *changes* the common law, although its enumeration of the various matters which are "of public interest" may serve to remove doubts in a particular case.[28]

The remaining two sections, 354 and 357,[29] deal with the defence of qualified privilege; and it is these sections which make the most important changes in the common law, although, as we have seen, they were probably intended to be declaratory only. Section 354 need not detain us long. In a slightly different form, heads (1), (2), (3), (4), (6), and (7) cover the same matters as were covered by English law after the passing of the Law of Libel Amendment Act, 1888.[30] Head (5) is, however, not recognised as a matter of qualified privilege at common law; it concerns, I suggest, matters which ought to receive qualified privilege, in order that affairs of state and police investigations may proceed efficiently. We may also note, in passing, that the various reports referred to in the section have to be "fair", not "fair and accurate" as English law requires. It is doubtful, however, whether a Court would hold that an inaccurate report can be "fair". The final paragraph of the section may also prove a useful weapon on occasions.

Section 357 makes the most sweeping changes in the defence of qualified privilege as deduced from the common-law cases. This results partly from modifications of the common law appearing in decisions given during the present century, and partly from the fact that the draftsman misunderstood the effect of the earlier cases. But whatever the cause it can be said with some confidence that only

27 [1906] 2 K.B. 627.

28 This assumes that section 355 would be treated by the Court as exhaustive. On the other hand, the Court might take the view that the defence of fair comment upon a matter of public interest is still available under the common law on facts falling outside the section. If so, the existence of malice in such a case, if it could be shown, would destroy the defence.

29 Sections 358 and 359, set out *supra*, merely explain certain aspects of the preceding sections.

30 51 & 52 Vict., c. 64.—not adopted in Western Australia. Note that certain reports, if published in a registered newspaper, receive absolute privilege (Newspaper Libel and Registration Act, 1884, 48 Vict. No. 12, as amended by 52 Vict. No. 18).

heads (1) and (2), and possibly (7),[31] accurately represent the common law. The remaining heads create qualified privileges wider than those allowed by the common law. We may examine them briefly.

Head (3) is covered by common-law decisions so far only as it is concerned with the protection of one's own interests; and even here it is doubtful whether the common law does not require that the recipient of the statement must be under a duty to protect those interests.[32] At any rate the protection of another person's interests (where the person making the statement is under no duty to protect them) is unknown to the common law as an instance of qualified privilege; nor does the common law recognise as privileged statements published "for the public good".

Heads (4) and (5) may be noticed together. They both deal with information given to a person interested in receiving it; and at the time when the Code was drafted, they probably represented (though perhaps the language used is rather too wide) the results of the decided cases. But a *dictum* of Lord Atkinson in *Adam v. Ward,*[33] followed by the Court of Appeal and made the *ratio decidendi* of *Watt v. Longsdon,*[34] has considerably narrowed the common law on this subject. It is now essential to show that the person publishing the statement was under a duty to protect the interests of the recipient, and published the statement in performance of that duty. The result is that the Code protects many statements which the common law does not.

Head (6) is often stated to be an instance of qualified privilege afforded by the common law; but the statement needs a mass of qualification if it is to be supported. The effect of the common law decisions appears to be as follows.[35] If the defendant has not previously made the statement which he now makes on the challenge or invitation of the plaintiff, he can claim qualified privilege, for the plaintiff has brought the defamation on his own head. But if the defendant has previously uttered the defamatory statement and repeats it, on the plaintiff's challenge or invitation, in the presence of a third party, the repetition is not, merely by reason of the challenge or invitation, privileged; unless, perhaps, the original statement was made on a privileged occasion. Thus, by its wide language, the Code

31 Cf. *Adam v. Ward,* [1917] A.C. 309.
32 As to this, see Winfield, *op. cit.* (note 3 *supra*), 303.
33 See note 31, *supra.*
34 [1930] 1 K.B. 130.
35 See Clerk & Lindsell, *Torts* (10th ed.), 744.

has destroyed a valuable means of tracking down a slanderous statement and bringing its perpetrator into court.[36]

Head (7) is, as noticed above, to a certain extent declaratory of the common law, but where the defamatory statement is made to answer or refute a statement defamatory of some person other than the defendant, the element of performance of a duty to protect that other person (which, as we have seen, the common law requires) is absent. Head (8), on the other hand, appears to be entirely novel; to a certain extent it is covered by the common law defence of fair comment, but it is worded widely enough to go far beyond that defence. At the time of writing, it has not apparently been the subject of judicial discussion.

Thus it is clear that the Code affords a number of possible defences to an action for defamation which are not available at common law. At the same time, however, we must observe that there has been a tendency to narrow down the provisions of the Code by judicial interpretation. It seems, for example, that the defence of publication in good faith for "the public good" given by section 357 (3) will only succeed in somewhat unusual circumstances; this defence has on two occasions[37] received the attention of the High Court, and it appears from these decisions that it is unlikely that a newspaper will be allowed to set up this defence. On the earlier occasion the High Court made some observations about the expression "interests" of a person, which appears several times in section 357; it appears that not everything which might be termed an "interest" will suffice—there must be "a real and direct personal, trade, business, or social concern" of the person in question.[38]

Correspondingly, although, as we have seen, the common law differs from the Code in requiring that the defendant shall have published the defamatory statement in performance of a duty to protect the interests of the reader or hearer, a generous meaning has been given to the conception of duty. It is clear that a moral or social, as opposed to a legal, duty is sufficient; and the English Courts have sometimes found it a difficult problem to decide whether such a duty exists.[39]

[36] A good example of this is *Griffiths v. Lewis*, (1845) 7 Q.B. 61.
[37] *Telegraph Newspaper Co. Ltd. v. Bedford*, (1934) 50 C.L.R. 632; *Musgrave v. The Commonwealth*, (1936-37) 57 C.L.R. 514.
[38] *Per* Evatt J., 50 C.L.R. 632, at 662.
[39] See the discussions in *Stuart v. Bell*, [1891] 2 Q.B. 341, and *Watt v. Longsdon*, [1930] 1 K.B. 130.

In concluding this discussion I repeat that the Code has effected a considerable number of changes in the civil law of defamation. Doubtless in the course of time judicial decisions will reveal its impact upon the common law more clearly. In the meantime. I submit that the sections which we have considered, rather than the common law cases, are worthy of detailed study by the legal practitioner who has to advise a prospective party to a defamation action.

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