SOUTH AUSTRALIA

FIFTEENTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

RELATING TO THE REFORM OF THE LAW OF LIBEL AND SLANDER

1972

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

R. G. MATHESON.

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FIFTEENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW OF LIBEL AND SLANDER

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

You referred to us for consideration the reform of the law relating to libel and slander and we now have the honour to report as follows:—

The law relating to libel and slander has come from the common law together with a certain amount of law from the ecclesiastical courts in relation to slander and from the old Court of Star Chamber in relation to libel. Very few amendments have been made by statute. Those that have been made refer particularly to Criminal libel, to slander of women and to words spoken on privileged occasions.

As the two torts came from different historical backgrounds they have been allowed to grow differently and with different results. Slander was originally dealt with in the ecclesiastical courts *pro salute animae* except where the slander caused monetary damage in which case the King's Courts had jurisdiction. Libel on the other hand was regarded primarily as an offence against good order and government and so it was dealt with during the years of prerogative rule by the Court of Star Chamber. The Court of King's Bench as was shown in Sedley's Case in 1663 took over the rule of the Star Chamber as *custos morum* and so took over the general jurisdiction which the Star Chamber had exercised in libel which was a jurisdiction both in punishment and in damages.

Accordingly slander was not actionable unless special or monetary damage was proved except in three cases in which the law presumed that monetary damage would follow. They were:—slander of a man in his occupation or business, the imputation of a crime to him, and the imputation of a venereal disease or other similar disease such as leprosy which cut him off from business relations with the rest of the community. To these three groups has been added a fourth by Statute namely an imputation of unchastity against a woman (see the Wrongs Act, 1936-1959 Section 5).

Libel, on the other hand, was always actionable without proof of special damage. It was basically a breach of the King's peace and accordingly no proof of special damage was required any more than in trespass *vi et armis* and many other similar forms of action. That distinction has persisted to the present day, but the distinction between spoken and written defamation is now completely outdated by the advent of the mass media and in particular radio and television.

The word libel originally had nothing to do with defamation at all. The Latin word "libellus" simply means a small piece of paper. For example the early Christians had to carry libelli, which were certificates of good character, with them and in the days before Christianity became a *religio licita* these served much the same purpose as passes do under the South African pass laws today. Later it became a synonym for any

kind of legal process and the word is so used today in that sense in the ecclesiastical law of the Church of Scotland. It has a similar meaning in relation to some kinds of civil process in Scots law. It was not until the sixteenth century that it acquired, in English law at any rate, its present meaning of written defamation.

The first problem is to decide in what manner we move towards amendment of the law. That the law needs to be amended is beyond doubt. As Sir Frederick Pollock said when writing his textbook on Torts "No branch of the law has been more fertile of litigation than (defamation) (whether plaintiffs be more moved by a keen sense of honour, or by the delight of carrying on personal controversies under the protection and with the solemnities of civil justice) nor has any been more perplexed by minute and barren distinctions".

Tasmania, Queensland and Western Australia and recently New South Wales have each adopted a Code on the subject which is basically that originally drawn by Sir Samuel Griffith for Queensland. The United Kingdom, Victoria and South Australia all use the common law. The Codes have themselves produced substantial difficulties of interpretation which are discussed in *Fleming on Torts, Third Edition, at pages* 545-546. The law of libel and slander is still in process of considerable development and having regard to the development of news media with such inventions as Telstar in the recent past, it is clearly capable of substantial further development. For these reasons whilst acknowledging the usefulness of a code in many spheres of the law we are of opinion that to adopt a code for South Australia at the present stage of development of the law of defamation might well be to put it into a strait-jacket and to stultify its further development. It is of interest to note that the New South Wales Law Reform Commission have recently recommended a return to the common law instead of the use of a Code. Accordingly we recommend as a matter of policy the enactment of a Defamation Act to amend what we see as the present deficiencies in the law. They are as follows:—

1. The abolition of the historical distinction between libel and slander.

Most of the English commentators have proceeded on the basis that the proper way to achieve this would be to abolish the necessity for proof of special damage in actions of slander and so assimilate slander to libel. American law on the other hand has in general proceeded in the opposite direction and now divides libel into two classes:— libel *per se* and libel *per quod*. Libel *per se* is a written statement which is defamatory on its face and because of that fact special damage need not be shown. Libel *per quod* is a written statement which is not defamatory on its face and which requires proof of extrinsic circumstances rather like our innuendo, to show that the statement is in fact defamatory and special damage must be shown. This distinction, however, produces its own anomaly in that a slanderous statement which is defamatory by reason of extrinsic facts and which falls within any of the categories in which slander has always been actionable without proof of special damage, is still so actionable if spoken but not if written. Accordingly, whilst we think it proper to draw the attention of the Government to American precedent we think that the safer rule to adopt in this State would be to abolish the necessity for special damage in slander. If this were adopted it would be

necessary to modify to some extent the provisions of Section 2 of the English Defamation Act, 1952 15 & 16 Geo. VI & 1 Eliz. II c. 66 which refers to special damage being a necessary ingredient in one particular kind of defamation, so that it would read—

> "Any statement calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication shall be actionable whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business."

This would get over the very fine distinctions as to when words are spoken of a man in the course of his trade or business. See for example *Ayres* v. *Craven* (1834) 2 *Ad. & E.* 2 *at* 7: *Jones* v. *Jones* 1916 2 *A.C.* 481 *at* 491, 492-498 *and* 499: *Hopwood* v. *Muirson* 1945 *K.B.* 313.

2. Jurisdiction as to foreign libels.

The test has been whether there has been any publication within the State in question and this of course may lead to numerous suits with some overlapping of damages, a question to which we shall return when we deal with damages. Some of the problems are set out in *Jenner* v. *Sun Oil Company* 1952 2 *D.L.R.* 526 and *Kroch* v. *Rossell* 1937 1 *All E.R.* 725.

In the United States what is known as the single publication rule has been judicially evolved under which a plaintiff has only one cause of action for a single act of a defendant leading to communication to others and it accrues when communication is first made to some segment of the public for which it was intended and about half the United States' jurisdictions now have an Act making this the law.

However, this has created a whole crop of new problems in that publication of a new edition for example is a republication. Further as not all jurisdictions recognize the single publication rule, very difficult questions of conflict of laws have also arisen with the result that forum shopping is not uncommon by plaintiffs. We think that the United States single publication rule has not worked out as well as its authors thought it would and it would be better to deal with the matter by the way of limitation of damages for any one libel and we shall return to the matter under that topic. Our view is that this problem is better treated by arranging for uniform law on this topic to be enacted throughout the Commonwealth.

The other matter which this topic raises is the question of limitation of actions. Time may run at present from the publication perhaps years later of a single copy of a newspaper bought at that later time (see *Duke of Brunswick* v. *Harmer* 14 *Q.B.* 185) and the *Advertiser* newspaper recommended the abolition of this rule. We see the force of their recommendation but think the case is so rare as not to justify legislation and in any case it could not apply to books as distinct from newspapers which may not be available here for many months after their first publication elsewhere.

3. Defamation in public office.

The cases on this vary very widely. In some cases the fact that a man is holding public office and that what has been said will reflect

on his administration of that office or his chances of re-election has been held to be sufficient. See for example *Mack* v. *North Hill News* 44 *D.L.R.* 2*d*. 147. In other cases a very narrow view has been taken as in the South Australian case of *Cameron* v. *Consolidated Press Limited* 1940 *S.A.S.R.* 372, and one can find any number of intermediate positions: e.g., *Jones* v. *Bennett* 66 *D.L.R.* 2*d*. 497: *Gobbart* v. *W.A. Newspapers* 1968 *W.A.R.* 113—contrast *Murphy* v. *Australian Consolidated Press* 87 *W.N. N.S.W.* (1) 165.

The United States law has recently moved sharply in a very restrictive direction following the decision of the Supreme Court of the United States in *New York Times Company* v. *Sullivan* (1964) 376 *U.S.* 254 in which a plaintiff who is holding public office cannot recover damages for defamation unless he can prove the defendant was guilty of "actual malice" to which is equated in the later decision of *Curtis Publishing Company* v. *Butts* (1967) 388 *U.S.* 130 "highly unreasonable conduct" by Mr. Justice Harlan and "reckless disregard" by Chief Justice Warren.

The Committee are divided on the recommendation which follows:—Some think that this situation is completely unfair to those who hold public office. Fair comment on what they do is proper and reasonable, just as it is in the case of any other person who subjects himself to public debate and criticism such as an artist, dramatist or actor. Those members think that extended protection should be given by Statute to the private life of public men, their wives and children, and that the defence of fair comment should be restricted to their public acts and utterances. Others think the present law is adequate, and that the enactment of Section 2 of the English Defamation Act gives extended protection in any case. If this latter view is preferred by the Government we desire to point out that the common law distinction between office of profit and office of honour has been held to survive the enactment of that Section (see *Robinson* v. *Ward "The Times"* 17 *June* 1958 and that the South Australian equivalent of Section 2 should be drafted so as to abolish that distinction.

4. Class Libels.

At present a man cannot recover for a libel on a class of which he is a member unless either it can be shown that he personally is identified as a member of the class in the article complained of (see *Knupffer* v. *London Express Newspaper* 1944 *A.C.* 116) or the class is so small that every member of it must necessarily be identifiable and therefore defamed, as for example the group of seven Roman Catholic priests in *Browne* v. *Thomson & Co.* 1912 *S.C.* 359 where the class comprised only the seven clergymen who exercised jurisdiction in Queenstown. A similar case was the allegation of cruelty "in some of the Irish factories" which was capable of supporting a jury verdict had it referred specifically to the plaintiff's factory. See *Le Fanu* v. *Malcolmson* 1 *H.L.C.* 637. A majority of us think this states the position too narrowly. If in fact a man can show special damage from a libel in that by reason of the comment made on the group, he has been dismissed from a position or has lost the opportunity of obtaining one, or has otherwise been damaged in his business, we see no reason why he should be denied a right of action. We agree immediately that this means reintroducing the concept of special

damage into this branch of the law but it may well be that it should be dealt with as a separate cause of action, namely causing special damage to a person by stirring up class hatred (in which term we include race, creed, colour and economic class hatred) by defamatory statements.

5. Injunction.

At present it is impossible to get an injunction to stop the publication of a libel before it happens (see *Frazer* v. *Evans* 1969 1 *All E.R.* 8) on the basis that until the publication has taken place there is no libel. A majority of us see no reason why an interlocutory injunction should not be granted in this case in the discretion of the Judge as in other *quia timet* cases on the basis that the plaintiff has to give an undertaking satisfactory to the Judge that he undertakes liability to the defendant for damages sustained by the defendant, if in fact it turns out at the trial the defendant was entitled to publish the statement complained of, before he gets his injunction.

6. Survival of Causes of Action.

By the Survival of Causes of Action Act 63 of 1940 Section 2, causes of action for defamation do not survive and the old rule *actio personalis moritur cum persona* still applies. This is so in all Australian jurisdictions except Tasmania. We think that this rule is too stringent. If the deceased has in fact sustained special damage we see no reason why the action should not survive as to the special damage and we think the law should be amended accordingly.

Akin to this problem is the question of defamation of the dead. In some of the Code States of Australia it is possible to take action for defamation of the dead. At common law no action lies for defamation of the dead unless the dead person was the King (see an article in 119 *L.J.N.* 769), or if the defamation of the dead necessarily involves defamation of the living.

We think that the common law as to defamation of the dead should continue. The New South Wales amendment is said to have arisen out of a particular political situation and we agree with *Fleming on Torts 3rd Edn. pages* 508-9 that if the abuse is sufficiently gross criminal libel proceedings may be taken and that curbing the freedom of biographers and historians is socially undesirable.

However there is no reason in law or in sense why causes of action in defamation should not survive against the estates of deceased tort-feasors and we entirely agree with the criticisms voiced in *Winfield on Tort 8th Edn. at page* 627. In our opinion where it is the defendant who has died, the cause of action should survive in the ordinary way against his estate.

These conclude the matters which we think ought to be altered in relation to the presentation of causes of action by plaintiffs. We turn now to the question of the modification of rules relating to defences:—

1. The doctrine of the "right thinking" man.

If the doctrine had been that of the reasonable man we could have understood it well enough but the way in which it has been used by

Judges has frequently shown them to be out of contact with the realities of life and we quote from an article by Professor Heuston called *"Recent Developments in the Law of Defamation"* published in 1 *Irish Jurist* (*N.S.*) 249 *at* 250 as follows:—

> "The modern case of significance in the Lords is *Turner* v. *M.G.M. in* 1949 (1950 1 *All E.R.* 449). In this case one of the several questions which arose was whether it could be defamatory of a distinguished woman film critic to say that she was 'out of touch with the tastes and entertainment requirements of the picture going millions'. The trial Judge, Mr, Justice Hilberry, who had great experience in these matters, and a number of the Law Lords, thought that these words were not so much defamatory of Lady Turner (Mrs. Arnot Robertson) as complimentary. For apparently one should expect that an intelligent woman who wrote film reviews would be out of touch with the tastes and entertainment requirements of the picture-going millions, using "out of touch with" in the sense of out of sympathy with, rather than ignorant of. For one would certainly expect the most high-brow film reviewer to know what the tastes and entertainment requirements of the millions were, even though she did not share them. Perhaps one could suggest that these judgments are worthy of a place in an anthology proposed by a former Oxford colleague of mine, entitled 'Things Judges have believed'."

A majority of the Committee think that the doctrine of the "right thinking" man ought to be abolished by Statute and the ordinary test in the law of tort of the reasonable man ought to be substituted. The reasonable man test was used by Lord Justice Goddard in *Hough* v. *The London Express Newspaper* 1940 2 *K.B.* 507 *at* 515 and by Griffith C. J. in *Slatyer* v. *Daily Telegraph* 6 *C.L.R.* 1 *at* 7. Others think that the present law is satisfactory without alteration.

We should perhaps also draw attention to the fact that although this would mean that the reputation which is lost must be that which exists in the eye of a rational good and law abiding subject of the Queen (see *Byrne* v. *Deane* 1937 1 *K.B.* 818), this has been criticized by a distinguished American Judge, Mr. Justice Learned Hand, on the ground that a man may value his reputation even amongst those who do not embrace the prevailing moral standards (see *Grant* v. *Readers' Digest* (1945) 151 *Federal* 2d. 733 *at* 734) but we agree with Professor Heuston in the article to which we have already referred and think that such a doctrine as that referred to by Mr. Justice Learned Hand should not find a place in Australian law.

2. As to what is publication.

Publication is the communication of the defamatory words to at least one other person than the person defamed. Communication to the person defamed himself is only sufficient in the case of criminal libel because there it may provoke a breach of peace. Accordingly reading of the defamatory document by inquisitive third persons is usually publication. See *Huth* v. *Huth* 1915 3 *K.B.* 32: *Theaker* v. *Richardson* 1962 1 *W.L.R.* 151.

Again it may well be, and has been so held in American jurisdictions, that dictation to a secretary is publication. A majority of us think that unintended publication and mere office routine should not amount to "publication" and the law should be amended.

3. Allied to the problem of publication is the problem of innocent defamation generally.

See *Vizetelly* v. *Mudie's Select Library* 1900 2 *Q.B.* 170 (distributors), *Hulton* v. *Jones* 1910 *A.C.* 20 *and Cassidy* v. *Daily Mirror Newspapers* 1929 2 *K.B.* 331 (*publishers*) and see 223 *L.T. Jo.* 97. As the law stands at present, the rule is as set out in *Sun Life Assurance Company of Canada* v. *W. H. Smith & Sons Limited* 150 *L.T.* 211 where Scrutton L. J. thought that the single question ought to be asked "Ought the defendant to have known that the matter was defamatory, *i.e.* was it due to his negligence in conducting his business that he did not know". This means that those who are concerned with the mere mechanical distribution of printed matter, newsagents, circulating libraries and booksellers, are in a safer position than those who are primarily concerned with its production, authors, newspaper proprietors, publishers, printers and editors. We think that Section 4 of the English Defamation Act 1952 providing for an offer of amends in cases of unintentional defamation should be enacted as part of the law of South Australia. If such a Section were enacted then we should also need to amend the Rules of Court by inserting a Rule of Court in similar terms to the present English Order 82 Rule 8.

4. Fair comment and proof of every supporting fact.

At present the law is as set out in *Kemsley* v. *Foot* 1952 *A.C.* 345. We think the defence of fair comment should 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, and that Section 6 of the English Defamation Act should be enacted as law in this State.

5. Justification.

At present every charge has to be justified as true (see *Clarkson* v. *Lawson* 6 *Bing.* 266 *at* 272 *and* 273: *Helsham* v. *Blackwood* 11 *C.B.* 111 *at* 129). We think that this takes the position too far and that a defence of justification should not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges and that Section 5 of the English Act of 1952 should be enacted as law in South Australia.

A further matter which requires consideration under this heading concerns successful libel actions brought by men such as Alfred Hinds after being convicted of a crime by a jury, thus enabling such a person to retry the issue of guilt in civil proceedings which may be heard years later when witnesses are unobtainable or their memories infirm, or documents have not been kept and filed away which bear on the matter. A majority of the Committee think that the New South Wales and English legislation should be adopted on this point making a conviction for a criminal offence conclusive evidence in a subsequent defamation action by the person convicted. A similar recommendation was made by Sir Stanley Burbury, Chief Justice of Tasmania, to the Tasmanian Law Reform Committee. We feel that we should point out that the enactment of such a Section would go further than the

policy embodied in Section 34 (*a*) of our Evidence Act which only makes proof of such a conviction *prima facie* evidence in civil proceedings.

6. Right of reply.

Some Provinces in Canada and States of the United States have "right of reply" Statutes under which any person who has been defamed may require the newspaper or periodical who printed the defamation to print a reply by the person defamed provided that such reply is not itself defamatory or if it turns out so to be that those who are required to publish it are absolutely privileged. Publication of such a reply can be offered in mitigation of damages and in Quebec it prevents any damages being awarded at all. Provisions for right of reply also exist in Austria, Belgium, Columbia, Denmark, Egypt, Finland, France, Germany, Greece, Guatemala, Italy, Japan, Norway, Panama, Portugal, Rumania and Yugoslavia. We draw the Government's attention to this without making any positive recommendation on the matter. The conflicting matters are well set out in a commentary prepared by Mr. Keeler, one of our members, as follows:

"This leaves only some general matters, though I find them all of extreme difficulty. Firstly, there is the question of the 'right of reply'. Although the use of such a device to supplement existing remedies is at first sight attractive it does seem to me to present some grave difficulties. That it is successfully used in Europe and Quebec does not seem to me persuasive that common law countries should adopt it; the gist of the civilian wrong is the insult to the plaintiff rather than the damage to his reputation, and a right of reply might well expunge an insult where it would be inadequate to vindicate a reputation. Moreover, the creation of the right of an aggrieved party to reply to a publication may well cause newspaper editors and broadcasting stations great practical difficulties: the number of potential applicants who may conceive themselves to have been disparaged might well be very great, and the purpose of introducing a right of reply would be hampered inordinately if a court had to consider the original publication before the reply is published. Finally, if the newspaper or broadcasting station chooses to query the reply by making a further comment the courts may ultimately be faced with the task of adjudicating upon a protracted exchange of abuse. In favour of the right of reply, on the other hand, is that some plaintiffs may not wish to go to court at all, nor particularly desire damages: yet, unless the original publisher is prepared to publish a voluntary retraction or apology, they have no other remedy. There is, therefore, a strong case to be made for a scheme which (1) allows for and encourages an organ of the media to publish a voluntary retraction but (2) equally allows an editor to stand by what he has written while compelling him, if he chooses to do so, to publish the other side of the story. Where the newspaper publishes an apology, I would allow that fact to be given in mitigation of damages (as under the Wrongs Act, s.9); where it publishes a reply (without comment) I would bar any further action by the plaintiff on the ground that he has chosen the public arena as the appropriate forum to defend himself in preference to the courts, and has, in a sense,, elected between alternate remedies. This goes further than any American

legislation (which does not bar the action, but allows the publication of the reply to go in mitigation of damages) or the Quebec legislation (which requires *both* retraction and the publication of the reply). But whether such a scheme is practicable depends on the extent to which the right of reply is likely to be abused by exhibitionists and cranks on the one hand, and by the media on the other."

7. Qualified Privilege.

This must be dealt with under separate heads:—

(*a*) Qualified privilege of newspapers.

This is dealt with to a certain extent already by Sections 6, 7 and 12 of the Wrongs Act, 1936-1959. The English Act of 1952, however, includes in Part II of the Schedule to the Act a large number of additional bodies in relation to which qualified privilege attaches unless the publication is proved to be made with malice. We think that this extension should be made here and that in effect Section 7 of the English Defamation Act *mutatis mutandis* should be enacted as law in South Australia. Further it would appear that Section 7 (1) (*c*) of our Wrongs Act does not cover the accurate reporting by a newspaper of proceedings in Parliament and we think the Section should be amended to cover this.

(*b*) Qualified Privilege and waiver.

We think that where a newspaper waives its privilege it should not thereafter be able to set up other defences such as fair comment if it invites litigation by the person defamed and should be restricted to a defence of justification and we think that the law as set out in *Penton* v. *Calwell* 70 *C.L.R.* 219 ought to be altered.

(*c*) We think that there is much to be said for the law as it stands in the United States that statements made in good faith in an attempt to aid law enforcement are conditionally privileged, *i.e.* privileged if made without malice, because of society's interests in encouraging such efforts. At present it is true that complaints made to proper officials about improper conduct or reports to the proper authorities of contemplated crimes or crimes that have occurred are the subject of qualified privilege but that this does not cover three quite important cases:—first where the person giving the information has no "interest" in the result, as for example a by-stander who honestly but erroneously identifies a stolen motor car or one concerned in an accident; secondly a person other than the one injured or robbed, who honestly but erroneously identifies an accused person and thirdly where the person making the statement honestly but erroneously sends it to the wrong authority. Such statements would be privileged in the States of the United States to which we have referred if they are not made recklessly or maliciously and we think that a similar privilege ought to apply here.

We now turn to the third question which this reform of the law in this area poses and that is the law relating to damages. It has for long been said that it was cheaper to break a man's limb than to defame him and many recent cases bear this out, for example early last year Captain John Groome recovered £40,000stg. damages against Cassells and Mr. David Irving for defamation in a book called "The Destruction of Convoy PQ 17". £15,000 of this was said to be compensatory and £25,000 was exemplary, or in the other words deterrently punitive. As C. H. Rolfe says in an article on the case "how can it be said that such a verdict is anything other than punishment and it certainly cannot be said that the civil law is being used for no more than a supposed purpose of restoring a wronged plaintiff to the status he was enjoying before the wrong was committed". The House of Lords held that exemplary damages were virtually abolished in *Rookes* v. *Barnard* 1964 *A.C.* 1129 but this decision was criticized and not followed by the High Court of Australia in *Uren* v. *John Fairfax & Sons Proprietary Limited* 40 *A.L.J.R.* 124 and an appeal from this decision was dismissed by the Privy Council on the ground that the law of England and Australia was different on the point. The Committee is divided on the question of whether exemplary damages ought to be retained and makes no recommendation on the point.

Aggravated damages are, on the other hand, proper. Where the plaintiff has been aggravated by circumstances of insult or outrage which have wounded his feelings, then he should be entitled to aggravated damages but this is a different matter from exemplary damages. This, however, does not deal with the other problem which is the question of what are proper damages for libel and we quote again from Professor Heuston's article at page 267—

> "The vagueness which surrounds the whole subject is well shown by *Greenlands Ltd.* v. *Wilmshurst* 1913 3 *K.B.* 507 *at* 532, in which the Court of Appeal ordered a new trial on the ground that £1,000 damages was excessive. It was said that the jury had been annoyed by the attitude of the defendants and in particular by the way in which F. E. Smith, K.C. had conducted their case.
>
> Hamilton L. J. said: 'Still, in my opinion by no formula or manipulation can £1,000 be got at. For any damage really done, £100 was quite enough; double it for the sympathy; double it again for the jury's sense of the defendant's conduct, and again for their sense of Mr. F. E. Smith's. The product is only £800'.
>
> The result no doubt does justice, but the respect which is given to the instinctive common-sense of judges in general and Hamilton L. J. in particular should not prevent us from asking how he knew that '£100 was quite enough'."

We do not after consideration feel justified in recommending the abolition of general damages in this type of case as it is so often impossible for a plaintiff to prove in what ways and to what extent his reputation has in fact been affected by the dissemination of the defamatory matter and we feel that the increase of the rights of mitigation and the enactment of a right of published reply above referred to might be a better answer in relation to keeping damages down in this field.

One small amendment which might help is the enactment of the Tasmanian and Australian Capital Territory provision that the plaintiff gets no costs if he recovers damages under $4. We think perhaps $4 is too low today because this goes back to the traditional £2 which has been the dividing line since the Eighteenth Century and we think the law today ought to be that the plaintiff gets no costs if the damages awarded are under $10 unless a Judge otherwise orders.

8. It is a matter of policy whether trial by jury should be allowed in defamation cases, either on all issues or on liability as is the case in most other English speaking countries which limit civil trials by jury. It is true that juries' ideas of damages in defamation are traditionally high, but also they are much more likely to reflect community feeling in the award of the traditional farthing (now presumably one cent). Further their views on what is defamatory may and do vary widely from those of Judges: to take a South Australian example it is thought that a jury might well have taken different views on some at least of the issues in *Murphy* v. *Plasterers' Society* 1949 *S.A.S.R.* 98. It would at least tend to do away with the type of decision as in the Arnot Robertson case about which we referred in the first quotation from Professor Heuston's article. The Committee split three ways on this point: Two members would not have juries at all: two others would allow juries to decide questions of defamation and justification but not damages; the Chairman would allow jury trials in all cases of defamation.

9. The next matter which arises under damages is the question of recovery of damages for several publications of the same libel. This is already partly covered by Sections 11 and 13 of the Wrongs Act, 1936-1959 but we draw attention to the fact that our Section 11 is restricted to libel contained in newspapers whereas the corresponding English Section has now been extended to cover all libel (by Section 12 of the English Defamation Act 1952) and we think that this extension should equally be enacted as the law in South Australia.

10. In this State the law on the question of whether damages can be recovered for emotional distress or bodily harm resulting from defamation is in a state of uncertainty. See *Mayne & McGregor on Damages* 12*th Edn. paras* 867 *and* 881.

The American law as set out in the Restatement Section 623 is that one who is liable to another for a libel or slander is liable also for emotional distress and bodily harm resulting therefrom which is proved to have been caused by the defamatory publication or in the absence of such proof for such emotional distress as normally results from such a publication. The latter proposition was carried by a majority.

English and Australian law is lagging badly in the area of damages for nervous shock and emotional distress generally in the law of tort and we think that the law should be amended in the case of defamation along the lines set out in the American Restatement.

We recommend that the sections on defamation now in the Wrongs Act should be transferred to the proposed Defamation Act.

We have not dealt in this report with Criminal libel as that will be dealt with in the special Commission on crime nor with any questions relating to the right of privacy which are the subject of a separate reference.

We have also assumed that defamation in relation to television and radio is a matter governed by federal law (except insofar as Sections 69 and 70 of the Judiciary Act may import State law in a given case) and therefore have not dealt with the specific problems of these two media in this Report.

We acknowledge the assistance we have received from a detailed analysis of a number of the problems in this field submitted to us by the *Advertiser* newspaper. We regret that other news media, although apprised of our work in this field, were not able to contribute similar detailed and constructive criticism.

We desire to express our appreciation to the Honourable Mr. Justice Hogarth and to His Honour Judge Mohr for their comments in relation to this paper.

We have the honour to be

HOWARD ZELLING

JOHN KEELER

B. R. COX

K. P. LYNCH

R. G. MATHESON

The Law Reform Committee of South Australia

Dated the 11th day of November, 1971.

Law School

10th November, 1971

SEPARATE REPORT OF Mr. J. F. KEELER

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

As a member of your Committee who has dissented from some recommendations made in its Fifteenth Report I should like to indicate my reasons for my disagreement with certain of the majority recommendations and to mention one point which the Committee as a whole thought it better to exclude from the Report.

My disagreement with the recommendations on pp. 6-8 and on p. 15 of the Report (relating to defamation of men in public office, class libels, injunctions, and waivers) stem from my belief that both individuals and the media ought to have a right of free debate, especially in political affairs, provided that they are prepared to, and can, stand behind any defamatory allegation of fact they may make and that their comment has been fair. In my view the law already recognizes this position with respect to the conduct of men holding public office and they do not require extended protection. The existing rule as to class libels recognizes that statements defamatory of a class are usually made in the course of political, social or religious debate; I do not dissent from the proposition that the law ought to deal with inflammatory statements made about a class but do not think that the law of defamation is the appropriate vehicle for it. I think that any extension of the law relating to injunctions would unduly hinder the work of the Press, which ought to be allowed to make statements if it is prepared to back them up. Lastly, I do not think that, in the rare cases in which the point is likely to arise, that a waiver by an organ of the Press of a privilege should deny it the defence of fair comment (which depends on the facts supporting the comment being true). I do, however, agree that a challenge to an individual to sue should be construed as a waiver of any privilege the challenger might otherwise possess.

The matter which the Committee as a whole preferred to exclude from the Report is the question as to whether or not the defences of qualified privilege which are available to newspapers with respect to fair and accurate reports of the proceedings of various bodies should be extended to radio and television stations. The majority of the Committee feel that the incursion into the field of defamation made by s.124 of the Commonwealth Broadcasting and Television Act gives rise to extremely difficult, and perhaps insurmountable, constitutional problems should the States endeavour (as has New South Wales) so to extend this protection. It seems to me that it cannot be right that some forms of the mass media should have protection in ways that others do not, and undesirable that radio and television stations should be denied privileges accorded to the Press for the benefit of the public. Accordingly I would draw your attention to this point so that you may take such action with respect to it as you may think possible and proper.

Yours faithfully,

JOHN KEELER