

The Foundations of Australian Defamation Law

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Abstract

When the Legislative Council of New South Wales passed the *Libel Act* in 1847, it created a distinctively Australian law of defamation. The Act abolished the distinction between slander and libel, and added a requirement of public benefit to the defence of justification. Both reforms were fundamental modifications of common law doctrines, which still applied in England despite legislative attempts at reform.

This article investigates why such fundamental changes were implemented in New South Wales, in spite of having failed in England. It reveals that one powerful influence on the New South Wales legislature was, paradoxically, the fact that the reforms had been defeated in the British Parliament. Another powerful reason was the perception of what suited New South Wales society. The article then goes on to explore how the New South Wales courts interpreted the Act during the course of the 19th Century, highlighting occasions of judicial creativity. It concludes that the 1847 Act was an important, independent-minded innovation, which could have been profitably adopted elsewhere.

1. Introduction

The *Libel Act* 1847 (NSW) fundamentally altered the common law of defamation. Its most far-reaching provisions abolished the distinction between libel and slander,¹ and modified the defence of truth so as to require a defendant to prove that publication was for the public benefit:² one landmark was swept away, another altered beyond recognition. The 1847 Act was subsequently consolidated in New South Wales,³ and was replicated — in identical terms — in Queensland.⁴ It marked the start of the complex history of Australian defamation reforms, which culminated in the uniform Defamation Acts (2005).

* Reader in Law, King's College London. I am very grateful to Andrew Kenyon for encouraging me to think about Australian defamation law and inviting me to visit the the Centre for Media and Communications Law at the University of Melbourne in August 2005. Much of the research for this article was conducted during that visit as a Senior Fellow, CMCL. I would also like to thank Brad Sherman and Robert Burrell (University of Queensland) for their help.

1 *Libel Act* 1847 (NSW) ss1, 2 (hereafter 'the 1847 Act').

2 *Libel Act* 1847 (NSW) s4.

3 *Defamation Act* 1901 (NSW); *Defamation Act* 1912 (Qld).

4 The relevant statutory sections are set out in Edward Sykes, 'Some Aspects of the Queensland Civil Defamation Law' (1948–1951) 1(3) *UQLJ* 19.

But, despite the Act's importance, it has never been the subject of a detailed study. A lack of 19th Century literature is perhaps not surprising. As one legal historian has pointed out, it took until the late 19th Century for most legal subjects to acquire their own Australian treatises — but even then there was a lack of books on tort.⁵ It seems to have been thought that works on Australian defamation would have been mere inferior duplications of their English counterparts: as late as 1909, the editor of a collection of Australian statutes remarked that 'there are many English treatises on Defamation, so excellent as to forbid the attempt to set up a local competitor'.⁶

The current neglect of the subject is more surprising. Australian legal history has become a flourishing academic discipline, with particular importance being given to the 'vibrant local quality'⁷ of legislation. Perhaps the explanation is that the 1847 Act is thought to be neither vibrant nor local: one leading work does not mention it at all,⁸ another refers to it only in passing.⁹

This article finally offers a detailed study of the English origins of the Act, its complex legislative process in London and Sydney, and its effects. The story that emerges casts light not only on the principles of defamation, but also on the relationship between the British and colonial legislatures, and on the methods of 19th Century colonial judges. It reveals, in other words, that the 1847 Act was vibrant and local, and has been undeservedly neglected.

2. *The English Origins of the 1847 Act*

A. *Brougham's Initiative*

The two principles which the 1847 Act altered so profoundly had very different statuses at the start of the 19th Century. Whilst the principle that truth was a complete defence to defamation had been established since at least the 14th Century,¹⁰ the distinction between libel and slander had only been settled since 1812. In that year it had been held, in *Thorley v Lord Kerry*,¹¹ and with great reluctance, that the publication of written words tending to expose the claimant to hatred, ridicule or contempt was actionable without proof of special damage. If the words were spoken, however, special damage had to be proved, unless the imputation was of criminality, certain contagious diseases or professional incompetence. The court felt that it was compelled to reach this conclusion by the mass of authority supporting it. The judges were probably influenced by the analysis to the same effect in Starkie's textbook on defamation, which had been published earlier that same year.¹²

5 Alex Castles, *Annotated Bibliography of Printed Materials on Australian Law 1788-1900* (1994) at xxiii.

6 Ernest Tebbutt, *The Statute Law Relating to Defamation and Newspapers, etc* (1909) at 1.

7 Bruce Kercher, *An Unruly Child; A History of Law in Australia* (1995) at 103.

8 *Ibid.*

9 Alex Castles, *An Australian Legal History* (1982) at 456.

10 Richard Helmholz (ed), *Select Cases on Defamation to 1600* (1985) 101 *Selden Society* at xxx-xxxii.

11 (1812) 4 *Taunt* 355.

Given the tenor of the Court's reasoning in *Thorley v Lord Kerry*, it is not surprising to find a Parliamentary attempt in 1816 to abolish the distinction between libel and slander. What is surprising is the way in which the distinction was proposed to be abolished. Whilst the gist of the Court's analysis was that there was no good reason to attach more onerous liability to libel than was attached to slander, Brougham's Bill for Securing the Liberty of the Press (1816) proposed to assimilate slander to libel. Clause 10 provided that:

it shall and may be lawful for the Plaintiff or Plaintiffs, in any Action brought for defamatory Words, spoken of and concerning him or them, to sue for and recover Damages for the uttering and speaking of those Words, provided the same are in any way injurious to the character and reputation of the Plaintiff or Plaintiffs, and notwithstanding the same Words may not impute to him or them any indictable offence.¹³

Brougham's Bill also proposed to reform the defence of justification. By clause 11:

if any Action or Suit shall be brought against the Maker or Publisher of any Libel, or against the Person uttering defamatory Words, of and concerning any Person or Persons, it shall not be lawful for the Defendant to plead in justification that the Matters contained in the said Libel, or expressed by the said defamatory Words, were true, but it shall be lawful for the said Defendant to plead the General Issue, and to give Notice [blank] days before the Trial of the same to the Plaintiff, that he means to give the Truth of the said Matters in Evidence, and thereupon ... it shall be lawful for the said Defendant to give Evidence under the General Issue, of the Truth of the said Matters, which Evidence shall be taken into consideration by the Court and Jury before whom the Cause shall be tried.¹⁴

Unlike his proposal to abolish the distinction between slander and libel, there was no obvious catalyst for this reform in the recent civil law of defamation. The real motivating force, as Brougham explained to Parliament, was concern over the law of criminal libel, where truth was no defence.

In his speech to the Commons, Brougham adopted the libel litigant's perspective, eschewing reliance on technical or historical analyses. He first took the (criminal) libel defendant's view: that the 'chief evil'¹⁵ of the current law was that the truth of the libel had no relevance to criminal liability at all. It did not follow, however, that truth should be a complete defence to criminal libel. Rather, the truth should be 'taken into consideration'¹⁶ by the jury as evidence of motive. A defendant publishing the truth was far less likely to have the necessary degree of malice than the publisher of falsity.

12 Paul Mitchell, *The Making of the Modern Law of Defamation* (2005) at 3–9.

13 UK, House of Commons, *Parliamentary Papers* [1816] Vol II (423) at 597.

14 *Ibid.*

15 UK, House of Commons, *Parliamentary Debates (Hansard)* (series 2) Vol 34, 8 May 1816 at col 378.

16 *Id* at col 379.

Next, Brougham considered the position of the claimant and described an unenviable choice. If the claimant chose to bring a civil action:

after running the gauntlet of having all his affairs exposed to the impertinence or pruriency of public animadversion — after submitting to a speech from the defendant's counsel ten times worse than the original libel — after all the expense of a trial, and the risk of being turned round on a point of law, he appeals to a jury for damages to estimate the value of his character.¹⁷

If a prosecution was brought, however, people assumed that the allegation must be true, since the prosecutor had chosen a process where truth was inadmissible. The way forward, Brougham argued, was to acknowledge:

that the proving the libel to be true, was not a sufficient justification; for which reason it followed, that neither, in a private action for damages, nor in a public criminal prosecution, should the truth be taken as a justification — but, in each case, it ought to go to the jury for their consideration.¹⁸

In civil actions, truth would go to damages only.

Brougham was a persuasive speaker, and his technique of adopting the litigant's perspective was to serve him well in later law reform speeches.¹⁹ But his proposals to modify the law on truth were met with scepticism. The Attorney-General's criticism was general: Brougham had not shown that the changes were called for 'either by necessity or convenience'.²⁰ The Solicitor-General was more specific, arguing that to allow proof of truth in criminal libel 'would prove destructive of social comfort', and might lead to the 'destruction of deservedly re-established character'.²¹ The second reading of the Bill was postponed,²² and, despite Brougham's optimism,²³ it went no further.²⁴

This first attempt to abolish the distinction between libel and slander and modify the defence of truth was, therefore, a failure. But it highlighted three themes that would continue to be important. First, while everyone could agree that written and spoken defamation should be governed by the same principles, not everyone agreed what those principles should be. Should slander be assimilated to libel, or libel to slander? Secondly, the fact that truth was a complete defence to an action, and irrelevant in a criminal prosecution, was a glaring inconsistency which called for reform. But reform required identification of the principle which made truth relevant to liability, whether civil or criminal. The principle Brougham had identified was malice, but, as we shall see, that was not the only possibility. The third theme was political: proposals for reform were never instigated by the executive, and they attracted sceptical responses from the Law Officers.

17 *Id* at cols 382–383.

18 *Id* at col 385.

19 Michael Lobban, 'Henry Brougham and Law Reform' (2000) 115 *EHR* 1184 at 1189–1190.

20 *Parliamentary Debates*, above n15 at col 393.

21 *Id* at col 395.

22 *The Journals of the House of Commons*, Vol 71, 14 June 1816 at 461.

23 *Parliamentary Debates* (series 2) Vol 34, 14 June 1816 at col 1108.

24 *General Index to the Journals of the House of Commons 1801–1820* (1825) at 783.

Brougham's proposals would not be the last to suffer at the hands of legally conservative ministers.

B. The 1830s

Parliamentary reform was not to return to the agenda until 1833, when Sir Francis Vincent introduced a Bill.²⁵ Vincent's Bill would leave the distinction between libel and slander untouched,²⁶ but would alter the law on truth:

the general issue of Not Guilty may in all cases, whether the Proceedings be by Action or by Indictment, be pleaded with or without a justification: Provided always, That the Defendant shall not be at liberty in any Action or Indictment to give in evidence any matter of justification, unless the same shall have been pleaded.²⁷

As the preamble to the Bill made clear, this provision was prompted by the discrepancy between criminal libel and civil defamation regarding the proof of truth.²⁸ However, while the Bill made it clear that proof of truth was to be admissible, it did not make it clear what effect such proof was to have. Vincent's speech to the House of Commons did not elaborate on the point,²⁹ so it is perhaps not a cause for regret that the Bill did not receive a second reading.

In early 1834, Daniel O'Connell sought leave to bring in a Bill 'to establish the Liberty of the Press'.³⁰ He was concerned that the law gave too much protection to private character, at the expense of freedom of independent discussion,³¹ and sought to redress the balance by abolishing the distinction between libel and slander, and allowing truth to be proved in criminal libel. His approach to both points was distinctive. In relation to the distinction between libel and slander, his Bill provided, in clause 5, that 'no Civil Action shall be maintained for any Words, merely because of the same being printed or written, or for any other Words, save for such as would be sufficient to sustain an Action when spoken'.³² Libel was to be assimilated to slander. As O'Connell explained to the House of Commons, he preferred the slander rules for their clarity:

Calumny being the essence of both, it would have been thought that there ought to be no difference in principle. But there was a material difference — the law of slander was limited within reasonable bounds. No man could bring an action for slander, unless it imputed some crime — impeached him in his trade or business — charged him with having an infectious disorder, or had been followed by some

25 *The Journals of the House of Commons* Vol 88 28 March 1833 at 231 and 30 March 1833 at 241.

26 'this Act shall extend to all cases of Libel, and to cases of Libel only'. *Parliamentary Papers*, [1833] Vol III (136) at 35 at 3 of the Bill. 'Libel' was given its traditional definition — see at 2 lines 33–39.

27 *Id* at 5, lines 18–23.

28 *Id* at 1, lines 6–8: 'some distinctions have obtained in the practice of the Law between Civil and Criminal Proceedings in cases of Libel, and it is expedient that such Proceedings should be assimilated'.

29 *Parliamentary Debates* (series 3) Vol 16, 28 March 1833 at col 1209.

30 *The Journals of the House of Commons* Vol 89, 18 February 1834 at 39.

31 *Parliamentary Debates* (series 3) Vol 21, 18 February 1834 at col 468.

32 *Parliamentary Papers* [1834] (48) Vol 3 at 449.

special injury. In all these cases the legal description was sufficient for all practical purposes; but it was not so with written slander — it was confined by no bounds, and had broken through all limits; “everything” in the words of Lord Ellenborough, “that hurts a man’s feelings is a libel, and may be made matter of action or of prosecution”. Was it not an absurdity, that the same grievance should have a different species of remedy? It had been proposed, by that Judge, to bring up the law of slander to the standard of the law of libel. He had great respect for the individual who made this suggestion, but, with all becoming deference, he must say that he was exceedingly mistaken. The true way was to cut down the law of libel to the standard of the law of slander — thus, in all private cases, there would be fixed rules and boundaries of offences.³³

In relation to truth, clause 6 of the Bill provided that:

at the Trial of any Indictment of a Libel, whether public or personal, or for Words, whether written, or printed, or spoken, it shall be competent for the Defendant to give in Evidence and prove the Truth of his Allegations of Matter of fact stated in such alleged Libel or Words, in order the better to enable the Jury to determine whether or not the same was or were published for the criminal purpose imputed thereto in such Indictment.³⁴

O’Connell’s explanation of this reform was that indictments for libel charged the defendant with having a criminal intention, but ‘there could be no better criterion of the intention with which anything was said than its falsehood’.³⁵ His view echoed that of Brougham, but his proposal was less ambitious than Brougham’s, being confined to criminal libel only.

While Sir Francis Vincent was delighted that O’Connell had taken up libel reform,³⁶ other Members of Parliament were less enthusiastic. John Jervis was not sure whether a select committee would have been more appropriate than a Bill.³⁷ Lord Althorp was not prepared to oppose O’Connell’s Bill, but did not agree with many of the details.³⁸

O’Connell’s Bill never received a second reading.³⁹ As he later explained, Lord Althorp persuaded him to drop the measure on the understanding that a Select Committee would inquire into the subject.⁴⁰ In March 1834 the Solicitor-General moved for the appointment of such a Select Committee, explaining the need for libel reform in striking terms:

In the existing Law of Libel there were many matters of grievance affecting all persons connected with the public Press ... [S]uch was the state of society now-a-days, that in considering this question, the House might exclusively direct its attention to those individuals engaged in our periodical publications.⁴¹

33 *Parliamentary Debates* (series 3) Vol 31, 18 February 1834 at col 474.

34 *Id* at n32.

35 *Parliamentary Debates* (series 3) Vol 31, 18 February 1834 at col 470.

36 *Id* at col 478.

37 *Id* at col 478–479.

38 *Id* at col 479.

39 *General Index to the Journals of the House of Commons 1820–1837* (1838) at 632.

40 *Parliamentary Debates* (series 3) Vol 38, 3 May 1837 at col 478.

41 *Parliamentary Debates* (series 3) Vol 22, 18 March 1834 at col 411.

The Solicitor-General also outlined some of the issues that the Committee should consider. At the forefront was the role of truth. For criminal libel, he acknowledged that since guilt required malice, ‘the consideration of truth or falsehood, as a matter of palliation, should not altogether be excluded’.⁴² This, essentially, was Brougham’s point again. But the Solicitor-General’s analysis of truth in civil actions was new, and policy-based:

In proceedings by simple action, the consequences resulting from the present law were really absurd. If the defendant could succeed in proving the libel to be true, no matter how injurious or cruel it might be, or however malicious soever the motives might be which prompted its publication, the person libelled could obtain no redress. Was it right that a person who had sustained the most serious injury to which he could be exposed — namely, the loss of his character — should be unable to obtain redress, because the fact which had been published, and which perhaps had occurred at an early period of life, and under circumstances which palliated its apparent enormity, could be proved to be true?⁴³

In relation to the distinction between libel and slander, he made it clear that he did not share O’Connell’s view:

it was obvious, that it would be necessary for the Committee to take into consideration the state of the law respecting slander, than which it was scarcely possible to conceive anything more absurd. In looking over the catalogue of words which were slanderous, no reason appeared for their insertion, except that they had been decided to be slanderous.⁴⁴

O’Connell was unpersuaded: he welcomed the appointment of a Committee, but remained convinced that the law of slander should prevail.⁴⁵ Other Members of Parliament raised important points about truth. In particular, Richard Sheil questioned the analysis that truth should be admitted in criminal libel because it was relevant to malice. The position, he argued, was more complex. In private libel cases truth would only be relevant to motive; ‘but in public cases, he ... was of opinion, that truth should, in every instance, be considered a complete justification’.⁴⁶

A Select Committee was appointed, which heard evidence but produced no Report. As O’Connell put it, crudely, in 1837, ‘The Committee, in fact, proved to be a perfect abortion — no record even of its proceedings remained — all the evidence given before it was lost’.⁴⁷ His frustration was understandable. The important issues had been clearly identified, and the competing principles articulated. The crucial deeper policy question — whether the law of defamation should be shaped by the needs of the press — had also been exposed. But perhaps most importantly, this had been a Government initiative with the Solicitor-

42 Id at col 413.

43 Id at col 413–414.

44 Id at col 418.

45 Id at col 421.

46 Id at col 423.

47 *Parliamentary Debates* (series 3) Vol 38, 3 May 1837 at col 478.

General's blessing. Conditions for fundamental reform of libel in England would never be so favourable again.

O'Connell persevered. In March 1835, he sought leave to bring in a further Bill to amend the law of libel.⁴⁸ The Bill was never printed, but O'Connell's speech in Parliament shows that he was still linking truth with the requirement of malice in criminal libel.⁴⁹ He brought in another Bill, in what appeared to be identical terms, in 1836.⁵⁰ Sir Frederick Pollock and the Attorney-General expressed their doubts about 'several' clauses,⁵¹ and the Bill was dropped.⁵² February 1837 saw a further attempt. The provisions dealing with truth and libel and slander were identical to those in his 1834 Bill,⁵³ and he advanced the same arguments to support them.⁵⁴

If O'Connell thought that his Bill stood a better chance of success in 1837 than during the previous three years, he was to be disappointed. The Attorney-General's criticism was scathing and contemptuous; O'Connell, he said, 'has utterly failed'.⁵⁵ Concerning the clause assimilating libel to slander, the Attorney-General commented that:

I am sure that my hon and learned Friend had not properly considered the effect of a provision such as this, when he finally allowed it to stand as one of the clauses of his Bill; or he must have forgotten, at the time, what the law of England at present is with respect to spoken words.⁵⁶

That law, the Attorney-General reminded the House, did not permit an action to be brought by a man who was said to be a scoundrel, or by a woman who was said to be unchaste. The law was in need of reform, but, he continued, the reform should be the exact opposite of O'Connell's proposal — it should bring 'the penalty for spoken words up to the same point which the law assigns for written words'.⁵⁷ Sir Frederick Pollock and Mr Poulter echoed this criticism, though in less harsh terms.⁵⁸ The motion for a second reading was defeated,⁵⁹ and, although a motion for a second reading in six months time succeeded,⁶⁰ nothing more was heard of it. O'Connell obtained leave for two more Bills, in 1838⁶¹ and 1839,⁶² but they never materialised.⁶³ His interest in libel reform was exhausted.

48 *Journals of the House of Commons*, Vol 90, 19 March 1835 at 139.

49 *Parliamentary Debates* (series 3), Vol 26, 18 March 1835 at col 1180.

50 *Journals of the House of Commons*, Vol 91, 11 February 1836 at 26.

51 *Parliamentary Debates* (series 3), Vol 31, 11 February 1836 at col 308.

52 *General Index to the Journals of the House of Commons 1820–1837* (1838) at 632.

53 *Parliamentary Papers [1837] (75)* Vol 3 at 329 at 2 clauses 5 and 6. Although the terms of the clause dealing with truth were identical to the 1834 Bill, it is interesting to note that the side heading read differently: 'Defendant in actions for Libel may prove the truth of his allegations'. This was difficult to reconcile with the section's reference to 'Indictment'.

54 *Parliamentary Debates* (series 3) Vol 38, 3 May 1837 at col 477.

55 *Id* at col 483.

56 *Id* at col 487–488.

57 *Id* at col 488.

58 *Id* at col 498 and 499 respectively.

59 *Journals of the House of Commons*, Vol 92, 3 May 1837 at 326.

60 *Ibid*.

61 *Journals of the House of Commons*, Vol 93, 7 February 1838 at 255.

62 *Journals of the House of Commons*, Vol 94, 28 February 1839 at 67.

C. *The 1843 Initiative*

There was no progress for the next four years. But in 1843, Lord Campbell became involved. He had previously been chairman of the Real Property Commission, and Solicitor-General. He had also been working on his gossipy *Lives of the Lord Chancellors* since 1841, of which one commentator remarked that they added a new sting to death.⁶⁴ Libel law reform combined his two main interests.

Campbell's first contribution was to move for a Select Committee of the House of Lords. He did not underplay the gravity of the situation, telling their Lordships at the outset that 'on this important subject the law of England is more defective than that of any other civilised country in the world'.⁶⁵ The further details of his speech showed that this was not a mere rhetorical flourish. Thus, the distinction between libel and slander, which Campbell regarded as the first of the law's 'most glaring defects'⁶⁶ was 'not made by the law of Scotland or the law of France'.⁶⁷ As Campbell mentioned, it had also been 'condemned by some of the most eminent judges in England'.⁶⁸

Campbell's analysis of the role of truth was similarly compelling. His concern about the exclusion of truth from criminal libel was based, not on the relevance of truth as evidence of good motive, but on the fact that the rule had 'a strong tendency to keep back from the public information, which the public have an interest to possess'.⁶⁹ As he explained, his conclusions about the role of truth in both criminal and civil law drew on the position in other legal systems:

Although I would allow the truth in every instance to be given in evidence, I am not prepared to say that in every instance it should amount to a complete defence. Upon this point I venture to differ, with great respect, from the commissioners who prepared the new code for our Indian possessions, and to agree rather with the celebrated code prepared by Mr Livingstone, for the state of Louisiana, according to which, the truth being admitted, it is left to the jury to say whether the publication was for the good of the community. I allow that you cannot look merely to the private motives of the defendant. Although they should be malicious and revengeful, if a benefit has been conferred upon society, he ought not to be punished as a criminal. But many cases may be imagined where society has no interest to be informed of the private history of an individual.⁷⁰

The House of Lords supported Campbell's proposal, and a Select Committee was appointed.

Campbell had not only rejuvenated the process of libel reform, he had taken it in a distinctively new direction. One immediately striking difference was the

63 *General Index to the Journals of the House of Commons 1837–1852* (1853) at 581.

64 Gareth Jones & Vivienne Jones, 'John Campbell' in the *Oxford Dictionary of National Biography* (2004–2005).

65 *Parliamentary Debates* (series 3) Vol 66, 13 February 1843 at col 395.

66 *Id* at col 397.

67 *Ibid*.

68 *Ibid*.

69 *Id* at col 401.

70 *Id* at col 404.

comparative approach, drawing on France, Scotland, India and Louisiana. This was a technique that Campbell had used previously, to impressive effect, as Chairman of the Real Property Commission.⁷¹ Perhaps more important was where the comparative approach led. The significance of truth was no longer that it potentially negated an element of criminal liability; now, the role of truth was as a defence that ensured that the public received important information. It followed that only certain types of true statement deserved protection; those relating purely to a private individual's history were excluded.

The Select Committee set to work two days later, hearing evidence from a wide range of witnesses. The comparative theme was still evident, with questions being put to Scots lawyers and the drafter of the Maltese libel laws. Campbell had also managed to lay his hands on transcripts of the 1834 House of Commons Select Committee, which included expert evidence on French law. Other witnesses included judges, law reformers, and both editors and owners of newspapers.

Their evidence illustrated the widely differing views that could be taken of both the distinction between libel and slander, and the defence of truth. Lord Brougham's criticism of the distinction was familiar enough: spoken slander might well be more damaging than libel in the right context, yet many serious accusations, such as 'calling a Man a Rogue, a Coward, a Knave, an Apostate, a Profligate, a Seducer, an Adulterer'⁷² were not automatically actionable as slander. The distinction was further undermined by evidence from the French and Scottish experts. Dupin explained that in French law, written and spoken slander were not treated differently, but the form of publication would be evidence to go to the judge and jury in assessing the gravity of the harm. As he put it, 'the Writer is supposed to have put more Perseverance and Obstinacy in the doing of the Injury'.⁷³ Scots law took the same approach: the only legal significance of writing was 'that Calumny in Writing implies probably more Deliberation and Vindictiveness'.⁷⁴ One Scottish witness described the English position as 'fanciful'.⁷⁵

But the fact that things were done differently in France and Scotland was not, in itself, conclusive. There was clearly a concern in the Select Committee that abolishing the distinction would admit a flood of frivolous claims. The Lord Advocate of Scotland was asked whether 'Inconvenience has arisen in Scotland from Actions being brought for Words of Heat spoken between low bred and vulgar People'.⁷⁶ He replied that:

71 Jones & Jones, above n64.

72 House of Lords Select Committee, *Report from the Select Committee of the House of Lords Appointed to Consider the Law of Defamation and Libel, and to Report Thereon to the House; With Minutes of Evidence Taken Before the Committee, and an Index* (London: 1843) at 12, q3 (in evidence to 1834 Committee). I am grateful to Michael Bools for drawing this material to my attention.

73 *Id* at 31 q83.

74 *Id* at 61 q194 (Duncan M'Neill, Lord Advocate of Scotland).

75 *Id* at 143 q589 (John Borthwick).

76 *Id* at 64 q224.

I cannot say that much Inconvenience has arisen. I have certainly seen some Actions brought which I thought were absurd; but then the Check is, that the Jury in such Cases will probably give only nominal Damages. The Costs operate as a Check.⁷⁷

He later confirmed that, under Scots law, the jury would be required to find for the claimant even in such a frivolous case.⁷⁸ The Committee even called back another Scottish witness, John Borthwick, to ask him about the likely practical consequences of abolishing the distinction. He admitted that some expedited procedure, perhaps without a jury, would be needed for small cases.⁷⁹

An entirely different view was taken by Thomas Starkie, the author of a leading libel textbook. The distinction between libel and slander was, he asserted, 'sustainable upon sound principle'.⁸⁰ The categories of actionable slander also made sense, since they 'carry with them the Probability that Damage will result'.⁸¹ The only view that the Committee did not hear was that libel should be assimilated to slander because the slander categories offered greater certainty. This is, doubtless, what Daniel O'Connell would have said, but he did not give evidence.

The views expressed about truth were equally diverse. Starkie flatly refused to countenance any reform in civil actions. The Committee pressed him, asking 'Do you consider that a Person has no Interest at all in his Reputation, where he may at some remote Period have committed a Fault which was unknown or forgotten, and which was again brought to light by the Publication of the Libel?'.⁸² But Starkie remained unmoved:

I should be obliged to come to that Conclusion, for if you at any Time allow that a Man has no Right, on account of the Truth of the Imputation, to recover in Damages, I cannot see at what Time he should acquire the Right to compel Silence concerning his Character. I am fully aware that hard Cases may be put, and I strongly feel the great Immorality of a Person who, from malicious Motives, rakes up an old Story for the Purpose of taking away the Character of an Individual — a newly acquired Character, if I may call it so. At the same Time, I should feel much Difficulty in endeavouring to lay down any Rule by which it should be determined after what Time the Party should be protected.⁸³

Brougham favoured a flexible rule, on similar lines to his 1817 Bill:

I would ... in no Case and in no Form of Proceeding, civil or criminal, have the Proof of the Truth to be conclusive, but only competent Evidence, with Notice; then the Court would judge whether it amounted to a Justification, or a Mitigation, or an Aggravation, or was neutral.⁸⁴

77 Ibid.

78 Id at 65 q226.

79 Id at 159.

80 Id at 36 q24.

81 Id at 38 q36.

82 Id at 39 q42.

83 Id at 39–40.

84 Id at 16 q22.

Rather surprisingly, a similarly flexible (and unpredictable) rule was also favoured by Albany Fonblanque, the owner of the *Examiner* newspaper.⁸⁵

Other witnesses sought to articulate a principle to explain the relevance of truth. The Scots emphasised the role of truth as evidence of malice, adding that Scottish judges would not permit truth to be proved if ‘a Great Degree of Animus injuriandi has prevailed in uttering the Defamation’.⁸⁶ The editors of the *Standard*⁸⁷ and the *Globe*⁸⁸ favoured such a rule. A more elaborate link between truth and malice had been made by Dupin, in his evidence to the 1834 Committee. In French law, truth was admissible as evidence where an allegation had been made against a public officer, but not where a private person had been attacked on account of his private life. ‘In the first Case’, Dupin explained:

even indiscreet Words may be excused by the Supposition that they emanated from the Desire to promote the public Welfare; in the Second Case, he who insults a private Citizen can only be moved to do so by Hatred or Malignity.⁸⁹

But there was also the possibility that the public nature of the allegation might, in itself, justify its publication. This was the approach adopted by Lord Campbell in his speech to the House of Lords when asking for a Select Committee, and it could be seen in several of the questions put to witnesses. Some were more receptive than others. The editor of the *Standard*, for instance, dismissed the idea, saying that he was ‘an Infidel about the Care for the public Good which is manifested in Libels’.⁹⁰ But George Lewis, the drafter of the Maltese libel statute, discussed the point thoughtfully. He took the view that truth should be admissible where the accusation was made against a public officer, but not for an allegation against private character. ‘The common Argument in favour of allowing Truth to be a Justification in private Libels’, he continued:

proceeds upon the Assumption that a single Fact in a Person’s Life may be taken as an Index of his general Character and Disposition. It seems to me that it would be as fair to judge of the general Character of a Book by taking a single Passage from it.⁹¹

The Select Committee responded by putting to Lewis an example of a person convicted of fraud abroad, who then established himself as a teacher in England. Would truth be a defence for the newspaper exposing such a person?⁹² Lewis suggested an exception for criminal convictions.⁹³ The Committee replied with a harder example: what about a man who replied to advertisements by young women

85 Id at 136 q522.

86 Id at 141 q573 (John Borthwick).

87 Id at 44 q84 (Stanley Lees Giffard).

88 Id at 166 q723 (Samuel Blackburn).

89 Id at 32 q88.

90 Id at 44 q86 (Stanley Lees Giffard).

91 Id at 57 q170.

92 Id at 58 q173.

93 Ibid.

seeking employment as governesses, with a view to seducing them?⁹⁴ Lewis admitted that this was ‘more difficult ... the Question is, whether that would be strictly a private Communication’.⁹⁵ Yet, the Committee pointed out, he was not in a public office. ‘No’, replied Lewis, ‘he is not in a political Capacity; but neither is an Actor or a Writer’.⁹⁶

This was a particularly significant exchange. The Committee, doubtless driven by Lord Campbell, was pushing witnesses on the issue of when the public nature of an allegation might make its truth a defence. The public element could not be coherently limited to the claimant’s employment as a public servant. But, on the other hand, the claimant’s privacy, and the importance of allowing a person to live down indiscretions, meant that some limitation was appropriate. By the end of his evidence, Lewis seemed to be edging towards the same kind of test that protected criticism of literary works or theatrical performances — that is, whether the matter was one of public interest.

The Select Committee made three important recommendations. First, all spoken words ‘tending to injure the Reputation of another’⁹⁷ should be actionable without special damage. Secondly, if defamatory spoken words did not impute an indictable offence:

it shall be open to the Jury ... to consider whether, under the Circumstances when the Words were spoken, they were likely to injure Reputation; and if they think that they were not, to find a Verdict for the Defendant.⁹⁸

Thirdly, in any action for defamation truth was no longer to be a complete defence. In addition to truth, a defendant had to prove ‘that it was for the Benefit of the Community that the Words should be spoken, or the alleged Libel written and published’.⁹⁹ Despite the fact that he disagreed with these proposals, Starkie was enlisted to draft a Bill,¹⁰⁰ which Lord Campbell introduced in the House of Lords.

Initially all went well. The Bill passed its first and second readings without difficulty.¹⁰¹ When it was considered in committee, Lord Campbell offered to alter the wording of the clause on truth from ‘public benefit’ to ‘public interest’,¹⁰² but their Lordships preferred the original formula.¹⁰³ The Lord Chancellor, Lord Lyndhurst, suggested tightening up the truth clause by requiring a defendant to demonstrate, in his pleading, how the publication was for the public benefit.¹⁰⁴

94 Id at 59 q175.

95 Ibid.

96 Id at 59 q176.

97 Id at vii.

98 Ibid.

99 Ibid.

100 Mary Hardcastle (ed), *John Campbell, Life of John, Lord Campbell, Lord High Chancellor of Great Britain* Vol II (1881) at 178.

101 *Journals of the House of Lords* Vol 75, 3rd July 1843 at 473 and 10 July 1843 at 499.

102 *Parliamentary Debates* (series 3), Vol 70, 18 July 1843 at col 1252–1253.

103 Id at col 1253.

104 Ibid.

Lord Brougham obligingly drafted the appropriate amendment,¹⁰⁵ which was passed on the Bill's third reading.¹⁰⁶

The smooth passage through the Lords, as well as the Lord Chancellor's assistance, gave cause for optimism. When the Bill was introduced into the Commons, its promoter expressed the hope that the Government's co-operation would continue.¹⁰⁷ But it quickly became clear that this was not to be so. Sir Frederick Pollock, now the Attorney-General, objected to each of the three proposed reforms. The clause assimilating slander to libel was misconceived: 'instead of passing a law to raise the law of slander to the law of libel, he would rather cut down the law of libel to the level of the law of slander'.¹⁰⁸ The associated provision for where spoken words were unlikely to have caused harm was worse: it focussed not on the important point of whether harm had actually occurred, but whether it was likely to have occurred.¹⁰⁹ The clause on truth was also, in his view, inadequate. It should have linked truth with proof of malice, but, instead, it introduced a test that effectively instructed a jury to decide 'which way they thought best'.¹¹⁰ Other Members of the House did not share those objections, pointing out, for instance, that the public benefit in exposing a teacher's criminal past outweighed questions of motive.¹¹¹ But the Attorney-General had the Government's majority behind him, and the clauses were struck out.¹¹²

Campbell was livid. He 'regretted and deplored the alterations',¹¹³ drawing attention to the fact that Parliament had endorsed the 'curious distinctions',¹¹⁴ between libel and slander. The civil law position on truth would now remain 'monstrous'.¹¹⁵ But in order to avoid the Bill failing completely, he would accept the amendments. Campbell knew exactly who was to blame, illustrating a point about frivolous claims with this example: 'Suppose some person were to say ... of a lawyer in high office — of his learned Friend the Attorney-General — that he has no more law than a jackanapes'.¹¹⁶ He obviously did not find this a difficult case to imagine.

The 1843 Act was, therefore, a shadow of the 1843 Bill. Truth for the public benefit was now a defence to criminal libel, but the far-reaching reforms proposed for civil defamation had come to nothing. Campbell's disappointment was understandable: a large part of his effort had been wasted by the attitude of Pollock, whom he had always considered a rival.¹¹⁷ Pollock's view was particularly surprising, since he had objected to O'Connell's earlier proposals to assimilate

105 Parliamentary Papers [1843] (521) Vol III at 275 cl3.

106 *Parliamentary Debates* (series 3) Vol 70, 27 July 1843 at col 1357.

107 *Parliamentary Debates* (series 3) Vol 71, 16 August 1843 at col 868 (Mr Christie).

108 *Id* at col 875 (16th August 1843).

109 *Ibid*.

110 *Id* at col 882.

111 *Id* at col 884 (Mr Macaulay).

112 *Id* at col 878 and 890.

113 *Id* at col 987 (22nd August 1843).

114 *Ibid*.

115 *Id* at col 992.

116 *Id* at col 991.

libel to slander and link truth with malice. Why he had changed his mind is not clear.¹¹⁸ Whatever the reason, more than a decade of Parliamentary debate and discussion, six Bills, and two Select Committees had culminated in failure. There was, perhaps, too much Parliamentary history and too many competing options. Everyone could agree that the law needed reforming; but they disagreed fatally about how to do it.

3. *New South Wales Legislates*

1843 marked the end of the road for the reform of libel in England. In New South Wales, however, it marked a new beginning: the colony's first representative legislature, the Legislative Council, was created, and representatives elected.¹¹⁹ In 1844 a Bill was introduced in identical terms to the English Act,¹²⁰ but Council members advised caution. Richard Windeyer argued that, by waiting, the Council would gain a better sense of the effect of the changes introduced in England.¹²¹ The Attorney-General agreed, suggesting that a month's delay should suffice.¹²² Robert Lowe had more fundamental concerns. The Bill 'imposed so many clogs' on the new defence of truth, as to make it 'of little avail'. Furthermore:

the truth or falsity of the libel was not the real question — that question being the degree of malice attending its publication: for if his (Mr Lowe's) father had been hanged, and someone was to tell all the colony of it, the injury would not be the less because it was true; on the contrary, the malice of the thing might, in instances of this kind, be even greater than in the publishing of an erroneous and easily refuted tale.¹²³

A month's delay was agreed to.

A month later, however, it was clear that the Council had been too optimistic: there had been no cases on the 1843 Act. Windeyer again pressed for postponement, commenting that:

the trial and interpretation of an Act of Parliament generally cost the public some £10,000 or £20,000, and that under such circumstances they might as well leave it to be tried and interpreted at home before they adopted it in the colony.¹²⁴

The Bill was withdrawn.

117 Jones & Jones, above, n64, quoting a letter written in 1824 from Campbell to his brother: 'I think I am in every way a match for Pollock'.

118 There is nothing in the correspondence between Robert Peel (then the Prime Minister) and Pollock on the subject.

119 Max Thompson, *The First Election; The New South Wales Legislative Council Election of 1843* (1996). The Legislative Council had existed since 1824, but as an unelected body.

120 James Windeyer, *Richard Windeyer: Aspects of his Work in New South Wales from 1835–1847* (1992) at 21.

121 *Sydney Morning Herald* (28 August 1844) at 2, col 6.

122 *Ibid.*

123 *Ibid.*

124 *Sydney Morning Herald* (26 September 1844) at 2, col 5.

The matter did not resurface until June 1846. Now Windeyer was in charge, but this change of control had had no substantive impact as yet. Windeyer's Bill 'was simply a transcript of the English Act'.¹²⁵ He sounded as if he introduced the Bill with reluctance, remarking that he would have preferred to wait, but 'some of his friends were of opinion that such a Bill as that which he now proposed was immediately necessary'.¹²⁶

A week later, when the Bill came on for its second reading, Windeyer's attitude was transformed. He was now talking of 'the right of that Council to adopt improvements in the law, which it was not desirable to make in England'.¹²⁷ As his speech progressed, he explained what had prompted this change of heart:

the English Parliament did not adopt all the suggestions of the Committee of the House of Lords, nor even all the clauses which had been passed by the Upper House. He had, since he introduced the Bill before the House, looked carefully into these ... and it did appear to him, that although they had been rejected in the House of Commons, they might safely and beneficially adopt the clauses which had been passed in the House of Lords.¹²⁸

His commentary on the new clauses revealed that he was now fully aware of the 1843 Act's parliamentary history. Thus, in relation to the clause assimilating slander to libel, he said:

This clause was adopted in the House of Lords without a dissentient voice; but it was opposed in the Commons by the Attorney-General, who, not having the talent and experience of the gentleman who filled the same office in the colony, had thought fit to set himself against it — and of course, the ministerial majority supporting that honourable and learned gentleman, the clause was negatived. He could not, however, agree with the Attorney-General, who was reported to have said, that he would rather prefer to see the law of written slander and the law of libel assimilated, than the law of libel and the law of oral slander — an opinion which, he thought, nine lawyers out of ten would repudiate.¹²⁹

The clause dealing with truth received enthusiastic praise — it was 'a salutary provision',¹³⁰ — and, Windeyer made clear, could address a local problem:

Why should the truth be spoken of parties, and published without some benefit to the public was to arise from it? Why should they have papers such as the *Satirist* was in the colony, and which abounded at home, raking up the faults and frailties of individuals with a view to extort money, and to shock the decorum and undermine the sociality of the community. There was no doubt that the *Satirist* had been the instrument by which money had been extorted from many parties, who had rather pay than have the secrets of their private life unveiled.¹³¹

¹²⁵ *Sydney Morning Herald* (3 June 1846) at 2, col 5.

¹²⁶ *Ibid.*

¹²⁷ *Sydney Morning Herald* (10th June 1846) at 3, col 3.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Id* at col 4.

¹³¹ *Ibid.*

Here the allusion was to *The Satirist and Sporting Chronicle*, a newspaper published between February and April 1843 by Thomas Revel Johnson.¹³² It is not now regarded as significant enough to deserve a mention in histories of the press in New South Wales,¹³³ but in its time it clearly had an impact. Such was the distaste felt for its editor that he could not obtain legal representation when brought up for sentence on a criminal charge.¹³⁴

The motion for a second reading was carried, and Windeyer proposed that the Council should go through the Bill in committee. The Attorney-General suggested that reference to a select committee would be more appropriate, but now Windeyer was in no mood for delay. As he pointed out:

the provisions he recommended had been assented to by Lords Denman, Lyndhurst, Cottenham, Abinger, Brougham and Campbell, and he was not disposed to think that any information they could obtain in committee on the subject would be preferable to that afforded by these learned lords. Most of them were between sixty and seventy years of age, and could hardly be chargeable with a disposition to do anything rash.¹³⁵

The idea of a select committee was abandoned.

For reasons that are not clear, the 1846 Bill did not pass. In 1847, the Bill was reintroduced. Windeyer reiterated that it was drawn:

to enforce the recommendations contained in a Report of a Select Committee of the House of Lords. In the Bill, however, amending the law of libel in England a part of these recommendations were struck out by the House of Commons. Seeing, however, the state of circumstances of this colony, he had thought that the whole of the recommendations might be advantageously adopted.¹³⁶

The crucial provisions — assimilating slander to libel, and requiring proof of public benefit in addition to truth — were passed without further discussion. There was now a distinctively Australian law of defamation.

The reasons given for adopting the failed 1843 proposals were striking. In relation to the clause assimilating slander to libel, the key point was a critique of the English parliamentary process: despite the good sense of the reform, it had effectively been blocked by one individual using a government majority. In the Legislative Council, by contrast, there were no political parties as yet.¹³⁷ Windeyer and other Council members would have been pleased to take the opportunity of showing that they did not make the same mistakes as the imperial Parliament. Such a demonstration of competence was particularly important at the time, because the Legislative Council was something of an experiment — only two thirds of its members were elected, while the rest were Crown nominees. As one historian has described it, it was:

132 The complete run of *The Satirist and Sporting Chronicle* is available at: <www.nla.gov.au/ferg/>.

133 See, for example, Robin Walker, *The Newspaper Press in New South Wales, 1803–1920* (1976).

134 *Sydney Morning Herald* (10 June 1846) at 3, col 4.

135 *Ibid.*

136 *Sydney Morning Herald* (11 June 1847) at 2, col 3.

137 Thompson, above n119 at 79.

a supervised rehearsal for self-government, offering a challenge to the community, an invitation to become familiar with the practicalities of parliament and a test of the capacity of the colonists to handle their own affairs.¹³⁸

The way the Legislative Council handled the libel reforms passed this test more convincingly than the supervising English Parliament had done.

The reasons behind the reform of truth were different, but equally important. Windeyer's allusion to 'the sociality of the community' echoed a speech he had made during his election campaign about protecting 'all men in equal enjoyment of their social rights'.¹³⁹ Windeyer's great-grandson, Sir Victor Windeyer, suggested, however, that the reform of truth was prompted by a more specific concern 'to prevent emancipated convicts being taunted as "lags"'.¹⁴⁰ He pointed out that Windeyer was sympathetic to ex-convicts, and drew attention to the general phrase 'the state of circumstances in this colony', which had been used when the Bill was read a second time in 1847.

Of course, it is true that a very large number of emancipated convicts lived in New South Wales in the 1840s (although the convict proportion of the population was declining).¹⁴¹ But the 'circumstances in this colony' referred to in 1847 seem more likely to be those circumstances described in detail in 1846, when the decision was made to reform the defence of truth. Those circumstances were the risk of embarrassment and distress, when long-forgotten private details were published in newspapers, or money extorted for their suppression. In other words, the concern was not specifically for emancipated convicts — whose past misdeeds were often publicly known and acknowledged — but, more generally, for anyone with a past to hide.

The immediate catalyst for the reform seems to have been the short-lived *Satirist*, which had already been out of business for four years by the time the Act was passed. In fact, when the reform of truth was introduced there was, in effect, only one newspaper in New South Wales — the respectable *Sydney Morning Herald*.¹⁴² In the hands of its upright, Methodist owner John Fairfax, it was difficult to imagine a paper less likely to descend into scandal and extortion.¹⁴³

However, it would be a mistake to see the New South Wales reform of truth as an over-reaction. The failure of the *Satirist* did not preclude a similar venture in the future — so the Act could be seen as a pre-emptive strike. More fundamentally, truth as an absolute defence assumed, as a witness to the 1843 Select Committee had put it, 'that a single Fact in a Person's Life may be taken as an Index of his general Character and Disposition'.¹⁴⁴ It denied the possibility of a new start. New South

138 Id at 8.

139 Id at 70.

140 Victor Windeyer, 'The Truth of a Libel' (1935) 8 *ALJ* 319 at 323.

141 Castles, above n9 at 153–155.

142 Walker, above n133 at 34–42.

143 John Fairfax, *The Story of John Fairfax: Commemorating the Centenary of the Fairfax Proprietary of the Sydney Morning Herald* (1941) 88–96.

144 *Report from the Select Committee of the House of Lords*, above n72 at 57 q170 (George Lewis).

Wales society in the 1840s rested on the opposite assumption. Emancipated convicts became successful business people, professionals and politicians;¹⁴⁵ they were also entitled to vote.¹⁴⁶ Others had emigrated voluntarily to start new careers (as Windeyer himself had done), or escape earlier embarrassment. The reform of truth was, therefore, powerfully linked to crucial assumptions about the nature of society in New South Wales. It suited the colony far better than the colonial power itself.

4. *The 1847 Act In Action*

The immediate reaction to the 1847 Act was ecstatic. After the second reading in 1847 — with royal assent over a month away — the *Sydney Morning Herald* was thanking Windeyer on behalf of ‘the community in general and ... newspaper proprietors in particular’.¹⁴⁷ ‘We hail this Act’, it said, ‘as one of the most desirable measures that has ever been submitted to the consideration of the Council’.¹⁴⁸

A. *The Assimilation of Slander to Libel*

The *Herald* approved of the clause ‘doing away with the absurd distinction’¹⁴⁹ between slander and libel, and regarded the accompanying section — allowing a jury to find for the defendant where spoken words were unlikely to injure the claimant’s character — as ‘a reasonable provision’.¹⁵⁰ Neither section generated much case-law, which, for the second section, was in itself a sign of success. As Windeyer J was to put it, that section was there to prevent ‘the bringing of actions of a class that ought not to be encouraged’.¹⁵¹ clearly the flood of trivial claims that had so concerned the House of Lords Select Committee¹⁵² had not materialised.

The only real controversy over ss1 and 2 of the 1847 Act concerned the respective powers of judge and jury under s2. Whether the words had been spoken on an occasion when the claimant’s character was likely to be injured was a question for the jury.¹⁵³ If a jury found that the words had been spoken on such an occasion, but their finding was against the weight of the evidence, the ordinary principles of civil procedure allowed the court to overturn the finding, and send the case back for a new trial.¹⁵⁴ More difficult was the position where the jury found in the claimant’s favour despite the weight of evidence showing that his character

145 See generally the discussion in Thompson (above n119) of William Bland & Richard Fitzgerald at 17 and 76 respectively.

146 Thompson, above n119 at 94.

147 *Sydney Morning Herald* (3 July 1847) at 2, col 2.

148 *Id* at col 3.

149 *Id* at col 2.

150 *Id* at col 3.

151 *Woodin v Matthews* quoted in James Moriarty, *The Law of Actionable Defamation Whether Spoken or Written in the State of New South Wales 1909* (1909) at 6. (National Library of Australia).

152 See text accompanying notes 76–79 above.

153 *Maxwell v Daley* (1854) Legge 843.

154 *Darby v Reid* (1851) Legge 704.

was unlikely to be injured, because the Act stated that if the words were spoken on an occasion when they were not likely to injure the claimant's character, it was 'competent' for the jury to find for the defendant. 'Competent' or 'open',¹⁵⁵ as the Select Committee report had put it, did not impose an obligation: 'they might, although they were not obliged to do so, return a verdict for the defendant'.¹⁵⁶ How far could the court review a jury's decision not to exercise their power?

The issue first surfaced in *Perry v Hoskings*,¹⁵⁷ where an imputation of adultery had been made, but only the claimant and her alleged lover were present. Stephen CJ left the case to the jury under s2, and the jury awarded £50. The defendant then obtained a rule nisi, arguing that the jury was not entitled to award damages, but the Supreme Court upheld the award. Stephen CJ highlighted the difficulty with s2:

In the first place, where words are spoken under circumstances when the plaintiff's character is not likely to be injured thereby, and the jury find otherwise, I am of opinion that the Court has power to grant a new trial. But secondly, the exercise of this power after a verdict for the plaintiff would, in any case, be practically useless; as even where they may think that the words were so spoken, it is not imperative on, but optional with, the jury to return a verdict for a defendant.¹⁵⁸

On the facts, he held that the words were not likely to have injured the claimant's character, 'For character can only be injured by the hearers thinking it possible that the slanderous charge may be true'.¹⁵⁹ The jury was, however, entitled to award some damages. And, given the injury to the claimant's feelings, £50 was not excessive.

Wise J concurred in the result, but in nothing else. He disagreed with the Chief Justice's comments on s2:

I am clearly of opinion ... that the Court is not deprived of its legitimate right to interfere with the verdict of a jury, where that verdict is manifestly wrong, by anything contained in that section ... although the second section of the local statute gives a certain power to a jury in actions of slander, it is subject to the usual incidents of other powers exercised by a jury.¹⁶⁰

Here the jury's verdict was not obviously wrong, because the claimant's character might have been injured:

it might be said that the party addressed knew that the charge was unfounded; but, on the other hand, it might be replied that this charge would not have been made, unless on some other occasion the plaintiff had acted improperly, or had been guilty of light conduct.¹⁶¹

¹⁵⁵ *Report from the Select Committee of the House of Lords*, above n72 at vii.

¹⁵⁶ *Woodin v Matthews*, above n151.

¹⁵⁷ (1865) 4 SCR (NSW) 124.

¹⁵⁸ *Id* at 125–126.

¹⁵⁹ *Id* at 126.

¹⁶⁰ *Id* at 126–127.

¹⁶¹ *Id* at 128.

If this rather artificial approach was correct, it was difficult to see when any defamatory allegation would fail to damage a claimant's reputation and, thus, when there would ever be a need to apply s2.

The issue continued to be controversial. Darley CJ, Stephen's successor as Chief Justice, had to consider *Perry v Hoskings* in *Parker v Falkiner*,¹⁶² where a jury had found for the defendant under s2. He was not convinced by his predecessor's analysis:

I confess I do not understand that portion of the judgment of Sir Alfred Stephen where he seems to think — if I understand the judgment rightly — that the section of the *Defamation Act* only applies where the words are spoken before persons who might believe the words, but if they are spoken before persons who do not believe them, then the section exempts the slanderer from liability. At any rate Sir Alfred Stephen seems to have thought that the jury having found in the way that they did, their verdict could not be disturbed. I think the opinion of Mr Justice Wise, who dissented from his Honour on that part of the case, was the sounder opinion of the two.¹⁶³

Windeyer J 'entirely' agreed.¹⁶⁴ Foster J concurred, 'without, however, thinking it necessary to dissent in any way from the judgment of Stephen CJ in *Perry v Hoskings*'.¹⁶⁵

In 1891, Windeyer J was in a position to clarify the meaning of s2 of his father's statute. In *Crick v Butler*¹⁶⁶ he asserted that he 'entirely' agreed:

as to the wrong that would be done in allowing a jury absolute and uncontrolled power under the second section of the *Defamation Act*. It would be manifestly wrong, if the use of slanderous words was proved, to allow a verdict to stand in favour of the defendant if the Court was clearly of opinion that the words were used upon an occasion when the character of the plaintiff was likely to suffer. There is no difference in the power of the Court in dealing with a finding of that kind and in dealing with any other finding.¹⁶⁷

He cited *Parker v Falkiner* in support of this position.

The analysis of Stephen CJ was, therefore, conclusively disapproved. But it may be that that analysis had been misunderstood by the later courts. Stephen CJ did not deny that there was a power to review the jury's findings — on the contrary, he asserted that it existed. His point was more subtle. It was that there was no effective way of challenging a jury's verdict for the claimant in a s2 case. Even if there was no evidence at all that the occasion was one where the claimant's character was likely to be injured, it did not follow that the verdict must be for the defendant: the jury was still entitled to exercise its option to award damages,

162 (1889) 10 NSWLR 7.

163 *Id* at 10–11.

164 *Id* at 12.

165 *Ibid*.

166 (1891) 12 NSWLR (CL) 75.

167 *Id* at 79.

despite the fact that injury to the claimant's character was unlikely. The only practical way to challenge such an award was to object that the damages were excessive. Verdicts for the defendant under s2 — which was the situation in *Parker v Falkiner* and *Crick v Butler* — did not raise the same difficulty: if the facts showed that injury to the claimant's reputation was likely, the jury had no option but to find for the claimant. A verdict for the defendant under those circumstances would have to be overturned.

B. The Reform of Truth

Section 4 of the Act, which dealt with truth, had a greater potential for controversy. It stated that:

in any action for defamation whether oral or otherwise the truth of the matters charged shall not amount to a defence to such action unless it was for the public benefit that the said matters charged should be published and that where the truth of such matters charged shall be relied upon as a defence to such action it shall be necessary for the defendant in his plea of justification to allege that it was for the public benefit that the said matters charged should be published and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published.

Difficult questions of both form and substance had to be resolved by the courts.

The formal difficulties concerned the requirement — drafted by Lord Brougham¹⁶⁸ — that a pleading must set out why it was for the public benefit that the publication should be made. Clearly it was necessary for a defendant to plead that the substance was true,¹⁶⁹ and that its publication was for the public benefit.¹⁷⁰ But the fact that it was also apparently necessary to include 'an averment of the particular fact or reason which was relied upon',¹⁷¹ prompted complaints. The Supreme Court in *Rusden v Cohen*¹⁷² observed that:

This necessity for setting out the mode in which an alleged libel would operate for the public benefit was of no advantage, and in many cases might operate unjustly. The end would be fully gained by the mere plea that a libel was for the public benefit, and giving proof to that effect, without showing on the record the precise mode in which the publication was to operate. This form of pleading, however, had been rendered necessary by the Legislature here.¹⁷³

The 'clogs' which had been criticised by Robert Lowe when the measure first went through the Legislative Council¹⁷⁴ were proving too tight.

¹⁶⁸ See above, text accompanying n105.

¹⁶⁹ *O'Connor v Ridsdale* (1891) 8 WN 37.

¹⁷⁰ *Armstrong v Parkinson* (1857) Legge 1021.

¹⁷¹ *Id* at 1022.

¹⁷² (1855) Legge 885.

¹⁷³ *Id* at 886.

¹⁷⁴ See above, text accompanying n123.

Two years later, in *Morgan v Irby*,¹⁷⁵ the Supreme Court made the best of the situation, and exploited the fact that the reasons for public benefit had to be stated on the record, to assert that the court could decide whether there was a sufficient factual basis to leave a case to the jury. But in 1860, in *Maister v Hipgrave*,¹⁷⁶ it signalled a more flexible approach. There a newspaper had published a petition from the residents of a town, which complained about the conduct of three officials. The plea set out the reasons why the officials' conduct had caused complaint, but seems not to have expressly asserted public benefit. This, the Court held, was not a fatal objection: 'There are cases, in which the facts themselves which are published may, always assuming them to be facts, show a sufficient justification for their publication, in a view to the public benefit.'¹⁷⁷ It is not immediately obvious that this approach could be reconciled with the statute; even if it could, a very relaxed attitude was now being taken, which effectively diluted the formal requirements of the section down to nothing. In *Floyd v Taylor*,¹⁷⁸ a year later, the Supreme Court rejected both of the defendant's pleaded grounds of public benefit, but identified a valid, unpleaded ground on its own initiative. It is difficult to imagine a comparable English court taking such an approach. And it may be no coincidence that, following *Floyd's* case, there were no more reported decisions on the pleading of public benefit. The Supreme Court had, effectively, disapplied the requirements of the statute.

The difficulties over substance also highlighted that there was scope for judicial discretion. In *Pickering v Mason*,¹⁷⁹ the claimants were the proprietors of a newspaper, *Bell's Life in Sydney*, and sued for an allegation that they had printed an article about deaths on a voyage as a money-making ruse, when they knew that the report was untrue. The defendant entered a plea under s4, to which the claimant demurred. The public benefit, argued the claimant, only extended to a contradiction, or correction of their news report; it did not extend to slanderous imputations on their motives for publication.

The Supreme Court rejected the demurrer in striking terms:

If the report was false, the publication that it was so, we consider, must have been beneficial to the public; as it is obvious that the propagation of rumours about particular voyages, in which individuals are interested, has a tendency to excite prejudices in the public, against adventures in the same direction. With respect to the objection that the libel is grosser than is excusable by reason of the beneficial effect of its contradiction, we think that a person who knowingly publishes false news is not entitled to an action for damages, because the libel complained of visits him individually more severely than is necessary for the public advantage. To hold a defendant under such circumstances to have been a wrongdoer *ab initio* is too extensive and novel an application of the doctrine laid down in the *Six Carpenters' case* for us to advance.¹⁸⁰

175 (1859) Legge 1149.

176 (1860) Legge 1254.

177 *Id* at 1256.

178 (1861) Legge 1402.

179 (1850) Legge 601.

180 *Id* at 604–605.

This reasoning seemed to overlook the fact that the Act only required proof that ‘the said matters charged’ were true and for the public benefit. If the imputation was accurate and for the public benefit, its severity did not matter. The Court’s analysis was more elaborate, and relied for support on an analogy with the 17th Century *Six Carpenters’ Case*.¹⁸¹ The analogy was a questionable one: the *Six Carpenters’ Case* concerned a trespass to land action, where the defendants had entered the claimant’s tavern, eaten and drunk, then refused to pay the bill; the Court held that this refusal did not make the defendants trespassers from the moment when they entered the tavern. Perhaps the New South Wales court referred to the case for the proposition that where a licence is given by law, rather than by an individual, subsequent abuse of the licence makes it retrospectively void.¹⁸² If this was what the Supreme Court was alluding to, it may have seen the defence in s4 as akin to a licence granted by law, and the excessive severity of the criticism as an abuse of that licence. It might have been simpler to say that malice did not destroy the s4 defence. Certainly this strained attempt to base the decision on some English precedent contrasted with the Supreme Court’s later robust and independent-minded approach to the formal requirements under s4.

The most fundamental substantive question concerned the nature of ‘public benefit’ itself. *Cory v Moffit*,¹⁸³ the earliest case on the point, concerned allegations of corruption against a practising attorney. The defendant’s plea was formally defective, but the Court considered what would have made it effective. What was needed, the Court held, were:

averments that the plaintiff was still a practising attorney at the time of publishing the alleged libel, and that there was a likelihood of his being employed by Her Majesty’s subjects in matters of trust, if they remained ignorant of his delinquency, consequently that this publication was necessary to put them on their guard, and, being thus necessary, it was a privileged statement made for the public benefit.¹⁸⁴

The libel had alleged collusion between the claimant and the Inspector of Nuisances in his official capacity, and the Supreme Court made it clear that this was also an important aspect of the case:

if a professional man who might be thus employed in matters requiring high integrity had, *in his professional capacity*, been guilty of such conduct as was here pleaded, it must be for the advantage of those who might employ him that they should know it.¹⁸⁵

The Supreme Court clearly appreciated the line between public misconduct — which should be exposed — and private indiscretion — which should not.

181 (1610) 8 Co Rep 146a.

182 See further Percy Winfield, *A Text-Book of the Law of Tort* (1937) at 354–356.

183 (1853) Legge 763.

184 *Id* at 764.

185 *Ibid* (emphasis in original).

The report of *Cory v Moffit* did not make clear how many people the information had been communicated to. But even if the allegations had been made in a newspaper, it would not have been of direct benefit to every reader, only to those readers who might employ an attorney. It was implicit in the Court's decision that it was not necessary for every recipient to benefit for the publication to be 'for the public benefit'. That proposition was subsequently made explicit by the decision in *Floyd v Taylor*.¹⁸⁶ There, a newspaper advertisement stating that the claimant had absconded, leaving his creditors unpaid, was held to be for the public benefit because 'there should be a caution against giving credit to a person, who had absconded under such circumstances'.¹⁸⁷ It was enough that there was a benefit to that section of the public that might have offered the claimant credit. Similarly, in *Morgan v Irby*,¹⁸⁸ it was said that a warning about the dishonest character of the claimant publican, which had been addressed to a local magistrate, would also have been protected if made to the public generally, since 'it was right if his character was bad that the public should be cautioned against him in future'.¹⁸⁹

In these cases the Supreme Court was developing a broad-ranging and realistic test of public benefit. In *McIsaacs v Robertson*,¹⁹⁰ the Court identified an important boundary. There, the defendant sabotaged business dealings between the claimant and two others by telling the three men that the claimant was a false swearing old vagabond and a swindler. The defendant pleaded truth and public benefit, to which the claimant demurred. As the claimant's counsel put it, '[i]t cannot be for the public benefit that A should tell B that C has cheated him'.¹⁹¹

The Supreme Court accepted this submission. Stephen CJ asserted that 'I do not see how it can be for the public benefit'¹⁹² for two people to be told that the claimant was a swindler. 'It might be for the benefit of those two persons', he continued:

but how is it for the public benefit? How could the public, by any possibility, be benefited by such publication? ... If it were for the public benefit that two persons should be told these things, it would be equally for the public benefit that one person should be told, and the statute would be completely frittered away. I am of opinion that the statute must be fairly construed, so as to put down slander, whether true or false, unless the public generally, who are interested in the publication, can be benefited thereby; and the public cannot be benefited in a case like the present.¹⁹³

Wise J agreed.

186 (1861) Legge 1402.

187 Ibid.

188 (1859) Legge 1149.

189 Id at 1151.

190 (1864) 3 SCR (NSW) 51.

191 Id at 53.

192 Id at 57.

193 Ibid.

On the face of it, the decision was not easy to reconcile with the earlier authorities. Protection had been given to warnings against employing an attorney, offering credit to an individual, or patronising a particular pub. Such warnings would only have benefited that section of the public that might otherwise have entered into those transactions. But here, a similar warning, targeted at the relevant members of the public, was outside the scope of the defence.

Here the Supreme Court had identified an issue which neither the Legislative Council nor the House of Lords Select Committee had envisaged. ‘Public benefit’ had been adopted as a test for identifying a kind of subject matter that was not purely private or personal. ‘Public’ was an adjective. But ‘public’ could also be a noun — as when Stephen CJ asked ‘[h]ow could the public ... be benefited by such publication?’. Perhaps this was an inappropriate and misleading paraphrase of the statutory test. Certainly it is odd to think that the defendant’s legal position would have been improved if more people had heard him, or he had advertised in a newspaper. Perhaps the Supreme Court was concerned that if it interpreted the s4 defence too generously, it would encroach into territory best left to qualified privilege — where the defence was lost on proof of malice. Certainly Wise J seemed to think that malice should have a role to play in this kind of situation, commenting that ‘[t]he evils which [the 1847 Act] was intended to guard against, might be remedied by allowing the plaintiff to reply to a defence that the defamatory matter is true, that it was said *malo animo*’.¹⁹⁴

The final case on public benefit in the 19th Century raised an issue that had been at the heart of the English Parliamentary debates and Select Committee proceedings: that is, when could past misdemeanours be raked up? In 1863, the *Sydney Morning Herald* commented on a speech given the previous day by John Dunmore Lang. Lang had advocated the principle of voluntaryism — that is, there should be no state funding of religion — a principle to which his commitment was so intense, he had said, that in 1842 he had resigned his own official religious post. The *Herald* alleged that the purity of his commitment was less than it seemed: in 1840 he had been arrested for debt in England, and had only been released after agreeing to assign his official salary to pay off the debt. His resignation in 1842 was hardly, therefore, the act of self-sacrifice that he claimed.

Lang sued Fairfax, the *Herald*’s owner, and the case went to the jury under s4. The jury found, by eleven to one, that the publication was not for the public benefit. The defendants then moved for a new trial on the ground that the verdict was against the evidence.¹⁹⁵ Counsel for the claimant argued that the finding could not be overturned — ‘How can the Court know as well as the public at large, as represented by the jury, what publication is for the public benefit’.¹⁹⁶ Here ‘public benefit’ seemed to have taken on a new meaning — what the public *thought* was of benefit. The Supreme Court rejected that argument. Stephen CJ acknowledged that opinions might well differ, but that a judge’s duty was nevertheless to express

¹⁹⁴ Ibid.

¹⁹⁵ *Lang v Fairfax* (1865) 4 SCR (NSW) 268.

¹⁹⁶ Id at 281.

his own independent opinion.¹⁹⁷ The ‘question’ of public benefit was, he said, ‘of social polity — or of ethics, in the larger sense of the term’.¹⁹⁸ In his view, the test was satisfied here:

Surely if a distinguished or prominent man becomes an advocate, as a member of the Legislature and otherwise, for the abolition of State support to ministers of religion, he moreover being himself one, and therefore to all appearance adversely interested, the public — who may be vitally affected by the measure — have a fair right to inquire, and it is for their benefit to be truly told, what that advocacy is really worth. In every discussion, doubtless, the strength of argument is the same, whatever the motives or the interest of the reasoner. But in the discussion of such a question, as of many others, personal character and position add weight to an opinion; and it is beneficial to the public, therefore, in a view to the formation of their own, in such cases, to be enabled rightly to appreciate both.¹⁹⁹

Hargrave J’s view was different. For him, the crucial point was the lapse of time: ‘if we are to have our properties protected by the Statute of Limitations, are we not to have our honour preserved?’²⁰⁰ Wise J, who had been taken ill, passed on a message that he thought that there should not be a new trial,²⁰¹ so he and Hargrave J formed a majority.

Of course, *Lang v Fairfax* was not a classic case of raking up some long-forgotten indiscretion: Lang himself had trumpeted his own self-sacrifice. There was also the link between his actions and his contributions to the Legislative Council to consider. The outcome of the case illustrated, perhaps uncomfortably, the Chief Justice’s point that opinions could differ depending on the weight given to various factors.

Undoubtedly, one of the great problems with the public benefit test was its unpredictability. As the *Sydney Morning Herald* had remarked, apprehensively:

By [section 4] we should have a perpetually varying Court of Conscience in the Jury-box, as to what statements of facts were or were not for the public benefit — a Court of Conscience always likely to be more or less involuntarily swayed by partialities and prejudices, especially in a country like this, where parties are generally known to the tribunal.²⁰²

But the Supreme Court decisions that explored its scope and boundaries indicated that it was a workable test, provided that the ambiguities in the word ‘public’ could be resolved. Perhaps, in hindsight, a provision excluding private matters from a general defence of truth would have been a more effective way of achieving the legislator’s aim.

197 *Id* at 292.

198 *Id* at 293.

199 *Ibid*.

200 *Id* at 297.

201 *Id* at 295.

202 *Sydney Morning Herald* (3 July 1847) at 2, col 3.

5. Conclusion

The 1847 Act was a success. When it was re-enacted in New South Wales in 1901,²⁰³ no serious objection was made,²⁰⁴ and a further consolidation in 1912²⁰⁵ went through smoothly. Although Victoria — which took all the New South Wales legislation when it became a separate state²⁰⁶ — did repeal the Act in 1856,²⁰⁷ Queensland adopted the key reforms that the 1847 Act had introduced.²⁰⁸ The Act remained a foundation of Australian defamation law right up to the very recent statutory reforms.

The story of the 1847 Act is a powerful illustration of the complexities of colonial conditions. While all the hard work was done in England, the proposals ultimately failed not because they were inherently defective, but because the topic had been stagnant for too long, and there was the distraction of other options. In the streamlined, new legislative system of New South Wales, legislators could make a point of avoiding English mistakes. The New South Wales judiciary then shaped the effect of the Act with a boldness that would have surprised their English counterparts. And the success of the 1847 Act underlined the opportunity that the English had missed. In particular, English law still labours under the distinction between libel and slander, an area which Frederick Pollock, grandson of the Attorney-General who opposed its reform, described as ‘perplexed with minute and barren distinctions’.²⁰⁹ The defence of truth remains absolute, although there is a specific exception for the publication of spent offences.²¹⁰ Perhaps more importantly, the protection of privacy, which was the real motivation behind the 1843 proposals, is only now being recognised as an important cause of action. Had Parliament acted in 1843, or earlier, there would have been wider support for an implicit privacy right — which might, in turn, have expedited recognition of a free-standing right to privacy. It is a pity, in other words, that the foundations of Australian defamation law were to remain so distinctively Australian.

203 *Defamation Act 1901* (No 22) (NSW).

204 *New South Wales Parliamentary Debates (Hansard second Series)*, 1901 Vol 1, col 1910–1913.

205 *Defamation Act 1912* (No 32) (NSW).

206 Castles, above n9 at 477.

207 An Act to Amend the Law Respecting Defamatory Words and Libel 1856 (19 Vict No 4), consolidated by Statute of Wrongs 1865 (28 Vict No 251).

208 Sykes, above n4; Sandra Berns, ‘Codifying Passion: the Griffith Defamation Code’ in John Macrossan (ed), *Griffith, the Law and the Australian Constitution* (1998) at 35.

209 Frederick Pollock, *The Law of Torts* (1887) at 205.

210 *Rehabilitation of Offenders Act 1974* (UK) s8.