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In Fact, It's a Matter of Opinion:
Determining a Distinction Between Fact and Opinion
within the New Zealand Defence of Honest Opinion

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Abstract:

*This paper discusses the distinction between fact and opinion within the defence of honest opinion. It is argued that the classic legal tests for determining that distinction are largely unhelpful and produce unpredictable results, which trigger a chilling effect on speech. This paper advocates for an adaptation of the four-factor totality of circumstances test, established in *Ollman v Evans* 750 F 2d 970 (DC Cir 1984), to be inserted into the New Zealand Defamation Act 1992. This would provide more clarity, consistency and predictability for the defence of honest opinion in New Zealand, thereby better supporting freedom of expression under s14 of the New Zealand Bill of Rights Act 1990.*

Keywords

Defamation, Fact, Opinion, Distinction

I Introduction

The common law defence of honest opinion to defamation proceedings provides a bulwark for one of society's most salient rights: freedom of expression. Whether a statement is held to be an opinion or a fact can make the difference between the defendant winning or having to pay damages. However, courts throughout the common law jurisdictions battle with the distinction. So murky and contentious is this boundary that it often seems that the only way to know if a statement is defamatory is to send it through the legal machine of the courts and see what emerges. The results can be baffling. In one case it was held defamatory to call someone "hideously ugly",¹ in another for a food critic to describe the food as "inedible".² In both instances the communicators felt they were simply voicing their opinions and should be free to do so. This uncertainty in the law can cause people to check themselves to such an extent that free speech is hindered. The United Kingdom Court of Appeal recently widened the concept of opinion, stating that the lower court's ruling against the defendant had "most certainly had a chilling effect on public debate".³

This paper will argue that the current methods determining a dividing line between fact and opinion are unworkable because no bright-line exists. After a summary of the law surrounding the defence of honest opinion, the rationale behind protecting opinion is discussed. The article then looks at the inadequacy of the fact-opinion distinction and its inability to support that rationale. Finally, after a survey of some current legal tests, a more flexible and predictable eight-factor test is proposed to address the dichotomy and better support free speech.

II The Law of Honest Opinion

The law of defamation aims to vindicate and prevent unjustified damage to reputations. In New Zealand, this endeavour comes by way of the common law and supported by the Defamation Act 1992. While the statute does not supply a definition, the words of Lord Atkin in *Sim v Stretch* describe a defamatory statement as one that has a tendency to lower a person "in the estimation of right-thinking members of society generally".⁴ To help provide a balance protecting free speech, the Defamation Act is furnished with four defences: truth, honest opinion, and absolute and qualified privilege.⁵ The first two are relevant for the purposes of this paper. The truth defence is available where the defendant has made a factual statement that he can prove true. The defence of honest opinion requires greater explanation. In essence, this defence

¹ *Berkoff v Burchill and Another* [1997] EMLR 139.

² John Martin "The Blue Angel Defamation Trial" (1989) 11 *Gazette of Law & Journalism* 13.

³ *British Chiropractic Association v Singh* [2010] EWCA Civ 350, [2011] 1 WLR 133 at [11].

⁴ *Sim v Stretch* [1936] 2 All ER 1237 at 1240.

⁵ Defamation Act 1992, ss 8, 9-12, 13-15, 16-19.

protects an individual's ability to voice their opinions. While some courts argue that opinions should be protected because they are not defamatory,⁶ the English treatise, *Gatley on Libel and Slander*, considers it better to view opinion statements as defamatory but not actionable.⁷ This defence is subject to three limitations:

A *The Opinion Must Be Genuine*

Under section 10 of the Defamation Act 1992, the genuineness of the opinion is paramount. While a factual statement is objectively determined to be true or false, a defendant's genuine belief in their statement is a subjective test, concerned with his state of mind.⁸ The question the courts ask is whether any man could honestly hold the views and express the opinion on those facts.⁹ This test is one of honesty, not of reasonableness.¹⁰ Thus, the question is not whether one agrees with the comment. The commentator may be prone to exaggeration or have obstinate, even prejudicial views.¹¹ This will not in itself defeat the defence. Furthermore, proof of actual malice is not an exception to honesty.¹² However, if sheer invective is used, this may be "compelling evidence" of a lack of genuine belief in the opinion.¹³ In addition, public interest is no longer a requirement.¹⁴ While important to note the element of honesty, it is the following two limitations that this paper is primarily concerned with.

B *The Opinion Must Be Clearly Opinion*

If the statement is a fact, the defence of honest opinion will not be available. Opinion has been described as "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc".¹⁵ It must be obvious to the reader¹⁶ that the statement is an opinion¹⁷ but distinguishing between

⁶ *Campbell v Spottiswoode* (1863) 3 B & S 769; *Minister of Justice v SA Associated Newspapers* (1979) 3 SA 466.

⁷ Patrick Milmo and W V H Rodgers *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London, 2008) at 12.1.

⁸ John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2010) at 3.2.3.

⁹ At 3.2.3, citing Lord Diplock *Associated Newspapers v Burstein* [2007] EWCA Civ 600, [2007] 4 All ER 319 at [519]-[520].

¹⁰ *Mitchell v Spratt* [2002] 1 NZLR 766 at [24].

¹¹ *Merivale v Carson* (1887) 20 QBD 275 at 281; *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 All ER 516 at 520; *Mitchell v Spratt*, above n 10, at [24].

¹² Defamation Act 1992, s 12.

¹³ *Tse Wai Chun v Cheng* [2000] HKCFA 86, [2001] EMLR 31 at [57].

¹⁴ *Awa v Independent Newspapers Ltd* [1997] 3 NZLR 590 at 595.

¹⁵ *Clarke v Norton* [1910] VLR 494 at 499.

¹⁶ References in this paper to 'reader', assume 'listener' as well.

¹⁷ Burrows and Cheer *Media Law in New Zealand*, above n 8, at 3.2.2; see also, *Hunt v Star Newspaper Co Ltd* [1908] 2 KB 309 at 319.

fact and opinion can be difficult. Currently, New Zealand courts often consider the contextual background of the statement to tell them how that statement would likely be interpreted.¹⁸

Presentation is crucial to whether a statement is or is not an expression of opinion.

...

The defence applies when the words appear to a reasonable reader to be conclusionary.

Similarly, courts in the United Kingdom often distinguish fact from opinion by a contextual analysis looking through the “prism of the reader”.¹⁹ An unclear statement may simply be treated as if it were a fact.²⁰ John Burrows and Ursula Cheer identify some types of statements that can cause difficulties, including: those that mix together facts and opinion such that the opinion cannot be separated out, those that appear as fact but are conclusions inferred from facts, and those that appear as opinions but are not supported by any facts.²¹

C The Opinion Must Be Based On a Substratum of Facts

Two conditions must exist for this element to be met. First, unless they are common knowledge, the facts on which the opinion is based must be stated. In this way, the reader can consider the communicator’s opinion and compare it against his own.²² In *Tse Wai Chun v Cheng*, Lord Nicholls established that the supporting facts must be sufficient for the reader to “judge for himself how far the comment was well founded”.²³ This test has now been altered to “whether the reader can recognise that what is being stated is comment”.²⁴

The facts set out need not be the entire facts, or else a theatre reviewer, for instance, would need to set out the entire script of a play.²⁵ The subject matter need only be “indicated with sufficient clarity to justify the comment being made”.²⁶ If the facts on

¹⁸ *Mitchell v Sprott*, above n 10, at [18-19]; Burrows and Cheer *Media Law in New Zealand*, above n 8, at 3.2.2.

¹⁹ *Joseph v Spiller* [2010] UKSC 53, [2011] 1 AC 852 at 855.

²⁰ At 855.

²¹ See Part III Inadequacy.

²² Burrows and Cheer *Media Law in New Zealand*, above n 8, at 3.2.1(a).

²³ *Tse Wai Chun v Cheng* [2000] HKCFA 86, [2001] EMLR 31 at [19].

²⁴ Milmo and Rodgers *Gatley on Libel and Slander*, above n 7, at 12.8, discussing the test from *Lowe v Associated Newspapers Ltd* [2006] EWHC 320 QB, [2007] QB 580.

²⁵ *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SRNSW 171 at 179.

²⁶ Burrows and Cheer *Media Law in New Zealand*, above n 8, at 3.2.1(a); *Kemsley v Foot* [1952] AC 345 at 347.

which the opinion is based are common knowledge, the reader will be able to determine if the opinion is justified without those facts being stated.

Second, the facts on which the opinion is based must be “proved true or not materially different from the truth”.²⁷ Two exceptions to this condition exist.²⁸ If false facts are protected by privilege, then they may still support an honest opinion defence. Furthermore, if there are enough true facts stated or common knowledge to justify the opinion then not all facts supporting the opinion need to be true.

The defendant’s state of mind is relevant, as he “cannot rely on as support of his opinion any facts not in existence when it was made or of which he was not aware”.²⁹

This final limitation is closely connected with the earlier aim in assisting a reader to recognise a statement as opinion. With a substratum of facts set out, a statement will appear to the reader more like an opinion.

D New Zealand and United Kingdom Comparison

While New Zealand defamation law regularly draws on law from the United Kingdom, there have been, and are, some important differences. Prior to the enactment of the Defamation Act 2013 (UK), the defence of honest opinion was called ‘honest comment’.³⁰ Public interest was a requirement under that defence. The new act removes the public interest requirement and introduces a serious harm threshold, whereby the statement must meet that threshold before a claim for defamation can be brought to the courts. This raises the bar for claimants.³¹ Notably, privilege is extended to include peer-reviewed scientific and academic journals.³²

III Rationale Behind the Honest Opinion Defence

The protection of honest opinion is a mainstay of freedom of expression. It is the “right of the citizen to express his genuine opinion... however wrong or exaggerated

²⁷ *Mitchell v Sprott*, above n 10, at [22]; Defamation Act 1992, s 11(a).

²⁸ Burrows and Cheer *Media Law in New Zealand*, above n 8, at 3.2.1(b).

²⁹ Milmo and Rodgers *Gatley on Libel and Slander*, above n 7, at 12.3. But see, Defamation Act 2013 (UK), s 3(4); Timothy Pinto “Defamation Act 2013: A boost for free speech – Part 1: Serious Harm, Truth and Honest Opinion” (2013) Inform’s Blog: The International Forum for Responsible Media Blog <inform.wordpress.com>.

³⁰ *Joseph v Spiller*, above n 19, at [117]. For purposes of this paper, which looks to various jurisdictions, the terms ‘fair comment’ and ‘honest opinion’ will be used interchangeably. But see, Milmo and Rodgers *Gatley on Libel and Slander*, above n 7, at 12.6 for discussion regarding different implications of each term.

³¹ Defamation Act 2013 (UK) (explanatory notes) at 11.

³² Defamation Act 2013 (UK), s 6.

or prejudiced that opinion may be”.³³ This defence supports overlapping arguments for freedom of expression, such as the search for truth, self-governance and the autonomy of the individual. In New Zealand, the right to free speech is embodied in section 14 of the New Zealand Bill of Rights Act 1990. It endorses “the freedom to seek, receive and impart information and opinions of any kind in any form”.³⁴ Under section 5, this freedom is subject to reasonable limitations “demonstrably justified in a free and democratic society.”³⁵

A Marketplace of Ideas

Safeguarding genuine opinions captures one of the key purposes behind free speech, namely to create a marketplace of ideas.³⁶ These types of statements “support an unfettered interchange of ideas for the bringing about of political and social changes desired by people”³⁷ and, thus, are in the public interest.³⁸ As Justice Learned Hand remarked, “the right conclusions are more likely to be gathered out of a multitude of tongues”.³⁹ Notwithstanding the aim of ‘right conclusions’, unpopular views can provide a useful backboard against which debate can arise. As such, the defence of honest opinion protects obstinate, exaggerated, even prejudiced views. The courts do not judge the reasonableness of the opinion.⁴⁰

Similar to obstinate and prejudicial views, arguably false facts too have a purpose in society. They provide the stepping stones for discovery by stimulating debate in bringing about ‘the clearer perception and livelier impression of truth, produced by its collision with error’”.⁴¹ Dealing with the facts that underlie ideas, even if they are false, “bears a proportionate relationship” to the freedom to discuss those ideas.⁴²

However, false facts that damage reputation may cross the line from the protection of section 14 into the realm of section 5. As such, the purpose behind free speech is often better supported by being balanced with the protection of reputation.⁴³ Without that

³³ *Telnikoff v Matuskevitch* [1992] 2 AC 343 at 357. See also, *Gertz v Robert Welch Inc* 418 US 323 (1974) at 339.

³⁴ New Zealand Bill of Rights Act 1990, s 14.

³⁵ New Zealand Bill of Rights Act 1990, s 5.

³⁶ David Bromwich and George Kateb (eds) *John Stuart Mill: On Liberty* (Vali-Ballou Press, New York, 2003) at 118.

³⁷ *Roth v United States* 347 US 476 (1957) at 484.

³⁸ *Lyon v Daily Telegraph* [1943] KB 746 at 752.

³⁹ *United States v Associated Press* 52 F Supp 362 (SD NY 1943) at 372.

⁴⁰ *Mitchell v Sprott*, above n 10.

⁴¹ *New York Times v Sullivan* 376 US 254 (1964) at 279, n 19.

⁴² Frederick Schauer “Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter” (1978) 64 VaLRev 263 at 273.

⁴³ *Ollman v Evans* 750 F 2d 970 (DC Cir 1984) at 974.

balance, “a newspaper just as easily could call a candidate a rapist, an axe-murderer, or an ivory-billed woodpecker.”⁴⁴ Ignoring the balance risks “protecting too much inaccurate and harmful reporting”.⁴⁵ A society soaked in erroneous and destructive information risks stalling a productive exchange of ideas. Accordingly, the limitation put on false facts that damage reputation is usually justified in a free and democratic society.

B Scientific Progress

Within the scope of the marketplace-of-ideas lies the significance of promoting debate and the exchange of ideas within the fields of science and medicine. In the recent case of *British Chiropractic Association v Singh*, science was touted as a sector where opinion should be especially protected.⁴⁶ Dr Singh had written an article in *The Guardian*’s ‘Comment and Debate’ page criticising the British Chiropractic Association. It alleged that the BCA “happily promoted bogus treatments” and did so without there being “a jot of evidence” to support the effectiveness of those treatments.⁴⁷ Eady J in the High Court ruled that the allegations were plainly “a matter of verifiable fact”.⁴⁸ The Court of Appeal reversed that decision, noting that the High Court ruling had “most certainly had a chilling effect on public debate which might otherwise have assisted potential patients to make informed choices about the possible use of chiropractic”.⁴⁹

C Counter-Balance for Absolute and Qualified Privilege

The protection of opinion provides a balance to the privileges accorded public officials in regards to statements made in their official duties.⁵⁰ These privileges allow them to “speak freely without fear that what they say will later be held against them in the Courts”.⁵¹ However, without the equivalent freedom to voice opinions, public officials would have an “unjustified preference over the public they serve”.⁵² As Justice Brennan observed, “analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticise as it is the official’s

⁴⁴ Schauer “Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter”, above n 42, at 289.

⁴⁵ Abner Mivka “In My Opinion, Those Are Not Facts” (1995) 11 GaStULRev 291 at 299.

⁴⁶ *Singh*, above n 3.

⁴⁷ At [1].

⁴⁸ At [14].

⁴⁹ At [11].

⁵⁰ Jeffrey Kirchmeier “The Illusion of the Fact-Opinion Distinction in Defamation Law” (1989) 39 CaseWResLRev 867 at 872.

⁵¹ *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 at 8.

⁵² *Sullivan*, above n 41, at 282-283.

duty to administer.”⁵³ Thus, the defence of honest opinion acts as a “brake on the abuse of power by public officials,”⁵⁴ and exposes individuals to a variety of beliefs, which they then can convey back to the government.

D Alleviating the Strictness of the Defence of Truth

The defence of truth⁵⁵ protects the defendant from being sued if the imputations contained in the statements complained of were “true or not materially different from the truth” or if “the publication taken as a whole was in substance true, or was in substance not materially different from the truth”.⁵⁶ Although a true statement may still lower a person in the estimation of others, the reason for the truth defence is that it entitles a person “only to the reputation his or her behaviour deserves”.⁵⁷

Nevertheless, the uncertainty of being able to prove the truth of a statement to a high enough degree to satisfy the courts raises concerns of self-censorship.⁵⁸ As a result, false statements may be deterred but also true ones and opinions. This chilling effect on free speech “dampens the vigour and limits the variety of debate”.⁵⁹

Without the defence of honest opinion to alleviate it, the truth defence is unsatisfactory and harsh. Justification applies to facts or opinions.⁶⁰ However, subjecting opinion to the same standard of proof as fact would be “a significant inhibition on free speech”.⁶¹ Potential critics may hold themselves only to the ‘safest’ of statements in order to avoid harsh penalties. This risks hindering valuable discussion and criticism through concerns that statements may not “survive the court test of ‘truth’ even when [there were] reasonable grounds to believe them to be accurate”.⁶² The defence of honest opinion then softens the burden of proving truth and encourages discussion and debate.⁶³

⁵³ At 282.

⁵⁴ *R v Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328 at 337.

⁵⁵ Also, ‘justification’. See Milmo and Rodgers *Gatley on Libel and Slander*, above n 7, at 12.3.

⁵⁶ Defamation Act 1992, s 8.

⁵⁷ John Burrows and Ursula Cheer “Defamation” in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) 16 at 16.9.

⁵⁸ *Sullivan*, above n 41, at 279.

⁵⁹ At 279.

⁶⁰ Milmo and Rodgers *Gatley on Libel and Slander*, above n 7, at 12.3.

⁶¹ Milmo and Rodgers *Gatley on Libel and Slander*, above n 7, at 12.3.

⁶² Herbert Titus “Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment” (1962) 15 VandLRev 1203 at 1209.

⁶³ At 1209.

E Opinions are Less Damaging Than Fact

Aside from the right of free speech, another basis behind honest opinion is the notion that “words which are clearly comment are likely to be treated with more caution by the reasonable reader and hence are less damaging than assertions of fact”.⁶⁴ A reader will be more wary of an opinion statement since it leaves room for other possible conclusions. For example, ‘I saw Sam in the office looking around suspiciously. I think he took the money.’ There is latitude here for the reasonable reader to consider alternatives other than Sam being a thief. Thus, to support the basis of the honest opinion defence, John Burrows suggests a reader should be able to discern when an opinion is being made and “compare it with his or her own”.⁶⁵

With the purpose of protecting free speech and a belief that opinions are less damaging than fact, the common law courts search for a dividing line between fact and opinion to clarify the defence of honest opinion.

IV Inadequacy of the Fact-Opinion Distinction

As the concerns underlying the truth defence indicated, uncertainty in defamation law breeds self-censorship. Accordingly, to support the rationale behind the honest opinion defence, the law must provide clarity and predictability. While the three limbs of the defence, namely honesty, clear indication of opinion and a supplied substratum of facts, are in themselves fairly straightforward, their implementation has proven challenging. Most elusive has been distinguishing facts from opinion in order to determine if the second and third limb has been satisfied.

A Inconsistency in the Courts

Courts across the common law countries battle with this dichotomy, often resulting in split decisions or similar cases being decided very differently. In the United Kingdom case of *Berkoff v Burchill*, the defendant was a film critic writing for the *Sunday Times*. In one review, she wrote that “film directors from Hitchcock to Berkoff are notoriously hideous-looking people”.⁶⁶ In another she wrote that the Frankenstein character in the film of the same name was “a lot like Stephen Berkoff, only marginally better-looking”.⁶⁷ The Court of Appeal held this gave the impression that Mr Berkoff, a well-known actor, director and writer, was physically repulsive and that, since he was in the public eye and made his living partially as an actor, this meaning was “capable of lowering his standing in the estimation of the public and of

⁶⁴ *Mitchell v Spratt*, above n 10, at [17], citing Patrick Milmo and W V H Rodgers *Gatley on Libel and Slander* (9th ed, Sweet & Maxwell, London, 1998) at 12.7.

⁶⁵ Burrows and Cheer *Media Law in New Zealand*, above n 8, at 3.2.1(a).

⁶⁶ *Berkoff*, above n 1, at 141.

⁶⁷ At 141.

making him an object of ridicule”.⁶⁸ In his dissenting judgment, however, Millet LJ reasoned that holding this statement as an actionable wrong would be “an unwarranted restriction on free speech”, asserting that “[p]eople must be allowed to poke fun at one another without fear of litigation”.⁶⁹

In 1984, Australian food critic Leo Schofield wrote a negative review of the Blue Angel Restaurant, published in the Good Living section of *The Sydney Morning Herald*.⁷⁰ Schofield lamented that the lobster he had ordered was so appallingly overcooked that it was a “culinary crime” and “so crudely handled as to be, for this diner at least, almost inedible”.⁷¹ Schofield added that the menu noted a 45-minute wait time for the lobster. He went on to describe his lobster as, “cooked until every drop of juice and joy had been successfully eliminated” and that “the carbonised claws contained only a kind of white powder”.⁷² The plaintiffs complained of a number of imputations and to three of these Schofield pleaded fair comment. Mr Justice Enderby allowed the defence to go to trial for only one: the plaintiff “was a restaurateur that charged a price for excellent fresh lobster which when later cooked incompetently... did not then represent good value”.⁷³ While the jury agreed that this imputation could be comment, they felt it was not based “on proper material for comment”.⁷⁴ As a result, Schofield’s defence failed and Blue Angel and its proprietor were awarded a total of \$100,000 in damages.⁷⁵

In *London Artists v Littler*⁷⁶ and *Jeyaretnam v Goh Chok Tong*,⁷⁷ the facts were startlingly similar but contrastingly decided. In the former case, four actors, via identical letters, each gave notice they were leaving a production at the end of the month. The defendant published a letter noting their resignations and stating there was a plot by the four actors to end the running of the play. The statement complained of in *London Artists* was: “I am hurt that you did not see me before being a party to what, on the face of it, appears to be a plan to close the run of [the play].”⁷⁸ The court held that this was stated as a fact. Similarly, in *Jeyaretnam*, the defendant spoke at a press conference, “I believe the exodus was engineered. I don’t think it was

⁶⁸ At 151.

⁶⁹ At 153.

⁷⁰ Martin “The Blue Angel Defamation Trial”, above n 2.

⁷¹ At 12.

⁷² At 12.

⁷³ At 13.

⁷⁴ At 14.

⁷⁵ At 14.

⁷⁶ *London Artists Ltd v Littler* [1969] 2 All ER 193.

⁷⁷ *Jeyaretnam v Goh Chok Tong* [1989] 1 WLR 1109.

⁷⁸ *London Artists Ltd*, above n 76, at 195.

spontaneous.” This was based on an incident that occurred at the inauguration of a political party. After his speech, Mr Jeyaretnam suddenly left, followed by a walk-out by 200 members of the audience. The statements were regarded by the courts as opinion.

B Underlying Problem

Why then, when the 3 limbs of honest opinion seem straightforward enough, are the results so erratic? In the cases above, discussion centers on determining whether a statement or statements should be neatly placed in the ‘fact box’ or the ‘opinion box’. Ideally, a test that creates a bright-line between fact and opinion would provide the predictability and certainty that the rationale craves. Yet, this clear distinction continues to elude the courts.

A bright-line distinction assumes that fact and opinion statements are opposites and therefore easily divided.⁷⁹ In reality, no bright-line can be determined because the distinction is one of degree.⁸⁰ As Robinson J noted, “fact is the germ of opinion”.⁸¹ The procession from opinion to fact statements exists on a continuum with progressing degrees of specificity.⁸²

While every statement, no matter how specific, will be “in some measure the product of inference and reflection as well as observation and memory”,⁸³ those at the extreme end of the spectrum contain the least amount. These statements deal with “one’s direct sensory perceptions” and will be viewed as “certain and true”.⁸⁴ This is especially so with a statement that refers to a tangible object. This object “can be compared with the words used to see if there actually is a correspondence between the object and the words used to describe it.”⁸⁵ To say that in the school dining hall is a table with four

⁷⁹ Titus “Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment”, above n 62, at 1222.

⁸⁰ *Beech Aircraft Corp v Rainey* 488 US 153 (1988) at 168.

⁸¹ *Ollman*, above n 43, at 1021.

⁸² Titus “Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment”, above n 62, at 1222.

⁸³ E Cleary *McCormick on Evidence* (3rd ed, West Publishing, St Paul, MN, 1984) at 27; Even facts themselves can be viewed as opinion statements that have been more specifically stated: see, *Beech Aircraft Corp v Rainey*, above n 80, at 168. Frederick Nietzsche maintained, “There are no facts, only interpretations.” (Frederick Nietzsche “Aus dem Nachlass der Achzigerjahr” in *Werke III* at 903, cited by Charles Larmore *The Morals of Modernity* (Cambridge University Press, Cambridge, 1996) at 81.)

⁸⁴ Titus “Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment”, above n 62, at 1222.

⁸⁵ Schauer “Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter”, above n 42, at 277.

legs can be resolved with a fair amount of confidence.⁸⁶ This type of statement contains “virtually no inference, synthesis, or opinion”.⁸⁷ For the sake of argument and the need to distinguish one end of the spectrum from another, comparing a statement to a physical object could be called a ‘pure fact’. Moving along the continuum, verifying a statement against established scientific principles, such as the detrimental physical effects of consuming large quantities of fast food, would be less precise but still well within the realm of general acceptance.⁸⁸

At the other end of the spectrum lie statements of ‘pure opinion’. These statements cannot be compared to objects that are observed or experienced through senses. They cannot even be verified against accepted criteria, since “the notion of confirming a statement purely of personal belief is nonsensical.”⁸⁹ Often these statements will refer to the “existence of God or the nature of knowledge”⁹⁰ or to matters of personal taste, political views or literary criticism. Sitting on the continuum just before these pure opinion statements are those Robinson J in *Ollman v Evans* referred to as “derogatory remarks [or]... expressions of generalised criticism or dislike without any specific factual moorings”.⁹¹ In this area would also fall metaphorical statements, which through context are clearly being used figuratively rather than literally.⁹² Robinson J provides an example where the plaintiff was said to “run a paper by paranoids for paranoids”.⁹³ Read in context, the statement in that case was described as “obviously used ... in a loose, figurative sense . . . [and could not] be construed as representations of fact”.⁹⁴

The fundamental problem with the fact-opinion distinction is that many statements fall somewhere on a continuum between strictly fact and strictly opinion. They often contain varying elements of fact, inference, reflection or emotion. It is in this mid-range of the spectrum that the 3 types of statements mentioned earlier exist.⁹⁵

⁸⁶ NB: This paper does not delve into philosophical arguments as to the existence of matter. For this philosophical discussion, see: Bertrand Russell *The Problems of Philosophy* (Oxford University Press, New York, 1959) at ch 2.

⁸⁷ Schauer “Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter”, above n 42, at 278.

⁸⁸ At 278.

⁸⁹ At 278.

⁹⁰ Michelle Sanders “The Fact/Opinion Distinction: An Analysis of the Subjectivity of Language and Law” (1987) 70 MarqLRev 673 at 680.

⁹¹ *Ollman*, above n 43, at 1021.

⁹² At 1022.

⁹³ At 1022, citing *Loeb v Globe Newspaper Co* 489 F Supp 481 at 486 (1980).

⁹⁴ *Loeb v Globe Newspaper Co* 489 F Supp 481 at 486 (D Mass 1980).

⁹⁵ “Law of Honest Opinion” section.

1 *The Intermingled Statement*

An opinion statement that is not plainly separated from the facts surrounding it may be understood by the reader to be just another fact based on adequate grounds known to the writer.⁹⁶ In the Canadian case of *Mitchell*, the *Victoria Daily Times* published an article imputing that the arrest of Mitchell solved the murder mystery of Molly Justice.⁹⁷ It continued on to say that the police had looked for Mr Mitchell for a lengthy period and that he was brought in on a boy-sex charge which led to the “uncovering of Justice murder facts”.⁹⁸ The only points made in the article which were actually true were that Mitchell was arrested and charged with murder and he had been booked on a boy-sex charge.⁹⁹ The paper raised the defence of fair comment, applying it to the statements that could not be proven true.¹⁰⁰ Bird J noted that while the article was a mixture of opinion and fact, it was not clear to him which statements were intended as which. Nor was it likely to be clear to the reasonable reader.¹⁰¹

2 *The Inference of Fact Statement*

While a statement that sets out a value-judgment may be apparent as opinion, one that “contains an inference of fact”¹⁰² may be more uncertain. This type of statement looks like a fact statement. However, it may be a fact stated as an “inference drawn by the writer from other facts” and would accordingly be treated like an opinion.¹⁰³ *Gatley on Libel and Slander* gives the example: “Jones took a bribe.”¹⁰⁴ If the writer had indicated in his article the events that led to this conclusion and indicated that this was his own personal conclusion, the defence may be available to him.

3 *The Bald Statement*

A ‘bald statement’, such as ‘X is dishonourable’, is one that does not identify the facts upon which it is based. Although it may look like an opinion, it will often be categorised as a fact because it gives no indication that it is a conclusion drawn from other facts. Without the facts to base the statement on, the reader would likely interpret it as a fact.¹⁰⁵ However, some authorities are concerned that labeling bald

⁹⁶ Milmo and Rodgers *Gatley on Libel and Slander*, above n 7, at 12.13.

⁹⁷ *Mitchell v Times Printing and Publishing Co Ltd* (No 2) [1944] 1 WWR 400.

⁹⁸ At [1].

⁹⁹ At [16].

¹⁰⁰ At [17].

¹⁰¹ At [33].

¹⁰² Burrows and Cheer *Media Law in New Zealand*, above n 8, at 3.2.2.

¹⁰³ Milmo and Rodgers *Gatley on Libel and Slander*, above n 7, at 12.6.

¹⁰⁴ At 12.6.

¹⁰⁵ *Lowe v Associated Newspapers Ltd* [2006] EWHC 320 (QB).

statements as ‘fact’ may be misleading.¹⁰⁶ Lord Phillips suggests this type of statement is “a comment coupled with an allegation of unspecified conduct upon which the comment is based”.¹⁰⁷

C Supporting the Rationale

The examples above indicate that the current method does not adequately support the rationale behind the honest opinion defence. First, there is a struggle to attain the predictability and certainty needed to prevent self-censorship.¹⁰⁸ Reviewers may be reluctant to critique restaurants negatively for fear of spending the next eight years in court battles. Scientists may keep thoughts to themselves on new or contentious theories. Even a case decided in favour of the defendant can cause a chill on speech, especially if it has gone through several courts or was not decided unanimously.

Second, the examples indicate that opinions are not necessarily less damaging than fact.¹⁰⁹ This rationale is in itself problematic. Opinions play a powerful role in society. Some of the most significant events in people’s lives are based on opinions: marriage, choice of religion, choice of career, to name a few.¹¹⁰ Furthermore, suggesting that factual statements are more harmful ignores the point that often “facts by themselves are innocuous”.¹¹¹ If, for example, Emma gets 1 minute 20 seconds in her 100m freestyle swim, this reflects nothing on its own. Without an opinion attached to it, there is no indication whether that is good or bad. Or if Jack buys wires and solder from the local hardware shop, this is simply a neutral statement. However, suggest he is there to get ingredients for a bomb and he could be in serious trouble.

Some situations can generate opinions that have a ruinous impact. Consider the communicator: “Identical words, in the mouths of different persons, can carry a radically different weight”.¹¹² For instance, some statements made by socially weak groups can be ineffective in contrast with statements made by more powerful ones.¹¹³ The effect a statement will have can depend on how favourably disposed an audience

¹⁰⁶ *Joseph v Spiller*, above n 19, at [5], per Lord Phillips; Burrows and Cheer *Media Law in New Zealand*, above n 8, at 3.2.2, n 412.

¹⁰⁷ *Joseph v Spiller*, above n 19, at [5].

¹⁰⁸ Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson *Libel and the Media: The Chilling Effect* (Oxford University Press, Oxford, 1997) at 190.

¹⁰⁹ Interestingly, while the 9th edition of Patrick Milmo and W V H Rodgers *Gatley on Libel and Slander* (9th ed, Sweet & Maxwell, London, 1998) at 12.7 (see, above n 64) stated that opinions are less damaging, this was removed in the 11th edition.

¹¹⁰ Jerry Phillips “Opinion and Defamation: The Camel in the Tent” (1990) 57 *TennLRev* 647 at 656.

¹¹¹ At 669.

¹¹² David Riesman “Democracy and Defamation: Fair Game and Fair Comment II” (1942) 42 *ColumLRev* 1282 at 1306.

¹¹³ At 1306.

is towards the communicator.¹¹⁴ Along that same vein, an opinion made by someone highly respected or with expertise, such as a doctor or lawyer, can notably influence others.

Another consideration is the person about whom the communication is being made. In the case of *Gacic v Fairfax*, a food critic reviewed an extremely high-end and expensive restaurant.¹¹⁵ Those eating there would expect near-perfection. The review described the food as “unpalatable”.¹¹⁶ This could cause many readers to shun the restaurant. When paying for expensive food, readers are less likely to want to risk getting an unpalatable meal.

V Current Tests

The struggle for clarity and predictability has led to much discussion across the common law countries regarding tests to distinguish fact from opinion.

A Perception of the Reader Test

As noted earlier, New Zealand and the United Kingdom view the statement from the perception of the reasonable reader and consider varying factors as to the context in which it was stated. The Supreme Court of Canada adopted a similar test: “What is comment and what is fact must be determined from the perspective of a ‘reasonable viewer or reader’”.¹¹⁷

However, this test has not defined what a ‘fact’ or ‘opinion’ statement is.¹¹⁸ Saying that the statement is an opinion if it is read as an opinion is circular.¹¹⁹ The terms ‘fact’ and ‘opinion’ are used so vaguely that nearly any conclusion sought could be made to fit.¹²⁰ On its own, the test becomes self-justifying and thus, neither helpful nor predictable.

¹¹⁴ Titus “Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment”, above n 62, at 1212.

¹¹⁵ *Gacic v John Fairfax Publications Pty Ltd* [2011] NSWCA 362.

¹¹⁶ Matthew Evans “Crash and Burn: When dining on the view is the only recommendation” *The Sydney Morning Herald* (Australia, 30 Sept 2003) at 6 Good Living.

¹¹⁷ *WIC Radio Ltd v Simpson* [2008] 2 SCR 420, 2008 SCC 40 at [27].

¹¹⁸ Titus “Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment”, above n 62, at 1205.

¹¹⁹ Jeffrey Thomas “Statements of Fact, Statements of Opinion, and the First Amendment” (1986) 74 *CalLRev* 1001 at 1011, n 69.

¹²⁰ Titus “Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment”, above n 62, at 1205.

A survey of the United States courts yields more variety and discourse surrounding the debate. Two tests emerge with frequency: the Verifiability Test and the Totality of Circumstances Test.

B Verifiability Test

The Verifiability Test attempts to find the distinction between actionable and protected statements by first assessing whether the statement has a “generally accepted core of meaning”.¹²¹ If it does, then the question is asked whether the statement is capable of proof or disproof by an objective standard. One that is capable of that proof will be considered a ‘factual statement’.¹²² The reasoning is that if a statement is not verifiable, it cannot be considered to convey actual facts and thus, cannot be actionable in defamation because of constitutional protections of opinions.¹²³

In some instances the verifiability test is used as an alternative to distinguishing fact from opinion.¹²⁴ The Supreme Court in the United States concluded that protecting free speech can be accomplished “without the creation of an artificial dichotomy between ‘opinion’ and fact”.¹²⁵ In *Milkovich*, the majority held that statements must be “provable as false before there can be liability under state defamation law”.¹²⁶ Mr Milkovich was a high-school wrestling coach in Ohio. During a home match a fight broke out, causing Milkovich’s team to be put on probation by the Ohio High School Athletic Association (OHSAA). Several parents sued the OHSAA. The Court of Common Pleas overturned the probation. Mr Diadiun wrote in his *News Herald* article, “Anyone who attended the meet... knows in his heart that Milkovich... lied at the [Court of Common Pleas] hearing after... having given his solemn oath to tell the truth.”¹²⁷ Mr Milkovich sued, alleging the statement that he had committed perjury was defamatory.

The majority held that because Mr Milkovich’s testimony before the OHSAA and his testimony before the trial court could be compared, the statement was “sufficiently factual to be susceptible of being proved true or false”.¹²⁸ While Brennan and

¹²¹ Thomas “Statements of Fact, Statements of Opinion, and the First Amendment”, above n 119, at 1017.

¹²² At 1017.

¹²³ David Becker “Structuring Defamation Law to Eliminate the Fact-Opinion Determination: A Critique of *Ollman v Evans*” (1986) 71 IowaLRev 913 at 924.

¹²⁴ For example, *Hotchner v Castillo-Puche* 551 F2d 910 (2d Cir 1977) at 913.

¹²⁵ *Milkovich v Lorian Journal* 497 US 1 (1990) at 19; 110 SCt 2695 at 2706.

¹²⁶ At 2706.

¹²⁷ At 2698.

¹²⁸ At 2707.

Marshall JJ agreed with the majority's theory, they disagreed with its application. In looking at the context of the *News Herald* article, they found the statements could not imply, as a verifiable fact, "that Milkovich had perjured himself".¹²⁹ Whether the verifiability test is perceived as a method of distinguishing fact from opinion or whether it is a separate test to indicate a statement as an actionable wrong, the test creates the same issues of uncertainty as the Perception of the Reader test.

Many statements do not "divide neatly into categories of 'verifiable' and 'unverifiable'".¹³⁰ Most statements will fall somewhere along a spectrum of differing degrees of verifiability.¹³¹ The more verifiable a statement is, the "more confident the determinations of truth".¹³² For example, a statement that one owns a home in New Zealand is verifiable, whereas a statement that 'X is frightening' is not. One can be more confident of the truth of the former statement than the latter. While being critical of an over reliance on this test, some courts have acknowledged its limited usefulness, as a "minimum-threshold issue".¹³³ As with pure opinion statements, the test may be helpful in recognising where a statement sits at the extreme ends of the continuum.

The marketplace-of-ideas metaphor, which underlies arguments for free speech and the defence of honest opinion, relies on the ideas brought forward in John Stuart Mill's *On Liberty*.¹³⁴ Ironically, the reason Mill felt opinions should be protected was not because of their inability to be verified but rather because since they could often be proven true, they have a valuable place in society. Even partially true opinions could lead to important discussion and clashes of opinion, allowing "the remainder of the truth... any chance of being supplied"¹³⁵

Another difficulty emerges when the test is used on its own. For example, consider a restaurant review that states, "The green peppers... remained frozen on the plate."¹³⁶ While this could be proven true or false, because it is in a restaurant review, the reader is most likely to understand it as an opinion.¹³⁷ As a single inquiry, verifiability may yield one result but when the scope of the test is widened to include context, another

¹²⁹ At 2711.

¹³⁰ *Ollman*, above n 43, at 982.

¹³¹ At 982; Schauer "Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter", above n 42, at 279.

¹³² Schauer "Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter", above n 42, at 279.

¹³³ *Potomac Valve & Fitting Inc v Crawford Fitting Co* 829 F 2d 1280 (4th Cir 1987) at 1289.

¹³⁴ Phillips "Opinion and Defamation: The Camel in the Tent", above n 110, at 659.

¹³⁵ Bromwich and Kateb (eds) *John Stuart Mill: On Liberty*, above n 36, at 118.

¹³⁶ *Mr Chow of New York v Ste Jour Azure SA* 759 F 2d 219 (2nd Cir 1985) at [13].

¹³⁷ At [46].

determination often results. This recognises that the “meaning of words vary depending on the immediate context of the words and the social setting of the statement”.¹³⁸ Some courts have opted to use this test in combination with other tests.

C Totality of Circumstances Test

One court that did so was the court in *Ollman v Evans*.¹³⁹ There the court developed the four-factor ‘totality of circumstances’ test to determine if a statement was an actionable fact or a protected opinion. The first factor determines whether the statement has a precise commonly understood meaning that gives rise to factual implications. The second looks at whether the statement is verifiable. The third and fourth factors look to context, namely the immediate context in which the statement occurs and the broader social context surrounding the statement.

The development of a test with factors that look to the statement itself and the context within which it sits provides some structure for courts to follow and retains the flexibility needed to analyse different types of statements and situations. However, even within *Ollman* there was disagreement with the test’s application. Once again, despite applying the same test, the court was split as to whether that test revealed the statements as fact or opinion. Differing views on what was contextually relevant and how much weight should be given to those factors caused some of the divide.¹⁴⁰ Additionally, Wald J in his dissent felt that the statement in that case yielded a precise commonly understood meaning that could be verified.¹⁴¹

The United States Supreme Court in *Milkovich* superseded *Ollman*. By ignoring the context factors from Court of Appeal’s test, the Supreme Court looked at statements in their literal form.¹⁴² This is less ideal in that it makes the defence harder to obtain and does not recognise the reader’s ability to interpret a statement as an opinion based on its contextual environment.¹⁴³ It also is undesirable to ignore the environment in which the statement exists as this can lead to an artificial determination of fact or

¹³⁸ Becker “Structuring Defamation Law to Eliminate the Fact-Opinion Determination: A Critique of *Ollman v Evans*”, above n 123, at 925.

¹³⁹ *Ollman*, above n 43.

¹⁴⁰ At 1034, per Wald J: “[T]he immediate context in which this statement was made does little to warn a reader to regard with scepticism what might otherwise appear to be an assertion of fact”.

¹⁴¹ At 1032.

¹⁴² *Milkovich*, above n 125, at 21; Margaret Chan “Importance of a Contextual Approach to Libel Law: The Impact of *Immuno AG v Moor-Jankowski* and *Milkovich v Lorain Journal Co*” (1993) 9 *Touro Law Rev* 611 at 618.

¹⁴³ *Milkovich*, above n 125, at 18; Nancy K Bowman “*Milkovich* Meets Modern Federalism in Libel Law: The Lost Opinion Privilege Gives Birth to Enhanced State Constitutional Protection” (1993) 42 *DePaul Law Review* 583 at 585.

opinion. Dissatisfaction with the Milkovich test is most evident in the case of *Moldea*,¹⁴⁴ which initially followed Milkovich. Just 3 months later, in a unique turnabout, the same panel of Court of Appeal judges reversed its decision, stating that context was a critical consideration.¹⁴⁵

D Further Inconsistency in the Courts

While contextual factors are sometimes considered in the United Kingdom and New Zealand courts, they are not done so consistently nor are the same factors considered across all cases. For example, in *London Artists*, the court felt the use of cautionary language was not strong enough to convey the statements as opinion.¹⁴⁶ By contrast, in *Jeyaretnam*, the statement, “I am inclined to believe”, was instrumental in the Court of Appeal deciding that the statements were opinion. That judgment did not reflect on the fact that the statement was made in a press conference, which could suggest a vessel for imparting news and facts rather than opinions.¹⁴⁷

To most, a value-judgment regarding someone’s appearance is likely to fall on the extreme opinion end of the spectrum. In *Berkhoff*, the majority ignored any possibility that the statement implying Berkhoff was hideously ugly was an opinion. However, Millet J, in his dissent, considered the contextual factor that the author was writing in her role as a film critic, allowing for the statement to be understood as a humorous exaggeration.¹⁴⁸

In *Singh*, the fact that the statements made were of a scientific or medical nature influenced the Court of Appeal to overturn the High Court decision and rule in favour of the defendant.¹⁴⁹

Hence, different cases regard different factors when assessing whether a statement is a fact or opinion.¹⁵⁰ The result is an inconsistent and unpredictable defence that risks

¹⁴⁴ *Moldea v New York Times Co* 15 F 3d 1137 (DC Cir 1994) [Moldea I].

¹⁴⁵ *Moldea v New York Times Co* 22 F3d 310 (DC Cir 1994) [Moldea II] at 313-4; Abner Mivka “In My Opinion, Those Are Not Facts” (1995) 11 GaStULRev 291 at 300; Regarding disapproval of Milkovich, see also: Lisa Herskowitz “One Bad Bit of Dictum Deserves Another: Gertz and Milkovich” (1992) 24 Con Law Rev 1159; Margaret Chan “Importance of a Contextual Approach to Libel Law: The Impact of Immuno AG v Moor-Jankowski and Milkovich v Lorain Journal Co” (1993) 9 Touro Law Rev 611; Lisa West “Milkovich v Lorain Journal Co – Demise of the Opinion Privilege in Defamation” (1991) 36 Vill L Rev 647; John B Cromer “Milkovich v Lorain Journal Co: This Opinion May Stifle Yours” (1991) 20 Cap U L Rev 498.

¹⁴⁶ *London Artists Ltd*, above n 76, at 392.

¹⁴⁷ *Jeyaretnam*, above n 77.

¹⁴⁸ *Berkoff*, above n 1, at 153.

¹⁴⁹ *Singh*, above n 3, at [26]; Eric Barendt “Science Commentary and the Defence of Fair Comment to Libel Proceedings” (2010) 2 Journal of Media Law 43 at 45.

courts picking and choosing the factors to accord with a desired outcome and arguably infringes upon the rationale behind the defence.

VI Solution

One of the difficulties with the Ollman test may be that the four factors are still too general. Determining what should be considered within each factor and the weight it should carry becomes “largely subjective”.¹⁵¹ It is likely that no one test could be created that would definitively discern a fact from opinion in each of the infinite possible scenarios. However, the Ollman test is a strong contender and can be used to supply a framework for a more specific set of factors. These would provide more clarity, predictability and consistency for the defence of honest opinion in New Zealand.¹⁵² Notably, many of these factors have been considered at one time or another in various judgments in the United Kingdom and New Zealand but rarely in their entirety and often erratically. The proposed eight-factor test would also widen the availability of the defence, thus better supporting freedom of expression in accordance with the New Zealand Bill of Rights Act 1990.

The proposed test would seek to answer an overarching question similar to that already asked by New Zealand courts:

“Is the statement presented in such a way that the reasonable reader would recognise it as an opinion?”

While the question by itself is circular, a series of factors would in most circumstances guide the courts to an answer by helping them ascertain where on the spectrum of fact-opinion the statement lies. The first two factors look to the statement itself:

1 Common usage

Is the statement one that has a precise commonly understood meaning?¹⁵³

¹⁵⁰ Lisa Herskowitz “One Bad Bit of Dictum Deserves Another: Gertz and Milkovich” (1992) 24 Con Law Rev 1159 at 1173.

¹⁵¹ At 1173.

¹⁵² The proposed test differs from Ollman in that its second and third factors replace Ollman’s verifiability factor. Additionally, the context factors in Ollman are separated out to give more clarity and structure to the test.

¹⁵³ *Ollman*, above n 43, at 980.

This factor gives the court a starting point on the fact-opinion spectrum. As other factors are considered, the statement may be adjusted along the spectrum one way or another.

Some statements are clearly understood as having one meaning and as such will carry factual implications. Saying someone is a thief would generally have one understood meaning: the person has stolen another's property. However, a further look at other factors, such as the context that the statement is in, may expose a figurative meaning, indicating this particular statement may be understood by the reader as an opinion.

2 Extent to which the statement is verifiable scientifically

While Ollman's second factor is one of verifiability, the concern is that this factor increases uncertainty. As stated above, verifiability can be difficult to determine and is often a subjective determination. Indeed, two judges applying the same 4-factor test in Ollman came to opposite results because of differing views on the verifiability of part of the statement.¹⁵⁴

Changing this factor to look at the extent that a statement is provable recognises the spectrum of verifiability mentioned earlier. This allows for a determination by degree. The greater the extent to which the statement is verifiable, the more likely, in light of the other factors, that it is a factual statement.

In recognising a statement to be a fact or opinion, "[r]eaders will inevitably be influenced by a statement's context".¹⁵⁵ The remaining factors look to the context of the statement.

3 Extent to which, if the statement is not verifiable scientifically, it is comparable against an implicit or explicit societal standard

Inherent in opinion statements is that they are some form of evaluative judgment, whether a conclusion, justification or even an observation, which is held by the communicator to some standard. If that standard is evident or is made evident, then this may further indicate an opinion.¹⁵⁶

¹⁵⁴ Ollman, above n 43, at 990, n 42, per Judge Starr; contrast, at 1033, per Wald J.

¹⁵⁵ At 982; see also, Rodney Ott "Fact and Opinion in Defamation: Recognizing the Formative Power of Context" (1990) 58 Fordham L Rev 761.

¹⁵⁶ For discussion on requiring that the standards on which the statement is based be set out in order to determine if reasonable care was taken in making that statement, see Titus "Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment", above n 62, at 1228.

A standard may be evident if the communicator provides information as to why they are making the statement. This is closely linked to providing a substratum of facts. A test that encourages the communicator of an opinion to explain *why* he or she is coming to that conclusion will do two things: first, make it clearer that the statement is an opinion and second, allow readers to decide if they agree or disagree with the statement. The latter effect goes to the heart of the defence. If a reader understands clearly that she could disagree with the statement, that statement will encourage debate and discussion and thus should be protected.

Additionally, an indication of a unique standard, whether implicit or explicit, may suggest an opinion. For example, the statement, 'Jones is an alcoholic' on its own may give the impression of a fact. However, if the reader is imparted with information indicating that the communicator vehemently considered all alcohol to be sinful and immoral, then that unique standard may indicate the statement to be an opinion.

4 Language surrounding the statement

Does the language surrounding the statement influence the way the statement is perceived?

A statement, which viewed in a vacuum would appear as a fact, may give the perception of opinion when viewed in the context of the remaining article. For example, in the New Zealand case of *Awa v Independent Newspapers Ltd*, the term 'body-snatcher' was used. The court in looking at the rest of the article held that 'body-snatching' was not meant to suggest improper purpose or dishonesty but merely that the body was removed against the wishes of the widow.¹⁵⁷

5 Cautionary language

While not definitive on its own,¹⁵⁸ words such as 'I believe' or 'In my opinion' can provide an indication to the reader that the statement was intended as an opinion.

6 Issues of public importance

Public interest is not a requirement under the defence. However, certain speech should encourage courts to be more lenient towards determining a statement to be an opinion. Statements such as scientific, medical or political speech play an important role in the marketplace of ideas, for example. This is echoed in the aforementioned recent

¹⁵⁷ *Awa*, above n 14, at 594.

¹⁵⁸ "[A] statement which is plainly one of fact cannot be transformed into one of opinion merely by prefacing it with the words 'in our judgment'": *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 at 474.

changes to the Defamation Act 2013 (UK) and in the United Kingdom decision of *Singh*.¹⁵⁹

7 *Location of article or discourse*

This factor looks to see if the statement is located in a context where rhetoric hyperbole would be expected. For example, in the United States Supreme Court case of *Letter Carriers*, the plaintiff was called a traitor. The court there reasoned that as this was in the course of labour disputes, this type of “exaggerated rhetoric was commonplace”.¹⁶⁰ Additionally, if the article were contained in a ‘Comment’ section of the paper, it would be more likely to be perceived as containing opinion statements than one placed on the front page.

8 *Type of article or discourse*

Some types of articles clearly indicate that the opinion of the author is being set out, such as restaurant or film reviews. Communication in a press conference, for example, would be more likely to be understood as factual than that on a late night talk show.

A *Application*

Applying the test to the forms of statements and previous cases that were discussed earlier, demonstrates how the test will work.

In *Blue Angel*, the statement that the lobster was ‘cooked incompetently’ could hold a range of meanings from clumsily handled to inexperienced. Thus to begin, the statement is on the opinion end of the spectrum. The extent that the phrase, which is one describing personal taste, is unverifiable supports this placement on the spectrum. The third factor recognises the author as a food critic and as such may be presumed by the reader to have a well-developed palate and high standards. The reader would be more likely to interpret his statement as one which the reader could well have disagreed with if they had eaten the same meal. The article surrounding the statement describes Mr Schofield’s impressions of the rest of his meal. These are evaluative statements, which would further lend the statement complained of an impression of opinion. While no cautionary language is used in this statement nor is it regarding a scientific, medical or political issue, these factors are not strong enough to shift the statement from the opinion end of the spectrum. Finally, the article was located in the *Good Living* section of the *Sydney Herald* rather than being front-page news and was clearly a restaurant review. By addressing these factors, courts would likely come to the same

¹⁵⁹ Defamation Act 2013 (UK), s 6; *British Chiropractic Association v Singh*, above n 3, at [26].

¹⁶⁰ *Letter Carriers v Austin* 418 US 264 (1974), 94 SCt 2770 (1974) at 2871.

conclusion: the statement was presented in such a way that the reasonable reader would recognise it as opinion.

The *Berkhoff* decision could have benefited from a set of factors to address. It is difficult to imagine a more obvious statement of opinion than an aesthetic evaluation.

The term

‘hideously ugly’ can carry a different meaning to each person and will fall on the extreme end of being unverifiable. Ms Burchill made the statement in her role as a film critic, adding an impression of opinion to an already personal viewpoint. Moreover, the words surrounding the statement were providing an opinion on films and their directors. The statement itself was clearly in the vein of a “humorously exaggerated observation”.¹⁶¹

B Implementation

While courts have the ability, within the constraints of the legislation, to develop the common law by applying the proposed test, it would add consistency and predictability¹⁶² if it were inserted as a separate section into the Defamation Act 1992:

9a Factors in determining opinion

(1) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant shall fail unless the defendant proves that the statement is presented in such a way that the reasonable reader would recognise it as opinion, having regard to the following factors –

- (a) Whether the statement has a commonly understood meaning indicating factual or evaluative implications; and
- (b) The extent to which the statement is verifiable scientifically; and
- (c) The extent to which, if the statement is not verifiable scientifically, it is comparable against an implicit or explicit standard; and
- (d) The extent to which the language around the statement influences the way the statement is perceived; and
- (e) The extent to which cautionary language is used; and
- (f) The extent to which the statement refers to issues of public importance; and
- (g) The location of the article or discourse; and
- (h) The type of article or discourse.

¹⁶¹ *Berkhoff*, above n 1, at 153.

¹⁶² For example, the decision in *Berkhoff* would likely have been far different had the court there been required to address these factors.

VII Further Considerations

The focus of this paper is on securing a method that could better distinguish opinion from fact. However, another issue could be further explored within the defence. While a detailed investigation is beyond the scope of this paper, brief observations may be addressed.

In 1962, Herbert Titus formed his own solution to the fact-opinion dichotomy.¹⁶³ While that solution is not directly adaptable to the modern New Zealand defence of honest opinion, the principles and philosophy behind it are informative. To indicate that his statement would not lower the plaintiff's reputation without justification, Titus felt that the communicator must show he had taken reasonable care in gathering information about the plaintiff and that his statement was justifiable in light of those facts gathered.¹⁶⁴ The reasonable care aspect embodies a principle of moral duty and responsibility to others within society.

Given the potentially formidable power individuals have through online forums and other methods of instant global communication,¹⁶⁵ consideration should be given in some way to the effect a statement will have on a given individual. A possible strategy could be to add a second limb to the proposed test, the purpose of which would be to focus on and encourage responsible communicating. This limb would recognise that opinion statements can, in some instances, cause more harm than factual ones. It could be assessed through a New Zealand Bill of Rights Act¹⁶⁶ inquiry: whether the harm that has resulted, or is likely to result, from the statement is a demonstrably justifiable reason to limit that statement.

Some factors the limb could consider that may increase the harm a statement may cause include:

(i) The probability that the statement has to mislead the reader: "Where that probability is high, a greater number of people will think worse of the plaintiff for reasons other than those which the defendant has relied upon".¹⁶⁷ This would further look at the standards against which the statement was made.

¹⁶³ Titus "Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment", above n 62.

¹⁶⁴ At 1228.

¹⁶⁵ Twitter, for example, provides the perfect conditions for a heedless '140-characters-or-less' comment to contact thousands of readers, who in turn pass it on to thousands of others. A plaintiff's reputation can be destroyed in minutes.

¹⁶⁶ New Zealand Bill of Rights Act 1990, s 5.

¹⁶⁷ Titus "Statement of Fact Versus Statement of Opinion - A Spurious Dispute in Fair Comment", above n 62, at 1236.

(ii) Potentially some of the same factors that are looked at in determining remedies could also be used in determining whether the harm done was enough to push the statement over the demonstrably justifiable threshold. For example, where the defendant has a great influence over the public or where the nature of the defamatory statement is a serious allegation, the harm will likely be greater.

The challenge in implementing this second limb would be to not undermine the honest opinion defence by causing more uncertainty or by requiring such care be taken before any statement is made that it has a chilling effect on speech.

VIII Conclusion

The unfeasible pursuit of a distinction between fact and opinion casts the law of defamation into a ‘chilling’ world of uncertainty. A society unable to understand and predict when they are free to speak their mind will create self-censorship, hindering the positive public interest effects of debate and discussion, as was seen in *Singh*.¹⁶⁸ The proposed test would more effectively provide foreseeable results for communicators while giving the courts a flexible approach that better reflects the fluidity of language and allows the defence to play its intended role as the hallmark of free speech.

¹⁶⁸ *Singh*, above n 3, at [11].

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