PROTECTING THE REPUTATION OF CORPORATE PERSONNEL, ORGANS AND ASSOCIATES

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Introduction

Ever since the case of *South Hetton Coal Company, Limited v. Eastern News Association, Limited* ("*South Hetton*"),[1] it has been clear that trading companies are able to protect their reputation by suing for defamation where the defamatory matter reflects upon the trade or business of the company. Subsequent cases have extended the right to sue for defamation to non-trading companies.[2] Although the action for defamation has never been seen as the sole method by which companies can protect their reputation, it has been used to protect two facets of corporate reputation: the general corporate image, and the personnel and associates of the company. This article concentrates on the latter of these two matters. The remaining aspects of corporate reputation, the corporate product and the goodwill, are protected by actions for injurious falsehood and passing off respectively.

In *South Hetton*, Lord Esher M.R. took as his premise the fact that:

> [t]he law of libel is one and the same as to all plaintiffs; and that, in every action of libel, whether the statement complained of is, or is not, a libel, depends upon the same question — viz., whether the jury are of the opi-

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1. [1883] 1 Q.B. 133 (C.A.). This case drew upon the earlier authorities of *The Metropolitan Saloon Omnibus Company (Limited) v Hawkins* (1859), 4 H. & N. 87, 157 E.R. 769; and *The Mayor, Aldermen and Citizens of Manchester v Williams*, [1891] 1 Q.B. 94.
2. For example, *Bognor Regis Urban District Council v Campion*, [1972] 2.Q.B. 169.

> nion that what has been published with regard to the plaintiff would tend in the minds of people of ordinary sense to bring the plaintiff into contempt, hatred or ridicule, or to injure his character. The question is really the same by whomever the action is brought — whether by a person, a firm, or a company. But though the law is the same, the application of it is, no doubt different with regard to different kinds of plaintiffs.[3]

A matter which sets apart the application of the law of defamation to companies from its application to non-corporate persons is the obvious fact that the company lacks any physical embodiment. A company can only act through its instruments: its directors and other agents, its employees and its general meeting. This raises the question of whether and when the company can sue for defamations of these instruments. Its ability to do so will govern both the extent to which it can protect its image and the extent to which it can protect its personnel. It seems that defamation of one of these corporate instruments may amount to defamation of the company either because it reflects on the "hiring and firing" policies of the company or because the instrument was, in law, the company. The organic theory of company law may well, therefore, have a part to play in determining when a company may sue for defamation. Another familiar doctrine of company law which may be relevant is that which relates to the piercing of the corporate veil. This is the case because the company may have an interest in protecting the reputation of those who are not strictly speaking its instruments or organs; for example, its shareholders or other members of its corporate group.

A subsidiary matter, but one which is related to the foregoing, is the question of who is "another person". An actionable defamation is one which is communicated to another person.[4] A statement about a company made to one of its instruments may not be a statement to another person. Alternatively, a statement made within the confines of the company while being made to another person may attract the defence of privilege.

Image of Corporate Personnel and Employees

Neiman-Marcus Co. v. Lait[5] provides a good example of the type

3. *South Hetton*, op cit., n.1, 138.
4. See, for example, *Riddick v Thames Board Mills Ltd,* [1977] 1 Q.B 884.
5. 107 F. Supp. 96, (1952).

of case in which the image of corporate personnel is directly relevant to the trading reputation of the company. In that case, the United States' District Court appeared to accept the assertion of the plaintiff company that it was "one of the leading and most fashionable stores in the United States", that it spent considerable quantities of money maintaining its goodwill and that much of its success depended upon the reputation, demeanour and skill of its personnel. The Court went on to say that:

> Because of the nature and character of Neiman-Marcus' Stores, the relationship between its clientele and personnel is a very personal one and to an unusual degree its good will [sic.] and business are dependent on the trust and confidence which its customers repose in the character and reputation of the personnel of the stores and in the reputation and good taste of the stores themselves.[6]

That being so, allegations that the plaintiff store employed saleswomen and models who were prostitutes or "call-girls" and dress designers who were homosexuals (the case, it must be remembered, was decided in 1952) would seriously injure its trading reputation. The case does, however, make it clear that even where one is dealing with such a plaintiff as Neiman-Marcus Co, insults about the personnel of a company will not necessarily be defamatory of that company. Clearly the company must be in some way responsible for the alleged state of affairs. In *Neiman-Marcus Co v. Lait* the comments about the personnel of the plaintiff were defamatory because they reflected upon the hiring policies of Neiman-Marcus Co. In the absence of such a suggestion of responsibility a company cannot maintain an action for a defamation of employees or representatives.[7]

Applicability and Effect of the Organic Theory

Having no physical existence, a company, while a separate legal person, can only act through others who may be either its agents or organs. The two main organs of the company are, of course, the board of directors and the general meeting. The question of which of these organs may be regarded as the company in relation

6. Ibid., 101n.
7. *R.H Bouligny, Inc v United Steelworkers of America* 154 S.E. (2d) 344, 352, (1967), which suggests that the ability to maintain such an action is the exception rather than the rule.

to a particular matter is generally dependent on the allocation of functions in the constituent documents of the company.[8] Usually the board of directors exercises the managerial functions of the company.[9] This being so, certain allegations about the board of directors may amount to a defamatory imputation concerning the management of the company. Likewise where the articles of association delegate particular managerial functions to, for example, a managing director. Equally, it seems that certain allegations about the company in a general meeting may be defamatory of the company where they are made with respect to those functions allocated to the general meeting under the articles of association. This is largely unproblematic. More difficult questions may be raised where a single director, member or even employee is the subject of a defamatory statement.

Companies are more likely to be identified in the public mind with the directors than with the shareholders because the directors, as mentioned above, generally exercise managerial functions and therefore represent the visible face of the company. One result of this is that problems of the identification of the reputation of an individual director with that of the company are more likely to arise. An early example of this occurred in *R v. Jenour*[10] in which the Crown moved for an information against the defendant for publishing a libel against the East India Company. The matter which had been published by the defendant was:

> Whereas an East India director has raised the price of green tea to an extravagant rate, the same gentlemen being also concerned with the Swedish East India Company, the English proprietors hope he will find some measure to raise bohea-tea in Sweden, that the company may have an opportunity to ship off some of their bad bohea-tea, instead of having it burnt as usual.[11]

The argument in the case concerned the question of whether or not it was correct to describe this as a libel against the East India Company. All the members of the Court held that it was a libel against the company because it amounted to a "reflection on the

8. *Shaw and Sons (Salford) Ltd v. Shaw*, [1935] 2 K.B. 113, 134 (C.A.).
9. For example, see *Companies Act, 1981* (Cth), Table A, Regulation 66 and Companies (Tables A to F) Regulations 1985, Table A, Regulation 70 (England).
10. 7 Mod. 400; 87 E.R. 1318.
11. Ibid., 400; 1318.

whole body".[12] It was held that the slander was a metonymy since one person could not alone have raised the price of tea.[13] Nor would anyone understand otherwise. The case must be considered in the light of the fact that the notion of separate legal personality was yet to be developed. Therefore, it may be seen as merely holding that a reflection on one may be a reflection on the whole group of which that one is a representative or member, the essential question being whether readers would be likely to identify the interests of the individual with those of the company.

The case of *Studdert v. Grosvenor*[14] also predates the decisive articulation of the separate corporate personality theory in *Salomon v. Salomon and Co.*.[15] However, the company in this case was a limited company and the approach is largely consistent with a modern view. The background to *Studdert v. Grosvenor* was that the plaintiff company, at the behest of its directors, had caused two criminal prosecutions for libel to be brought in the name of the company. One of these prosecutions was brought in respect of the publication of the following words in the *Broad Arrow*:

> Where does the surplus cash (of the company) go to? Have any of the directors bought new houses lately. I think I can name two. Have any of the directors' wives had handsome presents made them by tradesmen from whom the stores are supplied?[16]

The other prosecution was taken against a discharged employee who walked up and down in front of the company premises wearing a sandwich board which said, *inter alia*, "Public Notice. Beware of the confidence trick party. *The Army and Navy Stores* [the company] ... is a swindle and a counterfeit, and the directors a gang of swindlers and blacklegs" and so forth.[17] The action in *Studdert v. Grosvenor* was brought by a shareholder, on behalf of himself and all other shareholders, against the directors claiming that the company should not have to bear the cost of criminal proceedings. The

12. Ibid., 402; 1319 per Page, J. Similarly, per Chapple, J.: "It seems to be a reflection upon all the directors, and the conclusion of it seems to throw a general reflection on the company": ibid.
13. Ibid., per Page, J.
14. (1886), 33 Ch.D. 528.
15. [1897] A.C. 22.
16. Op. cit., n.14, 530.
17. Ibid., 531.

resolution of this matter involved Kay, J., in considering whether or not these amounted to libels on the company. He took the view that the prosecution in respect of the publication in *Broad Arrow* was not properly taken by the company, although the prosecution of the former employee was. In relation to the *Broad Arrow* libel, the directors argued that they had been involved in trying to prevent dishonest practices amongst corporate employees and that their efforts in this respect would be seriously hampered by similar allegations about themselves. Kay, J., said:

> It was a matter seriously affecting their [the directors'] private characters, and only incidentally injuring the company, because some persons might be deterred from becoming customers if they believed the gross charges made against the honesty of the directors. The object of this prosecution was mainly to clear the directors from an infamous charge.[18]

On the other hand, with respect to the former employee, Kay, J., held that the directors were acting in the interests of the company since the conduct was seriously injuring the company. Thus, the corporate funds were properly expended. This may have been because the company itself was described, as distinct from the directors, as a "swindle and a counterfeit", although it is not stated in the report. The different approaches of the Court with respect to the two libels do, however, illustrate the difficulty in drawing the line between libels of directors *qua* individuals and the directors *qua* the company. Nevertheless, as stated above, the approach is consistent with the theory of separate legal personality and with statements in later cases such as:

> A company can have a reputation which is not the reputation of the individual directors, but the reputation of the company, the reputation which the company itself and itself alone can protect by means of an action for libel.[19]

The general approach, however, of cases like *Studdert v. Grosvenor* may require some revision in the light of the development of the organic theory of company law. It is necessary to consider whether this theory or some variant of it could be used to give the company a right of action in cases where individual directors are defamed.

18. Ibid., 537. Repayment of the funds expended was not, however, ordered since the general meeting was aware of the payment being made before the action was commenced. This was on the basis of the principle from *Pickering v Stephenson* (1872), 14 L.R. Eq. 322.
19. Per Cozens-Hardy, M.R., in *Willmott v London Road Car Company, Limited,* [1910] 2 Ch. 525 (C.A.)

The *fons et origo* of the organic theory is the speech of Lord Haldane, L.C., in *Lennards Carrying Co. v. Asiatic Petroleum Co. Ltd.*:

> [A] corporation is an abstraction. It has no mind of its own anymore than it has a body of its own; its active and directing will must be consequently sought in the person of somebody who for some purposes may be called an agent, but who is the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[20]

Where such a directing mind and will can be found then the acts and intentions of that directing mind and will are the acts of the company itself rather than merely the acts for which the company is liable on the basis of *respondeat superior*.[21] Originally, the doctrine applied in order to extend the liability of companies in matters which involved determining corporate intention. However, it has been applied in other circumstances. For example, in *H.L. Bolton (Engineering) Co. Ltd v. T.J. Graham & Sons Ltd*, Lord Denning spoke of the directing mind and will of the company in relation to the question of whether the company intended to occupy certain premises.[22] The real difficulty in applying the doctrine to the area of defamation is the very fact that the use which has been made of the doctrine has been for the purpose of determining the intention or state of mind of the company. If the theory is to be confined in this way, then it will be a singularly inappropriate theory for determining the ability of the company to sue for the defamation of the director. However, in principle, the proposition that a defamation of a person who is the directing mind and will of a company should amount to a defamation of the company itself is not inconsistent with the organic theory, the law on defamation nor logic. In particular, so far as the law on defamation is concerned, since it focuses on the perception of those to whom the communication is made and since a company is likely to be perceived in terms of the personality of its directing mind and will, the application of the organic theory does not seem offensive. For example, even allegations of personal misconduct such as those in *Studdert v. Grosvenor* might ground an action if those directors were the directing mind and will of the company. It does not appear that the organic theory has

20. [1915] A.C 705, 713 (H.L.).
21. Ibid., 714.
22. [1957] 1 Q.B. 159 (C.A.).

ever been used in this manner. However, the organic theory, or something similar to it, has had some impact in the area of defamation of companies.

An interesting case on the relationship between the reputation of the company and its directors is *Hill, Edgar, Christie & Johnson v. Taylor.*[23] The plaintiffs in this case were in a position equivalent to that of directors of the State Rail Authority of New South Wales (S.R.A.), a statutory corporation. The suit was brought in respect of publications of allegations that the S.R.A. paid 4.2 million Australian dollars to a certain company, Seatainer Terminals Limited, for the remainder of a lease that the S.R.A. had previously granted to the company but in respect of which the company had no further use. In the impugned publications, the defendant was said to have called for an enquiry into the part played by the chairman of the S.R.A., Alex Carmichael, who was described as being associated in some way with the Seatainer group of companies. The plaintiff Hill was identified as the chief executive of the S.R.A. The other plaintiffs were not mentioned by name. The plaintiffs argued that the publication amounted to a defamatory imputation on them because it suggested that they had been susceptible to persuasion from Carmichael to enter into a transaction which was very favourable to Seatainer with the result that the plaintiffs were disloyal to the S.R.A. and failed to act properly as members and that in participating in the transaction the plaintiffs were acting corruptly. The two pertinent arguments of the defendants were that, first, the material was not capable of indentifying the plaintiffs other than Hill and, secondly, even if identified, the plaintiffs were unable to sue because only the S.R.A. had a right of action. Thus it can be seen the case involves the inverse proposition to that which has been the subject of discussion immediately above.

With respect to the first argument of the defendants, that the material was not capable of identifying the plaintiffs other than Hill, David Hunt, J., said:

> A corporation such as the State Rail Authority is, of course, an abstraction in law and it can only act by its agents. Such a concept may not be immediately apparent to the ordinary reasonable reader or viewer; to such

23. New South Wales Supreme Court, Common Law Division, Unreported, 25 November, 1983.

> a reader or viewer a corporation can have a personality of its own. When it is announced, for example, that the S.R.A. has just increased rail fares or reduced train services, the picture in the reader's mind is of some shadowy entity called the S.R.A., and it is against that entity that his anger ... would be directed initially. But a moment's thought would bring to the reader's mind a fact which is undoubtedly a matter of general knowledge within the community, that an entity such as the S.R.A. is administered by a person or a group of persons so that, when something is said or done, by the S.R.A., it is in reality said or done by the group of persons who are responsible for its administration.[24]

Therefore, the Court held that since all this was a matter of general community knowledge, the identification of the plaintiffs was within the natural and ordinary meaning of the words.

The second argument of the defendant, that the plaintiffs were precluded by law from suing, is based upon a passage from *Gatley* to the effect that members of the company are precluded from suing individually in respect of defamations of the company.[25] David Hunt, J., agreed with this principle, but considered that a distinction must be made in this respect between the members of a company and its directors. He said that it was difficult to think "of a statement concerning a company where the imputation which it conveyed would not also relate to directors or to those persons who were known to be responsible for the conduct of the company which was the subject of the statement made".[26] Therefore, directors cannot be precluded by law from suing "where the ordinary reasonable reader is entitled to infer that the (directors) ... were responsible for the conduct of the corporation which has been criticised".[27] It is submitted that if this case is to be regarded as good authority on the relationship between the reputations of the company and the directors (and the reasoning of the judge is persuasive) then the inverse of the case should also be true. Therefore, the company would have a cause of action with respect to the defamation of a director *qua* director at least where the director was the alter-ego or directing mind and will of the company or was perceived as such by the relevant audience.

24. Ibid., transcript pp. 4-5
25. *Gatley on Libel and Slander* (8th ed., 1981), para. 228 which places reliance on *Campbell v Wilson*, [1934] S.L.T. 249, 252.
26 Op cit., n.23, transcript p.6.
27. Ibid , transcript p.7.

The organic theory was used in a different way again in relation to the law of defamation in *Tratztand Pty Ltd v. Government Insurance Office of New South Wales*.[28] This case focuses on the need for there to be a publication to a third person in order that a defamation occur.[29] The plaintiff company traded as an autobody repairer. It alleged that servants or agents of the defendants made statements referring adversely to the quality of the work done by the plaintiff on certain vehicles. The statements were made to two employees of the plaintiff company, one of whom was a director. The defendant argued, on the basis of cases concerned with the application of the organic theory[30] that the publication was made to the company itself and not to a third party. The plaintiff, on the other hand, argued that a servant or agent is to be regarded as a third party for the purposes of the rules on publication.[31] Hunt, J., held in favour of the plaintiff. His judgment contains various matters of interest. First of all, with respect, he obscures the law of servants and agents with the organic theory and, secondly, he obscures both the law of servants and agents and the organic theory with the theory of separate corporate personality. The first of these two obscurities results from the fact that he does not consider whether the director in this case really was the servant or agent or whether the director was an organ of the company. This is a question of fact, the answer to which may result in significantly different conclusions in law. The separate corporate personality theory arises in the judgment of Hunt, J., when he says that since a company is a distinct entity a director cannot be the company:

> Although the legislature has in some instances allowed the lifting of the corporate veil, there has as yet been no instance when either the legislature or the common law has identified a company with its servants or agents as the one person for the purposes of the law on defamation.[32]

28. [1984] 2 N.S.W.L.R. 598.
29. This requirement is now codified in *Defamation Act, 1974* (N.S.W.) s.9(2)
30. *Tesco Supermarkets Limited v. Nattrass,* [1972] A.C. 153; *H L Bolton (Engineering) Co Ltd v T.J Graham and Sons Ltd,* op. cit., n.22; and *Brain v Commonwealth Life Assurance Society Ltd* (1934), 35 S.R. (N.S.W.) 36.
31. Reliance was placed upon *Ward v. Smith* (1830), 6 Bing. 749, 130 E.R. 1469; *Duke of Brunswick v. Harmer (No.1)* (1849), 14 Q.B. 185, 117 E.R. 75; *Pullman v Walter Hill Co Ltd,* [1891] 1 Q.B. 524.
32. Op. cit., n.28, 600.

It should be noted that this statement refers to "servants and agents", a different question to that of the identification of corporate organs with the company. The reason that Hunt, J., took this approach is that he seemed to regard the organic theory of company law as having no application in cases of this sort. He acknowledged the artificiality of such an approach in cases where, for example, a publication is made to a managing director where that managing director is to be regarded as the alter-ego of the company. Nevertheless, he seemed to take the view that the difficulties raised by this type of example should be dealt with not upon the basis that there has been no publication to a third party but rather upon the basis that there is no likelihood of harm.[33] This is not an unacceptable approach, but it is needlessly artificial and circuitous, since the reason that there is no likelihood of harm is because of the identification of the managing director (in the example of Hunt, J.) with the company.

The case of *Tesco Supermarkets Limited v. Nattrass*[34] referred to in *Tratztand v. Government Insurance Office of New South Wales* raises the question of whether or not a servant or an employee can ever be the company under the organic theory. It appears that this may occur where the employee has had the functions of the relevant organ of the company (usually the board of directors) in relation to the particular matter delegated to it. If this occurs then the employee may, in relation to the particular matter, be the company. If the organic theory in relation to employees was to be applied in the area of defamation this would have the same two results as it would have in relation to its application to directors. First, the defamation of the employee in relation to that function would amount to a defamation of the company in respect of which the company could proceed. Secondly, a statement made to the employee in relation to the particular function would not be a publication to a third party. Not only would *Tratztand Pty Limited v. Government Insurance Office of New South Wales* appear to set its face against the second of these two conclusions, but so also, by and large, would the case of *Rid-*

33. See *Defamation Act, 1974* (N.S.W.) s.13.
34. Op. cit., n.30.

dick v. Thames Board Mills Limited.[35] This case concerned a suit with respect to an interdepartmental memorandum within a company to the effect that the plaintiff was not up to the demands of his job. One of the arguments in the case was concerned with the question of publication. An argument was made by the defendant company that the writer of the memorandum was acting as the company when writing it and likewise the reader was acting as the company when reading the memorandum with the result that this was merely a publication by the company to itself. Lord Denning described this as the *qui facit per alium facit per se* theory of the master's liability for the acts of his servant. However, he said that modern authority compelled the acceptance of the *respondeat superior* theory and from this he seemed to conclude that all employees must be regarded as separate persons from their employer so that the reader would be a third party for the purposes of publication. Nevertheless, he took the view that, on policy grounds, interdepartmental memoranda should not make an employer liable in defamation. Presumably this view was based upon the positions of writer and reader as part of the same organisation and the stultifying effect on the internal administration of organisations which would otherwise occur. Stephenson and Waller, L.JJ., disagreed with Lord Denning. Stephenson, L.J., thought that the authorities on publication led inevitably to the result that publication to other corporate employees by a corporate employee was a publication to a third party for which the company was liable.[36] Waller, L.J., while coming to the same conclusion as Stephenson, L.J., took a different and interesting approach. He considered that the relevant choice was between the theory of vicarious liability and the theory of liability of a corporation. The former theory led to the conclusion that there had been a publication to a third party, because both writer and reader would be seen as separate persons from the employer. The latter theory led, in certain circumstances, to the conclusion that there had not been a publication to a third party. In this case, Waller,

35. Op. cit., n.4

36. He referred to *Pullman v Walter Hill Co Ltd*, 31 supra, *Boxsuis v Goblet Freres*, [1984] 1 Q.B. 842; *Edmondson v Birch C Ltd*, [1907] 1 K.B. 371; *Osborn v Thomas Boulter and Son*, [1930] 2 K B. 226; *Bryanstone Finance Ltd v de Vries*, [1975] Q.B. 703

L.J., preferred the vicarious liability theory. However, his judgment raises the possibility that a company could be distinguished from other employers with respect to the question of publication in the law of defamation. It seems that such a distinction could be drawn in situations where the servant who is reading or hearing the allegedly defamatory matter can be regarded as the company under the principles developed in *Tesco Supermarkets Ltd v. Nattrass*. The Denning approach, however, which views interdepartmental memoranda in any organisation as not being a publication to a third party, seems preferable to drawing such an artificial distinction between corporate and non-corporate employers. Thus, the application of the organic theory may well be undesirable in such a case.

From the foregoing it should be apparent that the application of the organic theory in the area of defamation of companies is a two-edged sword so far as the company is concerned. On the one hand, identification of the organ with the company may expand the range of situations in which the company can sue for defamation. On the other hand, a statement about the company to its organs would not be regarded as a publication to a third party and therefore would not be defamatory of the company. The scope for the application of this theory is, of course, considerably greater in relation to directors than it is in relation to employees. *Tesco Supermarkets Ltd v. Nattrass* illustrates that it will be unusual for a mere employee to be regarded as the directing mind and will of a company. From the company's point of view this is a desirable result, at least in the present context, since usually a company will be particularly susceptible to defamations of it directed to its employees. In *R.H. Bouligny, Inc. v. United Steelworkers of America*,[37] it was held that statements which are calculated to cause damage to the relationship between a plaintiff company and its employees are actionable defamations without proof of special damage because that relationship is "an important asset of any business corporation".[38] While there does not appear to be any case in this jurisdiction which has added such a class of statements to the categories of actionable defamations of companies, the broad definition which has been given to the notion of trading reputation would probably extend to cover most injurious statements of this nature.

37. Op. cit , n.7
38. Ibid., 353

Raising the Corporate Veil

The foregoing has been concerned with the identification of the corporate image with that of the director or employees. The identification of the corporate image with that of the members tends to raise slightly different problems. In general, courts have tended to take a firm position on the question of members suing individually for wrongs done to the company by stipulating that the company, and only the company, is the proper plaintiff.[39] Not surprisingly, this rule has found its way into the law of defamation of companies.[40] The converse of this rule is also true. Companies cannot sue for defamations of their members. This was clearly laid down by Lopes, L.J., in *South Hetton* who said: "The words complained of, in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation or company as distinct from the individuals who compose it".[41] An example of the application of this rule occurred in *Church of Scientology of Toronto v. Globe and Mail Ltd*[42] in which the allegedly defamatory words were *inter alia*: "MDs Worried Scientologists Breaking Law"; "whether the members of the Church of Scientology had been practising medicine"; "Scientologists had been offering passers by ... personality profiles".[43] The Court held that, while it may sometimes be difficult to determine whether the words refer to the company or its members, it was clear that here they referred to the members and thus the plaintiff company had no cause of action.

The principle that companies cannot sue for defamations of their members can only be regarded as having been strengthened as a result of the definitive statement of the separate legal personality of companies in *Salomon v. Salomon and Co.*.[44] Likewise, acknowledgement in the case law of the ability of members to defame the company serves to illustrate the clear distinction in this respect.[45] It should perhaps be noted in passing that defamatory

39. This is, of course, one limb of the famous rule from *Foss v Harbottle* (1843), 2 Hare 461.
40. See, for example, David Hunt, J., in *Hill, Edgar, Christie and Johnson v Taylor,* op cit , n.23, transcript p.6 and see text accompanying n 25-26 supra.
41. Op. cit., n.1, 141.
42. (1978), 84 D.L.R. (3d.) 239.
43. Ibid., 239.
44. Op cit., n.15.
45 See, for example, *Quartz Hill Consolidated Gold Mining Company v Beall* (1882), 10 Ch.D 501 (C.A.).

statements about the company made by members only to other members[46] or in a company meeting[47] will attract the defence of privilege and thus be defamatory only if shown to be malicious. The cases seem to indicate, however, that this is not due to anything inherent in the nature of the relationship between the company and its members. Rather, it depends upon the fact that the defamatory statement was made to a limited group of people each of whom had a particular interest in the subject matter of the defamation.

Since the judicial pronouncements to the effect that a company cannot sue for the defamation of its members appear to rest on the theory that the company and its members are separate entities, then it would seem that the exceptions to the rule of separate legal personality, where appropriate, could also apply in this area. The courts have not shown a great willingness to lift the veil between the company and its members even where the company is, in essence, owned by only one person[48] unless it is for the purpose of imposing liability on the person who is using the corporate form as a sham.[49] Thus, there is no clearly established exception which could be applied to allow "one-man" companies to sue in respect of defamations of their dominant member.

Nevertheless, a general trend in favour of recognising some commonality of interest between closely held companies and their owners has not gone entirely unnoticed in the law of defamation. The Court of Appeal of New South Wales attempted to come to terms with some of these issues in *World Hosts Pty Ltd v. Mirror Newspapers Ltd.*[50] The article in question, published in the newspaper of the defendant, was as follows:

> CAPRICE OWNER DECLARED BANKRUPT BY COURT.
> A Point Piper restauranteur, George Pierce Countis, was declared bankrupt in Sydney yesterday. Countis carries on business at the Caprice Restaurant Rose Bay.

In fact the restaurant was owned by the plaintiff company of which Countis was an employee. The plaintiff company was owned by Mr

46. Ibid.
47. Compare *Lawless v The Anglo-Egyptian Cotton and Oil Company* (1869), 4 Q.B D. 262.
48. *Salomon v Salomon and Co.*, op.cit., n.15 being a case in point. See also *Lee v Lee's Air Farming Ltd*, [1961] A.C. 12 (P.C.).
49. See, for example, *Gilford Motor Co v Horne*, [1933] Ch. 935.
50. [1976] 1 N.S.W.L.R. 712 (C.A.).

and Mrs Lapin. Moffitt, P., held that it would be open to a jury to conclude that any reader who knew that the restaurant business was carried on by the plaintiff company would reconcile the inconsistency between their knowledge and the article by concluding that Countis owned the plaintiff company, especially since the news value of the article clearly was not that it was Countis *qua* the individual that was bankrupt but rather Countis *qua* the owner of the "Caprice".

> A reader, a jury might find, would not discard this focus of the news, but would understand the writer to be referring to the well known practice of looking beyond the company structure to the ultimate owner of the business. It is quite usual in speech, writing and thought to refer to the ownership of an asset by a natural person, where the asset is owned by a proprietary company, but its shares, or most of them, are owned by the person in question.[51]

If this is so then the plaintiff's case must rest on that class of readers who knew that the plaintiff company owned the restaurant but did not know who owned the plaintiff company. Moffitt, P., went on to say that:

> This leads then to what I regard as the difficult question raised by this appeal — namely whether it was defamatory of the plaintiff proprietary company to say that it was the man who owned and controlled it and ran it who was bankrupt. Is such a statement likely to injure the plaintiff in its business, conducted under the name of the Caprice Restaurant? Even if it does is it defamatory of the plaintiff, as it refers not to the conduct of the plaintiff but of another.[52]

Hutley, J.A., posed the question similarly.[53] Regrettably, the Court was not required to solve these issues in terms of the presently applicable law but rather under a section of the *Defamation Act, 1958* (New South Wales) which, contrary to the common law on defamation, did not require the statement concerning the plaintiff to relate to some condition for which the plaintiff was allegedly responsible. They held, therefore, that an imputation that the plaintiff was controlled by a bankrupt is an imputation about the company which is likely to injure it because "a reader ... would insinuate that the proprietary company which was interposed, i.e. the plaintiff, was financially insecure and not financially dependable".[54] Some allu-

51. Ibid., 715 per Moffitt, P.
52. Ibid., 716.
53. Ibid., 720.
54. Ibid., 718 per Moffitt, P., 722 per Hutley, J.A.

sions, however, were made to the general law of defamation. In particular, the Court considered the question of when a statement about X would amount to a statement about Y for the purpose of the law on defamation. Hutley, J.A., said:

> In determining which on the face of it is about 'X' can be a statement about 'Y', regard can be had to the understood connections between 'X' and 'Y'. A statement that 'Y' is a bastard is defamatory not only of him but also of his mother and of his father, in that this statement contains, to those who know his parentage, imputations against both his father and mother. To say of a husband that he is a cuckold is defamatory of his wife: *Vicars v. Worth* (1722), 1 Str. 472; 93 E.R. 641.[55]

It is quite unclear whether or not the notion of understood connections would suffice at general law to allow at least "one man" companies an action in respect of defamations of their major shareholder or controller where that defamation clearly relates to some matter with respect to which the company has a legitimate concern (such as creditworthiness). It is also unclear as to whether or not a company could be regarded as being responsible for having a controller who was financially insecure. In *World Hosts Pty Ltd v. Mirror Newspapers Ltd*, reference was made to the question of realities of financial support between a "one man" company and its major shareholder.[56] In the light of this, any distinction between the two with respect to matters such as creditworthiness, even based upon the notion that the defamation must relate to some conduct for which the plaintiff is responsible, seems illusory.

So far as the question of whether a defamation of a one man company to its controller would constitute a publication to a third party enabling the company to sue, there is similarly no clear answer. However, it would seem absurd if that was the case. It seems unlikely, given this absurdity, and given the fact that the courts seem willing to pierce the corporate veil to limit opportunism, that separate legal personality would be insisted on in such a circumstance.

Under general company law, the courts have shown some willingness to pierce the corporate veil between groups of associated companies, although this appears only to have been the case where

55. Ibid., 721 per Hutley, J.A.
56. Ibid., 720 per Hutley, J.A.

the companies operate essentially as one entity.[57] In the defamation context, there is very little to indicate how the courts are likely to treat associated companies or groups of companies. The only case in which this issue appears to have been addressed is *Anderson v. Church of Scientology*.[58] In that case, the Court refused to regard the Church of Scientology of Western Australia as being identified for defamation purposes with its parent church in the United States. Accordingly, an allegation made on Western Australian radio that the religion was not genuine and that the United States church was registered as a religion in order to avoid tax did not give the Church of Scientology of Western Australia a cause of action. Given that the objects of the Western Australian church included affiliating and co-operating with the United States "mother church" and given the likely public perception about the relationship between the two, it seems plausible to suggest that the Court could have applied some sort of corporate group theory. However, the Western Australian company does appear to have had a separate existence of its own. Possibly a group theory would be applied in a stronger case.

Conclusion

It is apparent from the foregoing that the degree of difficulty which will be encountered by a company in pursuing a defamation action when the defamatory matter was directed at its personnel, organs or associates varies significantly depending upon the circumstances in which the defamation occurred. Thus comparatively insignificant difficulties will be encountered where the defamatory allegations attack corporate personnel:

i. in their capacity as corporate personnel or associates;
ii. in a way which reflects directly on the trading reputation of the company; and
iii. in respect of a state of affairs for which the company is in some way responsible.[59]

The inverse proposition is, unsurprisingly, true. The greatest difficulties arise where it is unclear: whether the person is attacked

57. See, for example, *D H.N Ltd v. Borough of Tower Hamlets*, [1976] 1 W.L.R. 852 (C.A.). See also, L.C.B. Gower, *Gower's Principle of Modern Company Law* (4th ed., 1979) 128-133.
58. [1981] W.A.R. 279 (Supreme Court of W.A.).
59. *Neiman Marcus Co v. Lait*, op. cit., n. 5, discussed in the text accompanying n. 5-7 supra is the classic example here.

in their capacity as a member of corporate personnel or as a corporate associate;[60] it is unclear whether the attack on them reflects on the trading reputation of the company;[61] or it is unclear whether or not the company can be said to be responsible for the alleged state of affairs.[62]

It has been suggested that the organic theory of company law may have a role to play in resolving some of these questions. Thus if a person is the directing mind and will of the company or has had the relevant functions of the company delegated to them with respect to the matter to which the defamation relates then these three questions should be answered affirmatively. But then, the question arises as to whether or not this is tantamount to saying that any defamation of such people amounts to a defamation of the company. The question is particularly pertinent since a difficulty arises here in trying to determine whether or not someone has been defamed in their personal capacity or in their capacity as a corporate associate of some kind.[63] The answer to the question must be that in the case of those people to whom only some of the corporate functions have been delegated then only in relation to those functions could a defamation of them amount to a defamation of the company. On the other hand, in relation to persons who could be described in general as the directing mind and will of the company, perhaps logic compels one to the conclusion that any defamation of such persons is one for which the company can sue because they are in law regarded as the company. However, the courts have not so far displayed any inclination to apply the organic theory in this context, although *Hill, Edgar, Christie and Johnson* v. *Taylor*[64] may be a step in that direction.

If the case is a suitable one in which to pierce the veil between a company and its shareholders or other companies somehow associated with it[65] then the question arises, similar to that con-

60. For example, *Studdert v Grosvenor*, op. cit., n 14.
61. Ibid
62 For example, *World Hosts Pty Ltd v Mirror Newspapers Ltd*, op. cit., n. 50.
63. See, for example, *Studdert v Grosvenor*, op. cit., n. 14.
64. Op cit., n. 23 and see text accompanying n 23-27 supra.
65. By virtue of being a parent, a subsidiary or because of some other type of corporate association such as the one which existed in *Re FG (Films) Ltd* [1953] 1 W.L.R. 483.

sidered immediately above in relation to the organic theory, as to whether or not it is justifiable to assert that the three factors mentioned in the first paragraph of this conclusion will be necessarily met. Since the courts demonstrate a marked reluctance to pierce the corporate veil, not only as between the company and its dominant natural person shareholder[66] but also with respect to groups of companies[67] then it may well be that the furthest the courts will ever go here is to apply the law on understood connections.[68]

One may assert here the proposition that where it is possible to say that the person who has been defamed is in law the company, either because of the organic theory or because the veil has been lifted, then one is compelled to the conclusion that the three elements, stated above, are necessarily satisfied. The first element appears to be satisfied as a matter of logical necessity. The second element is satisfied because where the situation is such as to make it appropriate to apply the organic theory or to lift the veil then the reasonable person who has business dealings with the company (who appears to be the person through whose eyes one should look in determining whether or not the company's trading reputation has been affected)[69] would think that the way in which such a person acts reflects upon the trading reputation of the company. The third element would be satisfied where the person defamed is responsible for the state of affairs alleged in the defamatory matter because if the person is to be regarded as the company then the company is inherently responsible. This analysis of the three elements could explain those cases in which a defamation of an organ, either the board of directors or the general meeting, amounted to defamation of the company.

A problem, however, remains: what of those cases in which the directing mind and will of the company is not someone with whom the company is publicly associated? In such a situation it is ques-

66. See text accompanying n. 48 supra.
67. See F. Rixon, "Lifting the Veil between Holding and Subsidiary Companies" (1986), 102 L.Q.R. 415 which suggests that *DHN Ltd v Borough of Tower Hamlets,* op.cit. n. 57 no longer reflects the attitude of English courts to groups of companies. It is arguable whether it ever reflected the attitude of the Australian courts.
68. See text accompanying n. 55 supra.
69. See *Barnes v. Sharpe* (1910), 11 C.L.R. 462; *Diplomat Electric Inc v. Westinghouse Electric Supply Co.* 378 F. 2d. 377 (1967).

tionable whether the first and, especially, the second elements could ever be satisfied. The answer here might be to qualify the way in which the organic theory applies by saying that where the reasonable person who has business dealings with the company knows of facts sufficient to lead a court to the conclusion that the person defamed is the directing mind and will of the company then defamation of that person will amount to defamation of the company. This particular problem may also arise in relation to the lifting of the corporate veil in this context, although arguably the courts would be unlikely to lift the veil in relation to a defamation where the person defamed was not publicly associated with the company.