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Report 64

Defaming Politicians

A Response to *Lange v Atkinson*

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Dear Minister

I am pleased to submit to you Report 64 of the Law Commission, *Defaming Politicians – a Response to Lange v Atkinson*.

Yours sincerely

The Hon Justice Baragwanath
President

The Hon Phil Goff
Minister of Justice
Parliament Buildings
Wellington

Defaming Politicians – a Response to *Lange v Atkinson*

THE LITIGATION

1 Mr lange, a former prime minister of New Zealand, claims damages for defamation from the author of an article published in a monthly magazine with a New Zealand-wide circulation and from the magazine's publisher. In response to Mr Lange's claim the defendants pleaded that they were entitled to invoke the defence of qualified privilege. Mr Lange applied to have this defence struck out. This application was declined by a Judge of the High Court,[1] and the High Court's ruling was upheld by the Court of Appeal.[2]

QUALIFIED PRIVILEGE

2 The basis of the defence of qualified privilege is an acceptance that there are situations in which one may have a duty to tell the truth as one sees it without being liable to a damages claim if one is mistaken. There is an infinite number of occasions on which the privilege exists. A reference given by an employer, an entry in a ship's logbook, or a report to his Council by one of its officers preceding a decision by a local body are examples.

3 It is essential to the existence of the privilege not only that the maker of the statement has a duty to make it but also that the recipient of the information has a duty or interest in receiving it. The word "interest" is used in the sense of a stake in rather than curiosity about.

> One has to look for a legitimate and proper interest as contrasted with an interest which is due to idle curiosity or a desire for gossip.[3]

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1 *Lange v Atkinson* [1997] NZLR 22.

2 *Lange v Atkinson* [1998] 3 NZLR 424.

3 Pearson J in *Webb v Times Publishing Co Ltd* [1960] 2 QB 535, 569.

> The titillation of calumny is not to be mistaken for the public interest.[4]

There is no privilege if the statement is made to a wider circle of recipients than is necessary. So qualified privilege exists if a former employer provides a reference to a prospective new employer who asks for it, but not if it is copied to others having no legitimate interest in its contents. This requirement can place considerable difficulties in the way of reliance on the defence of qualified privilege by newspapers and publishers of periodicals of general circulation. It is only if the whole of their readership can be said to have a legitimate interest in what has been published that the defence can be relied upon.

4 For the defence to be available the occasion of qualified privilege must not have been abused. The Defamation Act 1992 section 19 provides as follows:

> 19. Rebuttal of Qualified Privilege—
>
> (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
>
> (2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

THE COURT OF APPEAL'S 1998 JUDGMENT

5 The most important effect of the Court of Appeal's 1998 judgment is in relation to the element of the defence of qualified privilege that we refer to in paragraph 3 above, namely that the publication should not have been more widespread than necessitated by the duty to publish. The Court ruled that the public at large had sufficient interest in the fitness for office of certain politicians to make it possible for a general publication to be an occasion on which the defence of qualified privilege might be available. The judgment says:

> Our consideration of the development of the law leads us to the following conclusions about the defence of qualified privilege as it applies to political statements which are published generally:

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[4] Brennan J in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 244.

(1) The defence of qualified privilege may be available in respect of a statement which is published generally.

(2) The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.

(3) In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.

(4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.

(5) The width of the identified public concern justifies the extent of the publication.

(As appears from para (3) above this judgment is limited to those elected or seeking election to Parliament.)[5]

6 The majority of the Court of Appeal in the 1998 judgment declined to impose a requirement of reasonableness as an element of the availability of the defence. They said:

> The basis of qualified privilege is that the recipient has a legitimate interest to receive information assumed to be false. How can that interest differ simply because the author has failed to take care to ensure that the information is true?[6]

7 Tipping J who delivered a separate judgment, was troubled by the absence of a reasonableness requirement. He summed up his views as follows:

> In summary, the points which I have endeavoured to make are:
> 1. I accept, albeit with some hesitation, that the defence of qualified privilege should be developed so as to apply to political discussion, as the other members of the Court propose.
> 2. A requirement of reasonableness, in the sense of taking such care with the facts as is reasonable in the circumstances, cannot

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5 *Lange v Atkinson*, above n 2, 467–468 per Richardson P, Henry, Keith Blanchard JJ.

6 *Lange v Atkinson*, above n 2, 469–470.

be introduced as a condition or element of the proposed development, whether in the definition of the occasion or otherwise.

3. But such a reasonableness consideration could be relevant to whether the defendant has taken improper advantage of the occasion of publication.[7]

8 As we understand the judgment the "cannot" in item two of this excerpt relates to these earlier passages in Tipping J's judgment:

> On the other hand, the origins of qualified privilege could be said to support a reasonableness requirement. As noted earlier, qualified privilege grew out of the fact that in some circumstances the common law did not consider it right to presume malice from the publication of untrue defamatory words. That proposition in the present context involves asking whether it is right to presume malice from the publication of untrue defamatory words about the performance or competence of a politician by (usually) a member of the news media. It is arguable that unless the publisher can demonstrate the taking of such care as is reasonable in the circumstances to verify the facts, the presumption of malice should apply. Thus arguably the occasion is not one of qualified privilege unless the publisher can show that such reasonable care was taken.
>
> But if this Court is to develop the law of qualified privilege, it must be a bona fide development, and not the creation of a new defence. While the line can be fine, development is the prerogative of the common law, while creating a new defence is the prerogative of the legislature. …[8]
>
> Although I consider a requirement for the taking of reasonable care would be a desirable ingredient in striking a fair balance between the competing interests, and I remain anxious lest the balance be found wrong without it, I am ultimately persuaded that there are three related reasons why such a requirement should not be introduced by this Court as an ingredient of any developed law of qualified privilege in New Zealand. They are inherent in what I have already written. No other occasion of qualified privilege has such a requirement; there would be difficulties in drawing the line as to what occasions of qualified privilege were and were not covered by the reasonableness requirement; and however one dressed it up, we would thereby be creating essentially a new defence which is the prerogative of Parliament and not a bona fide development of the common law defence of qualified privilege.[9]

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7 *Lange v Atkinson*, above n 2, 477.

8 *Lange v Atkinson*, above n 2, 473.

9 *Lange v Atkinson*, above n 2, 474–475.

THE COMMISSION'S DISCUSSION PAPER

9 In September 1998 the Law Commission published a discussion paper (*Defaming Politicians: A Response to Lange v Atkinson* (NZLC PP 33)). We were concerned that as a result of the Court of Appeal's judgment politicians would be deprived of a means of protecting their reputations available to all other citizens. The category defined by the Court in the passage quoted in paragraph 5, that is, statements made about actions and qualities directly affecting capacity to meet public responsibilities, is very wide and would include virtually any criticism of the character or integrity of the defamed party. We instanced the hypothetical case of a candidate for political office left without redress when he was defamed by newspaper statements published on the eve of an election at which he was duly defeated, which statements were made negligently, being true of a member of his family but not of him. (Although some press critics of our paper described that example as far-fetched and absurd, it in fact closely parallels the actual facts of the United States Supreme Court case of *Ocala Star-Banner Co v Damron*)[10] We cited the famous passage by Cockburn CJ in *Campbell v Spottiswoode*:

> It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction a tax upon them, destructive of their honour and character, and made without any foundation.[11]

10 We also traced the recent history of defamation law reform in New Zealand which seemed to us to suggest that in tilting the balance in favour of freedom of expression without appropriate safeguards in favour of protection of reputation, the Court of Appeal was adopting a course expressly rejected by successive governments.[12]

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[10] (1971) US 295; discussed in Frederick Schauer "Uncoupling Free Speech" (1992) 92 Colum L Rev 1321, 1326 ff.

[11] (1863) 3 B & S 769, 777; 122 ER 288, 291.

[12] This matter is discussed at p 462 of the Court of Appeal's judgment and at p 3, paras 8-13 of the NZLC *Preliminary Paper 33 Defaming Politicians: A Response to Lange v Atkinson* (1998); it was subsequently to be discussed by the Privy Council at [2000] 1 NZLR 257, 262.

11 The solution we proposed was the insertion in the Defamation Act 1992 of a new section 19A in the following terms:

> 19A Restrictions on qualified privilege where general publication
>
> (1) In any proceedings for defamation in respect of matter that consists of a statement of fact published generally a defence of qualified privilege shall fail unless the defendant proves that the defendant believed on reasonable grounds that the statement of fact was true.
>
> (2) In any proceedings for defamation in respect of matter that consists of a statement of fact published generally by a news medium a defence of qualified privilege shall fail if the plaintiff alleges and proves
>
> (a) that the plaintiff requested the defendant to publish, in the manner in which the original publication was made, a reasponable letter or statement by way of explanation or contradiction; and
>
> (b) that the defendant has refused or failed to comply with that request, or has complied with that request in a manner that, having regard to all the circumstances, is not adequate or not reasonable.
>
> (3) This section does not apply where the publication is protected by qualified privilege conferred by section 16(1) or section 16(2).

12 If one tests this proposal against the three difficulties said by Tipping J in the passage from his 1998 judgment quoted at the end of paragraph 8 to stand in the way of such a solution, it may be noted:

- as to the concern that a requirement for the taking of reasonable care does not apply on any other occasion of qualified privilege, that a special requirement is warranted by the new category the Court of Appeal has created because "A test devised for situations where usually one person receives the publication is unlikely to be appropriate when the publication is to tens of thousands, or more, of readers, listeners or viewers";[13]
- as to demarcation problems that our proposal applies to all occasions of general publication; and
- as to the court or legislature point that our proposal was of course for legislation.

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[13] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 572.

REYNOLDS V TIMES NEWSPAPERS LTD IN THE ENGLISH COURT OF APPEAL

13 On 8 July 1998 the English Court of Appeal delivered its judgment in a case in which a former Irish Taoiseach (Prime Minister) claimed damages for libel from a newspaper.[14] The Court declined to follow *Lange v Atkinson*.[15] It rejected a submission:

> … that qualified privilege protects a publication to the public at large, arising out of discussion of political matters, including the manner in which a public representative or senior public officer has discharged his public functions, or relating to his public views and conduct in relation to those functions, or his fitness for political office. Such a qualified privilege arises, [counsel] submitted, in particular, where the plaintiff is an elected politician and where the defamatory words complained of relate to his conduct in his public role and not his private life or anything he has said or done in a purely personal capacity.16

The Court said that such a proposition was:

> … too broad because it exposes those who are properly the subject of political speech to false and defamatory statements about them with no protection save on proof, which will often be difficult or impossible, that the publisher lacked an honest belief in the truth of the statement.[17]

REYNOLDS V TIMES NEWSPAPERS LTD IN THE HOUSE OF LORDS

14 In both *Lange v Atkinson* and *Reynolds v Times Newspapers Ltd* there were appeals from the intermediate Court decisions. The appeals were heard consecutively by the same five judges and the judgments were delivered on the same day. In *Reynolds v Times Newspapers Ltd*[18] all five members of the House of Lords refused to create a special category of qualified privilege defined by the subject matter of the statement as our Court of Appeal had done in *Lange v Atkinson*. Lord Nicholls of Birkenhead, in whose judgment Lord Cooke of Thorndon and Lord Hobhouse of Woodborough concurred, said:

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[14] *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862.

[15] Lange v Atkinson, above n 2, 906–907.

[16] *Lange v Atkinson*, above n 2, 893.

[17] *Lange v Atkinson*, above n 2, 910.

[18] [1999] 3 WLR 1010.

> Freedom of speech does not embrace freedom to make defamatory statements out of personal spite or without having a positive belief in their truth.
>
> In the case of statements of opinion on matters of public interest, that is the limit of what is necessary for protection of reputation. Readers and viewers and listeners can make up their own minds on whether they agree or disagree with defamatory statements which are recognisable as comment and which, expressly or implicitly, indicate in general terms the facts on which they are based.
>
> With defamatory imputations of fact the position is different and more difficult. Those who read or hear such allegations are unlikely to have any means of knowing whether they are true or not. In respect of such imputations, a plaintiff's ability to obtain a remedy if he can prove malice is not normally a sufficient safeguard. Malice is notoriously difficult to prove. If a newspaper is understandably unwilling to disclose its sources, a plaintiff can be deprived of the material necessary to prove, or even allege that the newspaper acted recklessly in publishing as it did without further verification. Thus, in the absence of any additional safeguard for reputation a newspaper, anxious to be first with a "scoop", would in practice be free to publish seriously defamatory misstatements of fact based on the slenderest of materials. Unless the paper chose later to withdraw the allegations, the politician thus defamed would have no means of clearing his name, and the public would have no means of knowing where the truth lay. Some further protection for reputation is needed if this can be achieved without a disproportionate incursion into freedom of expression.[19]

LANGE V ATKINSON IN THE PRIVY COUNCIL

15 The reason we advanced in our preliminary paper for publishing it before the appeal to the Privy Council was determined was:

> It needs to be remembered that since *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 there can be no certainty that New Zealand decisions out of line with the common law as settled in other jurisdictions will not be left untouched by the Privy Council on the basis that "conditions in New Zealand are different" (519).[20]

This is essentially what happened. The Privy Council in a very short judgment[21] set aside the Court of Appeal's decision, but on the basis that it should be remitted to the Court of Appeal for

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[19] *Reynolds v Times Newspapers Ltd*, above n 18, 1023–1024.

[20] *Defaming Politicians: A Response to Lange v Atkinson* above n 12, vi.

[21] *Lange v Atkinson* [2000] 1 NZLR 257.

reconsideration in the light of the House of Lords' discussion in *Reynolds*. The basis of this decision was said to be:

> The Courts of New Zealand are much better placed to assess the requirements of the public interest in New Zealand than Their Lordships' Board.[22]

THE COURT OF APPEAL'S 2000 JUDGMENT

16 The Privy Council observed that:

> The composition of [the Court of Appeal] for the hearing need not be the same and may be larger; that is entirely a matter for the Court itself.[23]

In the event the Court of Appeal was constituted for the rehearing identically as in 1998. Judgment was delivered on 21 June 2000.[24] The Court held to the view that it was not obliged to leave any development of the law of qualified privilege to Parliament.[25] It rejected the suggestion that reasonableness be a necessary requirement of an occasion of qualified privilege.[26] It was for these reasons no doubt that the judgment was greeted in the print media with some triumphalist editorialising. But in fact plaintiffs will be substantially better off under the 2000 judgment than under its 1998 predecessor. The Court's alteration of position is to be understood and respected as the dutiful performance of an obligation to correct earlier errors rather than derided as a volte-face, though it would have helped the understanding of those who have to grope their way through these thickets if the change had been expressly acknowledged. We give below a more nuanced account of the judgment, but essentially the other four judges now share the view expressed in Tipping J's separate 1998 judgment, a situation reflected no doubt in the fact that the 2000 judgment is unanimous, that the balance between freedom of expression and protection of reputation is best preserved by a creative use of the Defamation Act 1992 section 19.[27]

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[22] *Lange v Atkinson*, above n 21, 262.

[23] *Lange v Atkinson*, above n 21, 264.

[24] Unreported see A52/7. Because the judgment is as yet unreported references to the judgment will be to paragraph numbers.

[25] Unreported see A52/7, above n 23, para 36.

[26] Unreported see A52/7, above n 23, para 38.

[27] Set out in full in para 4 of this report.

THE NEW VIEW OF SECTION 19

17 The new views of the Court of Appeal can be ascertained from these excerpts from its 2000 judgment:

> The full scope of s19 of the Defamation Act 1992 and its possible application to political discussion requires separate consideration, but as will be seen it can provide a measure of protection to or safeguard for a plaintiff which ought not to attract the restrictions sometimes applied to the common law concept of malice in this context. The idea of taking improper advantage of the occasion is important when one is considering the appropriate balance between freedom of expression and protection of reputation. Its connotations are potentially wider than the traditional concept of malice which included excess of publication and improper purpose. To that extent we are able to take a more expansive approach to defining an occasion of privilege because we have the ability in s19 to take a correspondingly more expansive approach to what constitutes misuse of the occasion. One development is therefore capable of being matched by another so that the overall balance is kept right. The idea of taking improper advantage is appropriately applied to those who are reckless and thereby do not exhibit the necessary responsibility when purporting to act under the cloak of qualified privilege.[28]
>
> Section 19 of the Defamation Act 1992 prevents reliance on qualified privilege if the defendant is predominantly motivated by ill will against the plaintiff or otherwise takes improper advantage of the occasion of publication. Although s19 was designed to reflect the common law concept of malice, it has within it the same flexibility and room for development as did malice itself; particularly in its connotation of improper purpose. The purpose of the newly recognised privilege is to facilitate responsible public discussion of the matters which it covers. If the privilege is not responsibly used, its purpose is abused and improper advantage is taken of the occasion. The section is concerned with situations in which qualified privilege is lost. Occasions of privilege are both fact dependent and not limited by closed categories. Where the common law affords privilege to a particular occasion, s19 must be applied to that occasion in an appropriate way, without any reading down of its terms.[29]
>
> What constitutes recklessness is something which must take its colour from the nature of the occasion, and the nature of the publication. If it is reckless not "to consider or care" whether a

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[28] Unreported see A52/7, above n 23, para 39.

[29] Unreported see A52/7, above n 23, para 42.

statement be true or false, as Lord Diplock indicated, it must be open to the view that a perfunctory level of consideration (against the substance, gravity and width of the publication) can also be reckless. It is within the concept of misusing the occasion to say that the defendant may be regarded as reckless if there has been a failure to give such responsible consideration to the truth or falsity of the statement as the jury considers should have been given in all the circumstances. In essence the privilege may well be lost if the defendant takes what in all the circumstances can fairly be described as a cavalier approach to the truth of the statement.[30]

No consideration and insufficient consideration are equally capable of leading to an inference of misuse of the occasion. The rationale for loss of the privilege in such circumstances is that the privilege is granted on the basis that it will be responsibly used. There is no public interest in allowing defamatory statements to be made irresponsibly – recklessly – under the banner of freedom of expression. What amounts to a reckless statement must depend significantly on what is said and to whom and by whom. It must be accepted that to require the defendant to give such responsible consideration to the truth or falsity of the publication as is required by the nature of the allegation and the width of the intended dissemination, may in some circumstances come close to a need for the taking of reasonable care. In others a genuine belief in truth after relatively hasty and incomplete consideration may be sufficient to satisfy the dictates of the occasion and to avoid any inference of taking improper advantage of the occasion.[31]

A PROBLEM OF INTERPRETATION?

18 Section 19 is in almost the very words recommended by the Report of the Committee on Defamation (the McKay Committee) in December 1977.[32] The material difference is that where the McKay Committee recommended "the defendant was actuated by spite or ill-will towards the plaintiff or otherwise took improper advantage of the occasion of publication" the section as enacted provides "the defendant was predominately motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication". It is clear from its report that the intention of the McKay Committee was to capture in statutory form the elements

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30 Unreported see A52/7, above n 23, para 47.

31 Unreported see A52/7, above n 23, para 48.

32 Recommendations on the Law of Defamation; Report of the Committee on Defamation (1977), Government Printer, Wellington. 153, cls 15(1) and (2) of the draft Bill forming part of that report.

of the existing law of malice not to change them.[33] As is clear from the speech of Lord Diplock in *Horrocks v Lowe*[34] malice does not include carelessness falling short of reckless indifference to the truth or falsity of a statement. All these matters were acknowledged by the Court of Appeal in its 1998 judgment[35] and would seem to contradict the proposition that section 19 is wider and more expansive or potentially so than the traditional definition of malice.[36]

19 The new proposition in the 2000 judgment that recklessness precludes reliance on section 19 and that "what amounts to a reckless statement must depend significantly on what is said to whom and by whom"[37] is or can be as the Court acknowledges tantamount to the imposition of a duty of reasonable care.[38] It is significant that in jurisdictions where such a duty does exist, a similar sliding scale dependent on the nature of the allegation and the width of the intended dissemination has been applied. As to the nature of the allegation for example, Lord Griffith for the Privy Council observed in *Austin v Mirror Newspapers Ltd*:

> When a journalist wishes to make such a trenchant and potentially damaging attack it is in the interests of society that he should be expected to take all reasonable steps to ensure that he has got his facts right … The harder hitting the comment the greater should be the care to establish the truth of the facts on which it is based.[39]

As to the width of the intended dissemination, we would refer to the passage in the judgment of the Australian High Court in *Lange v Australian Broadcasting Corporation*:

> No doubt it is arguable that, because qualified privilege applies only when the communication is for the common convenience and

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33 Report of the Committee on Defamation, above n 31, paras 195–199.

34 [1975] AC 135, 149–150.

35 Lange v Atkinson, above n 2, 468–469.

36 Unreported see A52/7, above n 23, para 39.

37 Unreported see A52/7, above n 23, para 48 set out *in extenso* in para 17 of this report.

38 There is a conceptual distinction between recklessness which involves a state of mind, an indifference, and negligence, which connotes an objectively measured breach of a duty of care. But there are many examples of the term recklessness as used in statutes being construed more loosely than this to mean something like gross negligence, and presumably it is this looser meaning that the Court had in mind in the penultimate sentence of para 48 of its judgment quoted in para 17 of this report.

39 [1986] AC 299–317.

welfare of society, a person publishing to tens of thousands should be able to do so under the same conditions as those that apply to any person publishing on an occasion of qualified privilege. But the damage that can be done when there are thousands of recipients of a communication is obviously so much greater than when there are only a few recipients. Because the damage from the former class of publication is likely to be so much greater than from the latter class, a requirement of reasonableness as contained in s 22 of the *Defamation Act*, which goes beyond mere honesty, is properly to be seen as reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication which the Constitution requires.[40]

WHAT SHOULD THE LAW COMMISSION RECOMMEND?

20 The difference between the reasonableness requirement that the Law Commission proposed in its preliminary paper and the meaning now conferred on section 19, is for practical and substantive purposes likely to be so slight that although problems of certainty remain it could be argued that we ought not to pursue our preliminary paper proposal for legislation. Such a view takes no account of the procedural problems to which we now refer. The Court of Appeal's solution places on the plaintiff the burden of rebutting the defence of qualified privilege by establishing that section 19 applies despite the fact that for the plaintiff to do so will require the plaintiff to establish facts not within the plaintiff's knowledge. This was a matter that concerned Lord Steyn in *Reynolds*. He said:

> On balance two particular factors have persuaded me to reject the generic test. First, the rule and practice in England is not to compel a newspaper to reveal its sources: see section 1 of the Contempt of Court Act 1981; RSC, Ord. 82, r 6; and *Goodwin v United Kingdom* (1996) 22 EHRR 123, 143, at para 39. By contrast a plaintiff in the United States is entitled to a pre-trial enquiry into the sources of the story and editorial decision-making: *Herbert v Lando* (1979) 441 US 153. Without such information a plaintiff suing for defamation in England will be substantially handicapped. Counsel for a newspaper observed that the House could recommend a reform of the procedural rule. This is an unsatisfactory basis to embark on a radical development of the law. Given the procedural restrictions in England I regard the recognition of a generic qualified privilege of political speech as likely to make it unacceptably difficult for a

[40] (1997) 189 CLR 520, 572–573.

victim of defamatory and false allegations of fact to prove reckless disregard of the truth.[41]

It seems to us that this would be no less so under the definition of recklessness now laid down by the Court of Appeal.

21 The Court of Appeal addressed these problems somewhat cursorily in paragraphs 55–59 of its judgment. The rule that a newspaper is not obliged in interlocutory proceedings to reveal its sources is the basis of Rule 285 of the High Court Rules which provides as follows:

> Defamation proceedings—
>
> > If in a proceeding for defamation the defendant pleads that the words or matters complained of are fair comment on a matter of public interest or were published on a privileged occasion, no interrogatories as to the defendant's sources of information or grounds of belief should be allowed.

The Court of Appeal said:

> The [newspaper] rule was affirmed by this Court in *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163 on the basis that it applies unless there are special circumstances warranting a departure from it. Whether that basis for departure is too narrow (Woodhouse P saw the rule as being almost absolute) may require reconsideration on an appropriate occasion. Similarly the absoluteness of Rule 285 may require reassessment.[42]

In the *Broadcasting Corporation* case all three members of the Court of Appeal refused to treat as a special circumstance the fact that the plaintiff was seeking to rebut a defence of qualified privilege by alleging malice.[43] The Court of Appeal in *Lange* did not expressly mention this but went on to say:

> The whole question whether sources should be identified before trial is very much influenced by public policy as seen in the particular jurisdiction. Such policy is not immutable and both judicial and legislative reflections of it can change over time. The approach of this Court in the *Broadcasting Corporation* case and of the Rules Committee in Rule 285 should not therefore be regarded as set in stone. The relevant policy considerations must now recognise the ramifications of the extended range of qualified privilege as affirmed in this judgment.[44]

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41 *Reynolds v Times Newspapers Ltd*, above n 18, 1032; consider also the passage from Lord Nicholls' judgment quoted in para 14 above.

42 *Lange v Atkinson*, above n 2, para 55.

43 Woodhouse P, 168; Richardson J, 174; McMullin J, 178.

44 *Lange v Atkinson*, above n 2, para 56.

The Court said "We have kept the rule in mind, along with possible developments of it, in coming to our conclusion".[45] The question to be asked is whether it is fair to plaintiffs for the law to be changed in the way it has while the newspaper rule and Rule 285 remain unaltered. The Law Commission's draft Evidence Code makes it clear that the High Court may overrule the protection of journalists' sources where this is appropriate to the issues to be determined in a hearing.[46] But there is at this stage no certainty as to whether or when or in what words the Code will be enacted and if it is enacted in the form proposed how the discretion will be exercised. In Lord Steyn's words "This is an unsatisfactory basis to embark on a radical development of the law".[47]

22 Even more difficult is the ability of a plaintiff to give the particulars required by the Defamation Act 1992 section 41 which provides as follows:

> 41 Particulars of Ill Will—
> (1) Where, in any proceedings for defamation,—
> (a) The defendant relies on a defence of qualified privilege; and
> (b) The plaintiff intends to allege that the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication,—
> the plaintiff shall serve on the defendant a notice to that effect.
> (2) If the plaintiff intends to rely on any particular facts or circumstances in support of that allegation, the notice required by subsection (1) of this section shall include particulars specifying those facts and circumstances.
> (3) The notice required by subsection (1) of this section shall be served on the defendant within 10 working days after the defendant's statement of defence is served on the plaintiff, or within such further time as the Court may allow on application made to it for that purpose either before or after the expiration of those 10 working days.

The Court of Appeal said:

> We think this concern is overstated … In some situations it may well be sufficient to plead that the statement was made recklessly, or that the defendant had no honest belief in its truth.[48]

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[45] *Lange v Atkinson*, above n 2, para 58.

[46] *Evidence* (1999) NZLC R 55 Vol 2, 172.

[47] From the passage by Lord Steyn in *Reynolds v Times Newspapers Ltd* quoted para 20 above.

[48] *Lange v Atkinson*, above n 2, para 59.

Such a pleading one would have thought to be hopelessly under-particularised and in most circumstances (because the success of the plea will depend on the proof of primary facts from which the ill will or improper advantage is sought to be inferred) in breach of the clear terms of section 41(2). Practitioners and judicial officers are left without the clear guidance to which they are entitled.

CONCLUSION

23 The Court of Appeal in its 2000 judgment has acknowledged, if only tacitly, that its 1998 judgment tilted the balance unfairly against the protection of reputation in favour of freedom of speech. Its judgment sets out a method of correcting that balance. In the view of the Law Commission that method is founded on a strained interpretation of section 19 and is for the reasons stated procedurally unfair to plaintiffs.[49] In relation to both fairness and certainty it compares unfavourably with the legislative solution proposed by the Commission in its 1998 discussion paper and set out in paragraph 11 of this report. A possible response to the Court of Appeal's judgment would be to wait and see. The difficulties with giving the solution contained in the Court of Appeal's judgment a chance to see if it works, are twofold and obvious. One is the expense to litigants. As to the other, the poet Tennyson once extolled in no doubt over-quoted lines:

> A land of settled government,
> A land of just and old renown,
> Where Freedom slowly broadens down
> From precedent to precedent.[50]

One problem when the New Zealand Court of Appeal decides to alter existing law rather than sticking to the previously existing law is that the relatively slight volume of litigation in this jurisdiction can mean that it is an excessively long time between precedents.

24 The outstanding question is a narrow one. What is the method of imposing the obligation to act reasonably that the Court of Appeal now accepts as a necessary qualification to the extension by its 1998 judgment to the occasions of qualified privilege, that is most just and certain? The problems with the Court of Appeal's solution are:

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[49] Much the same conclusion (though expressed in less sedate terms) is reached by Bill Atkin and Steve Price [2000] NZLJ 236.

[50] Alfred Lord Tennyson (1833) "You asked me, why", iii.

- that it does not really face up to the consequential procedural problems that we have discussed in paragraphs 20–22;
- that it is bottomed on a strained interpretation of section 19 of the Defamation Act 1992;
- that for both these reasons it leaves the law in a state of avoidable uncertainty that (because the solution has no overseas counterpart so that decisions in other jurisdictions will not be available to be looked to and because the volume of New Zealand litigation is not high) is unlikely to be clarified at all promptly.

For these reasons the Commission continues to favour the solution proposed in its preliminary paper and recorded in paragraph 11 of this paper.[51] (It was a solution that we can reasonably assume that the Court of Appeal regarded as unavailable to it for the reasons set out in page 433 of Tipping J's 1998 judgment quoted in paragraph 8 of this report.)

25 If that proposal is not acted on so that the Court of Appeal's solution remains the one in force, then at least the resultant procedural difficulties need to be addressed. In relation to the newspaper rule the procedural problem can be solved by the enactment of clause 66 of our proposed Evidence Code in the form recommended. This is on the assumption that the discretion conferred by that proposed provision will be so exercised (as in *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* the discretion was not) as to take into account the onus that lies on a plaintiff who invokes section 19. There will need to be a corresponding amendment to Rule 285. On the pleading point, we recommend the repeal of the Defamation Act 1992 section 41(2).

AFTERWORD

26 There is another problem that we mention by way of postscript. The law of qualified privilege has developed on the premise that (such local expedients as posters, graffiti, sandwich boards, loud hailers, pamphlets and broadsheets apart) general publication must necessarily involve one of the print or electronic media which in turn requires access to a printing press or transmitter, plus an organisational structure (traditionally presided over by an editor) to determine content. See for example Lord Nicholl's observation in

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[51] It should be noted that because of the unusual sequence of events the Law Commission has not invited submissions on this proposal, but the ground has by now been so well ploughed over and the issue is now so narrow that there seems little point in doing so.

Reynolds that "The [ethical] decision should be left to the editor of the newspaper"[52] and the observation of the Privy Council in *Lange* that "striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions. These conditions include matters such as the responsibility and vulnerability of the press".[53] But the spread of the internet means that now any person however unbalanced or disaffected can establish a website and engage in general publication of whatever suits him or her without the intervention of a news medium and without any concern for the ethical inhibitions said to govern journalists and editors.[54] The law of qualified privilege (and perhaps the law of defamation generally) may need it seems to us some fundamental reshaping to take this new phenomenon into account. But that is for another day. The likelihood at some future date of a need for reform to take into account the internet should not stand in the way of the limited changes proposed in the two previous paragraphs.

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[52] *Reynolds v Times Newspapers Ltd*, above n 14, 1024.

[53] [2000] 1 NZLR 257, 261.

[54] There is authority for the proposition that although a website is necessarily accessible to the world at large, yet given the vast number of domain names (about 15 million) and the absence of comprehensive directories, this does not preclude a court from enquiring for conflict of laws purposes as to the targeted audience. See *Telco Communications v An Apple a Day* (1997) 977 F Supp 404; *Blumenthal v Drudge and AOL* (1998) 992 F Supp 44, discussed by Uta Kohl *Defamation on the Internet – A Duty Free Zone After All?* (2000) 22 Sydney LR 186. This is however a different question from whether there is general publication (in the sense in which that term is used in this report and the cases it refers to) of matters published on a website.

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