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THE DAWN OF A CHARTER FOR SCANDAL
MONGERS? - HAS IN *LANGE* DEFAMATION LAW
TAKEN A WRONG TURN?

LLM RESEARCH PAPER
MASTERS LEGAL WRITING (LAWS 582)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

1997

W892 Woodnorth, D. B. The dawn of a charter for scandal mongers?

VICTORIA
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*Te Whare Wananga
o te Upoko o te Ika a Maui*



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ABSTRACT

In February 1997 Elias J gave a judgement holding that: "qualified privilege attaches to political discussion communicated to the general public." Without doubt this decision signals what may be one of the most significant changes to the law of defamation in modern times. Media interests have naturally welcomed the decision in *Lange v Atkinson & ACP* and most academic commentary on the decision has been in support of the proposed changes. The purpose of this paper is to critically analyse the judgement, challenging the outcome and the way that outcome was arrived at.

This paper sets the scene for a consideration of *Lange* by discussing some of the practical issues of the dynamic between freedom of political discussion and protection of reputation. The leading New Zealand precedent cases dealing with political discussion and qualified privilege are then considered. Against this background the proposed expansion of qualified privilege is critiqued. The key conclusions are: that *Lange* is inconsistent with and not distinguished from the binding precedents, the scope of the proposed defence is too broad, the reasons given for changing the law do not stand up to scrutiny, and that the type of proposed expansion of qualified privilege is a matter of policy for the legislature not the courts.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16,529 words.

I INTRODUCTION

In October 1995 Australian Consolidated Press NZ Limited ("ACP") published in its *North and South* magazine article written by Mr Joe Atkinson criticising the performance and leadership of Mr David Lange during his time as Prime Minister. Mr Lange issued defamation proceedings in respect of 16 passages in the article alleging conveyed meanings to the effect that, inter alia, Mr Lange was irresponsible, dishonest, insincere, manipulative and lazy.¹

In 1994 the High Court of Australia in the decisions of *Theophanous v Herald & Weekly Times*² and *Stephens v West Australian Newspaper Ltd*³ created a new stand alone defence to defamation, holding that "political discussion" was protected in Australia by a constitutional freedom found to be implicit in the concept of representative government. It was also held that in Australia such occasions as gave rise to the stand alone defence would also be occasions of qualified privilege.

The circumstances of *Lange v Atkinson and ACP* ("*Lange*") presented an opportunity for ACP to plead the stand alone and expanded qualified privilege defences. ACP's chances of success were significantly improved when defence counsel objected to the allocation of Anderson J as trial judge and Elias J was assigned to the case.⁴

¹ Attached as Annexure A is a copy of the *North & South* article. The passages complained of are underlined.

² (1994) 182 CLR 104; 124 ALR 1

³ (1994) 182 CLR 211; 124 ALR 80

⁴ Justice Anderson being a senior High Court Judge experienced in defamation trials who in *Television New Zealand Ltd v Quinn* [1995] 3 NZLR 216 had favoured status quo in terms of the balance struck between freedom of speech and protection of reputation, rather than accepting the defence's arguments that the chilling effect defamation laws have on freedom of speech required that the balance should be readjusted in favour of freedom of speech. Justice Elias, being a relatively recent appointment to the bench, had no experience of defamation litigation and, as the case proved to be, would be more responsive to the defences arguments couched in terms of enhancing freedom of speech and the functions of electors in the democratic process. For a discussion of the relevance of judge's differing views regarding the value of freedom of speech and protection of reputation see S Penlington "Interlocutory Injunctions in Defamation Actions and the New Zealand Bill of Rights Act 1990" (1995) 7 AULR 347, 353.

Although the stand alone defence was rejected Elias J made the following unequivocal findings:⁵

I am of the view that it is for 'the common convenience and welfare' of New Zealand society that the common law defence of qualified privilege should apply to claims for damages for defamation arising out of political discussion.

Qualified privilege attaches to political discussion communicated to the general public.

At least one commentator⁶ has queried whether the decision in *Lange* goes far enough toward protecting freedom of political speech. However, I suggest that such an analysis fails to properly comprehend the truly radical nature of the outcome in *Lange*. It is radical in its departure from the principles of long established precedents, and it is radical in terms of the proposed scope of the defence, indeed it is more radical than the Australian defence. It is with respect that I suggest that in making such a significant change to the law of defamation Elias J exceeded the legitimate judicial mandate to develop the common law, and in any event the reasons given for making such a change do stand up to critical scrutiny.

This paper will first consider the background to the context in which *Lange* was decided, discussing some non-"qualified privilege" issues before looking at the New Zealand precedent cases dealing with freedom of political discussion. Some attention will then be given to the principles governing judicial development of the law, with particular reference to the application of those principles recently by the Court of Appeal in *R v Hine*⁷. The scope of the defence "tentatively" outlined in *Lange* will be critiqued before analysing Elias J's reasons for creating this very significant new category of qualified privilege. Finally, the recent decisions of the High Court of Australia in *Lange v Australian Broadcasting Corporation (ABC)*⁸ and Paterson J of the

⁵ *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22, 46 and 51.

⁶ G Huscroft "David Lange and the Law of Defamation" [1997] NZLJ 112.

⁷ Unreported, 15 August 1997, Court of Appeal, CA 465/96.

⁸ Unreported, 8 July 1997, High Court of Australia, FC 97/021.

New Zealand High Court in *Harrison v Banks and the Northern Publishing Co. Ltd*⁹ considered.

II DEFAMATION AND POLITICAL DISCUSSION IN NEW ZEALAND - SETTING THE SCENE

A *Some Non-"Qualified Privilege" Issues for Preliminary Consideration*

1 *Massey v The New Zealand Times Company*¹⁰ - *Defamation recognises that politicians should have thicker hides*

On 3 December 1910 The New Zealand Times¹¹ published a cartoon lampooning Mr Massey, who was at the time leader of the parliamentary opposition party. Recently there had been allegations that Mr Massey had been associated with the distribution in Auckland, Wellington and elsewhere of a scurrilous pamphlet reflecting on the Prime Minister. Two days before the cartoon appeared, the New Zealand Times had published an article exonerating Mr Massey and the Opposition from any connection with the distribution of the pamphlet.

The defamatory meanings pleaded by Mr Massey as flowing from the cartoon were that he was responsible for the free distribution of the pamphlet, or had taken part in such distribution, and that he had been guilty of a mean and despicable act, and was a liar. The newspaper denied the alleged meanings. The jury found:¹²

1. We are of the opinion that the figure [hitching up the wagon] represents Mr Massey.
2. We are of opinion that this is a political cartoon pure and simple, and is not libellous.

⁹ Unreported, 22 August 1997, High Court, Whangarei Registry, CP 14/93.

¹⁰ (1911) 31 NZLR 929

¹¹ A copy of the cartoon is attached as Annexure B. It is interesting to note that in the same edition of *The New Zealand Times* (Wellington, New Zealand, 3 December 1910) at page 3 the paper greeted the enactment of the Libel Act 1910: "It enlarges the area of privilege necessary to true freedom of the press to almost the same extent that is allowed in nearly every other country of the Empire. It deals with 'chain' actions in such a way as to prevent them from being gold mines to the unprincipled...Had the area of privilege been extended to public meetings, and had there been a provision to for the right to fight unscrupulous blackmailers by demanding security for costs, the Bill would have been nearly perfect."

¹² Above n 10, 931.

Mr Massey applied unsuccessfully to the High Court, then the Court of Appeal, to have the jury's verdict set aside and a retrial ordered. In the Court of Appeal Williams J expressed the view that:¹³

Public men and public parties are liable to severe criticism... that the cartoon was a political cartoon no doubt abusing Mr Massey and his party and holding them up to ridicule, but within the wide limits of criticism allowable in the case of public men and public matters.....The jury are as well able to decided whether and how far the alleged libel would, in the opinion of an ordinary man, affect the personal character of the plaintiff as the most learned Judge or the most acute logician.

Williams J referred to the English case of *Odger v Mortimer*¹⁴ where the newspaper had characterised Mr Odger as "a demagogue of the lowest type, half booby and half humbug, a political cheap-jack who would be a political sharper if he had brains enough." . Also in the newspaper there appeared a statement purporting to be signed by Mr Odger stating: "I have any quantity of bottled-up abuse, treason, and riot. I will exchange the whole lot for any permanent appointment with £250 per annum and upwards - George Odger". Williams J observed that:¹⁵

If Mr Odger had been a private person and not a public man there can be no doubt that the statements would have been defamatory and libellous.....the question in that case was, was the alleged libel really a malignant attack on Mr Odger's private character, or was it a holding-up of his principles to derision?

Rosemary Tobin has suggested that in *Massey* there can be seen "an embryonic Theophanous defence.....With the positive recognition now accorded free speech in the Bill of Rights it may now be time to expand *Massey* into a common law Theophanous defence of qualified privilege covering , at least, matters of political discussion."¹⁶ With respect, this analysis of *Massey* is wrong. *Massey* did not concern defences to

¹³ Above n 10, 946 and 952.

¹⁴ 28 L.T. 472.

¹⁵ Above n 10, 946.

defamation, the Court of Appeal dealt with the issue of whether or not the publication was defamatory per se.

It is important to consider the basic building blocks of a defamation action concerning political discussion before weighing issues of qualified privilege. First, the jury or the judge, must find that the statement complained about is defamatory of the plaintiff. Not all unproved criticisms of politicians will be found to be defamatory. As *Massey* illustrates, the threshold for politicians and those in public life may well be considered by a jury or judge to be considerably higher than for a private individuals. Alternatively this distinction may manifest itself in a lower award of damages than might otherwise have been awarded to a purely private plaintiff. Support for this second proposition is revealed in a comparison of five recent defamation awards.

In *Shadbolt v Independent News Media (Auckland) Limited*,¹⁷ *Weepu v Greymouth Evening Star Company Limited*,¹⁸ and *Harrison v Banks*,¹⁹ the plaintiffs were to differing degrees public figures who had all been harshly defamed²⁰ in respect of their performance of their official duties. These plaintiffs were award \$50,000, \$50,000 and \$60,000 respectively. In *McRea v Australian Consolidated Press*, and *Quinn v TVNZ* the juries awarded the essentially private plaintiffs total damages of \$375,000 and \$1.5 million respectively.²¹ Although both these awards were very high by New Zealand's standards and they were both subsequently reduced.²² These cases support the proposition that the chilling effect defamation is significantly less frosty toward public discussion of politicians and holders of public office than private individuals.

¹⁶R Tobin *Defamation of Politicians, Public Bodies and Officials: Should Derbyshire and Theophanous Apply in New Zealand?* [1995] NZLJ 90,102.

¹⁷ High Court, Auckland Registry, CP 207/95, Tompkins J, 7 February 1997.

¹⁸ High Court, Greymouth Registry, CP 4/91, Tipping J, 19 March 1997.

¹⁹ Above n 9.

²⁰ All had been publicly accused of acting dishonestly and illegally for personal gain.

²¹ See *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 CA (refers to jury awards in both the *McRea* and *Quinn* cases).

²² In *McRea* the jury awarded \$375,000. The defendant applied to have the award set aside. During the course of arguing that application the parties negotiated a settlement whereby Toni McRea would receive \$100,000 plus payment of her legal fees. In *Quinn* the jury awarded \$400,000 and \$1.1 million on the two causes of action sued upon. Television New Zealand applied to have the awards set aside, Anderson J

2 *Further practical issues tempering the chilling effect of potential defamation actions in the political arena*

Costs are an issue significantly tempering the chilling effects of the threat of defamation proceedings. Although defamation is often called the plaintiff's tort, the label the plaintiff's financial millstone might be more apt. Defamation actions are very expensive to prosecute. Details of plaintiffs' costs are difficult to obtain, however I understand that Noel Harrison's²³ legal fees had exceeded \$250,000 before the three week jury trial in Whangarei had commenced. It is rumoured that in *Quinn* the plaintiff's total legal costs exceeded \$300,000. It was recently reported that M.P. Tuku Morgan had incurred legal fees in the vicinity of \$100,000 yet the proceeding against M.P. Trevor Mallard, Television New Zealand Limited and Television Three Limited seem to be a very long way from being set down for hearing. The decision to prosecute a defamation action may mean plaintiffs must commit and risk their financial security.²⁴ Even wealthy defamation plaintiffs may be seriously deterred from pursuing this type of litigation, particularly where the ultimate award of damages may not come close to the actual costs of the proceedings, moreso the case with public figure plaintiffs where ultimate damages are likely to be at the lower end of the range of awards.

In the USA there may be a highly skilled bar readily waiting to accept instructions and vigorously prosecute defamation proceedings on a contingency-fee basis. The New Zealand bar does not have a strong tradition of contingency-fee arrangements²⁵. The level of damages awarded, while seeming to be slowly increasing, coupled with the uncertainties associated with defamation litigation, has not encouraged the emergence of a contingency-fee based practice in New Zealand. Unless a defamation plaintiff can find able counsel willing to accept instructions on a contingency basis, or it is one of those

set aside the award of \$1.1 million but allowed the award of \$400,000 to stand. The appeal to the Court of Appeal was unsuccessful.

²³ Above n 9.

²⁴ In *Morgan v Mallard & Ors* the plaintiff's mother-in-law pledged the equity in her home in response to the first defendant's application against the plaintiff for security for costs. See "Morgan uses relative's home as court security" *The Dominion*, Wellington, New Zealand, 26 June 1997, 1.

²⁵ See R Fowler and P Connor "Contingency fees: a time for sunlight?" (1997) 253 Council Brief 1.

rare occasions where legal aid will be granted,²⁶ I suggest that the financial burden of prosecuting defamation proceedings will deter many would-be public figure defamation plaintiffs.

In addition to the issue of costs, a further deterrence factor against the commencement of defamation proceedings which experienced defamation practitioners will emphasise in the strongest terms at the outset are the personal and emotional costs to a plaintiff in pursuing defamation litigation. The lead up to trial may involve years of interlocutory manoeuvring, well resourced media defendants may attempt to burn-off plaintiffs during the pre-trial stages. Although all civil litigation has risks associated with it, defamation proceedings are perhaps the most fraught with uncertainties, especially where juries are involved. Invariably the trial of a defamation proceeding will be one of the most gruelling experiences of a plaintiff's life, often more traumatic in emotional terms, win or lose, than the publication of the statements sued upon.²⁷ Although it is the defendant which is strictly speaking on trial, it is very much the plaintiff who is under the jury's scrutiny, especially where the defences of truth and honest opinion are pleaded.

The issue of costs, both financial and personal, of pursuing defamation litigation, coupled with pragmatic and fair legal advice to most of the large media organisations, has resulted in a defacto operation of the media defence proposed by the McKay Committee²⁸ but not incorporated into the Defamation Act 1992. For example, where a newspaper has published what is clearly a defamatory statement to which none of the recognised defences apply, the most common outcome is the immediate publication of a correction and apology, and a contribution to the complainant's legal fees, which at that stage do not usually exceed \$1,500. Key factors in counsel so often recommending this course of action to potential plaintiffs are the costs and risks of pursuing the litigation. The media cooperate because legally they are seriously exposed. It is interesting to

²⁶ It seems that very few public figure type plaintiffs will be eligible for legal aid. Noel Harrison was granted legal aid after he had exhausted all his personal resources pursuing his claim against Mr Banks and the Northern Advocate.

²⁷ These comments are based upon the observations of leading defamation lawyer Peter McKnight.

²⁸ See *Recommendations on the Law of Defamation: Report of the Committee on Defamation* (Government Printer, Wellington, 1977).

ponder how this dynamic equilibrium will be effected by the decision in *Lange*, will the comfort of robust defence lead to the media being less accommodating?.

Setting the scene for a discussion of qualified privilege also requires a consideration of the context in which arguments of qualified privilege arise. Unlike the defences of truth and honest opinion, qualified privilege protects untrue statements of fact which have damaged a person's reputation. What has been said has been published as a statement of fact, not as a statement of opinion. It has been published as a statement of fact where the publisher cannot or will not by admissible evidence prove the truth of what has been stated as being the truth. As Michael Reed QC an experienced defamation trial lawyer has put it, privilege protects the "telling of lies".²⁹ It is significant that true statements and honest opinions are always protected even if publication is to the world at large, whereas the occasions are rare where publications of defamatory statements to the world at large are protected by qualified privilege.³⁰

Qualified privilege has developed as the courts have been called upon to identify occasions where "the common convenience and welfare of society"³¹ deems that as between the maker of a defamatory statement and the recipient there has been a sufficiently strong corresponding interest and duty that, in the absence of malice on the part of the maker of the statement, the making of a false statement should be protected from defamation liability. As it is a false statement which is being protected the size of the audience to which publication is made is important, the larger the audience to whom the false publication is to be made the greater should be the weight of the interest or duty which justifies the publication.

²⁹At a lunchtime debate hosted by the Faculty of Law, Victoria University of Wellington, 22 April 1997. The debate was chaired by recently retired Court of Appeal judge and recognised authority in the field of defamation Justice Ian McKay. The topic of the debate was along the lines of whether the decision in *Lange* should signal the future direction for the defence of qualified privilege. Arguing for the affirmative were Sir Geoffrey Palmer and Geoff McLay, for the negative were Michael Reed QC and Hart Schwartz. At the end of the debate a vote was put to the audience of several hundred, an overwhelming majority supported the negative side's position that *Lange* should not indicate the future direction for qualified privilege.

³⁰*Adam v Ward* [1917] AC 309. See also section 18(1) of the Defamation Act 1992 which states that a publication of a report or other matter specified in Part II of the First Schedule of the Act will not be protected unless "the report or matter is a matter of public interest in *any place where the publication occurs*" (emphasis added).

³¹*Toogood v Spyring* (1834) 1 CM & R 181,193, 149 ER 1044,1050.

Once the important distinction between protection defamatory statements which can be proved true or which are stated as genuine opinions and defamatory statements which are untrue, is fully appreciated it is not difficult to understand the history of judicial reluctance to extend qualified privilege to defamatory statements published to the world at large. It is also evident in the cases which are discussed below that questions of the importance of freedom of speech and the integrity of the democratic process have been seriously weighed when judges have made their decisions.

B *The New Zealand Precedents - Political Discussion and Qualified Privilege*

1 *Bradney v Virtue*³²

Mr Bradney had been a candidate in an election to the Auckland Harbour Board. He lost the election by one vote and subsequently applied to have the election upset on grounds of various alleged irregularities. There was a magisterial inquiry at which Mr Bradney gave evidence under oath. The outcome of the inquiry was that the election was declared void and a new election ordered. Mr Bradney was voted onto the Harbour Board at the second election.

Messrs Keen, Geddis and Weston were not themselves electors in the second election, but were all involved in promoting Mr Bradney. Prior to the second election the defendant, Mr Virtue, defamed Mr Bradney by saying to Messrs Keen, Geddis and Weston that in the course of the magisterial inquiry Mr Bradney had committed perjury. The jury found awarded damages of £25 on each of two causes of action, there was no finding of malice against Mr Virtue. Edwards J was required to decide whether qualified privilege applied to the occasion of the publication.

Had Messrs Keen, Geddis and Weston been electors Edwards J would have held that this would have given rise to a "special interest in the election which upon that ground

³² (1909) 28 NZLR 828.

would make the occasion a privileged occasion within the authorities".³³ However, finding that the facts of the case did not fit squarely within the authorities Williams J went on to consider whether Mr Virtue had been under a moral or social duty to act as he did.

Edwards J adopted the definition of moral or social duty given by Lindley L.J. in *Bradney v Virtue*,³⁴ then considered the facts of the case relevant to such a duty and held:³⁵

It is of the highest importance that none but persons of good character should be elected to public offices. To that end it appears to me that if a reputable citizen honestly believes that he knows that a candidate for a public office has committed a serious offence which in the opinion of reputable persons would be a disqualification for such office, that citizen is under a moral duty to society to communicate the facts as he believes them to exist to those who are actively promoting the candidature of the person whom he believes to have committed the offence.....The result may be a hardship to the plaintiff - the application of the law with reference to this ground of privilege has frequently caused hardships; but the principle is for the public welfare, and private interests must be subordinated to that.

Although perhaps not discussed using modern terminology, in the judicial reasoning in *Bradney v Virtue* can be seen a weighing the right to reputation against the competing considerations of freedom of speech and proper operation of the democratic process. Edwards J made the judgement that protection of defamatory statements made to a limited audience who had an immediate interest in the subject matter would properly serve the democratic process.

2 *Truth (NZ)Ltd v Holloway*³⁶

³³ Above n 32, 836.

³⁴ [1891] 2 Q.B. 350

³⁵ Above n 32, 839.

³⁶ [1960] NZLR 69 (C.A.).

The Rt Hon Phillip Holloway was the Minister of Industries and Commerce. The Truth publish an article dealing with the manner in which it was alleged certain import licences had been obtained, calling for an inquiry. The paper stated that the response to a request for information about import procedures had been "see Phil and Phil would fix it". The Minister sued alleging that the words were "defamatory in that, in their context, they meant, and were understood to mean, that he was a person who had acted, and was prepared to act, dishonestly in connection with the issue of import licences."³⁷

the Truth argued that qualified privilege should apply because "the subject-matter of the article was of substantial and legitimate common interest to every section of the community,"³⁸ The Court of Appeal held that the paper would have been protected if it had published its allegations only to the appropriate authority, not to the world at large. The Court of Appeal relied upon the speech of Lord Herchell in *Davis v Shepstone*.³⁹

There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the Press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert he has been guilty of particular acts of misconduct.

The Court of Appeal observed that Newspapers perform two distinct functions.⁴⁰ The first, to provide readers with fair and accurate reports of proceedings, judicial and otherwise, and of public meetings and the like, this function being supported by the Defamation Act 1954. The second function being to provide readers with news, and even gossip, concerning current events and people:⁴¹

³⁷ Above n 36, 79.

³⁸ Above n 36, 81.

³⁹ (1886) 11 App. Cas. 187

⁴⁰ Above n 36, 83.

⁴¹ Above n 36, 83.

In this second field, in our opinion, there is no principle of law, and certainly no case that we know of, which may be invoked in support of the contention that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest.

While the Court of Appeal acknowledged that the categories of qualified privilege were not closed,⁴² it classified the occasion of the allegation against Mr Holloway as falling within the second field of the newspaper's functions and not protected by qualified privilege. The decision in *Holloway* is not only significant for its rejection of a proposed new category of privilege based on "public interest" alone, but also for the Court of Appeal's finding that it was not in the public interest to find on the facts of the case a duty to publish to the general public the allegations of impropriety against the Minister.

In terms of recognising the proper operation of the democratic process and principle of participation in government, I suggest that in *Holloway* the Court of Appeal was implicitly favouring the importance of due process rather than trial by media. If the allegations about Mr Holloway had been reported to, and investigated by, the appropriate authority then the public would have learned of the matter through the protected publication of reports of that authority's proceedings. The relevance to the democratic process of this policy approach is that the public shall learn of scandalous allegations in a context where they are being treated simply as allegations which at some stage will be upheld or rejected by the forum society has appointed to decide such matters. Such a policy approach was embodied in the Defamation Act 1954 and has been carried over in the Defamation Act 1992. It is a policy approach which aims to achieve openness of process and public knowledge of such allegations, while ensuring the integrity of the democratic system by not protecting the publication to the public of false or unprovable allegations as statements of fact.

3 *Eyre v New Zealand Press Association Limited*⁴³

⁴² Above n 36, see 81 and 82 for a discussion of *M. G. Perera v Peiris* [1949] A.C. 1.

⁴³ [1968] NZLR 736

Mr Eyre was the retiring Minister of Defence, on 23 November 1968 he spoke at a political meeting held at Davenport in support of the candidature of Mr G.F. Gair, the National Party candidate for the North Shore. During the course of his speech Mr Eyre commented that he would give North Vietnam a basinful of bombs if he had his way, this remark was qualified to the effect that bombs should be dropped on military targets only. Some time later in his speech Mr Eyre made remarks dealing with Oriental people being different. The New Zealand Press Association ("the Press Association") forwarded a condensed report of Mr Eyre's speech to morning newspapers in New Zealand and a second condensed report to the Australian Associated Press and to Reuters, The material part of the second report read:

...Mr Dean Eyre, told an election meeting here tonight that if he had his way he would "give North Vietnam a basinful of bombs tomorrow morning".

Mr Eyre was stung by interjectors disagreeing with the National Party's Vietnam policy during the sometimes-stormy meeting.

"What about the children", shouted a heckler.

Mr Eyre: "Children died in London from bombs too. We are not dealing with ourselves, we are dealing with Oriental people. They are different from ourselves.

The jury found that the two reports were defamatory and awarded damages totalling \$30,000. McGregor J was required to decide whether the publication by the Press Association was protected by qualified privilege. At the outset McGregor J pointed out that any privilege would have to come from the common law as the Defamation Act 1954 only protected "fair and accurate" reports of the occasions listed in the First Schedule of the Act.⁴⁴

On behalf of the Press Association it was argued that as it had acted without malice it should enjoy the protection of a "generous privilege" to serve the public interest in the matter of news. It was also argued that it was in the public interest that there should be free dissemination of thoughts, ideas and newsworthy events, and that it was for the

⁴⁴ Above n 43, 739.

Court to decide whether the "occasion" as distinct from the "communication" was privileged. McGregor J held:⁴⁵

Here the defendant had an honest belief in respect of the correctness of its report as to what the plaintiff had said. It may well have possessed a duty to communicate what was said by the plaintiff to its associates, but in my view it had no duty to communicate an incorrect report of what the plaintiff had said. Such a claim to communicate in my opinion, is not "in the interests of the community", is not "for the welfare of society", is not "for the common good of society in general", is not "for the common convenience and welfare of society". The phrases I have used are those on which occasions of qualified privilege have been held to be based.....I do not think in any case the protection given is wider than that given to newspapers originally by the Law of Libel Amendment Act 1888, a condition of such protection being that the report be fair and accurate. The publication must be for the public benefit.....An inaccurate report cannot be for the public benefit. The Court must be satisfied that the publication of the very words complained of is for the public benefit.

But for the inaccuracy of the reporting the occasion of the publication in *Eyre* would have fallen squarely within the first of the two categories referred to in *Holloway*. The theme of a policy approach which promotes freedom of information, but which protects the integrity of the democratic process by ensuring potentially defamatory allegations are presented to the public in the proper context is reinforced in *Eyre*. Parliament's policy objective was that the public should receive reports of the views of politicians expressed at public meetings, even if such reports contained defamatory allegations at least the public would know that such allegations had originally been made in a context that Parliament had chosen on policy grounds to protect. However, to extend the protection of the privilege to beyond an accurate report of what was actually said at the public meeting would be to move beyond Parliament's policy choice as to how freedom of information should be balanced with preserving the integrity and truth of political discourse.

⁴⁵ Above n 43, 741,742.

I suggest that there are clear merits in maintaining a clear delineation between protected and unprotected occasions. It seems evident today that statements made in Parliament under the protection of parliamentary protection are perceived by the public as less likely to be true than statements for which the maker may be held accountable. By extending the boundaries of privilege too wide, for example beyond true and accurate reports in *Eyre*, there will be too few occasions upon which the public will be able to rely upon the integrity of the information it receives about the operation of the democratic system.

4 *Brooks v Muldoon*⁴⁶

Mr Brooks had been unanimously recommended by a committee set up by the Minister of Labour for appointment to the post of chief mediator under a 1970 amendment to the Industrial Conciliation and Arbitration Act 1954. Notwithstanding the committee's recommendation, Cabinet and the Government Caucus, both of which the Rt Hon Robert Muldoon was a member by virtue of being Minister of Finance, declined to appoint Mr Brooks. Mr Muldoon made several public statements on the matter, referring to Mr Brooks as *being* "a way-out militant", "a way-out left winger when involved with the National Union of Teachers", and that "his approach to industrial relations was entirely unorthodox and outside the scope of the Industrial Conciliation and Arbitration Act". Mr Muldoon also seriously misquoted an earlier statement by Mr Brooks.

Mr Books sued in defamation on four publications. Mr Muldoon pleaded qualified privilege.⁴⁷ Having held that at the material time the appointment of chief mediator was an issue of national importance and that the public press and community at large had a "corresponding interest" to receive advice that the post had been filled Halsam J said:⁴⁸

⁴⁶ [1973] NZLR 1

⁴⁷ Although Mr Brooks was not a candidate for elected political office the decision is still relevant as Elias J indicated that the expanded qualified privilege "could extend to information about the public conduct of those involved in political debate, whether or not they are elected or public officials." See above n 5, 46.

⁴⁸ Above n 46, 8,9.

But the relevant facts do not end there, and it 'does not follow that publication of all matters of public interest is in the public interest' (Flemming on Torts 4th ed 499) In my view, if imputations are made in such a setting against the fitness of an applicant for a public appointment, whether or not the post be still vacant, on the grounds of alleged bias or inadequacy on his part, then a defendant must be prepared to justify his words....for the public had no interest in receiving information which was tortious in content.

Halsam J acknowledged that the selection committee may have had sufficient interest receive the statements made by Mr Muldoon, and that Mr Muldoon may have been under a duty to impart his views to that committee, However, he could not sanction the publication of the defamatory statement to the public at large.⁴⁹

5 *Lucas & Son (Nelson Mail) Ltd v O'Brien*⁵⁰

In 1969 Mr O'Brien resigned from the New Zealand Social Credit Political League ("Social Credit") and became the leader of a new political party called the New Democrat Party, standing for that party in the 1972 general election in the Nelson electorate. On 21 November 1972 Social Credit filed proceedings against Mr O'Brien and others, alleging that assets properly belonging to Social Credit had been transferred for the purposes of the new party and to assist Mr O'Brien's electoral campaign. On 22 November 1972 the Nelson Mail published an article which in substance repeated the allegations contained in the statement of claim. The proceedings initiated by Social Credit were discontinued on 10 November 1975. Mr O'Brien sued both the publishers of the Nelson Mail and Social Credit in defamation.

The defendants pleaded privilege on the basis of: a) a moral and social duty to publish the contents of Social Credit's allegations to the general public; b) a fair and accurate report of court proceedings, and c) a fair and accurate extract of a court document. In the High Court Ongley J struck out all three pleadings of qualified privilege.

⁴⁹ Above n 46, 9.

⁵⁰ [1978] 2 NZLR 289

The Court of Appeal upheld the striking out of the pleadings based on reporting court proceedings and court documents, but in relation to the pleading bases on a moral or social duty held:⁵¹ “we have not the requisite material upon which to reach a definite and certain conclusion [that the defence] is so clearly untenable that it cannot possibly succeed”. Richmond P considered that there needed to be evidence of the degree of public interest in the subject matter at the time of publication, and as to the circulation of the *Nelson Evening Mail*, but that:⁵² “there will be difficulties in the way of establishing that the occasion of publication was a privileged one is apparent from the various authorities cited...”.

The President of the Court of Appeal cited with approval from *Bradney v Virtue*, particularly the reference to the definition of a social or moral duty by Lindley L.J. in *Stuart v Bell*. The statement in *Gatley* that:⁵³ “...no privilege would attach to the publication of matter injurious to the character of a candidate in a public newspaper” was referred to by the Court of Appeal, as was the statement by Lord Denman CJ in *Duncombe v Daniell*:⁵⁴

However large the privilege of electors may be, it is extravagant to suppose, that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate

Richmond P observed that Lord Denman’s statement had been accepted as correct the statement of law by the Supreme Court of Canada in *Douglas v Tucker* and in *Globe & Mail Ltd v Boland*, noting that in *Douglas v Tucker* the individuals involved were the Premier of Saskatchewan and the Leader of the Opposition.⁵⁵

While it may be argued that *O’Brien* adds little substantively to the debate as to whether qualified privilege should be expanded to encompass political discussion, the decision is significant for illustrating perhaps how the striking out application should have been

⁵¹ Above n 50, 297.

⁵² Above n 50, 297.

⁵³ *Gatley on Libel and Slander* (7th ed, 1974) para 97.

⁵⁴ (1837) 8 C & P 223,229; 173 ER 470,472

dealt with by Elias J in *Lange*. In *O'Brien* the Court of Appeal's approach was that although the law in the area seemed fairly settled there may be some kind of an arguable case for extending the privilege on the particular facts of the case, therefore let the facts be proved and then the trial judge could decide whether or not those facts combined with the recognised principles could justify the expansion of qualified privilege sought by the Newspaper defendant.

6 *Templeton v Jones*⁵⁶

The Hon H C Templeton was the sitting Member of Parliament for the Ohariu seat in the 1984 general election. Robert Jones was a declared candidate for the same seat. In a speech given to the annual general meeting of the Ohariu Branch of the National Party Mr Templeton said:

Mr Jones is a man who seems to hate. Mr Jones is a man who despises many people ... bureaucrats, civil servants, politicians, women, Jews and professionals. Doesn't it sound familiar? The politics of hatred.

Mr Templeton distributed to members of the parliamentary press gallery copies of his speech notes, this led to the publication of parts of the speech on television. Mr Jones sued only on the allegation that he despised Jews. Mr Templeton pleaded qualified privilege on the basis of:⁵⁷

...the social and/or moral duty of the Defendant to make a statement to the general public as to the conduct and the fitness for public office of a declared candidate for Parliament at the next general election and by reason of the corresponding interest of the general public to receive it.

⁵⁵ Above n 50, 297; *Douglas v Tucker* [1952] 1 DLR 657,666; *Globe & Mail Ltd v Boland* (1960) 22 DLR (2d)227,280.

⁵⁶ [1984] 1 NZLR 448

⁵⁷ Above n 56, 455.

Ongley J had refused to strike out the defence of qualified privilege, it came before the Court of Appeal. Cooke J gave the decision of the Court:⁵⁸

As the common law of New Zealand stands it is plain enough that the mere fact that the plaintiff was a declared parliamentary candidate cannot be treated as imposing on the defendant a social or moral duty to make a defamatory statement about him to the general public. And, for the reasons already explained, we do not think that it would be right to enlarge the common law of New Zealand so as to create a new privilege.

Cooke J's analysis began with the observation that if Mr Templeton could prove the truth of his statements about Mr Jones, or he could prove facts upon which an honest opinion was based, he would have a complete defence; that only if the statement could not be proved true, or it was not an honest opinion based upon proven facts, would he be needing to rely upon qualified privilege.⁵⁹

Cooke J observed that under s17 and the First Schedule, Part II, cl 11 of the Defamation Act 1954 a fair and accurate report of proceedings at a public meeting would be privileged if the matter was of public concern and the publication was for the public benefit, but that no similar statutory privilege would apply to written material circulated by parliamentary or local government candidates. Cooke J obviously did not fully agree with the perhaps seemingly arbitrary lines upon which the legislature had drawn the boundaries for the protection provided by statutory qualified privilege:⁶⁰

The present New Zealand law regarding qualified privilege in the political field is probably not wholly logical..... To extend the scope of the privilege is not altogether without attraction. But it has to be remembered that there are also strong arguments against doing so.

⁵⁸ Above n 56, 459,460

⁵⁹ Above n 56, 456.

⁶⁰ Above n 56, 458.

The Court of Appeal considered the United States line of cases beginning with *New York Times v Sullivan*⁶¹ and in rejecting that type of approach cited the following passage from *Gatley*:⁶²

It is, however, submitted that so wide an extension of the privilege would do the public more harm than good. It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation.

English and Canadian authorities considered by the Court of Appeal supported the proposition that publication to the general public of defamatory statements about public figures should not be protected. Cooke J cited the McKay Committee's observation that:⁶³ "The United States rule could open the door to irresponsible journalism based on speculation rather than facts and it is difficult to accept that a licence to state false facts is necessary for healthy criticism."

The Court of Appeal considered itself also constrained by the legislative context in which it found itself. The McKay Committee had recommended to Parliament a media defence aimed at going "a long way towards removing the inhibitory features of the present law of defamation."⁶⁴ particularly in relation to the publication of defamatory statements to the general public. The Court of Appeal held that as the legislature had not yet acted on the McKay Committee's recommendations it:⁶⁵

...should be especially cautious before moving towards a qualified privilege which in some ways would be even wider.

The judgments, textbooks and law reform reports already cited, considered as a whole, persuade us that we ought not to introduce anything akin to the American doctrine into New Zealand law by judicial decision. If there is to be any major change in this field, it should be made by Parliament.

⁶¹ 376 US 254 (1964)

⁶² *Gatley on Libel and Slander* (8th ed, 1981) para 488, note 65

⁶³ 459

⁶⁴ Above n 28, para 491.

Clearly the Court of Appeal was deferring Parliament's role in deciding what should be the law in areas involving major policy decisions. The refusal of Parliament to include in the Defamation Act 1992 the media defence recommended by the McKay Committee was a policy decision of considerable significance. Also of significance was that of cl 11, Part II of the First Schedule of the Defamation Act 1954 was not amended by the Defamation Act 1992 to include occasions such as gave rise to the action in *Templeton v Jones*.

Templeton v Jones was an important precedent decision by the Court of Appeal, not only did it refuse to expand the defence of qualified privilege to encompass the facts of the case, facts which were a classic example of political discussion, but the reserving of any "major changes in this field" to Parliament should have effectively preempted revisiting of these issues in the foreseeable future.

C The Scope For Judicial Expansion of Qualified Privilege To Occasions of Political Discussion Published to the General Public

The cases discussed above concerned a variety of occasions where the allegedly defamatory statements were made in the course of "political discussion". The weight of those precedents is clearly against applying common law qualified privilege to publications of defamatory statements to the general public. As a question of pure precedent the expanded qualified privilege defence pleaded by the defendants in *Lange* should not have survived the striking out application. However, development of the common law is not completely pre-empted by the doctrine of stare decisis. A consideration of the principles guiding judicial development of the common law is an important introduction to the detailed consideration of *Lange* which follows.

Not too much needs to be said about the judicial practice of navigating around unhelpful precedent decisions by way of distinguishing such cases on their facts. Scrutiny of this technique is very much a process of comparing the case in hand with the cases which the judge has endeavoured to distinguish. In relation to *Lange* unless the

⁶⁵ Above n 56, 459.

precedent cases, particularly *Holloway* and *Templeton v Jones*, were validly distinguished the principals discussed in the following paragraphs ought to have guided Elias J.

Speaking at the recent conference "The Struggle for Simplicity" held in honour of Lord Cooke of Thorndon, Lord Bingham of Cornhill said:⁶⁶ "Lord Radcliffe thought that judges should walk warily in fields where Parliament regularly legislated or had recently done so." This proposition is usefully expanded upon by Lord Radcliffe in his book *Not in Feather Beds*:⁶⁷

I think, that, while it is an illusion to suppose that the legislature is attending or can possibly attend all the time to all aspects of the law, there are certain areas of public interest which at any one time can be seen to be a matter of its current concern. [If] It has recently legislated on that subject according to certain principles (if they can be detected) or it regularly legislates on the whole field covered by that subject (as, for instance, the law of taxation). In those areas I think that the judge needs to be particularly circumspect in the use of his power to declare the law,...

Where a judge might be presented with an opportunity to change the law it Lord Radcliffe cautioned that:⁶⁸

It is a good thing that judges should be aware of the incidents and circumstances of the society of their own day and should be able to realise that these may have changed from those to which the rules were originally applied: but the true question for them, I think, is how far the situation has altered, so as to generate a new rule, rather than to find in the circumstances authority for a change of rule. [emphasis added]

I suggest that a fair conclusion to be drawn from the discussion of *Lange* which follows is that the decision is contrary to Lord Radcliff's principles; that Elias J was not sufficiently circumspect given the recent legislative activity in the field of defamation,

⁶⁶ The Rt Hon Lord Bingham of Cornhill, *The Judge as a Lawmaker: An English Perspective*, in P Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997).

⁶⁷ Viscount Radcliffe *Not in Feather Beds* (Hamish Hamilton Ltd, London, 1968) 215,216.

and that the recent changes in circumstances relied upon by Her Honour⁶⁹ did not genuinely "generate" the new rule, rather, at best, there may be found in those circumstances some "authority for" the change to the defence of qualified privilege.

It is most timely that less than three months before being due to hear the *Lange* appeal the Court of Appeal has given a decision involving "an assessment of the relevant considerations of precedent, legal principle and policy, not least the respective rolls of the judiciary and the legislature in determining complex public interest questions."⁷⁰

In *R v Hine* Williams J had been of the view that a key witness for the prosecution in an attempted murder case should be able to give evidence without disclosing his name and address. However, the earlier Court of Appeal decision in *R v Hughes*⁷¹ had held that as a matter of principle the identity of prosecution witnesses, in that case under-cover police officers, must be disclosed to the defence. In *Hine* the majority of the Court of Appeal held that it could not depart from the rule in *Hughes*.

There are some important similarities in the circumstances of *R v Hine* and *Lange*. First, in *Hughes* the majority of the Court of Appeal had expressed the view that any significant change to the common law under consideration in that case ought to be made by Parliament rather than the Court, an identical view to that expressed by Cooke J in *Templeton v Jones*. Secondly, following *Hughes* Parliament legislated in the area, it enacted anonymity in limited circumstances for undercover police officers. In *Hine* Richardson P considered the scope of the legislative response to *Hughes* and the relevant debate in the House of Representatives. A similar analysis to that adopted in *Hughes* should have been applied to the post-*Templeton v Jones* legislative developments in the law of defamation.

In 1992 the Defamation Act was passed, it did not significantly expand qualified privilege along any of the lines discussed in *Templeton v Jones*. During Parliamentary

⁶⁸ Above n 67, 223.

⁶⁹ See n 5, 43-46.

⁷⁰ Above n 7., Richardson P p2.

⁷¹ [1986] 2 NZLR 129.

debates on the Defamation Bill Members from both Governments⁷² spoke in support of the Bill, stating that there “was no pressing need to change the existing balance between freedom of speech and protection of reputation”,⁷³ “Defamation law requires a delicate balance between the reputation on the individual and freedom of speech...the Bill as reported back is indeed an effective compromise...[the reforms]are probably less radical than some would have hoped.”⁷⁴ “It is not a step that will assist freedom of expression, but it is a step that will protect people’s reputations...freedom of expression can be facilitated.”⁷⁵

In *Hine* Richardson P confirmed the Court of Appeal’s approach to reviewing its earlier decisions as stated in *Collector of Customs v Lawrence Publishing Co Ltd*,⁷⁶ that the court should not attempt an all-embracing formulation as to considerations that should influence the court, but that the members of the court after weighing the considerations favouring and negating review in a particular case should make a value judgment as to whether it is appropriate in the interests of justice to perhaps overrule an earlier decision.⁷⁷ The President then identified three considerations in determining whether is appropriate for the courts to fashion a new rule:

- a) The subject matter and its closeness to the court’s function. In *Hine* judge’s considerable experience in assessing fair trial questions was relevant;
- b) That in making value judgments the court is seeking to apply underlying community values, not the judge’s personal values. There is considerable room for differences of approach to the balancing of the worth of the individual and the human rights of all members of society, and that the emphases given by different societies to different values may change over time. Richardson P cited the following statement of Brennan J in *Dietrich v The Queen*:⁷⁸

⁷² When the Defamation Bill was first introduced in 1988 the Labour Party was in power, for the second and third readings of the Bill the National Party was the Government.

⁷³ Rt. Hon. Geoffrey Palmer NZPD, vol 491, 6369, 25 August 1988.

⁷⁴ Hon. D.A. M. Graham NZPD, vol 531, 12144, 10 November 1992.

⁷⁵ Hon. David Cagill NZPD, vol 531, 12150, 10 November 1992.

⁷⁶ [1986] 1 NZLR 404.

⁷⁷ See above n 7, Richardson P p11.

⁷⁸ (1992) 177 CLR 292.

The responsibility for keeping the common law consonant with contemporary values does not mean that the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values.

- c) Whether the question is appropriate for judicial resolution. The President emphasised that judges must be conscious of the respective rolls of the three branches of government reflected in the Constitution Act 1986: Parliament, the Executive and the Courts. He said:⁷⁹

The larger the public policy context, the less well equipped the courts are to weigh considerations involved and to attempt to resolve any moral quandaries and the less inclined they must be to intervene. That is particularly so where there are public policy ramifications affecting the bases of other relevant common law or statutory provisions. In short, where the consequences reach beyond the limits of the cases and beyond a response to a particular issue.”

Richardson P discussed in some detail the two major problems for the courts in deciding public policy litigation, namely: obtaining relevant information and then assessing it. He emphasised how the New Zealand Law Commission was far better suited to carry out such a function:⁸⁰ “That process produces carefully thought out policy with ample public participation which is then further subjected, as appropriate, to general governmental and parliamentary legislative policy processes.”

On a theoretical plane it may be argued that in deciding *Lange* Elias J was, subject to not being able to distinguish them, strictly bound by the Court of Appeal decisions in *Holloway* and *Templeton v Jones* and that considerations of the grounds upon which the Court of Appeal may review its earlier decisions are irrelevant. However, the practicalities of the situation are that it will be the Court of Appeal which will decide whether the decision in *Lange* will stand or not. Therefore the issues considered in *Hine* are directly relevant to an analysis of *Lange*.

⁷⁹ Above n 7, Richardson P p12.

⁸⁰ Above n 7, Richardson P p14.

In *Hine* it was acknowledged that where significant issues of public policy are involved, and the consequences reach beyond the limits of the particular case under consideration, these features tell against a judicial law making power.

Defining the limits of qualified privilege, and particularly any really significant change to those limits involves, I suggest, major issues of public policy. The learned author of the defamation section of *The Laws of New Zealand* introduces the subject of qualified privilege:⁸¹ "On grounds of public policy, the law affords protection from liability in defamation to certain occasions...". The expansion of qualified privilege proposed in the *Lange* decision is very significant, even radical. On the basis of the views expressed in *Hine*, the type of change to the law of defamation proposed in *Lange* should be effected by Parliament rather than the High Court or the Court of Appeal.

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A *The Scope of the Expanded Defence of Qualified Privilege*

Although Elias J only indicated "tentative" views as to the full scope and conditions of the expanded qualified privilege defence, the reality is that Her Honour is likely to preside at the trial of this case and it is to be expected that the final decision on the defence will reflect the judge's views on the defence as expressed in the striking out application. In my opinion the proposed defence is radical in character, both in terms of very wide subject matter to which it will apply and in the absence of the tempering conditions which the Australian High Court imposed on the freedom of political discussion defence there. Below I will consider the character of the class of plaintiff's against whom the expanded defence may be available and what type of speech may be protected. Then the features of the proposed defence will be considered, in particular Elias J's rejection of the tempering features of the Australian defence proposed in *Theophanous* and *Stephens*.

⁸¹ *Laws NZ*, Defamation para 98. The author is the Right Honourable Justice McKay, recently retired Court of Appeal Judge.

I To whom and what might the expanded defence apply?

As to whom the expanded defence might apply Elias J offered little guidance in Her judgment other than to indicate concurrence with the Australian approach.⁸²

In Theophanous members of the Court expressed the views that the privilege could extend to information about the public conduct of those involved in political debate, whether or not they are elected or are public officials. There may be difficult cases where a private person is swept involuntarily into political controversy or where a public official holds a minor office.

The potential of such a formulation is that the number of individuals against whom the expanded qualified privilege defence can be pleaded will be very large indeed. It is foreseeable that an individual could be swept into the realm of "public controversy" purely by virtue of the fact that a defamatory statement about them has been published. Furthermore, such a formulation seems to be not too far removed from that originally set down in *New York Times v Sullivan*⁸³ and which has evolved into the public figure defence, a species of defence expressly rejected in *Templeton v Jones*⁸⁴.

As to the type of speech which might be protected by the expanded qualified privilege defence Elias J acknowledged that any formulation would be "necessarily imprecise" until applied in a tangible context, but that:⁸⁵

"political discussion" is discussion which bears upon the function of electors in a representative democracy by developing and encouraging views upon government.....
..impact upon the functions exercised in a representative democracy by the people governed seems a surer standard than is available for the wider concept of "public interest".

⁸² Above n 5, 46.

⁸³ 376 US 254 (1964)

⁸⁴ Above n 56.

⁸⁵ Above n 5, 46,47.

While the physical extremities of this formulation may not be identified until tested on the facts of cases involving statements on the margins of what might be classified as political discussion, one thing is clear, the subject matter which falls within the definition of political discussion is very broad.

Development of the common law defence of qualified privilege has tended to be incremental, permitting limited publication of limited material to limited audiences. Expansion of the defence to limited subject matter published to the general public has tended to be by way of legislation.⁸⁶ Whatever the final limits of the expanded defence proposed in *Lange* may be, the defence will encompass the widest scope of publication (ie to the general public), it will apply to a very broad range of potential plaintiffs and include a vast array of subject matter. I suggest that not only is scope of the proposed defence many times more radical than any previous expansion of qualified privilege undertaken by the courts, but its effect on the law of defamation will be as significant as any single change undertaken by the legislature in recent times.

2 *Proposed elements of the freedom of political speech category of qualified privilege*

Given the very significant scope of the new qualified privilege defence it might have been expected that Elias J would follow the Australian High Court and temper the defence by introducing conditions to the defence. The Australian conditions were summarised by Elias J:⁸⁷

All Judges in the High Court of Australia in *Stephens* (with the exception of Dawson J who found it unnecessary to consider the Question) recognised that political discussion gives rise to qualified privilege in some circumstances.....In *Theophanous* and

⁸⁶ See the occasions listed in the First Schedule of the Defamation Act 1992.

⁸⁷ Above n 5, 48. Reflecting on *Theophanous* and *Stephens* it is arguable that the prerequisites of reasonableness of publication, unawareness of falsity, and absence of recklessness, were only applicable to the stand alone defence and not to qualified privilege. However, in *Lange* the defendants included these elements in their pleading of qualified privilege, and in *Lange v Australian Broadcasting Corporation* (High Court of Australia, 8 July 1997, FC97/021) the Australian High Court seemed to assume that the *Theophanous* and *Stephens* decisions these prerequisites were included with qualified privilege (see pp 31,32).

Stephens all Judges with the exception of Deane J would have imposed preconditions upon the availability of the privilege. The majority held that the defendant would be liable in damages unless able to establish that he or she was unaware of the falsity, that the defendant did not publish recklessly (not caring whether the matter was true or false) and that the publication was reasonable (a matter to be established in the circumstances of the case to be established in the circumstances of the case either by showing that steps were taken to check the accuracy of the information or that publication without checking was justified in the circumstances).

However despite concurring in the result, Deane J in his reasoning in the Australian cases rejected the imposition of the preconditions of absence of recklessness and reasonableness.⁸⁸ The outcome in *Lange* on the issue of conditions for the implementation of the expanded defence is a point somewhere between the result in *Theophanous* and Deane J's reasoning.

The decision in *Lange* seems to have been heralded as an overwhelming victory for the defence.⁸⁹ However, it must not be overlooked that the stand alone defence pleaded by the defendants was struck out. That decision has not been appealed. However, it cannot be denied that the striking out of the stand alone defence was a wholly Pyrrhic victory for the plaintiff, for although the pleaded stand alone defence was struck out, in Elias J's expansion of qualified privilege the defendant's received much more than they had asked, perhaps even hoped, for.

The defence of qualified privilege founded on freedom of political discussion was pleaded by the defendants in *Lange* on the basis that the *North and South* article was inter alia:

- Published without malice;
- Not published recklessly; and

⁸⁸Above n 2, ALR 63. The High Court was sitting with seven members, without Deane J's concurrence with Mason CJ, Toohey and Gaudron JJ the outcome would likely have seen the status quo maintained rather than the introduction of the stand alone defence. This strange situation of a Judge concurring in a result which was markedly inconsistent with his reasoning so as to arrive at an outcome with was *less different* to the alternative was one of the key justifications used by the High Court in July 1997 to revisit and consequently abolish the stand alone defence. See above n 8.

⁸⁹ See G Huscroft "David Lange and the Law of Defamation" [1997] NZLJ 112, S Mills and A Adams "Lange Defamation Decision Revitalises Law of Political Expression" (1997) 476 Lawtalk 10.

- Was reasonable in the circumstances, having regard to;
 - The first defendant's belief that the article did not contain any matters that were false;
 - The steps taken by the first defendant prior to the publication of the article; and
 - The matters referred to in paragraphs 41.1 to 41.6 of the defence (the political discussion context, absence of malice and recklessness).

The pleading by a defamation defendant of absence of malice and recklessness, and reasonableness of publication was novel. Such pleading seems to have been based upon defence counsel's understanding of the Australian position. In a decision which must have delighted the defendants Elias J held "*tentatively*" that they need not plead absence of malice or recklessness, or reasonableness of publication save as to the element of honest belief.

In relation to the pleading of malice Elias J observed that section 19 of the Defamation Act 1992 "excludes [from qualified privilege] any concept of malice other than that where the defendant is predominantly motivated by ill will or otherwise takes improper advantage of the occasion of publication."⁹⁰ Her Honour felt it inappropriate to reintroduce the concept of malice as this would be inconsistent with the Act. Such an approach seems logical as the expanded qualified privilege defence would still be subject to the statutory elements of absence of ill will and improper advantage, albeit with the plaintiff bearing the onus.

As to the pleading of reasonableness in the publication Elias J held that as long as the publication did not exceed the occasion such an inquiry would introduce a wide factual inquiry as to fault inconsistent with the Defamation Act's restatement of the defence of honest opinion. The dubious merit of seeking consistency between qualified privilege and honest opinion is considered in detail below,⁹¹ suffice to say that this aspiration

⁹⁰ Above n 5, 49.

⁹¹ See below part III B3.

when critically assessed reveals little to commend it and promises many practical difficulties.

Elias J gave further reasons for rejecting a requirement of reasonableness in the publication. Her Honour referred to Deane J's observation in *Theophanous* that a reasonableness element would require an inquiry in to media methods similar to that required by the actual malice rule in *New York Times v Sullivan*. She felt that this would cause increased costs and strain, and greater risks of litigation because it would require "a more fine judgment than the United States requirement of clear proof of malice."⁹² It is difficult to accept that an onus on the American plaintiff to prove actual malice of a defendant can be likened to a defendant tendering some evidence that there was reasonableness in the publication. In practice a defendant will probably need to lead evidence of such matters in order to rebut pleas of ill will and improper use of the occasion.

A further reason give by Elias J for rejecting a requirement of reasonableness in the publication was that reasonableness in the sense of absence of negligence has historically been rejected as being an element of the defence of qualified privilege. *Horrocks v Lowe*⁹³ and *Spring v Guardian Assurance plc*⁹⁴ support this proposition. However, Elias J does not appear to have applied this type of historical analysis when proposing the precondition of honest belief,⁹⁵ an factor more foreign to the defence of qualified privilege than the concept of negligence.

In rejecting the Australian requirement of reasonableness in the publication Elias J created a defence easier to invoke than its Australian counterpart. The underlying rationale for this seems to be a view that in New Zealand political discussion requires even greater protection than that provided in Australia. This notion is evident in Elias J's conclusion that:⁹⁶

⁹² Above n 5, 50.

⁹³ [1975] AC 135

⁹⁴ [1995] 2 AC 196

⁹⁵ Above n 5, 50.

The uncertainties in expanding determination of whether an occasion of qualified privilege has been established into a trial of whether a defendant has acted reasonably seem to me to provide insufficient protection for political discussion.

In addition to rejecting the requirement of reasonableness Elias J also rejected the Australian requirement that the author of the defamatory statement should have special knowledge. Her Honour held that while special knowledge may well be relevant to honest belief:⁹⁷ “in the market place of ideas it seems to me invidious and dangerous to make judgements that free speech is not served except by those with special knowledge.”

The expanded qualified privilege defence in *Lange* is a defence considerably wider in scope and easier to invoke than that pleaded by the defendants. Proof of absence of malice and recklessness, and the requirement of reasonableness were rejected by Elias J and substituted by the ambiguous and novel requirement of honest belief. The net result is a defence broader than the Australian stand alone political figure defence, which Elias J had had rather ironically suggested earlier in the judgment:⁹⁸ “would deny the protection of the law of defamation to a section of the community in a manner which would be inconsistent with *Banks v Globe Mail Ltd*, *Templeton v Jones* and *Truth (NZ) Ltd v Holloway*.”

B Problems With Precedent

1 The failure to successfully distinguish *Templeton v Jones* and the other New Zealand precedent cases

Prior to *Lange* as a matter of precedent the answer would have been “no” to the question of whether qualified privilege, as a matter of principle as opposed to a conclusion based on the facts of a particular case, applied “to speech which is critical of the performance in public office of an elected representative and which is published to the general

⁹⁶ Above n 5, 50.

⁹⁷ Above n 5, 50.

⁹⁸ Above n 5, 44.

community".⁹⁹ Of particular significance being *Truth (NZ) Ltd v Holloway* and *Templeton v Jones*. While it would be wrong to argue with Elias J's observation that the common law of defamation continues to adjust the balance between freedom of speech and protection of reputation, such adjustment must build upon and be consistent with the precedent case law. When considered in detail Elias J's attempts to sidestep the restraining effects of *Truth (NZ) Ltd v Holloway* and *Templeton v Jones* do not survive critical scrutiny.

Elias J distinguished *Truth (NZ) Ltd v Holloway* on the basis that:¹⁰⁰

It did not, however, address the question of a qualified privilege for political discussion, but a wider privilege claimed for matters of public interest. 'Merely' because the matter developed is of public interest was held to be insufficient.

But *Holloway* was not concerned with a "wider privilege". It is misreading of *Holloway* to suggest that a wide privilege based "merely" on public interest was either sought by counsel for the newspaper or rejected by the Court of Appeal. Counsel for the newspaper argued that it would be in the public interest and for the "general welfare of society"¹⁰¹ if the particular subject matter of that occasion was held to be privileged. By contrast the decision in *Lange* creates an expansive new category of privileged occasion which Elias J has held it is for the "common convenience and welfare"¹⁰² of New Zealand society to protect. Ironically the category created by Elias J would include the facts of the particular event to which the Court of Appeal in *Holloway* refused to extend qualified privilege.

Holloway involved a classic example of core political discussion. It involved allegations of impropriety by a government Minister in the discharge of his ministerial duties. It had been argued by counsel for the newspaper that members of the public had a common interest and concern in the working of the import system and in the

⁹⁹ Above n 5, 43.

¹⁰⁰ Above n 5, 44.

¹⁰¹ Above n 36, 80.

¹⁰² Above n 5, 46.

“activities of Ministers and ordinary Members of Parliament in connection with its administration”.¹⁰³ The Court of Appeal held that although the publication may have been *of* interest to the public, it was not *in* the public interest to extend qualified privilege to that occasion. I suggest that any difference between the “in the public interest” test used by the Court of appeal in *Holloway* and the “common convenience and welfare” standard used by Elias J in *Lange* should be acknowledged to be one of semantics not substance.

The court of Appeal in *Templeton v Jones* held that while statements to a candidate’s constituents might be protected by qualified privilege, the mere fact that a plaintiff was a declared parliamentary candidate could not be treated as imposing any social or moral duty to make a defamatory statement about the candidate to the general public.¹⁰⁴ In *Lange* Elias J expressed the view the emphasis in *Templeton v Jones* on a plaintiff’s particular constituency “may overlook the broader participation in government recognised by McLachlin J in the *Saskatchewan Electoral Boundaries* case.”¹⁰⁵ This proposition is not justifiable as a basis for revisiting the principles so clearly laid down by the Court of Appeal in *Templeton v Jones*. Whether or not the *Saskatchewan Electoral Boundaries* case was considered by the Court of Appeal, issues of participation in government and the democratic process were clearly considered in *Templeton v Jones*.

In *Templeton v Jones* Cooke J had clearly considered the McKay Committee’s Report in detail, the introduction to that Report stated:¹⁰⁶

We accept as an equally basic principle [to protection of reputation] that society is entitled to a free flow of information and to give and take robust and stimulating comment, this is necessary for a full life, informed decision-making, and effective democratic government.

¹⁰³ Above n 36, 81. It is interesting to note that counsel for Truth (NZ) Ltd was Mr R Cooke, now Lord Cooke of Thorndon.

¹⁰⁴ Above n 56, 459.

¹⁰⁵ Above n 5, 43. Reference to *Saskatchewan Electoral Boundaries* case at 31 of *Lange*.

¹⁰⁶ Above n 28, 7.

Cooke J had also considered the “view that the scope of qualified privilege in the political arena should be extended....[as]...strongly argued by Mr Geoffrey Palmer...” in various publications including an article titled “Politics and Defamation - a Case of Kiwi Humbug?”.¹⁰⁷ In that article Mr Palmer had argued that:¹⁰⁸ “We need uninhibited, robust and wide open debate on public issues in New Zealand. We are not getting it and we will not get it unless the libel laws are altered.”

In arriving at the decision not to expand the scope of qualified privilege in the political arena the Court of Appeal in *Templeton v Jones* had clearly formed the view that if effect were to be given to contemporary arguments advocating significant changes to the limits of the public’s rights of participation in government, such changes should be made by the legislature; that in New Zealand the public’s rights to participation in government did not constitute a “duty” to publish defamatory statements to the general public such as might justify an expansion of qualified privilege.

In *Lange* Elias J attempted to distinguish *Templeton v Jones* on basis that the type of political discussion in the two cases was different. She accepted that both cases involved political figures, however Elias J seems to have been dismissive of *Templeton v Jones* because the *Lange* article was “concerned with political criticism and discussion of the conduct in public office of a national politician....*Truth (NZ) Ltd v Holloway* was closer on the facts to the case here because it was concerned with the conduct in office of a Minister.”¹⁰⁹ But the facts in *Templeton v Jones* were far closer to the recognised parameters of qualified privilege categories than the facts in *Holloway*.¹¹⁰ It is noteworthy that in *Templeton v Jones* Cooke J had relied upon the “pragmatic approach” of the court in *Truth (NZ) Ltd v Holloway*. In *Templeton v Jones* the Court of Appeal made a number of statements of general principle which I suggest cannot be ignored merely because *Lange* involved a slightly different type of political discussion.

¹⁰⁷ Above n 56, 457.

¹⁰⁸ [1972] NZLJ 265.

¹⁰⁹ Above n 5, 44.

¹¹⁰ Defamatory statements about a candidate’s suitability for office were protected by qualified privilege save that such statements must only be published to the relevant constituency. See *Templeton v Jones*, *Bradney v Virtue*, *Lucas & Son (Nelson Evening Mail) Ltd v O’Brien*. However, statements about the conduct of a Minister would only be protected where a court held that the particular contents of the

Cooke J stated that if there were to be any major change "in this field" it should be made by Parliament,¹¹¹ surely the occasion under consideration in *Lange* at least fell within the same "field" as *Templeton v Jones*?

In addition to the failure in *Lange* to properly deal with the *Holloway* and *Templeton v Jones* precedents the statements of principle in the other New Zealand decisions dealing with the type of public statements which would fall within the scope of Elias J's "political discussion" were not distinguished or otherwise dealt with. In *Bradney v Virtue*¹¹² the High Court held privilege would protect only statements to the promoters of a candidate and not defamatory statements to the public at large. In *Eyre v NZPA*¹¹³ McGregor J held that it was not for the welfare of society or for the common good of society to protect the contents of a publication that was not true in substance or in fact, this was notwithstanding that the case involved an example of core political discussion. *Brooks v Muldoon*¹¹⁴ echoed the reasoning in *Holloway*, that merely because the subject matter of a defamatory statement may have been "of" public interest, protection of that statement was not necessarily "in" the public interest. *Brooks v Muldoon* also emphasised the distinction between publication of defamatory statements to those with a legitimate interest to receive the statement and publication to the general public.

2 *Why Templeton v Jones and Hyams v Peterson did not "expressly reserve for further consideration" the extension of qualified privilege to occasions of political discussion*

As part of the attempt to avoid the binding effect of the dicta in *Templeton v Jones* Elias J held that:¹¹⁵ "In both *Templeton v Jones* and *Hyams v Peterson* the extension of qualified privilege was clearly reserved for further consideration". With respect, I suggest that this proposition is not supported by a close reading of these two cases.

material were such that there was a duty to inform the public. See *Templeton v Jones* and *Truth (NZ) Ltd v Holloway*.

¹¹¹ Above n 56, 459.

¹¹² Above n 32.

¹¹³ Above n 43.

¹¹⁴ Above n 46.

In *Templeton v Jones* the Court of Appeal had noted that Parliament had not at that time adopted the recommendations of the McKay Committee, and that "if any development of the law of qualified privilege is to be made in this country, it falls to the Courts."¹¹⁶ After carefully considering the arguments before it the Court of Appeal rejected the possibility of expanding the categories of qualified privilege saying that any development of the law would have to be undertaken by Parliament.¹¹⁷ This conclusion of the Court of Appeal is totally opposite to the proposition drawn from this case and relied upon by Elias J. The Court of Appeal having decided that any expansion of qualified privilege should be left to parliament went on to consider whether the particular facts of the case might fit within the existing law of qualified privilege. The conclusion was no.

*Hyams v Peterson*¹¹⁸ was not a case dealing with political discussion, nor did it involve qualified privilege. The plaintiff Mr Hyams was a businessman who Mr Peterson had defamed by alleging that he was involved in a large scale fraud involving other businessmen at the time labelled "the Gang of Twenty". The Court of Appeal was deciding appeals against Justice Wiley's refusal to strike out a number of causes of action on the basis that the defamatory publications were not capable of being found to be referring to Mr Hyams or bearing the defamatory meanings alleged. The media defendants argued that evidence of what had been said on absolutely privileged occasions (ie. in Parliament) could not be used to prove what the public in fact would have understood from what was published in the allegedly defamatory statements.

Cooke P, giving the judgment of the Court of Appeal, said that if there was to be a change in the law to give the media greater freedom the Court should not "obscure the true issue of policy by a fiction" (ie. the ban on particular evidence), that if there were to be any change in the law in favour of the media "it should be made by way of extending the defences of privilege and fair comment."¹¹⁹ However the President was at considerable pains to emphasise that the decision in *Hyams v Peterson* had nothing to

¹¹⁵ Above n 5, 44.

¹¹⁶ Above n 56, 457.

¹¹⁷ See above n 65.

¹¹⁸ [1991] 3 NZLR 648

do with qualified privilege. In case there was some remote chance of ambiguity in his statement "We are not called upon to determine any question concerning these [including qualified privilege] defences" Cooke P closed his judgment with the statement "Last it may be as well to repeat that this Court has not been concerned with the various defences of justification, qualified privilege and fair comment."¹²⁰

Nothing in *Hyams v Peterson* diminishes the findings of the Court of Appeal in *Templeton v Jones*. It cannot be denied that there is scope for the incremental evolution of the common law of qualified privilege by the application of established principles to new or novel fact situations. However, to read into *Templeton v Jones* and *Hyams v Peterson* some kind of judicial mandate to revisit the statements of principle laid down by the Court of Appeal is unsustainable.

It may be argued that the principles of precedent when properly applied to *Lange* should result in the decision being overturned on appeal and that little more needs to be said about the judgment. However, it seems that appellate courts seem to find ways around sticky issues of precedent when the substantive merits of the cases compel an alternative outcome. For this reason it is important to consider the substantive reasons why Elias J in *Lange* decided that the defence of qualified privilege should undergo this very significant expansion.

C How Compelling are Elias J's Reasons for Such a Radical Expansion of Qualified Privilege?

In *Templeton v Jones* the Court of Appeal had refused to undertake what in practical terms may have constituted a relatively modest and incremental expansion of qualified privilege.¹²¹ In *Lange* the High Court has undertaken a very significant adjustment to the

¹¹⁹ Above n 118, 657.

¹²⁰ Above n 118, 656 and 658.

¹²¹ See above n. 56. Had the Court of Appeal in *Templeton v Jones* considered that qualified privilege should apply to the circumstances of that case a limited expansion of qualified privilege could have been achieved by holding that qualified privilege not only applies to reports of a speech made at a public meeting but also to the speech notes used by the speech maker. Such a solution might have cured one of the "not wholly logical" aspects of the New Zealand law regarding qualified privilege referred to by Cooke J(458).

balance between freedom of speech and protection of reputation. What reasons do we find in *Lange* that eluded the Court of Appeal in *Templeton v Jones*? The crux of Elias J's justification for expanding qualified privilege was the following statement:¹²²

In a system of representative democracy, the transcendent public interest in the development and encouragement of political discussion extends to every member of the community. A lesser protection for such communications if made to the general public than is available to sections of the community able to point to a common interest which may be of no direct public value at all, seems to me to be a result which is wrong. It is a result which is not consistent with the underlying principle of protection of communications 'for the common convenience and welfare of society'. Comment upon the official conduct and suitability for office of those exercising the powers of government is essential to the proper operation of a representative democracy...It is necessary for the public to be informed about these matters for a representative democracy to function.

Three key factors may be identified in the *Lange* judgment as supporting the above conclusion, they are: Elias J's opinion that earlier decisions had not properly considered the importance of the democratic process, a perceived legislative trend favouring the adjustment of the historical balance between public rights to participation in the democratic process and individual rights to reputation, and the desirability of achieving in the area of political discussion consistency on the element of fault between qualified privilege and honest opinion. These three factors are discussed in detail below, none stand up to critical analysis. But what is of greater concern is that the judgment represents a High Court judge expressing personal opinion as law, yet that opinion is in conflict with the central themes of the common law defence of qualified privilege as it has evolved over many years. Qualified privilege has developed on the basis of courts making the judgment that the public interest, common convenience or welfare of society justifies protecting particular occasions, such occasions have usually been defined by deeming that statements concerning a particular subject matter may be made to a limited number of recipients considered to have a special interest in hearing such statements. the greater the size of the audience to whom a defamatory statement has been published the

¹²² Above n 5, 46

more reluctant the courts have been to extend the defence, hence the historical reluctance to extend qualified privilege to defamatory statements broadcast to the public at large. In a nutshell Elias J's ultimate conclusion must have been that the jurisprudence which constitutes the common law defence of qualified privilege is fundamentally flawed. Without the most compelling of justifications this conclusion could not be sustained.

1 The perceived failure of the earlier cases to properly consider the proper role of the democratic process

Elias J's finding that the New Zealand cases may have overlooked the principle of participation in government has been considered in some detail under the *Problems with precedent* heading above. It seems clear from the cases considered earlier in this paper that the common law of defamation has evolved in New Zealand with judges always acknowledging either explicitly or at least implicitly "that the maintenance of the democratic process is of fundamental importance"¹²³ and that freedom of political discussion has a crucial part to play in maintenance of that process, albeit perhaps the concept has not been expressed using the same terminology adopted by Elias J.

In *Massey, Bradney v Virtue, Truth (NZ) v Holloway, Brooks v Muldoon, Lucus & Son (Nelson Mail) Ltd v O'Brien*, and *Templeton v Jones* the High Court and Court of Appeal considered the balance between freedom of political speech and protection of reputation in the context of publications of defamatory statements to the general public. In discussing these cases I have noted how the courts gave particular consideration to the importance of maintaining the democratic principles upon which New Zealand society is based.

At this stage of the discussion is also opportune to emphasise that under the law as it existed prior to *Lange* New Zealanders were totally free to participate in political discussion by publishing statements to the general public where the truth of the statement could be proved true, or the statement was one of an honest opinion, or the

¹²³ Above n 5, 45.

occasion was recognised by statute or common law as being one of absolute or qualified privilege.

2 *The "legislative trend" favouring expansion of qualified privilege*

Elias J justified her finding that the "*transcendent public interest*" favoured greater freedom of political discussion in part on the basis a perceived a trend in certain legislation, namely the Official Information Act 1982, the Electoral Act 1993 and most significantly the New Zealand Bill of Rights Act 1990. Having considered this legislation Elias J said:¹²⁴

But the significance of the New Zealand Bill of Rights Act is that it recognises that the maintenance of the democratic process is of fundamental importance. The balancing of rights, critical to the law of defamation, is required by s5 of the New Zealand Bill of Rights Act 1990 now to be guided by the underlying assumptions of democratic government.....The weighting now given to the democratic process by s5 [Bill of Rights Act] requires reconsideration of the protection provided by the common law for political speech. Section 5 is recent and important legislative recognition of the same values recognised by the High Court of Australia and applied by the Judges of that Court in reassessment of the balance struck by the common law between freedom of speech and protection of reputation."

The two significant difficulties here are that Elias J has attributed inappropriate status to section 5 of the Bill of Rights Act 1990 and she has failed to give due consideration to countervailing but equally applicable legislative trends.

Section 5 is important legislative confirmation of the democratic process, however, contrary to the effect of Elias J's finding, I suggest that section 5 does not elevate democratic process to a to a higher constitutional status than it previously occupied, or if elevated then certainly not to the heights required to sustain Elias J's conclusions. If Parliament had intended in the Bill of Rights Act to accord superior constitutional protection to the democratic process it would have expressly stated such a significant

¹²⁴Above n 5, 45.

intention, or at the very least adopted the wording of Article 10(2) of the Convention for Protection of Human Rights and Fundamental Freedoms which permits only such limits to the protected rights and freedoms as are "necessary" in a free and democratic society. Instead New Zealand opted to follow the words of the Canadian Convention and allow the rights and freedoms contained in the Bill of Rights to be subject to such legal limitations as can be "demonstrably justified" in a free and democratic society. The distinction is significant: "Section 5 [of the] Bill of Rights can be regarded as allowing a rather broader scope of restrictions upon freedom of expression than s10 of the Convention."¹²⁵

The balance struck between freedom of political speech and protection of reputation in the earlier New Zealand decisions on qualified privilege should only have been overturned¹²⁶ through the application of section 5 if it could be established that the limitations those cases placed on freedom of expression could not be demonstrably justified in a free and democratic society. This stance involves no denial of Elias J's statement that "Representative democracy is fundamental to the New Zealand social and legal order. Political debate is at the core of representative democracy."¹²⁷ However, where in these observations or in section 5 is the justification for radically recasting the rules governing political debate in accordance with the principles adopted by the Australian High Court? The status of the fundamental democratic rights upon which the Australian law has developed is such that the High Court has indicated that the "constitutional implication" could be invoked to strike out legislation which the High Court might find to be insufficiently protective of freedom of political speech from defamation,¹²⁸ such an approach on the basis of s5 of the Bill of Rights Act is expressly precluded by the New Zealand Bill of Rights Act.

¹²⁵ Above n 21, 59. See also *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48.

¹²⁶ In my view this is the effect of the decision in *Lange* as prima facie it would appear that if the *Lange* test were applied to the facts of all the earlier cases the outcomes would have been the denial of a remedy to most, if not all, of the defamed plaintiffs.

¹²⁷ Above n 5, 46.

¹²⁸ Above n 8, 34. Although the High Court found that the Defamation Act 1977 (NSW) did not infringe the constitutional implication it said; "However, the need to develop the common law to conform with the constitutional implication may require that defamation legislation in other States be reevaluated. It is unnecessary in this case to consider whether, when so evaluated, that legislation is reasonably appropriate and adapted in the sense indicated, and if not, the extent to which it is invalid."

If Elias J had been free from precedent to consider extending qualified privilege on the grounds of the legislative trend toward members of the public having greater direct participation in shaping policies (the Official Information Act) and a franchise interest beyond their own immediate constituency (the Electoral Act), then before acting on such a trend Her Honour should have weighed both the countervailing legislative trends discussed in the following paragraphs and the ever increasing power of the mass media. In *Quinn*¹²⁹ Lord Cooke referred to the power of the mass media as being a factor telling against restricting the existing law as to damages in defamation. When introducing the Defamation Bill the Rt. Hon. Geoffrey Palmer expressed the view of the Government that "the news media environment has changed dramatically since 1977."¹³⁰ Any legislative trend toward greater public participation in the democratic process has been accompanied by a significant increase in the role of the mass media in that process. Some might argue that the freedom enjoyed by the media even prior to *Lange* was too great, that the integrity of the democratic process has been diluted by the increase in tabloid style journalism, that news is more often presented with an editorial slant and that the speed and coverage of dissemination by the mass media can only be kept honest by the presence of legal check and balances such as are provided by defamation.

The relevant but countervailing legislative trends to which I have referred include the general trend of greater protection of an individual's inherent dignity, particularly, protection of individual privacy which includes the principle of using only correct information about an individual, and entitlement to treatment in accordance with principles of fairness and natural justice.

Although the news media is presently excluded from the definition of "agencies" to whom the Privacy Act 1993 applies, various statements in the House of Representatives when this exemption was debated made it clear that continued exclusion was dependent

¹²⁹ Above n 21,38. It is also interesting to note that in *Quinn* Lord Cooke observed that the Australian trend in defamation was opposite to that in Canada, in Australia there was discerned a greater need to protect defendants and the cases based on the constitutional implication of freedom of political discussion were "One manifestation of the trend" (*Quinn*, 35). While Lord Cooke stated that the Australian constitutional implication cases were not relevant for the purposes of deciding *Quinn*, it is significant that the outcome of the Court of Appeal's decision in *Quinn* was not supportive of the Australian trend of giving greater protection to defendants.

¹³⁰ NZPD, vol 491, 6369, 25 August 1988.

on effective self-regulation.¹³¹ Therefore, at the very least media behaviour should be consistent with the principles of the Privacy Act. Of particular relevance are Privacy Principles 7 and 8 which create the right of correction of inaccurate information and the requirement that agencies take such steps as are reasonable in the circumstances to ensure information is accurate before it is used. The legislative trend favouring protection of personal privacy is also evidenced in s4(1)(c) of the Broadcasting Act 1989 and s9(2)(a) of the Official Information Act 1982.

The New Zealand Bill of Rights Act affirms New Zealand's commitment to the International Covenant on Civil and Political Rights, one of the objectives of the Covenant is to protect and enhance the inherent dignity of the individual. The Covenant includes protection of reputation as part of this concept:

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 19

3. The exercise of the rights provided for in paragraph 2 of this article [freedom of expression rights] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For protection of the rights or reputations of others;

The Bill of Rights includes specific protections which are analogous to the principles underpinning defamation. Section 9 protects against "cruel treatment", being subjected to public odium and ridicule because lies have been published about an individual is very cruel treatment. Section 19 protects individuals from discrimination on the grounds of discrimination in the Human Rights Act 1993, it is arguable that discrimination on the basis of untruths published to the general public is an equally undesirable practise. Section 25 of the Bill of Rights prescribes minimum standards of criminal procedure aimed at ensuring a fair hearing, should not the tenor of this sentiment apply where the

¹³¹ See P Roth *Privacy Law and Practice* (Butterworths Wellington) 1002.5.

case is one of trial by media. While in a free democracy vigorous public debate is crucial, defamation provides one of the minimum standards which helps ensure the process is fair to all involved.

The legislative trend against misleading conduct in trade as evidenced in the Fair Trading Act is also relevant. While it is clear that the Fair Trading Act does not apply to the news media,¹³² it remains as an issue of principle that in publishing defamatory statements to the general public the media is in the course of a very lucrative trade engaging in misleading conduct, something most other business are prohibited from doing.

In August 1996 the Protected Disclosures Bill was introduced, recently a select committee reported back on the bill. The select committee has recommend that the legislation only apply to the public sector. The proposed legislation, which in its current form is indicative of the Government's current views on matters, does not protect disclosure of "serious wrongdoing" to the media, but only to those who have a specific interest in receiving the information. The principles which underpin the disclosure rules contained in this proposed legislation are almost entirely consistent with those of the traditional formulation of qualified privilege. Clearly the Parliament in 1997 does not consider that accountability of the public sector, something which falls squarely within Elias J's formulation of political discussion, should be in all instances conducted through the media. Indeed one media submission to the select committee opposed the bill due to its negative effect on freedom of expression as the proposed system will discourage whistleblowers from making public their concerns about serious wrongdoing in their workplace.¹³³ Surely the public interest favours the publication of the results of properly conducted inquiries or proceedings when such have been carried out and justice done to all concerned, rather than the premature publication of unproven and untested allegations which may have the effect of completely devastating the respondent's life notwithstanding the fact that vindication may follow.

¹³² See section 14 of the Fair Trading Act. Also *Ron West Motors Ltd v Broadcasting Corporation of New Zealand* [1989] 3 NZLR 520.

¹³³ P Pepperwell, Editorial 20 TCL 38/1

These legislative trends weigh heavily against denying to a significant and important sector of the community the protection from publication of lies to the general public provided by the law of defamation; of substituting due process for trial by media.

3 *The quest for consistency between the defences of honest opinion and qualified privilege*

Although not necessarily presented in the judgment as a primary reason for considering expanding the defence of qualified privilege, the proposition that "the two defences of honest opinion and qualified privilege should conform on the question of fault"¹³⁴ was central to Elias J's reasoning for why the scope of the expanded privilege should not include an element of reasonableness on the part of the publisher. This proposition resulted in a defence significantly wider in scope than its Australian counterpart.

Elias J suggested that if consistency between qualified privilege and honest opinion were to be achieved "the only appropriate condition for raising qualified privilege should be honest belief."¹³⁵ No recognised authority or principle was cited to support the proposition that there should be consistency between the elements of these two very different defences.

The Defamation Act treats the defences honest opinion and qualified privilege completely separately and very differently. If a defendant's words are opinions rather than statements of fact then the defence of honest opinion may be available, if available it will be far easier to invoke than qualified privilege. This is because the two defences are completely different in nature. The defence of honest opinion operates to define the boundary between expressions of genuinely held opinions and defamatory statements of fact. Whereas qualified privilege deals with defamatory statements of fact which the Defamation Act or the common law deems should be protected from defamation liability because the prevailing public interest requires that such statements should be protected.

¹³⁴ Above n 5, 50.

¹³⁵ Above n 5, 50.

It is difficult to accept that there is any platform from which to reach for consistency between honest opinion and qualified privilege when qualified privilege is subject to the requirements of commonality of interest between publisher and audience, and absence of both ill will and improper advantage of the occasion. But the defence of honest opinion is devoid of either requirement, the Defamation Act having done away with the traditional elements of a public interest in the subject matter and absence of malice which attached to the defence of fair comment.

Elias J proposed that conformity between the defences of honest opinion and fair comment on the issue of fault in the area of political discussion would have particular merit where there might be difficulties distinguishing between statements of fact and opinion.¹³⁶ In practice this distinguishing exercise can present real difficulties. However, it should not always be automatically assumed that difficulties in invoking a defence run contrary to the rationale underpinning the defence. The defence of honest opinion exists to protect the public expression of genuinely held views, comments and opinions when presented as such. If such views, comments or opinions are published to the public sounding more like statements of fact than expressions of opinion it seems only just that the defence is more difficult to invoke.¹³⁷

It seems that Elias J has proposed that if conformity between honest opinion and qualified privilege is achieved on the issue of fault, at least in the arena of political discussion, then all statements falling within the generic category of political discussion whether they be statements of fact or opinion could be dealt with similarly, thereby avoiding the difficulty of separating the two. In practice such an approach would be unworkable. Where the defences of honest opinion and qualified privilege are pleaded in relation to statements of fact and opinion without distinguishing between the two, a plaintiff would need only serve a notice in terms of section 41 of the Defamation Act alleging that the defendant was predominantly motivated by ill will or otherwise took improper advantage of the occasion of publication. Prudent defendants must object that

¹³⁶ Above n 5, 50.

¹³⁷ See n 17, p12 where Tompkins J confirmed that the onus was on the defendant to prove what were the alleged statements of honest opinion and that they were genuinely held opinions.

such a notice cannot apply to their statements of honest opinion. A fair objection, but one which would result in such defendants again shouldering the onus of proving exactly what was opinion.

In any event, the defence of honest opinion will fail "unless the defendant proves that the opinion expressed was the defendant's genuine opinion." (section 10 Defamation Act), particularly where a notice in terms of section 39 of the Defamation Act has been given by the plaintiff alleging that the opinion was not the genuine opinion of the defendant. Central to his defence is identification of what exactly are the statements of opinion.

There is a further difficulty with the objective of seeking commonality between honest opinion and fair comment on the issue of fault. Elias J proposed that the only appropriate condition, once an occasion of political discussion was established, would be that of honest belief. However, the inquiry into what constitutes an honest belief in an opinion held by an individual must be very different to an honest belief in the truth of a statement of fact.

III RECENT DEVELOPMENTS

1 *Lange v Australian Broadcasting Corporation*

During the three years after the decisions in *Theophanous* and *Stephens* the composition of the Australian High Court changed significantly. Two of the majority judges in *Theophanous* and *Stephens* had retired.¹³⁸ Brennan J who had been opposed to the stand alone defence in *Theophanous* and *Stephens* had become the Chief Justice. The scene was set for the High Court to revisit *Theophanous* and *Stephens*. In a most remarkable coincidence the case which would provide the opportunity would involve David Lange as plaintiff.

¹³⁸ Mason CJ and Deane J. None of the judges opposed to the stand alone defence in *Theophanous* and *Stephens* had retired, Brennan, McHugh and Dawson JJ.

In the New Zealand *Lange* decision Elias J had rejected the concept of a stand alone defence, preferring to achieve an adjustment in the balance between freedom of speech and protection of reputation by expanding the existing common law defence of qualified privilege. In the *ABC* decision the Australian High Court duplicated the Elias J's approach by unanimously rejecting the concept of a stand alone defence, preferring to achieve conformity with the perceived requirements of the implied rights of freedom of political discussion arising from the Constitution Act by recognising an expanded qualified privilege defence.¹³⁹ Upon considering the varied conditions of society as set out by McHugh J in *Stephens*¹⁴⁰ the High Court held that it should:¹⁴¹

now declare that each member of the Australian community has and interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.....That interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege....the real question is as to the conditions upon which this extended category of common law qualified privilege should depend.

The High Court distinguished between the usual type of occasion protected by qualified privilege which involves publication to a limited audience, and the expanded category of qualified privilege which would protect publication to the general public. Whereas the single discipline of honesty of purpose, absence of malice, would provide sufficient protection of reputation on occasions of publication to a limited audience, the High Court held that when publication is to the general public and the scope for damage is much greater:¹⁴²

a requirement of reasonableness as contained in s 22 of the Defamation Act (NSW), which goes beyond mere honesty, is properly to be seen as reasonable appropriate and adapted to the protection of reputation...Reasonableness of conduct is an element for

¹³⁹ The hearing of the *ABC* case before the High Court appears to have been a Huge affair. In addition to hearing counsel for David Lange and ABC, counsel instructed by leading media organisations, most of the federal states and the Attorney-General of the Commonwealth appeared as interveners or amice curiae. At the hearing there appears to have been 27 counsel, of which 11 were Queens Counsel

¹⁴⁰ See *Stephens n 3*, ALR 114, Referred to by Elias J in *Lange n 5*, at 41,42.

¹⁴¹ Above n 8, 29.

the judge to consider only when a publication concerning a government or political matter is made in circumstances that, under the English common law, would have failed to attract a defence of qualified privilege.

The High Court avoided being prescriptive as to the particular elements which might constitute reasonableness of in a publication, preferring the principled approach that:¹⁴³ “the defendant must establish that its conduct in making the publication was reasonable in all the circumstances of the case.” However the Court provided some guidance as to the factors it considered might indicate reasonableness of conduct in a publication.

In all but exceptional cases the High Court expected that proof of reasonableness would fail:¹⁴⁴ “unless the publisher establishes that it was unaware of the falsity of the matter and did not act recklessly in making the publication.” Generally a defendant would not be found to have acted reasonably unless it proves that it:¹⁴⁵ “had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue.”

The High Court suggested that in the context of expanded qualified privilege defence the concept of “‘actuated by malice’ is to be understood as signifying a publication made not for the purpose of communicating government or political information or ideas, but for some improper purpose.”¹⁴⁶ This approach to the concept of malice echoes that found in s 19 of the Defamation Act 1992 (NZ).

The High Court also held that a defendant’s conduct would not be reasonable unless it had:¹⁴⁷

...sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.

¹⁴² Above n 8, 31.

¹⁴³ Above n 8, 31,32.

¹⁴⁴ Above n 8, 32.

¹⁴⁵ Above n 8, 33.

¹⁴⁶ Above n 8, 32.

The High Court concluded that while defamation might still burden communications necessary to give effect to freedom of choice in federal elections, an expanded defence of qualified privilege on the terms outlined would not unduly burden the freedom; that "the law of New South Wales goes no further than is reasonably appropriate and adapted to achieve the protection of reputation..."¹⁴⁸

The decision in *ABC* brings the Australian and New Zealand positions into alignment in one respect in that the abolition of the stand alone defence sees both countries dealing with an expanded qualified privilege defence. There remains, however, two significant issues of divergence. First, the New Zealand defence by not including a requirement of reasonableness in the publication will be significantly easier to invoke by defendants and therefore represents an adjustment of the law considerably more in favour of freedom of speech and against protection of reputation than in Australia. Secondly, the Australian result is justified upon implied rights found in the Constitution Act, however, New Zealand has no equivalent Act nor has the New Zealand accorded superior constitutional status to such rights. Even the rights specifically stated in the New Zealand Bill of Rights Act have not been given the superior the constitutional status of the Australian implied rights relied upon in *ABC*.

2 *Harrison v Banks*

In August 1997 Paterson J was required to decide whether the defence of qualified privilege applied to allegations against Mr Noel Harrison, at the material time head of the Northland Polytechnic, of roll-rigging and financial mismanagement made by Mr John Banks MP and published in the Northern Advocate newspaper.

The defendants argued that the law of qualified privilege "has now moved on as is indicated in"¹⁴⁹ *Lange* and *ABC* and that the facts in *Harrison* should fall within the

¹⁴⁷ Above n 8, 33.

¹⁴⁸ Above n 8, 33.

¹⁴⁹ Above n 9, 5 and 6.

types of occasion of political speech protected by the expanded qualified privilege defence.

The defences proposed in *Lange* and *ABC* both contemplated the possibility of including the public conduct of public officials falling within the ambit of protected political discussion. In *Harrison* Paterson J held:¹⁵⁰

Notwithstanding the extension of the boundaries as suggested in *Lange v Atkinson* and *Lange v Australian Broadcasting Corporation*, I am of the view that in the circumstances of this case the defence of qualified privilege is not available to either defendant. This was not one of those exceptional cases where the law has recognised an interest or duty to publish defamatory matter to the general public.....There was no duty in such circumstances to make, what the jury has held to be defamatory statements, to the wider public.

Although Paterson J noted the differences between the case before him and cases involving information enabling electors to make their choice in a national election,¹⁵¹ the decision in *Harrison* is significant for its reading down of the scope of political discussion occasions which will be protected from defamation liability. *Harrison* is also notable I suggest for the tendency by Paterson J to prefer the Australian formulation of the expanded defence in *ABC* with its requirement of reasonableness.

IV CONCLUSION

The significant change to the law of defamation heralded by the decision in *Lange* has been justified in terms of the noble aspirations of recognising rights of¹⁵² "participation in government" and "rights fundamental to the democratic process". I have argued that the status quo represented an appropriate balance of these important principles with the countervailing principles of protection of reputation and maintenance of standards of integrity in the quality of political discourse. In any event if the time has come to enhance the public's rights of participation in government the appropriate means by

¹⁵⁰ Above n 9, 9.

¹⁵¹ Above n 9, 10.

which this may be achieved is an issue of policy for Parliament. The judgment that freeing political discussion from the constraints of potential defamation liability will enhance the quality of the democratic process is one of pure policy.

In closing, it is well to dwell for a moment on the concept of "freedom" in the context of public participation in the democratic process. I can do no better than to refer to Lord Radcliffe's expression of his concern at:¹⁵³

...the extent to which modern usage has perverted the true meaning of freedom, by stressing so constantly its merely negative aspect. To the mood of the day, to which the complex and the inhibition, tension and self-control, are scourges more fearful than were Sin and the Black Death to our curious ancestors, it seems to be enough to resent and reject all external control, and then all grace will be added to you. That is little but escapism, a sort of Beatnik political philosophy and it is unworthy of that larger spirit of earlier days when such words as liberty and freedom meant a positive claim to displace outside authority by the more arduous responsibility of ordering oneself.

Will the new freedom of political discussion truly enhance the democratic process in New Zealand or is it the dawn of a charter for scandal mongering?

¹⁵² Above n 5, 43 and 45.

¹⁵³ Above n 68, 226.

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"A"

Politics

By Joe Atkinson

Getting What You Order

FORMER LEADERS HAVE a bad habit of hanging around to make a nuisance of themselves. Sir Robert Muldoon did it to both Jim McLay and Jim Bolger, hounding the former out of politics and causing a succession of difficulties for the latter. But with the rise of political commentary and the commercial speaker's circuit giving platforms and financial incentives to the

deposed, this perennial problem is getting worse. Helen Clark is currently assailed by no less than three former leaders. Sir Geoffrey Palmer doesn't mean to cause trouble, but he is regularly in the public spotlight, which makes him a formidable presence to be acknowledged. Mike Moore has done his very best to cause trouble but is still dithering about how to administer the most telling blow. So the immediate problem for Clark is her old friend David Lange, who has lately taken to pronouncing tentatively on any number of issues: New Zealand troop deployments in Bosnia, the ideological character of the parliamentary Labour Party, the selection of his successor in Mangere, the New Zealand response to French nuclear testing, and so on.

Former leaders are often anxious to make out that they could do the job better than their successors. David Lange is no exception here, but his willingness to rewrite history in doing so is reminiscent of Daniel Defoe.

Lange talks now as though he stood alone against Roger Douglas, when in fact his attack of social conscience was a belated one. He talks as though he invented New Zealand's anti-nuclear policy, when in truth his conversion was somewhat reluctant. He talks as though he actually deserves the media-awarded mantle of international statesmanship, when in fact he handled the issue of nuclear-ship visits with the finesse of a skateboarding hippo.

Having himself showboated with the French over the *Rainbow Warrior* and being forced to back down over imprisonment of the convicted agents, he now has the effrontery to criticise others for grandstanding on Moruroa. His charge that the parliamentary Labour Party is more conservative now than it was under his own leadership is breathtaking in its audacity. Similarly, in trying to appoint his own successor in Mangere, he cheekily suggests that the electorate needs an MP who will



stay put, rather than one who gallivants all over the country — as if he'd always been there when they needed him!

Cartoonist Tom Scott caught the shameless casuistry in one of Lange's comments last year when he pictured the former PM lying in a hospital bed flanked by two doctors in white coats. The doctors look intently at the patient, shaking their heads, as one says to the other: "Worst case of false-memory syndrome I've ever seen."

WITH HIS IMPRESSIVE physical presence, prodigious brain and extraordinary verbal dexterity, Lange possesses many of the attributes of greatness. His command of the rhetoric of moral outrage in his Oxford Union debate with the Reverend Jerry Falwell deservedly won him (and New Zealand) global plaudits, but the finish has not been worthy of the start. Perhaps it never is, but with Lange the gap between promise and performance is wider than usual.

It has always been so apparently. Nobody I've spoken to who knew Lange at school or university reckons that he worked particularly hard in those days. His brilliance is freely acknowledged, but with the common caveat that it was flashy and just slightly oversold. A more inappropriate minister of education would be hard to find, for he appeared to despise his teachers and they sometimes resented him, thinking he wasn't at school to learn, but to show off.

Lawyers make a distinction between admired colleagues who have mastered difficult areas of law and courtroom actors who know less law but are lightning quick on their feet. David Lange was one of the latter. His speciality was the plea in mitigation for guilty but indigent clients. Picking up legal aid briefs shortly before his clients were due in court, he improvised defences against poor odds, and when the inevitable verdict was handed down he did a brilliant job of explaining why the normal penalty ought to be reduced.

He was a superb legal aid barrister, morally committed to his hapless clients but by all accounts less than fully committed to the profession he practised. And as with his teachers, there was the barest hint of disdain in his manner, as if conceding more than minor effort on his part might reduce him to their level.

Lange carried this dilettantish guise into the political arena. His rise was meteoric, but his appetite for the battle was always slightly suspect. It is hard to say how much his health problems had to do with this, though when standing down as prime minister on August 7 1989 he assured the press that poor health was not a conclusive factor in his decision.

A retrospective look at a transcript of that final press conference makes interesting reading, for some of his answers are a lot funnier now than he could possibly have intended them to be at the time.

When asked, for instance, what he

wanted to do as a backbencher, Lange responded facetiously: "Well, I won't be a political columnist." He was also asked what he would miss most in his old job, and he made three evasive replies, each one of them inadvertently revealing.

¹⁰ The first thing he said he'd miss was "press conferences". Everybody laughed, but never was a truer word spoken in jest. Lange had more obvious enthusiasm for prime ministerial press conferences than for any other aspect of his job. He relished the contest because he won it easily. His minders advised him to cut off reporters' questions after 15 minutes maximum, but Lange would amble out under the television lights, with chest puffed out and hands pushed down at his sides, like a boxer taunting his opponent to take a shot at him. As the ineffectual queries pelted down on him — seldom getting close, never hurting — the big man ducked and weaved with obvious gusto, drawing out the bout for 20 minutes, 40 minutes, sometimes longer. His staff couldn't get him to stop.

¹¹ But at the 1989 press conference, the journalists pressed him again for a satisfactory answer. Apart from the press, what else would he miss? Lange now became more obviously evasive, referring to himself in the third person. "Oh," he responded, "there are lots of things you

miss, and there's lots of things that you're glad you did, and lots of things you don't feel like." "Like what?" someone insisted. The final reply was vintage Lange: "I don't know whether you've ever tried to order breakfast in a New Zealand hotel," he said, "but I have yet to get one that I ordered."

¹² Again the laughter roared forth, deflecting, as it was meant to, the chance of self-revelation. Lange had won another round.

And yet in a sense he had also lost the battle, for what he hid from his audience, perhaps even from himself, were his real reasons for leaving: the truth was, he found the job too much like hard work. It wasn't just the hotel breakfasts Lange loathed, but many other things about the role as well. One of the crucial things he "didn't feel like" as prime minister, for instance, was going to meetings, including cabinet meetings which he habitually left early.

¹³ For whatever reason — angina pains, boredom or some inner demon — he found it hard to sit still and often turned over the cabinet chair to Geoffrey Palmer while he ambled off to the toilet, to his office, or even to the self-drive car which he liked to take out for a recreational spin on the Wellington motorway. When his staff responded by having a car phone fitted, he took it off the hook. He has never really grown up.

But he got a real kick out of press con-

ferences, public performances, rhetorical pyrotechnics. It was the nitty-gritty of politics he couldn't stand, the endless face-to-face wrangles and policy consultations with people he thought boring or worse.

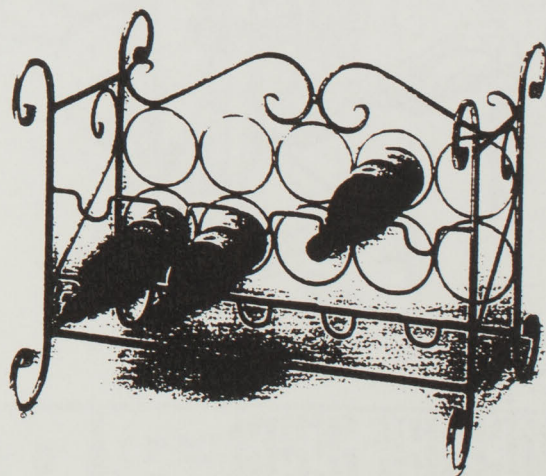
HE SAW THE ENDS of politics so clearly but he couldn't sit still long enough to get agreement on policy details. That must have been part of his problem with Roger Douglas. It was a job he preferred to leave to others, and yet it was a job that, as leader, he had to do himself or it wouldn't be effectively done.

It must gall David Lange that several of those others, those inferior mechanics (Clark, Cullen and Caygill among them), are now running the Labour Party and doing a vastly better job of it than he was ever capable of doing.

That must be why he so often puts them down. For if the fourth Labour government under his leadership had been saying and doing what it is now saying and doing, it would surely not have been so thoroughly discredited among its followers.

She may not have Lange's wit or genius, nor his effortless command of the popular media, but Helen Clark is vastly superior to him as a policy-maker and party manager. I'll bet she also has no trouble getting the breakfasts she orders in New Zealand hotels. ■

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...off the road.
...less than 1100 in a



NO. 7301.

WELLINGTON, N.Z., SATURDAY, DECEMBER 3, 1910.

AND WATER-POWER

Annual charges incurred by the Government in supplying power:

Interest at 4 per cent.	16,880
Sinking fund at 1 per cent.	4,220
Maintenance	4,000
Depreciation	6,280
Running cost	6,620
Total	£38,000

As it will be reasonable for the Government to expect revenue from other local authorities apart from its own requirements, it seems to me that the financial success of the scheme on the figures quoted by him is assured."

AN EXHAUSTIVE ANALYSIS

BASED ON GOVERNMENT REPORTS.

EXPLANATION BY MAYOR OF WELLINGTON.

Mr Willford went exhaustively into the whole position, dealing fully with the report submitted by the city electrical engineer (Mr B. Richardson), his object being to place before the House and the city Wellington's position as far as it was or was not able to take current supplied by the Government through its water power proposals.

Mr Willford said Mr Richardson had gone carefully into the scheme to arrive at one particular point—whether or not if the Government's scheme were brought into operation it would be possible for the city, which was now equipped with electrical plant, to take current from the Government at the charge proposed. He had told the engineer to be very careful in his estimate—to rather be pessimistic than optimistic—and above all things, to remember that as far as the requirements of the city were concerned, a most cautious and careful analysis was needed of what the city could do. In the deductions he proposed putting on record, Mr Holmes' figures of the cost of production and current had been taken as the basis of the report. It was necessary that he should criticize Mr. Birk's report. They could not altogether rely upon it, some of the figures and comparisons being misleading. It was wrong to estimate any amount of revenue to come from Wellington for "pumping sewage to the city



"HITCH YOUR WAGGON TO A STAR."—Emerson.

"HITCH YOUR WAGGON TO A LIE."—Dr. Findlay's Amendment.

JEM MACE'S GREAT FIGHTING CAREER

OLD-TIME WORLD'S CHAMPION

STIRRING BATTLES OF THE PAST.

"Jem Mace, the one-time pugilistic champion, is dead from senile decay."

The above brief cablegram from London, published yesterday, does not convey much to the present day generation of the remarkable career which Mace had in the pugilistic arena in the Old Country from 1853 to 1864, when he was at the height of his fame. He was of unique personality and the participant in many stirring battles, most of which he won.

No one who witnessed the public appearances of Mace would, according to Henry Downes Miller in a work dealing with the history of British boxing, dispute that he was one of the cleverest and smartest and most skillful pugilists that ever sported buff in the 24-foot ring. Had he appeared at an earlier period than the latter days of the falling and moribund prize ring, and had he chosen honestly to exert his powers, the fame that accompanied the championships of Jem Belcher and Jem Ward might also have shone on him. The ring, however, had fallen into degradation when Mace first became known as a boxer and it was to this that some of the "shady" incidents of his career might be ascribed.

FAME AS A SHOWMAN.

Born at Beeston, near Swaffham, in Norfolk, in May, 1831, he first came under public notice as proprietor of a travelling booth, where he played the violin, supplied the piano, and gave exhibitions of acrobatics, as a skilful juggler. He had not been long in business before his booth was mirrored of glove-practice, and he became famed for his prowess in demolishing opponents. Though often over-matched, a perseverance taught him to "big ones," as his cut Tom King and Sam...

ANNEXURE B

...HIS FIRST... Mace's first fight, when twenty-four years of age, was with an "illustrious obscure" named Slack. The mill...

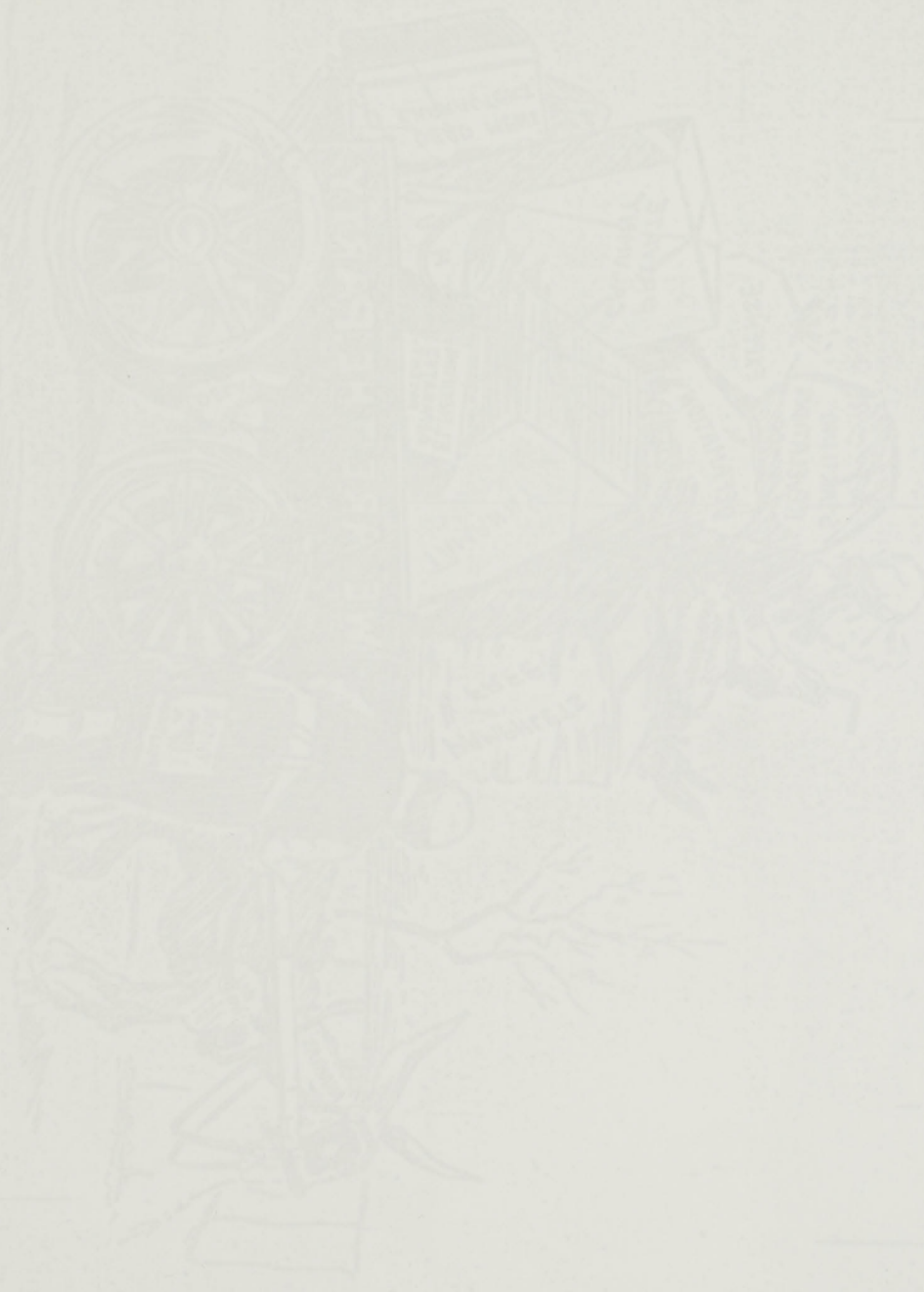
ALL CHARGES CONSIDERED. The whole expense of the conversion...

PENDING DIVORCE ACTION

LESSONS FOR MUNICIPALITIES

taken down and lifted up with the least possible expenditure of time or toll. He gave me estimates, showing that...

ANNEXURE B



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