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**LANGE AND QUALIFIED PRIVILEGE: ONE
ISSUE IS SETTLED, MANY MORE ARE
RAISED**

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TABLE OF CONTENTS

I	INTRODUCTION	5
II	THE LANGE SAGA	8
A	<i>Common Law Qualified Privilege Pre-Lange</i>	9
B	<i>The High Court</i>	10
C	<i>The Court of Appeal- Round 1 (Lange 1998)</i>	12
	1 <i>The decision of the majority</i>	12
	2 <i>The decision of Tipping J</i>	15
D	<i>The Privy Council</i>	16
E	<i>Reynolds</i>	17
III	LANGE 2000	19
A	<i>The Occasion of Privilege</i>	20
B	<i>Misuse of the Occasion of Privilege</i>	22
C	<i>To What Extent is New Zealand Different from the United Kingdom?</i>	24
D	<i>What Happened to the Bill of Rights?</i>	28
E	<i>How Greatly has the Law in New Zealand Changed?</i>	30
IV	IMPACT AND IMPLICATIONS OF LANGE 2000	32
A	<i>How does New Zealand Compare with other Jurisdictions?</i>	32
B	<i>Likely Impact on the Media</i>	37
	1 <i>Introduction</i>	37
	2 <i>Judicial standards of journalism</i>	38
	3 <i>Proving irresponsibility</i>	39
	(a) <i>Industry standards</i>	39
	(b) <i>Texts</i>	40
	(c) <i>Foreign jurisprudence</i>	41
	3 <i>Conclusion</i>	43

C	<i>Does New Zealand Adequately Protect Reputation? - Problems Associated with the Burden of Proof</i>	44
D	<i>What are the Options for Solving these Problems and which is the Best Approach?</i>	47
1	<i>Switch the burden of proof</i>	47
2	<i>Attempt to fix the procedural problems</i>	48
	(a) The pleading problem	48
	(b) The Newspaper Rule	49
	(i) Introduction	49
	(ii) The Australian approach	49
	(iii) Should disclosure be required in order to help allow the plaintiff to show irresponsibility?	51
	(iv) The Law Commission	53
3	<i>Recommendations</i>	54
V	THE SCOPE OF THE NEW PRIVILEGE	55
A	<i>Representative and Responsible Government</i>	55
B	<i>Status Versus Content Based Approaches to Defining Scope - Lessons from the United States Experience</i>	56
C	<i>Political Speech Versus other Speech</i>	58
D	<i>Other Issues Related to Scope - A Plethora of Questions</i>	59
VI	CONCLUSION	60
APPENDIX 1	<i>The Allegedly Defamatory Column</i>	62
APPENDIX 2	<i>Codes of Ethics</i>	64

Abstract

This paper analyses the second decision of the Court of Appeal in *Lange v Atkinson*. The Court of Appeal confirmed that there was a special subset of qualified privilege set aside for political speech. This paper also outlines the pre-*Lange* law, the decision in the High Court, the first Court of Appeal decision, the Privy Council decision and the decision of the House of Lords in *Reynolds v Times Newspapers*. It suggests that New Zealand was not justified in departing from the House of Lord's decision and criticises the Court of Appeal's decisions for not giving adequate reference to the New Zealand Bill of Rights Act 1992.

It discusses how other jurisdictions have dealt with political speech and compares the balance struck between free speech and reputation of each of them to New Zealand. It is suggested that New Zealand favours free speech more than Australia, the United Kingdom and Canada.

It then discusses the likely impact of the decision on the media. It is suggested that the new decision will lead to a de facto code of ethics which will be developed by the judiciary. This is because the Court of Appeal has expanded section 19 of the Defamation Act in a way which will now focus more on the defendant's conduct.

The paper discusses whether New Zealand is currently providing adequate protection for reputation. It is suggested that while the second Court of Appeal decision has greatly improved the balance between protection of reputation and freedom of expression, certain problems associated with the burden of proof mean that reputation is still not being adequately protected. The Court of Appeal hinted at how these problems might be fixed and it is suggested that the Court's comments be adopted. The Law Commission's commentary in this area is also discussed.

It then discusses the scope of the new privilege. Qualified privilege will now be more readily available to those who make statements which concern the functioning of representative and responsible government. This test is content-based and it is suggested that the scope of the new privilege should be defined in relation to the statement-maker's status. The new privilege affords political speech more protection than other speech. The sorts of anomalies that can arise when types of speech are categorised are illustrated.

The paper concludes by reflecting on the number of issues that still remain in relation to this area of law and it is suggested that it may have been easier to simply follow the approach taken by the House of Lords in *Reynolds v Times Newspapers*.

The text of this paper (excluding contents page, footnotes, and annexures) comprises approximately 14593 words.

I- INTRODUCTION

In October 1995 *North & South* magazine published a column, written by Auckland University political scientist Joe Atkinson, which heavily criticised former Prime Minister the Right Honourable David Lange. Lange sued for defamation. After nearly five years of legal analysis, and four judgments, all Joe Atkinson knows is that he might have a qualified privilege defence of political discussion while all that David Lange knows is that he could defeat such a defence by proving that the article was written irresponsibly. This is the result of the latest Court of Appeal decision in the *Lange v Atkinson* saga.¹ While Lange and Atkinson are finally able to proceed with the actual defamation suit, practitioners and commentators are left pondering the impact of this decision. Although not considered by the Court of Appeal to be a major revision of its earlier decision (*Lange 1998*),² the new judgment (*Lange 2000*)³ represents a significant shift, from both *Lange 1998* and the pre-*Lange* law, in the balance between the competing rights of free speech and reputation.

I believe that *Lange 1998* greatly advanced qualified privilege, and therefore free speech, at the cost of reputation. Other commentators have also criticised *Lange 1998* for this reason.⁴ *Lange 2000*, on the whole, greatly rectifies this imbalance by increasing the protection afforded reputation. While the defence of qualified privilege for political discussion remains largely intact, the Court of Appeal has created a new, enlarged interpretation of malice.⁵ The extension moves away from the subjective mental state of the defendant and instead focuses on their

¹ [1997] 2 NZLR 22 (HC) [*Lange 1997*]; [1998] 3 NZLR 424 (CA) [*Lange 1998*]; [2000] 1 NZLR 257 (PC) [*Lange 2000-PC*]; CA 52/97, 21 June 2000 [*Lange 2000*].

² *Lange 1998*, above n 1.

³ *Lange 2000*, above n 1.

⁴ See New Zealand Law Commission *Defaming Politicians: A Response to Lange v Atkinson* NZLC PP 33 (Wellington, September 1998) ["NZLC Preliminary Paper"]; B Atkin "Has Lange Tipped the Balance too Far?" (1998) NZLJ 293 ["Has Lange Tipped the Balance too Far?"]. See also J Burrows "Defamation and Politicians" (1999) Tort Law Review 8; W Rogers "Privilege and the Media" (1999) Tort Law Review 13.

⁵ Qualified privilege, once arisen, can be defeated if the defendant was predominately motivated by ill will or otherwise took improper advantage of the occasion- s 19 of the Defamation Act 1992.

conduct. A defendant must now act "responsibly" in order to rely on qualified privilege.

This paper discusses the *Lange* saga and its implications. I conclude that *Lange 2000* represents a major change to the law of defamation, not only in what it means for parliamentarians but also in its impact on the development of qualified privilege generally. The Court of Appeal has given a green light to discussion which "directly concerns the functioning of representative and responsible government"⁶ effectively inviting lower courts to rapidly advance the defence.

While *Lange 2000* is an improvement on *Lange 1998* in terms of protecting reputation, it raises more questions than it answers. This paper examines some of those questions. It must be asked whether the Court of Appeal was justified in leaving so many unanswered questions. A recognised aim of the Defamation Act 1992 is to ensure the prompt commencement and disposal of defamation causes of action.⁷ This proposition is further reinforced when it is considered that legal aid is not available for defamation actions and therefore few can even afford to risk taking a claim. Is it fair on plaintiffs to answer one question while raising a plethora of others? The Law Commission certainly does not think so.⁸

Part II explains the pre-*Lange* law and outlines the decisions, from the High Court up to the Privy Council. The House of Lords decision in *Reynolds v Times Newspapers Ltd*⁹ (*Reynolds*) is also discussed.

Part III focuses on the *Lange 2000* judgment and asks whether the Court of Appeal was justified in adopting a different approach to the House of Lords.¹⁰ The Privy Council asked the Court of Appeal to reconsider its decision in light of *Reynolds*.¹¹ In order for the Court of Appeal to justifiably take an alternative

⁶ *Lange 2000*, above n 1, para 10.

⁷ *Gillespie v McKay* (1999) 13 PRNZ 90, 93 (HC).

⁸ See New Zealand Law Commission *Defaming Politicians: A Response to Lange v Atkinson* NZLC Report 64 (Wellington, August 2000) ["NZLC Final Report"].

⁹ [1999] 4 ALL ER 609 (HL) [*Reynolds HL*].

¹⁰ *Reynolds HL*, above n 9.

¹¹ *Lange 2000-PC*, above n 1, 264.

approach to *Reynolds* it had to explain the extent to which New Zealand is different from the United Kingdom. This part of *Lange 2000* is criticised and it is suggested that New Zealand is not justifiably different. The absence of Bill of Rights analysis in both of the Court of Appeal's judgments is also discussed. Part III concludes by discussing the extent to which *Lange 2000* advances the pre-*Lange* law. I believe that the *Lange* saga has resulted in a major change.

Part IV examines the impacts and implications of *Lange 2000*. The balance New Zealand strikes between freedom of expression and protection of reputation is compared to other jurisdictions. Australia, Canada, United States and the United Kingdom are all examined. The impact on the media is also discussed. In New Zealand, while the media will benefit from the new privilege, they will have to act "responsibly" in order to enjoy it. The introduction of the responsibility standard will mean increased judicial focus on aspects of media behaviour. As it is the judiciary and juries who will decide what is responsible and what is not, journalists are likely to find themselves subject to judicial standards of journalism. Various sources, ranging from internal industry standards to foreign jurisprudence, of behavioural restraints are examined to establish the sorts of conduct standards that will potentially be necessary in order to enjoy the new privilege.

Procedural and pleading issues are examined in order to establish whether reputation is being adequately protected. Under *Lange 2000* qualified privilege for political discussion will now arise more easily and it will be up to the plaintiff to show that the defendant should not be entitled to the privilege. Procedural and pleading restrictions appear to make it very difficult for a plaintiff to defeat the privilege. The Court of Appeal intimated how these problems might be fixed, however their discussion of the problems was minimal. The Court's suggestions are discussed along with other options. Solutions are suggested.

Part V discusses the scope of the new privilege. The precise rule arising from *Lange 2000* relates to parliamentarians. This is a status-based rule. The general proposition from *Lange 2000*, being statements about the functioning of

representative and responsible government,¹² is a content-based rule. United States law is traversed in order to assess the merits of content versus status based approaches. The validity of distinguishing political speech from other types of speech is also questioned. The sorts of anomalies that can arise when types of speech are categorised are illustrated.

Part VI concludes by reflecting on the number of difficult legal issues that still need to be resolved in this area of law. It seems a huge amount of legal argument and expense is still needed before the issues surrounding political discussion are resolved. Many of these issues could have been avoided if the Court of Appeal had followed the approach preferred by the Privy Council and simply allowed the existing common law to deal with political discussion.¹³

II- THE LANGE SAGA

This part introduces the law of qualified privilege generally and then outlines the reasoning that led firstly the High Court and, then on appeal, the Court of Appeal to extend the defence. The analysis will be undertaken in light of the balance which defamation law seeks to achieve between the competing rights of free speech and reputation. I submit that the pre-*Lange* qualified privilege law did not adequately protect free speech. The High Court's, and Court of Appeal's (*Lange 1998*), reasons for extending this protection are then examined. I suggest that these decisions went too far in trying to fix the problem and extended the privilege at the cost of reputation. The scales were tipped too far in favour of free speech. From this background information it will be possible to examine whether *Lange 2000* restores the balance.

¹² *Lange 2000*, above n 1, para 10.

¹³ This is the approach taken by the House of Lords, see *Reynolds HL*, above n 9.

A Common Law Qualified Privilege Pre-Lange

All occasions of qualified privilege are derived either from statute¹⁴ or from the common law. The defence allows people to speak freely without fear of a defamation suit. It recognises, and attempts to mitigate, the “chilling effect” of defamation. The chilling effect suggests that free speech is hindered by the law of defamation because people refrain from speaking through fear of a defamation suit. This theory was recently explored by Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson.¹⁵ After collecting and analysing empirical evidence the authors concluded that “the chilling effect genuinely does exist and significantly restricts what the public is able to read and hear”.¹⁶

Common law qualified privilege is based around the familiar duty/interest test as described by Lord Atkinson in *Adam v Ward*:¹⁷

A privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.

The test is a flexible one designed to be applied in varying fact scenarios. It is important to note that strict reciprocity of duty or interest between the maker and receiver of a statement is not necessary.¹⁸ It is enough that communication is “fairly made by a person... in the conduct of his own affairs, in matters where his interest is concerned and demands no community, reciprocity or correspondence either of interest or duty”.¹⁹

In deciding whether the duty/interest test is satisfied, courts consider the width of dissemination. The wider the publication the less likely the necessary duty and

¹⁴ Defamation Act 1992, s 16 and the First Schedule.

¹⁵ *Libel and the Media* (1997, Oxford University Press, United Kingdom).

¹⁶ *Libel and the Media* (1997, Oxford University Press, United Kingdom), 191.

¹⁷ [1916-1917] All ER 157, 170 per Lord Atkinson. For a more in depth discussion see S Todd (ed) *The Law of Torts in New Zealand* (1997, Brookers, Wellington) 918.

¹⁸ *Lange* 1998, above n 1, 440.

¹⁹ *Lange* 1998, above n 1, 440. See also *Mowlds v Fergusson* (1940) 64 CLR 206, 215 per Dixon J.

interest will be present. This factor substantially restricts common law qualified privilege and is illustrated by previous authority in the context of political discussion. In *Templeton v Jones*²⁰ a defence of qualified privilege failed because the defendant's action of having his press notes distributed to the parliamentary press gallery, which therefore constituted general publication, went beyond what was reasonably necessary for communicating with his constituents.²¹ In *Truth v Holloway*²² the Privy Council denied the publisher, *Truth*, a defence of qualified privilege for generally published allegations of corruption against Cabinet minister Phil Holloway. If *Lange 2000* had been in force when these cases were decided, qualified privilege would most likely have arisen. Prior to *Lange* there was little recognition for generally published statements. However in some extreme situations the common law had recognised qualified privilege in instances of general publication. For example, in *Perera v Peiris*²³ general publication of parts of a Bribery Commission report about members of the State Council of Ceylon attracted privilege.

General publication was therefore only justified in very limited circumstances. A person wishing to make allegations would have to be very conscious of how widely they published their statements. Also, a person who originates the defamatory statement can be liable for other publications if this was a natural and probable consequence of the original publication.²⁴ In my opinion the pre-*Lange* law unduly chilled free speech.

B The High Court

In October 1995 the monthly magazine *North and South* published an article, written by Joe Atkinson, which heavily criticised David Lange's performance as Prime Minister. Mr Lange claimed that sixteen passages in the article, and the accompanying cartoon, in their ordinary meaning meant, and were understood to

²⁰ [1984] 1 NZLR 448 (CA) [*Templeton v Jones*].

²¹ *Templeton v Jones*, above n 20, 459.

²² [1961] NZLR 22 (PC) [*Truth v Holloway*].

²³ [1949] AC 1 (PC).

²⁴ See *Slipper v British Broadcasting Corporation* [1991] 1 QB 283 (CA).

mean, that Mr Lange was dishonest, lazy, insincere, and irresponsible and that the words complained of were intrinsically malicious.²⁵ Mr Lange issued proceedings claiming damages for defamation against Mr Atkinson and against the magazine's publisher.²⁶ The defendants, in their defence, claimed that they were protected by a defence of political discussion. The defence was pleaded both as a stand alone defence and as part of qualified privilege. Mr Lange sought to have the defence struck out as not recognised by law.

The strike out application went firstly before Elias J in the High Court. The application was refused. Elias J held that the common law did not recognise a separate defence of political discussion but that it could form a category of qualified privilege. She defined the width of political discussion as: "discussion which bears upon the function of electors in a representative..."²⁷

In extending qualified privilege Elias J was unwilling to restrict the new privilege by requiring a defendant to act reasonably. She thought that such a requirement would be inconsistent with the Defamation Act.²⁸ Elias J directed that the two defences, one for political discussion as a stand alone defence and the other for political discussion under qualified privilege, should be pleaded as one and declined to strike the proceedings out.²⁹ The decision was appealed.

The result of Elias J's judgment, like that of the majority in *Lange 1998*, increases the right to free speech without a corresponding increase in the protection of reputation.³⁰

²⁵ *Lange 1998*, above n 1, 429. The sixteen allegedly defamatory pieces are underlined in the article which is found in Appendix 1. These are the passages alleged by Mr Lange's counsel to be defamatory.

²⁶ Australian Consolidated Press.

²⁷ *Lange 1997*, above n 1, 46.

²⁸ *Lange 1997*, above n 1, 49.

²⁹ *Lange 1997*, above n 1, 49.

³⁰ This is illustrated more thoroughly below under the discussion of the majority decision in *Lange 1998*, see Part III C.

C The Court of Appeal- Round 1 (Lange 1998)

While *Lange 1998* was updated by *Lange 2000*, much of the reasoning was not altered and is therefore still relevant. In a lengthy judgment, the court dismissed the appeal by substantially affirming the decision of Elias J in the High Court. The Court agreed that the common law could now recognise a qualified privilege defence of political discussion. Tipping J delivered a separate opinion. He agreed that the common law should recognise the new privilege but differed in relation to how the privilege should be limited.

1- The decision of the majority

The majority did not recognise political discussion as a stand-alone defence but as a subset of qualified privilege. Like the High Court, the majority refused to introduce a reasonableness requirement or some other added protection for reputation.

In order to put qualified privilege in context, the majority began by discussing other defences to defamation. After a review of the development of qualified privilege, the majority then entered a lengthy discussion of how other jurisdictions have dealt with political discussion.³¹ Their only conclusion was that different approaches are taken across the globe.

Some important constitutional features were then outlined as supporting the extension of qualified privilege. The change in electoral system, from first past the post to mixed member proportional, was discussed as indicating a more direct recognition of the competition organised by political parties for the power of the state.³² The addition of list candidates and the party vote has given more New Zealanders a greater interest in political discussion. On a national level it must

³¹ *Lange 1998*, above n 1, 450-459. The majority examined decisions from Canada, United States, United Kingdom, Australia. It also considered decisions under the European Convention on Human Rights.

³² *Lange 1998*, above n 1, 463.

however be noted that many current and aspiring members of parliament are not on party lists. Therefore this reasoning does not support the Court of Appeal's broad conclusion that all New Zealanders have an interest in criticising all current, former and aspiring parliamentarians.³³

The change in access to government documents brought about by the Official Information Act 1982 was then mentioned. The majority stated that this legislation stood for the principle that information should be made available unless there are good reasons for withholding it.³⁴ However, *Templeton v Jones*, decided after the introduction of the Official Information Act, firmly rejected a defence of political discussion.³⁵

The New Zealand Bill of Rights Act 1990 (NZBOR) was also discussed. The Court of Appeal's analysis was lacking in its use of the NZBOR. The Act was not discussed until late in the judgment and then the majority did nothing more than outline the relevant law; there was no substantive analysis. This was not improved upon in *Lange 2000* and is more fully discussed below.³⁶

These considerations led the court to formulate a five-point conclusion which extended the scope of qualified privilege at common law:³⁷

- (1) The defence of qualified privilege may be available in respect of a statement which is published generally.
- (2) The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible performance of specific individuals in elected public office.
- (3) In particular, a proper interest does exist in respect of statements made about

³³ The Court of Appeal's conclusions are outlined below, see Part II C 1.

³⁴ *Lange 1998*, above n 1, 463 citing the Official Information Act 1982, s 5.

³⁵ *Templeton v Jones*, above n 20, 455.

³⁶ See Part III D.

³⁷ *Lange 1998*, above n 1, 467-468.

actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.

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

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

Lange 1998 gave a green light to political discussion which, in what is a delicate balancing act between two competing rights, tipped the scales in favour of free speech.

The majority was unwilling to restore the equilibrium by imposing additional protections for reputation. They refused to follow the Australian approach and require that the defendant's conduct be reasonable in order to attract privilege.³⁸ Its primary reason for rejecting this standard was that neither the common law nor the legislature had in the past imported a duty of care into the defence of qualified privilege.³⁹ Negligence, they said, has no role to play in the law of defamation.⁴⁰ Furthermore the majority thought that it would be inconsistent with other defamation defences to introduce a reasonableness requirement into qualified privilege.⁴¹ In addition the majority asked how a legitimate interest to receive information can differ simply because the author has failed to take reasonable care.⁴²

³⁸ New South Wales employs the "reasonableness" standard through s 22 of the Defamation Act 1974 (NSW). Federally it is employed through the common law, see *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1 (HC); *Stephens v West Australian Newspapers Ltd* (1994) 24 ALR 80 (HC); *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 (HC) [*Lange v ABC*]. The "reasonableness" standard under the New South Wales Defamation Act and the common law "reasonableness" standard are considered to be the same, see S Walker "Lange v ABC: the High Court rethinks the 'constitutionalisation' of defamation" (1998) 6 TLJ 1.

³⁹ *Lange 1998*, above n 1, 469.

⁴⁰ *Lange 1998*, above n 1, 469 citing *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148, 155-157 (CA); *Balfour v Attorney-General* [1991] 1 NZLR 519, 529 (CA); *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, 298-299 (CA).

⁴¹ *Lange 1998*, above n 1, 470.

⁴² *Lange 1998*, above n 1, 469-470.

While these may all be valid points against introducing a reasonableness requirement, the majority failed to discuss other ways of restoring the equilibrium between the rights of free speech and reputation. The practical result of *Lange 1998* meant that, in the case of political speech, qualified privilege would inevitably arise and could only be defeated by overcoming the high threshold of malice found in section 19 of the Defamation Act 1992.⁴³ This would have meant that in cases of political discussion, qualified privilege would most likely be a successful defence. People had the ability to speak carelessly about politicians with no repercussions if their statements turned out to be false.⁴⁴ Therefore *Lange 1998*, in my opinion, advanced free speech at the cost of reputation. The New Zealand Law Commission⁴⁵ and other commentators⁴⁶ also thought this.

2- *The decision of Tipping J*

Tipping J, in a separate opinion, agreed that qualified privilege should be developed to encompass political discussion.⁴⁷ However he differed from the majority in relation to what, if any, restraints should be imposed on the privilege in order to protect reputation. He noted that the public do have a valid interest in receiving political information and that qualified privilege should recognise this "provided there is sufficient counter-balancing protection for those defamed".⁴⁸ Tipping J stated that the reasonableness of the defendant's conduct could be relevant when establishing whether the occasion of privilege has been misused under section 19 of the Defamation Act 1992.⁴⁹

⁴³ Section 19 was designed to codify the common law concept of malice. However, after *Lange 2000* s 19 is now far wider than common law malice, see below Part III B.

⁴⁴ See "NZLC Preliminary Report", above n 4, 1.

⁴⁵ See "NZLC Preliminary Report", above n 4.

⁴⁶ See "Has Lange Tipped the Balance too Far?", above n 4. See also J Burrows "Defamation and Politicians" (1999) Tort Law Review 8; W Rogers "Privilege and the Media" (1999) Tort Law Review 13.

⁴⁷ *Lange 1998*, above n 1, 473.

⁴⁸ *Lange 1998*, above n 1, 473.

⁴⁹ *Lange 1998*, above n 1, 475.

[T]he circumstances in which the statement is made and the amount of care which has been taken in establishing the facts, could well be relevant to whether the maker of the political statement, has, or has not, misused the occasion.

By not only recognising the importance of political discussion but also increasing the protection for reputation, Tipping J did, in my opinion, a better job than the majority in balancing free speech and reputation.

Tipping J reached this result in the context of the NZBOR. He began his analysis by stating that the striking of the balance between the two rights must be informed by section 5 of the NZBOR.⁵⁰ Tipping J recognised the imbalance created by the approach of the majority and rectified this by allowing the reasonableness of a defendant's conduct to be relevant to whether the occasion of privilege has been misused.

The decision was appealed to the Privy Council.

D The Privy Council

The Privy Council allowed the appeal and set aside the decision of the New Zealand Court of Appeal. However, the court did not substitute its own decision but instead remitted the case back to the New Zealand Court of Appeal for rehearing. The Privy Council took this approach because it recognised "that striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions".⁵¹ It gave the New Zealand Court of Appeal the opportunity of rethinking its earlier decision in light of the change in English law arising from *Reynolds*.⁵²

⁵⁰ *Lange 1998*, above n 1, 474.

⁵¹ *Lange 2000-PC*, above n 1, 263.

⁵² *Lange 2000-PC*, above n 1, 263.

E Reynolds

Reynolds was heard at the same time as the *Lange* appeal by the same judges, only in *Reynolds* the court was in its capacity as the House of Lords and not the Privy Council.

Reynolds involved the publication, in *The Sunday Times* in Britain, of allegations that the former Irish prime minister, Albert Reynolds, had deliberately and dishonestly misled the Dail. The incident arose over the appointment of the Irish Attorney-General, who Reynolds supported, to the presidency of the High Court. Reynolds was accused of suppressing crucial information about the Attorney-General. Reynolds sued the paper for defamation.

The House of Lords rejected any form of generic qualified privilege, which it viewed *Lange 1998* as creating,⁵³ for political discussion. Cases of political speech, like all other categories of speech, will have to be decided, in the United Kingdom at least, individually under the common law duty/interest test.

In delivering the leading judgment Lord Nicholls⁵⁴ made many valid points which, in my opinion, clearly illustrate the failures of the majority judgment in *Lange 1998*. Lord Nicholls began his substantive reasoning with freedom of expression. He noted that the right can be limited in order to protect reputation which is in turn conducive to the "public good".⁵⁵

Lord Nicholls went on to state that the crux of the appeal lay in identifying the restrictions which are fairly and reasonably necessary for the protection of reputation.⁵⁶ This point is clearly correct. The importance of free and frank political discussion in a democracy is undeniable: the difficult issue is deciding

⁵³ See *Reynolds HL*, above n 9, 621 per Lord Nicholls.

⁵⁴ Lord Cooke (637) and Lord Hobhouse (657) agreed with the result and reasoning forwarded by Lord Nicholls.

⁵⁵ *Reynolds HL*, above n 9, 622.

⁵⁶ *Reynolds HL*, above n 9, 622.

how to give effect to this without trammelling the right to reputation. This style of analysis is absent from the majority decision in *Lange 1998*.

Lord Nicholls's next point illustrates the inadequate protection which *Lange 1998* afforded reputation. The common law malice standard, codified in New Zealand under section 19 of the Defamation Act 1992, combined with the practical difficulties associated with proving malice make it extremely hard to defeat qualified privilege.⁵⁷ Lord Nicholls therefore concluded that: "some further protection for reputation is needed if this can be achieved without a disproportionate incursion into freedom of expression."⁵⁸

Lord Nicholls, and the Court, concluded that the existing common law could best strike the balance between the two competing rights. He provided a non-exhaustive list of ten factors which could be relevant in deciding whether the duty/interest test is satisfied:⁵⁹

- (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
- (2) The nature of the information, and the extent to which the subject is a matter of public concern.
- (3) The source of the information. Some informants have their own axes to grind, or are being paid for their stories.
- (4) The steps taken to verify the information.
- (5) The status of the information. The allegation may have already been the subject of an investigation which demands respect.
- (6) The urgency of the matter. News is often a perishable commodity.
- (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
- (8) Whether the article contained the gist of the plaintiff's side of the story.
- (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
- (10) The circumstances of the publication, including the timing.

⁵⁷ Difficulties associated with the burden of proof are discussed below. See below, Part IV C and D.

⁵⁸ *Reynolds HL*, above n 9, 623.

⁵⁹ *Reynolds HL*, above n 9, 626.

While *Reynolds* does not expressly recognise political discussion as a category of qualified privilege, it does recognise the importance of free speech and in particular political free speech. The judgment advances the common law⁶⁰ and anticipates that the duty/interest test will now be more readily satisfied in cases of general publication.⁶¹

Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.

I submit that *Reynolds* strikes a far better balance than the majority in *Lange 1998*. *Reynolds* is very different to *Lange* in that it does not categorise types of speech. Political speech, like all other types of speech, must satisfy the duty/interest test to attract privilege.

III- LANGE 2000

The New Zealand Court of Appeal began by citing two passages from the Privy Council decision.⁶² These passages stated that New Zealand was not bound to follow *Reynolds* and that it must take an approach consistent with local political and social conditions.⁶³ From this beginning, the Court of Appeal decided against following the *Reynolds* approach. But instead of leaving its earlier decision untouched, the Court made some significant changes. The Court stated that it was of "first importance to keep conceptually separate the questions whether the

⁶⁰ See below, Part V D.

⁶¹ *Reynolds HL*, above n 9, 626.

⁶² *Lange 2000*, above n 1, 2-3.

⁶³ *Lange 2000-PC*, above n 1, 261, 263.

occasion is privileged and, if so, whether the occasion has been misused".⁶⁴ From this starting premise the Court moved on to redefine the rules concerning political discussion in two parts, the first relating to whether an occasion is privileged, the second relating to misuse of the occasion of privilege.

A *The Occasion of Privilege*

The Court felt a "need for amplification"⁶⁵ of its earlier five point conclusion. After accepting that their earlier decision could be interpreted "as suggesting that a communication within the qualifying subject matter will always attract qualified privilege",⁶⁶ the court added a sixth concluding point:⁶⁷

6. To attract privilege the statement must be published on a qualifying occasion.

An objective reading of *Lange 1998* clearly suggests that, at least in 1998, the Court of Appeal created a generic subset of qualified privilege for certain statements about current, former or aspiring parliamentarians.⁶⁸ The privilege cannot now be considered strictly generic. However, it is my view that the "generic" nature of the political discussion defence remains largely intact. While the court held that in all situations it will be necessary to inquire whether the publication was made on a qualifying occasion, it also noted that:⁶⁹

This requirement for the occasion to qualify, as well as the subject matter, may sometimes lead to difficulties at the margins, but in reality there is likely to be comparatively little uncertainty in this area. Any bona fide communication in the course of political discussion and within the defined subject matter is very likely to be made on an occasion of qualified privilege. The possibility of the

⁶⁴ *Lange 2000*, above n 1, para 4. This can be compared to the approach taken in *Reynolds HL* where misuse of the occasion is part of the consideration of whether the privilege arises.

⁶⁵ *Lange 2000*, above n 1, para 21.

⁶⁶ *Lange 2000*, above n 1, para 22.

⁶⁷ *Lange 2000*, above n 1, para 41.

⁶⁸ Point 3 of the 1998 conclusion stated that a proper interest "does exist" in relation to former, current and aspiring parliamentarians. See above Part II C 1.

⁶⁹ *Lange 2000*, above n 1, para 21.

occasion not attracting privilege is unlikely to cause difficulty for news media organisations, or indeed others who are engaged in genuine political discussion. Such possibility, and the small level of uncertainty it may cause, is a necessary price to pay to guard reputations against false imputations made on occasions which are outside the purpose of privilege; albeit within its literal subject matter.

When deciding whether a statement was made on a qualifying occasion reference should include "the identity of the publisher, the context in which the publication occurs, and the likely audience, as well as the actual content of the information".⁷⁰ The Court gave an example of a situation where no privilege would arise. This was where an article in a motoring magazine, about a person's activities in sport, made a one-line reference to alleged conduct of a grave nature.⁷¹ Any genuine political discussion is likely to attract privilege.⁷²

When the above points are considered together in light of *Lange 1998* it seems clear that the new point six represents only a slight change to the 1998 position. Qualified privilege for political discussion will arise in all but the most extreme cases. Although "does exist" in 1998 means "may exist" in 2000,⁷³ any genuine statements made in the course of political discussion will give rise to a qualified privilege defence.

It should be noted that the introduction of point six has slightly shifted the balance between the competing rights of reputation and free speech. The Court expressly stated that they would not strike the balance differently from *Lange 1998*.⁷⁴ However, by narrowing the scope of scenarios where the defence will arise, the balance has shifted marginally in favour of reputation. When this is coupled with the introduction of the requirement to act responsibly,⁷⁵ *Lange 2000* is, overall, far more favourable to reputation than *Lange 1998*.

⁷⁰ *Lange 2000*, above n 1, para 13.

⁷¹ *Lange 2000*, above n 1, para 13.

⁷² *Lange 2000*, above n 1, para 21.

⁷³ B Atkin, S Price "Lange 2000" (2000) NZLJ 236, 236.

⁷⁴ *Lange 2000*, above n 1, para 38.

⁷⁵ See below Part III B.

B Misuse of the Occasion of Privilege

Section 19(1) of the Defamation Act 1992 provides that:

19(1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.

Although it does not do so explicitly, section 19(1) was designed to codify the common law concept of malice.⁷⁶ Lord Diplock's speech in *Horrocks v Lowe*⁷⁷ (*Horrocks*) is generally accepted as the leading authority on common law malice. The defendant must either publish the material with knowledge of its falsity or with reckless disregard to its truth.⁷⁸ Carelessness is not enough.⁷⁹ Following *Lange 2000*, section 19 malice is now far wider than the test outlined by Lord Diplock in *Horrocks*. The Court, following Tipping J's lead in *Lange 1998*,⁸⁰ thought it appropriate to extend the concept of malice, particularly misuse of occasion, to make it easier to defeat qualified privilege. The Court did so in order to restore the equilibrium between the competing rights of reputation and free speech.⁸¹

The idea of taking improper advantage of the occasion is important when one is considering the appropriate balance between freedom of expression and protection of reputation. Its connotations are potentially wider than the traditional concept of malice...

While granting qualified privilege for political discussion is an increase in recognition for the right to free speech, developing the concept of malice is a

⁷⁶ *Lange 2000*, above n 1, para 42; B Atkin, S Price "Lange 2000" (2000) NZLJ 236, 237; Rt Hon Justice McKay, Laws NZ, Defamation, para 123.

⁷⁷ [1974] 1 ALL ER 662 (HL).

⁷⁸ *Horrocks v Lowe* [1974] 1 ALL ER 662, 669 (HL).

⁷⁹ See *Reeves v Saxon* (17 December 1992) unreported, Court of Appeal, CA 134/89 17, applying *Horrocks v Lowe* [1974] 1 ALL ER 662.

⁸⁰ *Lange 1998*, above n 1, 473.

⁸¹ *Lange 2000*, above n 1, para 39.

corresponding increase in protection for reputation. "One development is therefore capable of being matched by another so that the overall balance is kept right".⁸² Those who wish to rely on qualified privilege for political discussion will have to ensure that the privilege is responsibly used. "If the privilege is not responsibly used, its purpose is abused and improper advantage is taken of the occasion".⁸³ The legal test can be stated as follows:⁸⁴

Has there been a failure to give such responsible consideration to the truth or falsity of the statement as should have been given in all the circumstances?

If the answer is yes then the person will be regarded as reckless and the occasion will have been misused.⁸⁵ Conceptually placing the responsibility standard in relation to other legal standards is not easy. While the Court of Appeal again rejected the Australian standard of reasonableness, it is my opinion that the responsibility standard is substantially similar to this standard. Both will require an examination of objectively assessed factors and each will focus on aspects of the defendant's conduct. Also each standard will operate on a sliding scale dependent on the nature of the allegation and the intended dissemination.⁸⁶ The more serious the allegation and the wider the dissemination, the more steps a defendant will usually have to take in order to appear responsible in New Zealand and reasonable in Australia. The Court of Appeal themselves recognised that:⁸⁷

[T]o require the defendant to give such responsible consideration to the truth or falsity of the publication as is required by the nature of the allegation and the width of the intended dissemination, may in some circumstances come close to a need for the taking of reasonable care.

⁸² *Lange 2000*, above n 1, para 39.

⁸³ *Lange 2000*, above n 1, para 42.

⁸⁴ Applying *Lange 2000*, above n 1, para 47.

⁸⁵ *Lange 2000*, above n 1, para 47.

⁸⁶ *Lange 2000*, above n 1, para 49; *Lange v ABC*, above n 38, 572-573.

⁸⁷ *Lange 2000*, above n 1, para 48.

In New Zealand, a defendant's conduct must be labelled "responsible" in order to enjoy the new privilege, in Australia it must be labelled "reasonable". While the Court of Appeal clearly did not intend the two standards to always be the same, in my opinion differences between the two are likely to only be semantic.⁸⁸

The responsibility standard extends the ways in which qualified privilege may be defeated.⁸⁹ The burden of proof therefore lies on the plaintiff. The defendant, though, will not be able to sit idle: "if the publisher is unable or unwilling to disclose any responsible basis for asserting a genuine belief in truth, the jury may well be entitled to draw the inference that no such belief existed."⁹⁰

A defendant will need to be proactive and present evidence showing that they acted responsibly in making the statement in question.

C Is New Zealand justifiably different from the United Kingdom?

In line with other decisions,⁹¹ the Privy Council recognised that New Zealand could adopt its own approach according to its unique environment. The Court of Appeal, in deciding not to follow *Reynolds*, was therefore forced to justify its decision by showing that New Zealand political and social conditions are different from those found in the United Kingdom.

In fact the court noted very few factors in distinguishing the two countries. It cited a passage from the report of the Committee on Official Information⁹² as

⁸⁸ The Law Commission has also expressed this view, see "NZLC Report 64", above n 8, para 19-20.

⁸⁹ Whether the extension applies to all types of qualified privilege is unclear and is further discussed in Part V D below.

⁹⁰ *Lange 2000*, above n 1, para 43.

⁹¹ See for example *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

⁹² *Towards More Open Government* (Government Press, Wellington, 1980).

authority for the proposition that New Zealand is a small country whose government has an extensive and pervasive involvement in everyday national life.⁹³ However, any democratically elected government impacts greatly upon everyday life, New Zealand no more so than Britain. Furthermore it must be questioned whether the passage cited by the Court of Appeal is relevant twenty years after it was written. That very same passage notes New Zealand's focus on state ownership and control of major assets, as an alternative to overseas ownership and control, as one unique and distinguishing factor. Such reasoning is far less persuasive today considering the extent to which State Owned Enterprises have been privatised. Also market deregulation has been prominent in New Zealand's economic policy in the last twenty years.⁹⁴ New Zealand is very different to what it was in 1980.

The court also stated that the British press is less responsible than the New Zealand press. While this may be true as a generalisation, New Zealand media organisations are just as able to harm reputations as their British counterparts. Furthermore complaints against the media are increasing,⁹⁵ and surely the court should approach the problem on a worst case scenario basis.

The Court of Appeal noted further that New Zealand's dailies are generally of a "regional character".⁹⁶ On the other hand many British dailies are distributed nation-wide and are therefore in more direct competition with each other. Although not stated by the Court of Appeal, this presumably means that there is less risk for irresponsible journalism in New Zealand. However, there is significant competition for daily news in New Zealand, for example a Wellington news-seeker can choose from a number of news sources including the Dominion, Evening Post and New Zealand Herald. Furthermore non-newspaper news sources like television and the Internet are also available.

⁹³ *Lange 2000*, above n 1, para 32.

⁹⁴ For example the market for postal services has been recently deregulated.

⁹⁵ For example the number of complaints heard by the Broadcasting Standards Authority are increasing. 184 were heard in 1999 compared with 239 heard in 2000. Complaints figures can be found at www.bsa.govt.nz.

⁹⁶ *Lange 2000*, above n 1, para 35.

The Court of Appeal also compared circulation numbers of British and New Zealand publications. Circulation numbers are of course relevant to the amount of damage that a false statement may cause. However, it is hard to see how this is relevant in deciding whether a plaintiff should be entitled to recover damages for reputational harm. Furthermore, New Zealand's circulation figures are hardly insignificant, the New Zealand Herald for example distributes approximately 213 000 copies daily.⁹⁷ The Court of Appeal did not bother to compare readership numbers as a ratio of total population.

The Court also reiterated aspects of *Lange 1998*. New Zealand's electoral system, the Official Information Act 1982 and the NZBOR were again discussed.

Differences between the NZBOR and the United Kingdom Human Rights Act 1998⁹⁸ were outlined. The latter Act does significantly differ in some respects, for example in relation to the right of privacy. However, in relation to free speech and reputation there is little difference. As Lord Cooke noted: "the existing balance between the right to personal reputation and freedom of speech has been gradually developed over the years by common law and statute."⁹⁹ The recent codification of the rights, in both jurisdictions, by the New Zealand Bill of Rights Act 1990 and the United Kingdom Human Rights Act 1998 does not mean that the rights should be applied differently in the two jurisdictions. The rights are dynamic concepts that require a judgement call according to each fact scenario. Any differences in the statutory framing of the rights, between the two jurisdictions, is unlikely to be determinative. This view is supported by the fact that both New Zealand and the United Kingdom call on the European Convention on Human Rights when solving human rights problems.¹⁰⁰ The Convention

⁹⁷ Source, New Zealand Audit Bureau of Circulations Inc. *Summary of Audited Circulations*, period ended 31 March 2000.

⁹⁸ The Act comes into force in October 2000.

⁹⁹ *Reynolds HL*, above n 9, 640 per Lord Cooke.

¹⁰⁰ It should be noted that New Zealand courts, when referring to international human rights treaties, use the International Covenant on Civil and Political Rights more than the European Convention on Human Rights.

featured in *Lange 1998*¹⁰¹ and was central to the reasoning of Lord Nicholls in *Reynolds*.¹⁰²

The Official Information Act does emphasise the importance of access to information as the Court of Appeal notes. On the other hand, it must be noted that the Act recognises information should be withheld in some broadly defined situations, for example where it would be used for improper gain.¹⁰³ The Act provides wide grounds for denying requests for information.

New Zealand's electoral system, although not that different to some found in Europe,¹⁰⁴ is one factor that potentially differentiates New Zealand from the United Kingdom. However, it is hard to see how this could have a significant bearing on the issue. This is especially so when considering the similarities between the two jurisdictions. Both feature parliamentary democracies based on universal suffrage. Both governments are responsible to their respective parliaments which in turn answer to the electorate. Former president of the New Zealand Court of Appeal, Lord Cooke of Thorndon, certainly believed the two jurisdictions to be materially similar.¹⁰⁵

As I see it, however, the United Kingdom is no less a representative democracy with responsible government than... New Zealand. For the purposes of defamation law, the background or context does not seem materially different. The constitutional structures vary, but the prevailing ideals are the same. Freedom of speech on the one hand and personal reputation on the other have the same importance in all democracies.

Another commentator has also questioned whether New Zealand is different enough to justify taking a different approach.¹⁰⁶ Overall the two jurisdictions are

¹⁰¹ *Lange 1998*, above n 1, 457.

¹⁰² *Reynolds HL*, above n 9, 625.

¹⁰³ Official Information Act 1980, s 9(2)(k).

¹⁰⁴ See *Reynolds HL*, above n 9, 654 per Lord Hope.

¹⁰⁵ *Reynolds HL*, above n 9, 641.

¹⁰⁶ B Atkin "Let-Down in Lange" 1999 NZLJ 442, 442-443.

in my opinion very similar. While subtle differences may exist, they hardly justify taking an alternate approach.

D What happened to the New Zealand Bill of Rights?

Although *Lange 2000* improved the balance between free speech and reputation, both of the Court of Appeal's judgments, I submit, fail to give adequate reference to New Zealand's primary tool for managing fundamental rights- the NZBOR. This failure is illustrated by the majority's judgment in *Lange 1998* and is not improved upon in *Lange 2000*.

The majority's reference to the NZBOR was relegated to very late in the judgment and then did no more than briefly outline the relevant law. There was no substantial analysis in deciding the difficult issue of how reputation and free speech should be balanced. The starting point should have been to point out, as Elias J did in the High Court,¹⁰⁷ that the Act applies to the common law.¹⁰⁸

Although not expressly recognised by the NZBOR, the Act provides for the right to reputation in two ways, through section 5, and through section 28.

Section 5 provides a general mechanism which is used to limit the rights contained in the Act. This can be contrasted with the International Covenant on Civil and Political Rights (*ICCPR*) which provides specific reference, under each right, to factors that may justifiably limit a right. Furthermore, the Court of Appeal has recognised that, in applying section 5, courts may use the more detailed

¹⁰⁷ [1997] 2 NZLR 22, 32.

¹⁰⁸ The Court of Appeal's failure to endorse Elias J's view that the NZBOR applies to the common law means that the proposition is still unsettled in New Zealand. In my opinion the common law is subject to the NZBOR; s 3 states that the Act applies to the judicial branch of government. For a summary of the arguments for and against applying the NZBOR to the judiciary see A Butler "The New Zealand Bill of Rights Act and Private Common Law Litigation" [1991] NZLJ 261.

provisions of the ICCPR to aid the outcome.¹⁰⁹ One of the specific factors recognised by the ICCPR, as a justifiable limit on free speech, is the right to reputation.¹¹⁰ This is one way in which the Court of Appeal could have used the right to reputation in order to limit free speech.

Another way is through section 28, which provides that other rights are not abrogated by those found in the Act. Reputation, considered to be one such right,¹¹¹ is therefore arguably not just a limiting factor under section 5 but also a stand-alone right preserved by the NZBOR. If this approach is taken, then reputation would have to be balanced directly against freedom of expression.

It seems clear that the majority in *Lange 1998* did not keep these points in mind in reaching the result they did. The practical result of *Lange 1998* was to greatly advance freedom of expression at the expense of reputation. This can be contrasted with the results reached by Tipping J in *Lange 1998* and Lord Nicholls in *Reynolds*. Both started their substantial analysis by focusing on the rights in question, Tipping J in light of section 5 of the NZBOR,¹¹² Lord Nicholls in light of the United Kingdom Human Rights Act 1998.¹¹³ More significantly, both judges, after applying this rights centred approach, in my view struck a far better balance than the majority in *Lange 1998*.

While *Lange 2000* improved the balance it added nothing in the way of NZBOR analysis. It is interesting to note that the outcome of *Lange 2000* is almost identical to that reached by Tipping J in *Lange 1998*. Tipping J, however, by focusing on the NZBOR, needed only one attempt to reach this result.

Furthermore, both the Court of Appeal's judgments involved section 19 of the Defamation Act 1992. *Lange 1998* left the section untouched while *Lange 2000*

¹⁰⁹ *Re J (An Infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA); 135; *Television New Zealand Ltd v R* [1996] 3 NZLR 393 (CA); 395; *Lange 1998*, above n 1, 466.

¹¹⁰ International Covenant on Civil and Political Rights, Article 19.

¹¹¹ *Television New Zealand v Quinn* [1996] 3 NZLR 24, 56 per McGechan J (CA).

¹¹² *Lange 1998*, above n 1, 470.

¹¹³ *Reynolds HL*, above n 9, 621.

greatly widened it. Section 6 of the NZBOR provides a mechanism for interpreting other statutes when considering human rights contained in the NZBOR. If an interpretation consistent with the NZBOR can be given, without straining the plain meaning of the section in question, then that interpretation must be preferred. In neither judgment did the Court of Appeal refer to section 6 of the NZBOR when discussing section 19 of the Defamation Act. This is especially hard to justify in relation to *Lange 2000* which involved an entirely new and enlarged interpretation of section 19 of the Defamation Act.

The lack of reference to the NZBOR becomes even harder to justify when considering other free speech cases considered by the Court of Appeal around the same time as *Lange*. *Moonen v Film and Literature Board of Review*¹¹⁴ involved the application of free speech principles to the Films, Videos and Publications Classification Act 1993. The decision uses the NZBOR solely to establish how best to give effect to free speech. This can be contrasted with *Lange* which also involved statutory interpretation but only made minimal use of the NZBOR.

E How greatly has the law in New Zealand changed?

Lange represents, in my view, a substantial change to the law of defamation. The existing common law was extremely slow to recognise qualified privilege in situations of general publication.¹¹⁵ After *Lange 2000* it is clear that this is no longer so. Point one of the six point conclusion makes it unequivocally clear that qualified privilege can apply to generally published statements. More specifically the width of dissemination is no longer relevant for genuine political discussion about former, current or aspiring parliamentarians. In other situations general

¹¹⁴ (8 November 1999) unreported, Court of Appeal, CA 42/99. The decision was not reported at the time of writing this paper.

¹¹⁵ See *Templeton v Jones*, above n 20, 459. See also *Truth v Holloway*, above n 22.

publication will not be fatal to a claim for qualified privilege but the identified public concern must justify the extent of publication.¹¹⁶ However, where comments relate to the functioning of representative and responsible government, point 2 of the *Lange* conclusion,¹¹⁷ general publication will be more easily justified than before. This is due to the increase in recognition which *Lange 2000* gives to political speech.

While *Lange 2000* is not the complete triumph for free speech that *Lange 1998* was. It still represents a significant increase in recognition for this fundamental right. This point is further illustrated by the fact that qualified privilege will now more easily arise in relation to generally published statements that relate to the functioning of representative and responsible government.¹¹⁸ This is the most important proposition to arise from *Lange* and is fully discussed below.¹¹⁹ This point greatly broadens the scope of the political discussion privilege and will allow information to flow more freely as those commenting are now more likely to successfully defend a defamation action.¹²⁰ Just how great that extension will be largely depends on how future courts interpret, among others,¹²¹ the phrase "representative and responsible government".¹²²

Furthermore the new responsibility standard has greatly widened section 19 of the Defamation Act. That section, which was designed to codify the common law concept of malice, traditionally focused on the mental mind state of the defendant. The introduction of the need to act responsibly means that the focus is now

¹¹⁶ *Lange 1998*, above n 1, concluding point 5, 468. Outlined above, see Part II C 1.

¹¹⁷ See above Part II C 1.

¹¹⁸ *Lange 1998*, above n 1, concluding point 2, 468. Outlined above, see Part II C 1.

¹¹⁹ See Part V A.

¹²⁰ It must be noted, however, that a plaintiff can still issue proceedings and will often force a defendant to incur large legal costs in defending the action. Even if the defendant wins they will still have incurred large expenses. A plaintiff can therefore "win" by "losing". This phenomenon has been discussed in the United States, see for example D Boies "The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution" 39 St Louis LJ 1207; P Voakes "Lessons Learned: A Lawsuit's Impact on Journalistic Behaviour" 4 Comm L & Pol'y 87.

¹²¹ Other factors that still need to be determined will also bear on the issue of how greatly the law is changed, for example procedural and pleading problems also require attention. This is discussed below, see Part IV D and E.

¹²² This phrase is discussed below, see Part V A.

squarely on the conduct of the defendant. It is, however, unclear whether this extension applies to all cases of qualified privilege or only to political discussion. This is discussed further in Part V D.

IV- IMPACT AND IMPLICATIONS OF LANGE 2000

A How does New Zealand compare to other jurisdictions?

Appellate courts from Canada, Australia, the United Kingdom and New Zealand have all recently had to decide how to best uphold free speech without too greatly infringing on the right to reputation. The United States Supreme Court first considered the issue over 35 years ago. Now that the dust has finally settled it is possible to reflect on how each jurisdiction balances the two rights and where New Zealand sits comparatively. This analysis focuses on the scope of the various privileges and the ease with which they may be defeated. A continuum is provided which shows how comparatively each country balances the two rights.

The United States lies at the free speech end of the continuum. The famous case of *New York Times Co v Sullivan*¹²³ (*Sullivan*) established a wide privilege in respect of statements about public officials. The only way to defeat the privilege is to show actual malice which requires knowledge of falsity or reckless disregard to the truth of a statement.¹²⁴ In later decisions the scope of the privilege has been extended to include statements about public figures.¹²⁵ Overall, the United States awards a broad privilege to criticisms of public people that can only be defeated by actual malice.

In some respects *Lange 1998* is similar to the United States approach. *Lange 1998* awarded a privilege, albeit a narrower one, which could only be defeated by

¹²³ (1964) 376 US 254 (SC).

¹²⁴ *New York Times Co v Sullivan* (1964) 376 US 254, 279-280.

¹²⁵ See *Gertz v Robert Welch Inc.* (1974) 418 US 323, 346.

proof of the *Horrocks* standard of malice.¹²⁶ *Lange 2000* differs from the United States approach primarily in three ways. Firstly, by allowing irresponsible conduct to amount to misuse of the occasion of privilege, New Zealand allows the privilege to be defeated far more easily. Reputation is therefore afforded greater protection in New Zealand. Secondly, the scope of the privilege is more limited in New Zealand. The United States public figure and public official doctrines allow more wide ranging comments to be made about a greater pool of people. Alternatively, New Zealand restricts the privilege to statements which concern representative and responsible government. The third point relates to disclosure of sources. In New Zealand defendants have common law and statutory protection which protects them from disclosing their sources in defamation actions.¹²⁷ While these rules are not absolute, they provide much greater protection for sources than in the United States where defendants are not entitled to protect the confidentiality of their sources.¹²⁸

Canada is at the opposite end of the continuum favouring reputation more than the other four jurisdictions. In marked contrast to judgments such as *Sullivan, Lange 1998* and *Theophanous v Herald & Weekly Times Ltd*¹²⁹ the Supreme Court in *Hill v Church of Scientology of Toronto*¹³⁰ (*Hill*) places great emphasis on protecting reputation. Although not in the context of political discussion, the judgment goes as far as suggesting that protecting reputation and freedom of expression are of equal importance.¹³¹

[T]he protection of the good reputation of an individual is of fundamental importance to democratic society. . . [so that] the protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression.

¹²⁶ This standard, while not identical, is similar to the United States actual malice standard.

¹²⁷ These rules are fully discussed below, see Part IV D.

¹²⁸ See *Branzburg v Hayes* (1978) 408 US 665, 668. See also *Caldero v Tribune Publishing Co.* (1977) 434 US 930. It should also be noted that a defendant who breaches a confidentiality agreement can be liable for damages, see for example *Cohen v Cowles Media Co.* (1991) 111 S Ct 2513 (SC).

¹²⁹ (1994) 124 ALR 1 (HC).

¹³⁰ [1995] 2 SCR 1130.

¹³¹ *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, 1167. See also NZLC Preliminary Report, above n 4, 6.

The whole flavour and approach of *Hill* is unique. The Supreme Court does not assume that free speech should automatically trump reputation. *Hill* goes on to hold that the existing common law is consistent with the values of the Canadian Charter of Rights and Freedoms 1982. Therefore no extension of qualified privilege was recognised, the existing common law duty/interest test must still be applied in all cases where qualified privilege is raised.¹³² Political speech is not afforded extra protection. In terms of defeating the privilege Canada lies somewhere between the Australian "reasonableness" standard and the British malice standard found in *Horrocks*. In *Botiuk v Toronto Free Press Publications Ltd*¹³³ the Supreme Court noted that *Horrocks* was generally representative of the Canadian position but then went on to apply the recklessness standard more liberally. The Supreme Court, in analysing the facts, stated that the defendant's failure to undertake a reasonable investigation amounted to recklessness.¹³⁴ The position in Canada is still developing, so that it is unclear exactly when qualified privilege will be defeated.¹³⁵

As illustrated Canada and the United States strike very different balances between free speech and reputation. While the United States staunchly favours free speech, Canada on the other hand is far more protective of reputation.

New Zealand, Australia and the United Kingdom lie somewhere in between. The three jurisdictions have all taken conceptually different approaches but all strike the balance similarly. However, having said this, I believe there are some subtle differences that result in New Zealand favouring free speech slightly more than Australia and the United Kingdom.

¹³² See R Martin *Essentials in Canadian Law- Media Law* (Concord, Ontario, 1997) 152-154. It is unclear whether Canada will embrace *Reynolds* the next time the issue arises. However, at the time of writing this paper Canada had not done so.

¹³³ [1995] 3 SCR 3.

¹³⁴ *Botiuk v Toronto Free Press Publications Ltd* [1995] 3 SCR 3, 22-25.

¹³⁵ *Lange 2000* contains a more in depth discussion of the Canadian approach, see above n 1, paras 50-52.

As already outlined,¹³⁶ the United Kingdom, through *Reynolds*, has left the common law duty/interest test to deal with political discussion. *Reynolds* did however emphasise the importance of political discussion and stress that a court should be slow to conclude that the test is not satisfied.¹³⁷

Australia, on the other hand, expressly provides that qualified privilege exists for governmental or political matters that affect the people of Australia.¹³⁸ The privilege is however subject to a reasonableness requirement. The privilege will not arise unless the publisher's conduct was considered "reasonable".¹³⁹

Although two conceptually different approaches are taken by Australia and the United Kingdom, the balance struck is almost identical. Firstly both recognise the importance of political discussion and provide that qualified privilege can arise in such cases. Australia does it expressly through a specific category of qualified privilege whereas the United Kingdom does it implicitly through the existing common law. Secondly, both jurisdictions restrain the privilege similarly. In Australia the courts will examine various aspects of a defendant's conduct to see if they have acted reasonably. United Kingdom courts will also examine conduct, not to see if it is "reasonable" but to see whether the necessary duty/interest has arisen.¹⁴⁰ Any difference appears to be semantic: both jurisdictions will examine almost entirely the same factors to see if the statements were privileged. Lord Cooke, speaking in *Reynolds*, recognised that differences between Australia and the United Kingdom are not substantive:¹⁴¹

Lord Nicholls has listed, non-exhaustively, matters to be taken into account. As the Court of Appeal suggested, this brings English law into a position not very different from that produced by the Australian reasonableness test...

¹³⁶ See above Part II D 1.

¹³⁷ *Reynolds HL*, above n 9, 626.

¹³⁸ *Lange v ABC*, above n 38, 115.

¹³⁹ New South Wales provides for this through statute, see s 22 of the Defamation Act 1974 (NSW). The common law provides the same standard for other states, see above n 38.

¹⁴⁰ Lord Nicholls provided a non-exhaustive list of factors to be considered (See above Part II E). Some of these also focus on the defendant's conduct.

¹⁴¹ *Reynolds HL*, above n 9, 645.

One factor that could potentially set Australia and the United Kingdom apart is the Newspaper Rule. This rule allows a defendant to uphold the confidentiality of their sources, at interlocutory stages, and therefore makes it more difficult for plaintiffs to point to factors which show that the defendant should not be entitled to the privilege.¹⁴² In the United Kingdom the Newspaper Rule does not apply in "special circumstances".¹⁴³ However, what exactly amounts to special circumstances has not been defined and no case has found them to exist. The rule is therefore almost absolute.¹⁴⁴ Australia on the other hand does allow the rule to be defeated in some situations. This is discussed below in Part IV D 2 (b) (ii). This means that it is easier for the privilege to be defeated in Australia than it is in the United Kingdom. This pushes Australia more towards the reputation end of the continuum while the United Kingdom moves towards the free speech end. New Zealand's law, in terms of the Newspaper Rule, is currently unsettled but the Court of Appeal in *Lange 2000* indicated that we might follow the Australian approach.¹⁴⁵ This is further discussed below.¹⁴⁶

In New Zealand qualified privilege is likely to arise in most cases of genuine political discussion.¹⁴⁷ The privilege is restrained by allowing it to be defeated if the defendant has not acted "responsibly". As discussed above,¹⁴⁸ it is my view that this standard is almost identical to the Australian reasonableness standard. New Zealand does however boast one important difference. Unlike the other two, New Zealand requires that the plaintiff defeat the privilege. The plaintiff must prove on the balance of probabilities that the defendant has acted

¹⁴² It should be noted that the onus in Australia and the United Kingdom, unlike New Zealand, is on the defendant to raise the privilege. However, in practice a plaintiff will try to stop this by pointing to evidence to show that the privilege shouldn't arise.

¹⁴³ See for example *Lyle-Samuel v Odhams Ltd* [1920] 1 KB 135 (CA).

¹⁴⁴ For a good summary of the history of the Newspaper Rule see *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163 (CA) [*Alex Harvey*].

¹⁴⁵ *Lange 2000*, above n 1, para 57.

¹⁴⁶ See below Part IV C and D.

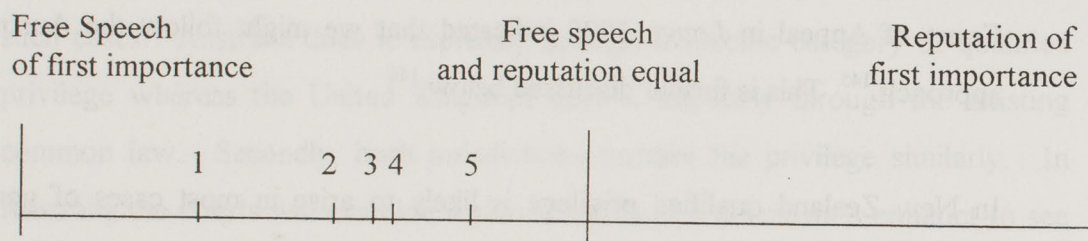
¹⁴⁷ See above Part III A.

¹⁴⁸ See above Part III B.

irresponsibly and has therefore misused the occasion.¹⁴⁹ In the United Kingdom it is the defendant who must show that the duty/interest test is satisfied. Likewise it is Australian defendants who must prove that they have acted reasonably.

While in reality both the plaintiff and defendant are likely to bring evidence relating to the defendant's conduct, the New Zealand approach is more favourable to free speech. It awards the privilege first and then asks the plaintiff to defeat it. Australia and the United Kingdom on the other hand require defendants to show that their conduct warrants protection. It is defendants who must prove they are entitled to protect their speech.

The above analysis can be illustrated as follows:



- | |
|---|
| <p>1= United States
 2= New Zealand
 3= United Kingdom
 4= Australia
 5= Canada</p> |
|---|

B Impact on the Media

1- Introduction

The defence of political discussion in New Zealand is not limited to the media and can be pleaded by anyone. It will, however, be the media who will rely on, and

¹⁴⁹ It should also be noted that misuse of the occasion of privilege is a question for the jury whereas the occasion itself is decided by the judge. Therefore the "reasonableness" of the defendant's conduct (Australia) and the duty/interest test (United Kingdom) are decided by the judge. In comparison in New Zealand it is a jury who will decide whether the defendant has acted responsibly.

benefit from, it the most. When the media prepare and publish stories they are forced to rely on certain facts. The media constantly risk defaming people and organisations if those facts are false. While other defences, for example honest opinion,¹⁵⁰ may be available qualified privilege will often be pleaded. The recognition, provided by *Lange 2000*, that qualified privilege will be more readily available for general publication will greatly benefit the media. For it is the media that by nature publish to the public at large. This factor meant that under the old duty/interest test it was difficult for media defendants to succeed in a claim to qualified privilege.¹⁵¹ The new privilege will be far more readily available to media defendants.

While at first glance the obvious result of *Lange 2000* is to facilitate free political discussion, which is clearly beneficial to the media, a more in-depth analysis reveals some potentially negative impacts.

2- Judicial standards of journalism

With the extension of section 19 malice to include irresponsibility, plaintiffs will now be more likely to bring evidence relating to the conduct of the defendant. Similarly defendants will want to bring their own evidence to refute allegations of irresponsibility.¹⁵² As a body of precedents accumulates, minimum standards will emerge that, if fallen below, will indicate irresponsibility. By the introduction of the responsibility standard the Court of Appeal has placed the spotlight squarely on the defendant's conduct. Courts will now be forced to examine conduct which will result in a de facto code of ethics for the media.¹⁵³ This is an interesting phenomenon considering that the media profession themselves are staunchly opposed to outside regulation.¹⁵⁴ While journalists have always had to be aware

¹⁵⁰ Defamation Act 1992, ss 10-11

¹⁵¹ See for example *Templeton v Jones*, above n 20, 459.

¹⁵² *Lange 2000*, above n 1, para 43

¹⁵³ B Atkin, S Price "Lange 2000" (2000) NZLJ 236, 237-238. See also R Bezanson, G Cranberg, B Murchison, J Soloski, R Wissler "Sullivan's Paradox: The Emergence of Judicial Standards of Journalism" 73 N.C.L Rev 7 ("Sullivan's Paradox"); L Bloom "Proof of Fault in Media Defamation Litigation" 38 Vand. L. Rev. 247.

¹⁵⁴ See for example A Cropp *Digging Deeper: A New Zealand Guide to Investigative Reporting* (New Zealand Journalists Training Organisation, Wellington, 1997) 180 [*Digging Deeper*].

of the limits imposed by defamation law, they will now have to be especially wary of their conduct. For example, a media defendant who has not checked more than one independent source or who has failed to seek a reply from the person defamed could easily be viewed as irresponsible.

3- Proving irresponsibility

Plaintiffs will be forced to use various benchmarks when they attempt to show that the defendant has acted irresponsibly. These benchmarks may come in various forms. Experienced journalists may be called to give evidence relating to acceptable standards. Reference may be had to industry standards such as those developed by the Press Council, the Broadcasting Standards Authority (BSA), the New Zealand Engineering, Printing and Manufacturing Union (Journalists' Union) and individual news organisations like Independent News Limited (INL). Journalism texts and foreign jurisprudence are also likely to be referred to. Industry standards, texts and foreign jurisprudence are separately considered below.

(a) Industry standards¹⁵⁵

The Press Council is the only complaints body relating to print media. While some publishers do not consent to the Press Council's jurisdiction, it now has a wide jurisdiction to hear complaints in relation to nearly all print media publications, but has little disciplinary power.¹⁵⁶ The Press Council has a set of Principles which guide adjudications. Unfortunately, like the Journalists' Union, BSA¹⁵⁷ and INL codes, the Principles are so broad that they will provide little assistance in deciding whether certain conduct should be deemed irresponsible. However, it would be possible to argue that the standards do require certain specific acts. For example cl 7(a) of the Journalists' Union code arguably requires

¹⁵⁵ The various codes of ethics are outlined in Appendix 2.

¹⁵⁶ See The Twenty-Seventh Report of the New Zealand Press Council 1999.

¹⁵⁷ The Broadcasting Standards Authority has various codes according to the content of the broadcast and the medium used. Codes relate to Radio, Pay Television, Free-to-Air Television, Liquor Promotion, Election Programmes/Advertising. Selected standards from the free-to-air code are listed in Appendix 1, the other codes can be found at www.bsa.govt.nz.

a journalist, who is a member of the union, to do many things including: to only use relevant facts; to not distort facts and therefore show both sides fairly and to seek a reply from the person at the centre of the allegations. Clause 7(a) provides that:

7(a) They shall report and interpret the news with scrupulous honesty and striving to disclose all essential facts and by not suppressing relevant, available facts or distorting by wrong or improper emphasis.

Such broad non-specific standards hardly promote public confidence in print media. Any hope of a more precise code being developed, by the Press Council or by the print media organisations themselves, is very unlikely after *Lange 2000*. The introduction of the responsibility standard may in fact dissuade print media organisations from formulating more precise standards. This is because a more precise formulation could very easily be used against the organisation in court. A journalist who did not strictly adhere to their own newspaper's standards would clearly appear irresponsible to jury members. On the other hand though it could be argued that *Lange 2000* encourages organisations to develop more precise ethical codes. These codes, if followed, would be able to be used as evidence of responsibility. Ironically though *Lange 2000* may have created a disincentive to formulate more rigid industry standards and could further compound the media's apprehension regarding external regulation.

(b) Texts

While the various codes of ethics are very broad, more precise rules may be found in journalism texts. One such text, written by Amanda Cropp and supported by the New Zealand Journalists Training Organisation,¹⁵⁸ contains exact guidelines which could easily be used as ammunition against reporters. For example under the title "The Importance of Independent Sources" she provides:¹⁵⁹

Confirm key facts which are likely to be highly contentious or libellous with at least three independent sources.

¹⁵⁸ *Digging Deeper*, above n 154.

¹⁵⁹ *Digging Deeper*, above n 154, 26.

And under the heading "Golden Rules for Using Unnamed Sources" she provides.¹⁶⁰

Never use the information unless it can be corroborated by at least one other source. In cases where the information is contentious and central to the story seek three independent sources.

The above are just a few of the specific rules provided by Amanda Cropp. A failure to comply with these standards will not automatically result in a loss of privilege. Exactly what amounts to responsibility will differ from case to case. However, once a plaintiff points to a certain standard of conduct, the defendant will tactically be forced to bring their own evidence to suggest that a lower standard was still "responsible" in the circumstances. For example, it is not difficult to envisage Joe Atkinson on the witness stand being asked by Lange's counsel whether he checked three independent sources before alleging that Mr Lange was lazy. If three independent sources cannot be pointed to then counsel for Mr Atkinson would be wise to bring evidence suggesting that three sources were not necessary in that situation.

(c) Foreign jurisprudence

In the context of the United States actual malice standard, comprehensive studies have been undertaken to analyse the types of journalistic conduct at issue in defamation cases.¹⁶¹ While the New Zealand responsibility standard is much lower than its United States counterpart, the studies do provide useful insight into the types of factors likely to be considered in New Zealand. The authors of one study, *Sullivan's Paradox*,¹⁶² conclude that *Sullivan* has not lived up to its aim of alleviating the chilling effect of defamation and that judicial standards of journalism have arisen.¹⁶³ *Sullivan's Paradox* examined all parts of the story creation process, from the gathering of information to the writing, editing and

¹⁶⁰ *Digging Deeper*, above n 154, 32.

¹⁶¹ See "Sullivan's Paradox", above n 153; L Bloom "Proof of Fault in Media Defamation Litigation" 38 Vand. L. Rev. 247.

¹⁶² "Sullivan's Paradox", above n 153.

¹⁶³ "Sullivan's Paradox", above n 153, 14.

presentation of stories. No factor was found to establish actual malice on its own.¹⁶⁴ However, under the much lower threshold in New Zealand one factor could easily be enough to persuade a jury that the defendant has acted irresponsibly.

Behaviours often at issue include failure to verify information provided by a source, unclear writing, failure to provide an accurate summary of information and failure to investigate adequately. It is interesting to note that some of the most frequent behaviours found by *Sullivan's Paradox* to be at issue relate to a defendant's sources.¹⁶⁵ This is particularly relevant in relation to problems associated with the burden of proof.¹⁶⁶

Australia, where journalists wanting to use the defence must act reasonably, also considers behavioural factors in deciding whether to grant privilege. In *Lange v Australian Broadcasting Corporation*¹⁶⁷ Brennan J gave a minimum standard test to which a defendant's behaviour must adhere.¹⁶⁸

Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant has 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. Furthermore, the defendant's conduct will not be reasonable unless the defendant has 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.

In other cases, considered under the New South Wales statutory reasonableness requirement,¹⁶⁹ courts have had regard to: the manner and extent of publication;

¹⁶⁴ "Sullivan's Paradox", above n 153, 29.

¹⁶⁵ "Sullivan's Paradox", above n 153, 36.

¹⁶⁶ See Part IV C.

¹⁶⁷ *Lange v ABC*, above n 38.

¹⁶⁸ *Lange v ABC*, above n 38, 118.

¹⁶⁹ I believe that this requirement is almost identical to the New Zealand responsibility standard, see above Part IV A.

the connection between the subject and the imputation; the reasonableness of the assertion itself; the publisher's belief in the truth of the statement; the surrounding circumstances and the care exercised before publication.¹⁷⁰

It should also be noted that reference may even be made to Lord Nicholls's ten factors which he provided in *Reynolds*. Many of these factors, provided in Part II E above, will be relevant in deciding whether the occasion of privilege has been misused.

3- Conclusion

Over time New Zealand courts will develop a set of behaviours which will be used to prove whether a defendant has acted responsibly. A de facto code of ethics will be developed by the judiciary. Media organisations who do not follow it will lose the benefit of common law qualified privilege.

Whether or not judicial standards of journalism are desirable is an entirely different issue. Arguably media defendants should be held accountable if they do not hold themselves to a responsible standard of conduct. This is especially so when it is considered that the level of responsibility required may be taken from the media defendants own code of ethics or from an industry code such as the BSA code or the Press Council Principles. It seems only fair that media defendants are held to a standard of conduct which they themselves say they apply anyway. On the other hand it must be remembered that journalists: "act without the benefit of a clear line of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment."¹⁷¹ There is a real risk that juries will be too quick to find that a media defendant has acted irresponsibly. As Bill Atkin and Steven Price put it: "it will be a talentless plaintiff's lawyer who cannot find some way to stoke the jury members' fire against a media defendant."¹⁷²

¹⁷⁰ *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697, 713 per Reynolds JA (NSW SC). See also *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383 (NSW SC); *Smith v John Fairfax & Sons Ltd* (1986) FLR 343.

¹⁷¹ *Reynolds HL*, above n 9, 626 per Lord Nicholls.

¹⁷² B Atkin, S Price "Lange 2000" (2000) NZLJ 236, 238.

C Does New Zealand Adequately Protect Reputation? - Problems Associated with the Burden of Proof

Lange 2000 is a great improvement on *Lange 1998* in terms of protecting reputation. Concerns from the Law Commission¹⁷³ and commentators¹⁷⁴ have been partially answered by the introduction of a requirement to act responsibly. This standard is far more protective of reputation than the common law malice principle. The question that must now be answered is whether this extension to section 19 provides enough protection for reputation. Currently the answer to this question is, in my opinion, no. While prima facie the responsibility standard is in my view adequate to counter-balance the new privilege, certain problems associated with the burden of proof mean that this protection is partially negated. These problems were briefly addressed by the Court of Appeal in *Lange 2000*. The Court gave some signals as to what changes may occur in the future. However, until changes are made reputation will not, in my opinion, be adequately protected. New Zealand is currently not adequately protecting reputation. The following discussion outlines the problems and examines how they might be addressed following the Court of Appeal's leads given in *Lange 2000*. Other potential solutions are also discussed and recommendations are given.

It is currently very difficult for a plaintiff, who under *Lange 2000* is charged with the onus of defeating the new privilege, to obtain evidence to support a claim that the privilege of political discussion has been misused. This is due to three rules that allow a media defendant to uphold the confidentiality of their sources. These rules apply at different stages of the litigation process.

The first, the Newspaper Rule, is founded in the common law and applies to interlocutory proceedings. Its rationale is to allow the free flow of information by

¹⁷³ See "NZLC Preliminary Report", above n 4.

¹⁷⁴ See "Has Lange Tipped the Balance too Far?", above n 4. See also J Burrows "Defamation and Politicians" (1999) Tort Law Review 8; W Rogers "Privilege and the Media" (1999) Tort Law Review 13.

ensuring that people can speak to the press in confidence.¹⁷⁵ The Newspaper Rule overlaps with Rule 285 of the High Court Rules which prohibits interrogatories designed to elicit sources in defamation cases. At trial section 35 of the Evidence Amendment Act (No. 2) 1980 provides the court with a discretion to excuse witnesses from breaching confidential relationships. Information provided to a media organisation in confidence is clearly one such relationship.

While section 35 is at the court's discretion, Rule 285 and the Newspaper Rule are framed in more absolute terms. Rule 285 is a broad prohibition and the Newspaper Rule has been interpreted to be almost absolute.¹⁷⁶ The Court of Appeal in *Lange 2000* indicated that the latter two might need to be revised in order to better protect reputation. However little insight into how this might be done was given.¹⁷⁷

A plaintiff who is trying to show that the defendant has acted irresponsibly will not be able to point to factors that relate to undisclosed sources. For example it will not be known whether the undisclosed source is reliable, or was misquoted or has previously been shown to be biased against the plaintiff. Also it will not be known whether any disclosed sources are independent of the undisclosed source. This will make it difficult to see whether the sources are adequate and whether others should have been consulted. Such factors have been recognised as important when proving malice both in the United States¹⁷⁸ and the Commonwealth.¹⁷⁹ This does not mean that plaintiffs' attempts to defeat privilege will be doomed to fail. Plaintiffs will know, amongst other things, how many sources there are, who has not been spoken to, whether disclosed sources are

¹⁷⁵ *Alex Harvey*, above n 144, 166 per Woodhouse J, 172 per Richardson J, 180 per McMullin J.

¹⁷⁶ See *Alex Harvey*, above n 144.

¹⁷⁷ The Court of Appeal merely referred to Australian jurisprudence as authority that inroads into the Newspaper Rule may be justified. This is discussed further below, see Part IV D 2 b.

¹⁷⁸ See "Sullivan's Paradox, above n 153; L Bloom "Proof of Fault in Media Defamation Litigation" 38 Vand. L. Rev. 247.

¹⁷⁹ *Alex Harvey*, above n 144, 172; *Lyle Samuel v Odhams Ltd* [1920] 1 KB 1235, 143 per Scrutton LJ (CA); *South Suburban Co-operative Society v Orum* [1937] 2 KB 690, 700 per Scott LJ (CA).

biased and whether the plaintiffs themselves were spoken to.¹⁸⁰ These are all factors which can point to irresponsibility. However, having said this, I believe the Newspaper Rule and its counterparts are still a substantial burden on plaintiffs who wish to defeat the new privilege. The House of Lords, in the context of the common law malice standard, has also recognised the difficulties which the Newspaper Rule presents for plaintiffs.¹⁸¹

An associated, albeit smaller, problem is found in section 41 of the Defamation Act 1992. Once a defendant pleads qualified privilege, a plaintiff must provide particulars which "specify facts or circumstances"¹⁸² that support an allegation of section 19 malice. The inability to obtain information about a defendant's sources will make it difficult to provide such particulars. In the absence of other potential conduct faults the defendant will be able to apply to have the section 19 claim struck out. The Court of Appeal briefly addressed this issue but thought it to be overstated.¹⁸³ They said that "in some situations it may well be sufficient to plead that the statement was made recklessly, or that the defendant had no honest belief in its truth..."¹⁸⁴ This comment sends a signal to lower courts that, in "some" situations, only minimal particulars will be required. *Lange 2000* has left unclear what situations will require more than merely minimal particulars. The Court of Appeal has left lower courts, lawyers and their clients in a difficult position. Should a judge strike out a claim stating nothing more than that the defendant has acted recklessly, or should it be allowed to go to trial? The former is consistent with the plain meaning of section 41(2) of the Defamation Act 1992 and its emphasis on solving defamation suits promptly.¹⁸⁵ The issue is an important one and could very easily decide the issue of whether or not a claim of irresponsibility, under section 19 of the Defamation Act 1992, should be struck out for lack of particulars.

¹⁸⁰ It should also be noted that the plaintiff can try for disclosure at trial. However, the witness may be excused from disclosure under s 35 of the Evidence Amendment Act 1980 (No. 2).

¹⁸¹ *Reynolds HL*, above n 9, 623 per Lord Nicholls, 631 per Lord Steyn, 640 per Lord Cooke.

¹⁸² Section 41(2), Defamation Act 1992.

¹⁸³ *Lange 2000*, above n 1, para 59.

¹⁸⁴ *Lange 2000*, above n 1, para 59.

¹⁸⁵ *Gillespie v McKay* 13 PRNZ 90, 93.

D What are the Options for Solving these problems, and which is the Best approach?

1 Switch the Burden of Proof

The Law Commission, in following up a preliminary paper, has released a report which also highlights procedural and pleading problems.¹⁸⁶ The report recommends legislative intervention to provide that qualified privilege will fail for general publication unless the defendant proves on reasonable grounds that they believed the statement to be true.¹⁸⁷ This changes the burden of proof and largely mirrors the approach taken in Australia.¹⁸⁸ While this would solve many of the above problems, it is unlikely that Parliament will intervene in the near future. Traditionally Parliament has been slow to intervene, the *Mckay Commission* proposals for defamation reform were tabled in 1977 but the Defamation Act was not passed until 1992. Furthermore, this would not in my opinion be the ideal approach. I believe the burden should remain on the plaintiff provided that the plaintiff is given adequate opportunity to show that the privilege has been misused. Leaving the burden on the plaintiff is a rights centred approach. This approach awards the fundamental right of free speech first and then asks the plaintiff to show why the defendant should be deprived of that right. This approach is therefore more consistent with the New Zealand Bill of Rights Act.

Also, simply switching the burden of proof would not solve all of the problems. While this would put the onus on defendants to show that they are entitled to the privilege, courts would still have to decide when, if ever, defendants should have to reveal their sources. The significance of refusing to disclose would also have to be established.

¹⁸⁶ See "NZLC Final Report", above n 8.

¹⁸⁷ "NZLC Final Report", above n 8, para 11.

¹⁸⁸ This recommendation would import a "reasonableness" requirement rather than a "responsibility" requirement. As already mentioned (see above Part III B), the two standards are, in my opinion, materially similar. However it must be noted that the Court of Appeal thought the two to be different. Therefore if the burden is changed it may be more consistent with the Court of Appeal's views to require the defendant to prove that they acted "responsibly" rather than "reasonably".

However, the Law Commission's proposal of Parliamentary intervention does have benefits. The proposal, if acted on quickly, would avoid much of the uncertainty that surrounds the current position. Furthermore, adopting an approach consistent with Australia would give New Zealand courts the advantage of Australian jurisprudence.¹⁸⁹

Overall I favour fixing the procedural issues ahead of Parliament introducing a reasonableness requirement. This is more consistent with the NZBOR and may be the only option if Parliament is unwilling to intervene. It is pointless to sit back and hope that Parliament does intervene.

The Law Commission also recommended some procedural changes if Parliament does not adopt the reasonableness requirement. These and other options are discussed below.

2 *Attempt to fix the procedural problems*

(a) The pleading problem

As discussed, the problem revolves around what particulars are required in order to plead that the defendant has misused the occasion. The Law Commission recommended that section 41(2) be repealed.¹⁹⁰ This would mean that the plaintiff would not have to provide particulars of section 19 malice before the trial. While this would solve the problem it relies on Parliamentary intervention which, as mentioned, is unlikely. The best option therefore seems to be for judges to simply follow the Court of Appeal's direction and only require that the plaintiff plead that the defendant has acted irresponsibly and therefore recklessly. This should, in my opinion, always be sufficient in order to satisfy section 41(2) where confidential sources are at issue. Where they are not other particulars should be necessary. This, though, arguably makes it too easy for a plaintiff to survive a strike out or summary judgment proceeding and is therefore detrimental to the

¹⁸⁹ For a summary of why the Law Commission recommends Parliament intervene see "NZLC Final Report", above n 8, para 24.

¹⁹⁰ "NZLC Final Report", above n 8, para 25.

defendant. However, I believe this to be a justifiable trade-off for a defendant who wishes to maintain source confidentiality. If they wish to maintain confidentiality then they have to accept that malice may be an issue at trial.

(b) The Newspaper Rule

(i) Introduction

The Court of Appeal stated that the Newspaper Rule might need to be adjusted in order to take account of the new privilege available under *Lange 2000*.¹⁹¹

The whole question whether sources should be identified before trial is very much influenced by public policy as seen in the particular jurisdiction... The relevant policy considerations must now recognise the ramifications of the extended range of qualified privilege as affirmed in this judgment.

The court referred to the Australian approach, where inroads into the Newspaper Rule have been justified, intimating that such an approach may be adopted in New Zealand. The following analysis outlines the Australian approach and advocates that the approach in *John Fairfax and Sons v Cojuangco*¹⁹² (*Cojuangco*) should be adopted. A further problem is then identified and a recommendation given. The Law Commission's proposals are then examined.

(ii) The Australian approach

Australia allows disclosure of sources to be ordered where this is "necessary in the interests of justice".¹⁹³ This principle applies where a plaintiff wishes to sue the source directly because an effective remedy is not available against the media organisation.¹⁹⁴ An example of where this will arise is when the media organisation would have a defence which would not be available to the source. It is therefore necessary, in the interests of justice, that a plaintiff is able to sue the

¹⁹¹ *Lange 2000*, above n 1, para 57.

¹⁹² (1988) 82 ALR 1 (HC).

¹⁹³ *John Fairfax and Sons v Cojuangco* (1988) 82 ALR 1, 9 (HC).

¹⁹⁴ *John Fairfax and Sons v Cojuangco* (1988) 82 ALR 1, 9 (HC).

source in order to help mend reputational harm. If the plaintiff is denied the opportunity to sue the source the plaintiff will be denied a remedy and justice will not be done. However, if an effective remedy is available against the media organisation then disclosure is not required. This approach is very similar to the equitable procedure for discovery of a wrongdoer.¹⁹⁵

Allowing disclosure of sources in this situation has been shown to have some negative effects. In two cases, to ensure that orders for preliminary discovery of the identity of sources were set aside, media organisations abandoned defences which might otherwise have protected them from liability for defamation.¹⁹⁶ This effectively saw the media organisations assume liability in order to protect the confidentiality of their sources. This effect could potentially dissuade media organisations from guaranteeing confidentiality which will in turn dissuade informants from providing information.

However, having said this, I believe this to be a justified limitation on the Newspaper Rule. Sources should be revealed if a plaintiff would otherwise be denied an effective remedy. While media organisations may in rare circumstances be forced to assume liability in order to protect their sources, this is a cost which can be justified by the need to protect reputation. A media organisation will simply have to assume the consequences of their decision to guarantee confidentiality.

This is one example where disclosure will be necessary in the interests of justice. The more difficult, and important issue, is deciding whether disclosure should be required in order to allow the plaintiff to prove irresponsibility. As is explained in the following analysis the "necessary in the interests of justice test" is not helpful here.

¹⁹⁵ See *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 (HL); *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (HL). See also Sally Walker "Compelling Journalists to Identify Their Sources: 'The Newspaper Rule' and 'Necessity'" (1991) 14(2), U.N.S.W. Law Journal 303.

¹⁹⁶ *Cojuangco v John Fairfax & Sons Ltd* (No 2) (1991) Aust Torts Rep 81 068 (NSW SC); *The Herald & Weekly Times Ltd v The Guide Dog Owners' and Friends' Association* (1990) VR 451 (Vic SC).

(iii) Should disclosure be required in order to help allow the plaintiff to show irresponsibility?

The introduction of a responsibility standard now means that a defendant's sources are more likely to be scrutinised because it is now easier to defeat the new privilege. The question that must now be answered is whether, in light of the new privilege, it could be necessary, in the interests of justice, to order a defendant to reveal sources in order to prove misuse of the occasion of privilege.

Applying the Australian "necessary in the interests of justice" formulation would mean that disclosure would only be required if the claim would otherwise fail against the media organisation. In such a situation disclosure would be necessary otherwise the plaintiff would be deprived of a remedy. There is, however, one glaring problem with this approach, it cannot work in practice. This is because the relevance of a defendant's sources, in relation to the success or failure of a defamation suit, cannot be ascertained until those sources are in fact disclosed. The problem is circular, the question of disclosure cannot be answered without first disclosing. Disclosure of sources could reveal substantial conduct faults or it could reveal no conduct faults. In the latter case a plaintiff would have to rely solely on other factors to show irresponsibility/recklessness anyway.

The "necessary in the interests of justice" test is unhelpful in resolving this issue. What then should the significance be of a defendant's decision not to disclose the identity of their sources? There is no obvious answer. On the one hand it seems absurd to allow a plaintiff the opportunity to defeat qualified privilege by showing irresponsibility but then partially negating this opportunity by restricting the means to do it. On the other hand, requiring that a media organisation disclose its sources, whenever it relied on the new privilege, would undermine the rationale of the new privilege and the Newspaper Rule which is to promote free speech. Neither of these alternatives is satisfactory.

The answer to this problem can be found by reference to *Lange 2000*. The court indicated that a defendant would be wise to point to factors which show they have acted responsibly: "If the publisher is unable or unwilling to disclose any

responsible basis for asserting a genuine belief in truth, the jury may well be entitled to draw the inference that no such belief existed."¹⁹⁷

If the defendant cannot point to non-confidential source factors which show they have acted responsibly then the decision whether or not to maintain confidentiality will become critical. If the media organisation decides not to disclose their sources, the jury is "entitled" to deprive them of the defence. However, if the media organisation has acted responsibly in relation to its sources then disclosure may show them to be responsible. A defendant who cannot show responsibility without source disclosure will have to decide whether to burn their sources or run the risk of having the privilege defeated. Non-disclosure will therefore be one factor relevant to deciding whether a media organisation has acted responsibly. The decision not to disclose, by itself, will not be enough to defeat the new privilege if the defendant can point to other factors which show responsibility. If they cannot, the decision to maintain confidentiality could be costly.

This approach, recommended by *Lange 2000*, is in my opinion the best way to deal with a defendant's decision not to disclose their sources. This approach will still allow a defendant to uphold confidentiality and will therefore not undermine the rationale of the Newspaper Rule which is to promote the free flow of information.¹⁹⁸ However, this is counter-balanced in order to provide some protection for reputation. The decision not to disclose may be costly for the defendant if they cannot point to other areas of responsible conduct or have been shown, by the plaintiff, to have acted irresponsibly in relation to other areas of conduct. This approach would strike a fair balance between the competing interests of the defendant and free speech on the one hand and the plaintiff and reputation on the other.

¹⁹⁷ *Lange 2000*, above n1, para 43.

¹⁹⁸ *Alex Harvey*, above n 144, 166 per Woodhouse J, 172 per Richardson J, 180 per McMullin J.

(iv) The Law Commission

In its discussion of *Lange v Atkinson* the Commission recommended that Parliament adopt cl 66 of its draft evidence code.¹⁹⁹ Clause 66 appears to apply to the entire litigation process and provides a broad prohibition against compelling a journalist to reveal their sources, however the High Court can order disclosure.²⁰⁰

66 Protection of journalists' sources

(1) A journalist who has promised an informant not to disclose that informant's identity and the employer of such a journalist are not, unless an order is made under subsection (2), compellable in a civil or criminal proceeding to answer any question or produce any document that the journalist or employer would, but for this section, be compellable to answer or produce if that answer or production would disclose the identity of the informant or make possible the discovery of that identity.

(2) The High Court may order that subsection (1) is not to apply if a Judge of the High Court is satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs

(a) any likely adverse effect of such disclosure on the informant or any other person; and

(b) the public interest in the communication of facts and opinion by the news media to the public and the corresponding need of the news media for access to the sources of facts.

Clause 66(3) allows the High Court to impose such terms and conditions on disclosure as it thinks fit. This provision, if adopted by Parliament,²⁰¹ would provide a broad test that would allow exceptions to the Newspaper Rule and its counterparts. Exactly when the public interest in disclosure will be dominant and

¹⁹⁹ "NZLC Final Report", above n 8, para 25; New Zealand Law Commission *Evidence* (1999) NZLC R 55 Vol 2, 172.

²⁰⁰ New Zealand Law Commission *Evidence* (1999) NZLC R 55 Vol 2, 172.

²⁰¹ It should be noted that Parliament is more likely to intervene here than in relation to switching the burden of proof, discussed above- Part IV D 1. This is because this provision is part of a comprehensive evidence code which demands greater parliamentary attention than one area of defamation law. However, at the time of writing this paper the draft evidence code was not yet on the legislative agenda for Parliament to discuss.

require disclosure of sources is unclear. The test does, however, recognise that in-roads into the Newspaper Rule can be justified.

3 *Recommendations*

With regard to the pleading problem I submit that, in all situations where confidential sources are used, only minimal particulars should be required.

In relation to the Newspaper Rule, and following the Australian approach, disclosure should be ordered where a plaintiff is unable to obtain an effective remedy against the media organisation. This is necessary in the interests of justice. Where disclosure is ordered a media organisation can avoid this and still uphold the confidentiality of their sources by not pleading qualified privilege for political discussion. Other situations may require disclosure where necessary in the interests of justice.

Disclosure should not be required simply because a media organisation wishes to rely on the Newspaper Rule while pleading qualified privilege for political discussion. However, a refusal to disclose is one factor which may help to show irresponsibility. This factor is not sufficient on its own and therefore the new privilege cannot be defeated where a defendant refuses to disclose but has no other conduct faults. The defendant will be under a tactical burden to show that they have acted responsibly in other ways if they wish to maintain confidentiality.

If the Law Commission Evidence Code is adopted then this will provide a broad test which can be applied to all situations and will obviously replace the "necessary in the interests of justice" test. However, if adopted, the Code should still be applied consistently with the above recommendations.

V- THE SCOPE OF THE NEW PRIVILEGE

A Representative and Responsible Government

Lange 2000 recognises specifically that qualified privilege applies to statements about former, current and aspiring parliamentarians. This is an application of the more general principle that privilege attaches to statements which directly concern the functioning of representative and responsible government. The Court of Appeal did not define the scope of this phrase.

Both logic and foreign jurisprudence suggest that the privilege include statements which relate to the executive branch of government. This would include all government bodies which maintain and execute the law by way of enforcement and administration of public services.²⁰² In *Lange v Australian Broadcasting Corporation*²⁰³ Brennan J speaking for the court stated that:²⁰⁴

[T]hose provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government... Moreover, the conduct of the executive branch is not confined to ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a minister who is responsible to the legislature.

Although this comment was made in light of the Australian constitution, Brennan J was discussing general concepts of free speech and "responsible government".²⁰⁵ It therefore seems clear that the privilege should apply to at least some parts of the executive. For example the Police should be included as they exercise

²⁰² M McDowell, D Webb *The New Zealand Legal System: Structures, processes & legal theory* (1995, Butterworths, Wellington) 104.

²⁰³ *Lange v ABC*, above n 38.

²⁰⁴ *Lange v ABC*, above n 38, 116.

²⁰⁵ *Lange v ABC*, above n 38, 116 per Brennan J.

important functions daily and wield a huge amount of discretion.²⁰⁶ The judiciary has also been thought to come within the scope of "political discussion".²⁰⁷ Local government authorities, who also exercise parliament delegated discretion, should also clearly be subject to the privilege.²⁰⁸

It is important to note that the width of dissemination will be relevant when considering the general privilege given in *Lange 2000*. The privilege can apply to generally published statements but the "width of the identified public concern [must justify] the extent of publication".²⁰⁹ So in the case of local government issues it will be necessary to show that general publication is justified.

B Status Versus Content Based Approaches to Defining Scope- Lessons From the United States Experience

More difficult issues arise when trying to establish how far into government agencies the general privilege should go. For example, should the privilege apply to all employees of government agencies which fall under the executive branch of government? The simple answer would be yes, provided that the statement concerned the functioning of representative and responsible government. This test is however problematic because it is based on the content of the information rather than the status of the individual.²¹⁰ For example it is unclear whether statements about a public school headmaster, or a case manager for a Work and Income New Zealand branch are covered under "representative and responsible government". In comparison, the specific test relating to current, former or aspiring parliamentarians is far more easy to apply because it is based on status which is generally more easy to establish.

²⁰⁶ *Lewandowski v Lovell (No 2)* (1995) WAR 468, 470 (SC). This case involved allegations that certain police officers were trying to pervert the course of justice. This was held to be "political discussion".

²⁰⁷ *Lewandowski v Lovell (No 2)* (1995) WAR 468, 470 (SC).

²⁰⁸ *Lange v ABC*, above n 38, 116.

²⁰⁹ *Lange 2000*, above n 1, para 10.

²¹⁰ Any status based test will always have a content element to limit it. For example while the specific *Lange 2000* privilege relating to parliamentarians is based on status it is limited to statements which effect their capacity to meet their public responsibilities.

United States jurisprudence is useful to illustrate why a status-based approach should be favoured to a content-based approach. The Supreme Court recognised the importance of political discussion over 35 years ago. It held that privilege applied to criticisms of public officials.²¹¹ The privilege was soon after extended to include public figures.²¹² The privilege was at this stage based on the status of the individual. However, in *Rosenbloom v Metromedia Inc*²¹³ (*Rosembloom*) the Supreme Court decided to adopt a content-based approach allowing privilege to apply to statements of "public or general concern".²¹⁴ Only three years later the Supreme Court overruled *Rosembloom* abandoning the content-based approach. Its reason for doing so was because of the inherent difficulties in establishing "which publications address issues of 'general or public interest' and which do not".²¹⁵ The content-based test had proven too difficult for courts to manage. It must, however, be noted that the status-based approach is not without grey areas. For example difficulties arise in the United States in relation to deciding exactly when someone has become a public figure or has stopped being a public figure.²¹⁶ While problems exist, in my opinion they are smaller under a status-based approach.

New Zealand courts will have enormous problems in trying to establish exactly what relates to the functioning of representative and responsible government. Perhaps a workable test that could be used in interpreting this term would be to allow the privilege to apply to those who have responsibility for exercising discretion in administering governmental functions.²¹⁷ Such an approach would be desirable for two reasons. Firstly, it could be more easily applied as it is a status-based approach. It would not be overly difficult for a court to establish whether the plaintiff's duties involve exercising administrative discretion or

²¹¹ See *New York Times Ltd v Sullivan* (1964) 376 US 254.

²¹² See *Curtis Publishing Co v Butts* (1967) 388 US 130.

²¹³ (1971) 403 US 29.

²¹⁴ *Rosembloom v Metromedia Inc.* (1971) 403 US 29, 52 per Burger J.

²¹⁵ *Gertz v Robert Welch Inc.* (1974) 418 US 323, 346.

²¹⁶ See D Walton "The Public Figure Doctrine: A Re-examination of *Gertz v Robert Welch Inc.* in Light of Lower Federal Court Public Figure Formulations" 16 N Ill U L Rev 141, 156.

²¹⁷ See J Schaffner "Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation" (1990) 63 S. Cal. L. Rev. 435, 458.

whether they merely carry out prescribed administrative duties. Secondly, because it would cover those who have the power to affect the public it would fall within the Court of Appeal's broad test of statements which concern the functioning of representative and responsible government. While there will always be grey areas, this approach would, in my opinion, be helpful in establishing the scope of the new privilege.

C Political Speech Versus Other Speech

Lange 2000 has increased the protection for one category of free speech. Such an approach to human rights law has received criticism:²¹⁸

[A] test expressed in terms of a category of cases, such as political speech, is at variance with the jurisprudence of the European Court of Human Rights which in cases of competing rights and interests requires a balancing exercise in the light of the concrete facts of each case.

This argument recognises the dynamic nature of human rights and the need to assess their application according to individual fact scenarios. While political discussion is fundamental to any democracy, it must be questioned whether it is justifiable to broadly distinguish political discussion from discussion of other matters of serious public concern.²¹⁹ There are individuals and organisations in New Zealand that fall outside the scope of the political discussion test but still have the ability to greatly affect the public. The following example illustrates the sorts of anomalies that can arise where types of free speech are categorised. Take on the one hand a list candidate for the Green Party who is accused of embezzling party funds. Such a case is considered important enough so as to automatically attract qualified privilege for political discussion. Now imagine a newspaper is informed by a reliable source that there is price collusion between oil companies in

²¹⁸ *Reynolds HL*, above n 9, 631 per Lord Steyn. It should also be noted that the European Court of Human Rights has indicated that free speech as a whole should be given special protection, see *Lingens v Austria* (1986) 8 EHRR 407 (E Ct. HR).

²¹⁹ *Reynolds HL*, above n 9, 625 per Lord Nicholls, 631 per Lord Steyn, 640 per Lord Cooke, 649-650 per Lord Hope.

New Zealand. The public interest in the information contained in the second example is clearly as great, if not greater, than the public interest in the information in the first example. However, the dissemination of the information regarding the oil companies receives less free speech protection. While the later case might still receive protection from the common law duty/interest test,²²⁰ it is hard to justify the difference. Free speech is a dynamic concept that can only be dealt with on a case by case basis.

D Other Issues Relating to Scope- A Plethora of Questions

While *Lange 2000* established a new form of qualified privilege, many issues now surround the existing common law duty/interest test. *Reynolds* has advanced the common law test by recognising that “court[s] should be slow to conclude that a publication is not in the public interest...”²²¹ Furthermore, Lord Nicholls has provided a list of factors which should be referred to in deciding whether the duty/interest test is satisfied. These factors were not part of the pre-*Reynolds* law and it must be decided whether New Zealand embraces all of these factors in deciding whether privilege applies to non-political discussion. Arguably, due to *Lange 2000*, New Zealand courts should ignore any factor that relates to misuse of the occasion of privilege when assessing privilege. This is because the *Reynolds* formulation mixes the occasion of privilege with misuse of that occasion, an approach firmly rejected in *Lange 2000*.²²²

This raises another interesting issue relating to misuse of the occasion of privilege. The Court of Appeal left unclear whether the “responsibility” standard applies to all types of speech. The answer here is arguably no. This is because the extension to section 19 was aimed at counter-balancing the increase in free speech recognition given by the new privilege. There was no increase in free speech recognition given to non-political speech and therefore it cannot have been

²²⁰ It should be noted that the dissemination of the information regarding the oil companies could receive protection under *Reynolds* if that decision was upheld in New Zealand. This is, however, unlikely in my opinion and is more fully discussed below in Part V D.

²²¹ *Reynolds HL*, above n 9, 626 per Lord Nicholls.

²²² *Lange 2000*, above n 1, paras 5-6.

intended that the extension of section 19 apply to non-political speech. This analysis suggests that *Reynolds* has no application in New Zealand and that therefore non-political speech will have to remain under the pre-*Reynolds* duty/interest test. Applying *Reynolds* to non-political speech would be inconsistent with the Court of Appeal's emphasis on keeping the occasion of privilege separate from the misuse of that occasion.

VI- CONCLUSION

Lange 2000 is, overall, a great improvement on *Lange 1998* in terms of balancing the competing interests of freedom of expression and protection of reputation. However, in my opinion, there are unsettled issues in relation to the burden of proof and until they are resolved reputation will not be adequately protected. This paper has attempted to make recommendations to help solve those issues.

The Court of Appeal has answered the question of whether political speech should receive added protection, but has raised many other questions in doing so. Overall, it seems unsatisfactory that the Court has taken this approach. Leaving so many unresolved issues hardly promotes the prompt commencement and disposal of defamation claims, a recognised aim of the Defamation Act. Perhaps it would have been easier, and cheaper, to follow *Reynolds*. That is not to say that *Reynolds* is the perfect approach. However, many of the issues raised in this paper could have been avoided if this approach was taken. For example *Reynolds* does not categorise types of free speech and will therefore not encounter the sorts of problems outlined in Part V C.

There is, however, no point in crying over spilt milk. Lawyers, courts and commentators will have to focus on the live issues. For example it must be decided whether the extension to section 19 of the Defamation Act applies to all occasions of qualified privilege, I believe it should not (see above Part V D). Also

journalists will have to be especially wary of their conduct if they want to use the new privilege. More importantly, the boundaries of the new privilege will require further attention. As illustrated in Part V A, the phrase "representative and responsible government" is very broad. Exactly how widely the phrase will be interpreted is unclear. *Lange 2000* heralds a new era for defamation law in New Zealand. *Lange 2000* has given lower courts the green light to rapidly apply qualified privilege in many situations that would not be recognised by the pre-*Lange* law.

D. Other Issues Relating to Scope - A Pickover of Questions

VI-CONCLUSION

While *Lange 2000* established a new era of qualified privilege, it also left many questions unanswered. The boundaries of the new privilege will require further attention. As illustrated in Part V A, the phrase "representative and responsible government" is very broad. Exactly how widely the phrase will be interpreted is unclear. *Lange 2000* heralds a new era for defamation law in New Zealand. *Lange 2000* has given lower courts the green light to rapidly apply qualified privilege in many situations that would not be recognised by the pre-*Lange* law.

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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 tendentiously 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 re-write 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.

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.

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." 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.

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.

Appendix 2- Codes of Ethics

A Press Council Principles

Accuracy

1. Publications (newspapers and magazines) should be guided at all times by accuracy, fairness and balance, and should not deliberately mislead or misinform readers by commission, or omission.

Corrections

2. Where it is established that there has been published information that is materially incorrect then the publication should promptly correct the error giving the correction fair prominence. In appropriate circumstances the correction may be accompanied by an apology and a right of reply by an affected person or persons.

Privacy

3. Everyone is entitled to privacy of person, space and personal information, and these rights should be respected by publications. Nevertheless the right of privacy should not interfere with publication of matters of public record, or obvious significant public interest.

Publications should exercise care and discretion before identifying relatives of persons convicted or accused of crime where the reference to them is not directly relevant to the matter reported.

Those suffering from trauma or grief call for special consideration, and when approached, or enquiries are being undertaken, careful attention is to be given to their sensibilities.

Confidentiality

4. Editors have a strong obligation to protect against disclosure the identity of confidential sources. They also have a duty to take reasonable steps to satisfy themselves that such sources are well informed and that the information they provide is reliable.

Children and Young People

5. Editors should have particular care and consideration for reporting on and about children and young people.

Comment and Fact

6. Publications should, as far as possible, make proper distinctions between reporting facts and conjecture, passing of opinions and comment.

Advocacy

7. A publication is entitled to adopt a forthright stance and advocate a position of any issue.

Discrimination

8. Publications should not place gratuitous emphasis on gender, religion, minority groups, sexual orientation, race, colour or physical or mental disability unless the description is of public interest.

Subterfuge

9. Editors should generally not sanction misrepresentations, deceit or subterfuge to obtain information for publication unless there is a clear case of public interest and the information cannot be obtained in any other way.

Headlines and Captions

10. Headlines, sub-headings, and captions should accurately and fairly convey the substance of the report they are designed to cover.

Photographs

11. Editors should take care in photographic and image selection and treatment. They should not publish photographs or images which have been manipulated without informing readers of the fact and, where significant, the nature and purpose of the manipulation. Those involving situations of grief and shock are to be handled with special consideration for the sensibilities of those affected.

Letters

12. Selection and treatment of letters for publication are the prerogative of editors who are to be guided by fairness, balance, and public interest in the correspondents' views.

Council Adjudications

13. Editors are obliged to publish the substance of Council adjudications that uphold a complaint.

B Independent News Limited (INL) Code of Ethics

INL publications, editors and editorial staff will strive to be:

- accurate
- fair
- independent

In pursuit of these goals, they will:

1. Present news and comment honestly, bearing in mind the privacy and sensibilities of individuals as well as the public interest.
2. Correct mistakes by prompt correction and explanation and, where necessary, apology.

3. Ensure journalists and photographers identify themselves and their purpose clearly and not misrepresent themselves unless there is a case of compelling public interest and the information cannot be obtained in any other way.
4. Approach cases involving personal grief or shock with sympathy and discretion.
5. Ensure that staff act professionally so as not to compromise the integrity or reputation of themselves or their publication.
6. Value originality in journalism, and take every reasonable precaution to avoid plagiarism.
7. Not allow the personal interests of journalists to influence them in their professional duties.
8. Not allow the professional duties of journalists to be influenced by any consideration, gift or advantage offered and, where appropriate, disclose any such offer.
9. Not tamper with photographs to distort and/or misrepresent the image without informing the reader what has occurred and why.
10. Protect confidential sources.
11. Avoid stereotyping by race, gender, age, religion, ethnicity, sexual orientation, physical appearance or social status, without avoiding legitimate public debate on such issues in the public interest.
12. Publish any Press Council decisions involving their publications as soon as practicable.

C New Zealand Engineering, Printing and Manufacturing Union-Journalists' Code of Ethics

Respect for truth and the public's right to information are over-riding principles for all journalists. In pursuance of these principles, journalists commit themselves to ethical and professional standards. All members of the Union engaged in gathering, transmitting, disseminating and commenting on news and information shall observe the following Code of Ethics in their professional activities:

- (a) They shall report and interpret news with scrupulous honesty and striving to disclose all essential facts and by not suppressing relevant, available facts or distorting by wrong or improper analysis.
- (b) They shall not place unnecessary emphasis on gender, race, sexual preference, religious belief, marital status or physical or mental disability.

(c) In all circumstances they shall respect all confidences received in the course of their occupation.

(d) They shall not allow personal interests to influence them in their professional duties.

(e) They shall not allow their professional duties to be influenced by consideration, gift or advantage offered and, where appropriate, shall disclose any such offer.

(f) They shall not allow advertising or commercial considerations to influence them in their professional duties.

(g) They shall use fair and honest means to obtain news, pictures, films, tapes and documents.

(h) They shall identify themselves and their employers before obtaining any interview for publication or broadcast.

(i) They shall respect private grief and personal privacy and shall have the right to resist compulsion to intrude on them.

(j) They shall do their utmost to correct any published or broadcast information found to be harmfully inaccurate.

*D Broadcasting Standards Authority- Free-To-Air Television
Programme Code: General Programme Standards
(Selected standards only)*

All Programmes (including promos)

In the preparation and presentation of programmes, broadcasters are required:

G1. To be truthful and accurate on points of fact.

G2. To take into consideration currently accepted norms of decency and taste in language and behaviour, bearing in mind the context in which any language or behaviour occurs.

G3. To acknowledge the right of individuals to express their own opinions.

G4. To deal justly and fairly with any person taking part or referred to in any programme.

G5. To respect the principles of law which sustain our society.

G6. To show balance, impartiality and fairness in dealing with political matters, current affairs and all questions of a controversial nature.

G7. To avoid the use of any deceptive programme practice in the presentation of programmes which takes advantage of the confidence viewers have in the integrity of broadcasting.

...

G13. To avoid portraying people in a way which represents as inherently inferior, or is likely to encourage discrimination against, any section of the community on account of sex, race, age, disability, occupational status, sexual orientation or the holding of any religious, cultural or political belief. This requirement is not intended to prevent the broadcast of material which is:

- i) factual, or
- ii) the expression of genuinely-held opinion in a news or current affairs programme, or
- iii) in the legitimate context of humorous, satirical or dramatic work.

News, Current Affairs and Documentaries

G14. News must be presented accurately, objectively and impartially.

G15. The standards of integrity and reliability of information sources in news, current affairs and documentaries should be monitored regularly.

...

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VICTORIA
UNIVERSITY
OF
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*D - Broadcasting Standards Authority - Free-To-Air Television
Programme Code - General Programme Standards
(Selected standards only)*

All Programmes (including promos)

In the preparation and presentation of programmes, broadcasters are required

G1. To be truthful and accurate on points of fact

G2. To take into consideration currently accepted norms of decency and taste in language and behaviour, bearing in mind the context in which any language or behaviour occurs

G3. To acknowledge the right of individuals to express their own opinions

G4. To deal justly and fairly with any person taking part or referred to in any programme

G5. To respect the

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