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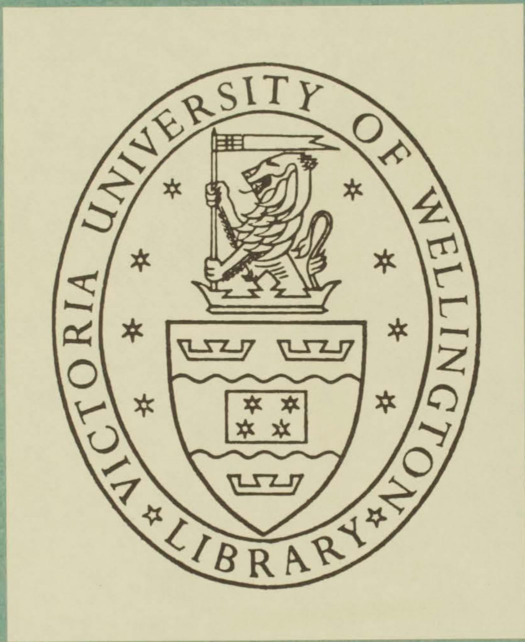
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ROGER MORRIS HARWOOD

DEFAMATION IN THE POLITICAL ARENA

An Extended Casenote on Templeton v. Jones [1984] 1 N.Z.L.R. 448

Submitted for the LL.B. (Honours) Degree at the Victoria University of Wellington

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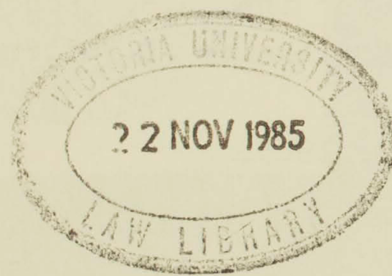

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I INTRODUCTION

The tort of defamation attempts to strike a fair balance between the importance of protecting reputation and the fundamental right of freedom of expression. However, the often inconsistent nature of defamation law suggests that the exact "fair balance" is difficult to define.

One such area of inconsistency is the application of the defence of qualified privilege in the political arena. In this area an immediate distinction arises between the defamed politician who sues to protect his reputation and the politician who is sued for defamation, but who seeks to rely on the protection afforded by the defence of qualified privilege. Politicians, therefore, have two distinct interests to be protected.

Consequently, there are two predominant competing views in this area. The first bases its argument on the belief that protection of reputation and maintenance of public confidence in our leaders is of vital importance. Furthermore, it is argued that such protection underlies equally important interests, including justice, and upholding truth. These ideals are well established within the common law.

The competing view claims that politicians seek the nation's attention and in doing so expose themselves to public scrutiny, even personal attack. These advocates of free speech insist that we "need uninhibited, robust and wide open debate on public issues in New Zealand" and further "we are not getting it and we will not get it unless the libel laws are altered."[1] The extension of qualified privilege would afford greater protection to the politician who speaks out on relevant and even controversial issues. Templeton v. Jones[2] is a clear illustration of the New Zealand Courts' unwillingness to extend the present defence of qualified privilege.

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This paper aims to show the present need for reform in this country, with particular reference to the possible extension of qualified privilege in the political arena. The significance of qualified privilege is not limited to the courtroom. Its influence can be seen before the defamatory statement is published. With the knowledge of this privilege, the publisher may make a defamatory statement knowing that protection from suit will be afforded. This paper is primarily concerned, however, with the ability to raise the defence of qualified privilege when being sued.

Using Templeton v. Jones as a guide, the paper first looks at the practical effect of the law of defamation on politics in New Zealand today. The second part takes a wider look at the direction of the law in the future. Having made a suggestion for reform, the paper will return to the facts of Templeton to see the practical effect such reform would have in New Zealand.

II BACKGROUND

A. The Defence of Qualified Privilege.

There are occasions where, on the grounds of common convenience and the welfare of society, a person may publish a defamatory statement about another without incurring liability. A privileged publication arises when it is [3]

> fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters his interest is concerned.

The burden is initially on the defendant to establish the presence of a privileged occasion for the publication by proving a recognised public or private interest which would justify the publication.[4] Whether the occasion is privileged is a question

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for the judge to decide.[5] This includes deciding whether the privilege has been exceeded. If any facts are in dispute, it is for the jury to find the facts, but the question of privilege returns to the judge. If the judge rules that the occasion is privileged, the burden shifts to the plaintiff who must prove that the defendant did not use the occasion honestly for the purpose for which the law gave it to him, but was actuated by some indirect or ulterior motive. This is known as "malice". Malice is a matter for the jury to decide.[6] The court will look to the primary motive or purpose which has inspired the defendant.[7]

B. The Templeton Case.

The plaintiff, Robert Jones, was a declared candidate for the Ohariu seat at the 1984 General Election. Hugh Templeton, the defendant, was a sitting member for that seat, a member of the National Party and a Minister of the Crown. The defendant appealed against a judgment in which Ongley, J. struck out certain particulars in support of a defence of justification and also struck out a defence of fair comment. The plaintiff cross-appealed because Ongley, J. had not struck out a defence of qualified privilege. In the statement of claim it was pleaded that on or about 2 March 1983 the defendant distributed to the Parliamentary press gallery copies of his speech given to the annual general meeting of the Ohariu Branch of the National Party on or about that date. In addition, on 3 March on the television programme "Eye Witness News" extracts from the speech and reports of it were broadcast, including the statement:[8]

> Mr Jones is a man who seems to hate. Mr Jones is a man who despises many people ... bureaucrats, civil servants, politicians, women, Jews and professionals.

The plaintiff ignored all the allegations save the one that he

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despises Jews, and claimed it was false, malicious and defamatory, therefore injuring his reputation and bringing him into public scandal, odium and contempt.[9]

The statement of defence denied that the defendant was liable for the subsequent publication of parts of the speech. In doing so the statement raised the defences of justification, fair comment and in the event of the allegation being found unjustified, the defence of qualified privilege. The Court of Appeal dismissed the defendant's appeal but allowed the cross-appeal and struck out the defence of qualified privilege.

It is respectfully submitted that after initially conceding that the annual general meeting itself was a privileged occasion, the Court of Appeal ignored both the practicality of restricting the speech to the members of the Ohariu Branch of the National Party and the national interest in the suitability of a declared parliamentary candidate who was also the leader of a party. In ignoring these factors, the court was able to conclude that Templeton, in releasing the speech to the press gallery, had exceeded the bounds of qualified privilege.

Excess will certainly defeat the defence. However, the rule in relation to excess can be used very easily to nullify the advantages of qualified privilege. It can be all too tempting to overlook the practical considerations which make it difficult to limit the publication of the material. Copies or extracts of political speeches will inevitably reach the hands of the media who will republish portions of the speech to the general public. There are obvious difficulties in ensuring that only members of a particular branch of a party attend a meeting. Gate-crashers are an accepted feature of

political election meetings. Therefore, just how realistic the court's application of this "excess" rule was, is questionable.

III THE PRACTICAL EFFECT OF THE LAW OF DEFAMATION ON NEW ZEALAND POLITICS

The competing arguments over the fair balance of defamation law in the political context raise many interesting issues. Most significantly, the question arises of what sort of protection politicians should be afforded by the law when they speak out. Many hold the view that the "game of politics" carries with it inherent risks [10] and politicians therefore should have access to a means of insurance or protection. One solution is qualified privilege.

Such an approach was taken in <u>Braddock</u> v. <u>Bevins</u> [11] where it was held that within proper limits, defamatory words spoken by one election candidate about another were entitled to the protection of qualified privilege. The test applied for 'proper limits' was that the matter communicated be germane to the questions which the electors may properly and reasonably take into consideration in deciding how to cast their votes.[12] Further, it was held untenable that the candidates' interest in procuring their own election should negative the privilege.[13]

Those in favour of this broad application of qualified privilege also question the present legal principles which so readily allow New Zealand politicians not only to sue but to be sued themselves. [14] These advocates support the extension of qualified privilege in the political arena and regard the susceptibility to being defamed and the exposure to public comment as a necessary consequence of political life. This

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was acknowledged by the trial judge himself in the Templeton case:[15]

> That is an unavoidable concomitant of political life and I do not think that a person having a duty to publish a statement in the public interest should be unduly circumscribed in fulfilling it by too stringent an obligation to prevent publication to a wider audience than those to whom it is directly addressed.

Ironically, the majority of advocates for this greater protection are not the politicians themselves. On the contrary, politicians are amongst the major beneficiaries of New Zealand defamation law today. Between 1969 and 1978 politicians and aspirants to elected office made up 16% of the 86 plaintiffs in New Zealand and Australian defamation cases.[16]

The following figures represent the number of defamation cases in New Zealand and the percentage of political plaintiffs and defendants between 1979 and 1985.

i. Reported Cases.

YEAR	DEFAMATION CASES	*PLAINTIFFS	*DEFENDANTS
1979	-	-	-
1980	1	-	-
1981	2	-	-
1982	2	-	-
1983	-	-	-
1984	2	2	1
	7	2	1

ii.** Unreported Cases.

YEAR	DEFAMATION CASES	*PLAINTIFFS	*DEFENDANTS
1979	4	-	-
1980	7	-	-
1981	5	1	-
1982	2	-	-
1983	4	1	1
1984	6	1	3
1985	1	-	-
	29	3	4
TOTAL	36	5 (14%)	5 (14%)

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* Includes politicians and aspirants to elected office.
** Cited in 'The Capital Letter' between 1 January 1979 and 1 June 1985.

The percentage of politician plaintiffs does not appear to have altered dramatically in the last six years. That there were exactly the same number of defendants shows that politicians are being sued with the same ease as they are suing. It should also be noted that there was an average of nine to ten cases per year between 1969 and 1978 and an average of six cases per year between 1979 and 1985. This is quite remarkable considering the fact the figures based on the years 1969 to 1978 also include Australian cases. The defamation action in New Zealand, therefore, does not appear to have lost interest. It is also possible to argue on these figures that the politician or aspirant to elected office remains one of the major beneficiaries of New Zealand defamation law.

What is the great attraction to defamation cases? Why are politicians so prone to having actions brought against them and why do they bring so many cases to court themselves? There are a number of possible explanations. One explanation is the existence of British social class values which give rise to such ideals as good moral standards and sound reputation. In particular, honour and reputation, concepts which date back centuries, are still regarded in the twentieth century as important values which need to be protected by the law. The law of defamation serves to guard these values and has been defined as "a civilising influence, as a force for decency and moderation in language..."[17] It has been commented that in England the bringing of a libel action is regarded as quite respectable and further, the social compulsion to do so can be

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very strong.[18] However, it is questionable whether such ideas prosper to the same extent in New Zealand today. In fact, our present Minister of Justice, the Hon. Geoffrey Palmer M.P., has a somewhat lower estimation of the role reputation plays in defamation law.[19]

> Defamation has traditionally been that part of the common law which holds dear such delicate, fastidious and intangible matters as reputation.

Another plausible explanation for the number of libel actions involving politicians is the need for public confidence in our political leaders. This follows on from the idea that politicians are constantly in the public's eyes and under their unrelenting scrutiny. It is of fundamental importance, however, that there exists sufficient public confidence in our leaders that we may stand as a democratic country with national unity. For this reason it is crucial to have a means over and above the political process itself, of destroying the impact of any undue or defamatory statements made in relation to our political leaders.

In relation to the Templeton case, one wonders what was the true stimulus for Jones to bring the case to trial. It may have been to save his reputation, but it is questioned whether Jones actually felt the statements made by Hugh Templeton would really lower him in the estimation of right thinking people. Despising bureaucrats, civil servants, politicians, women, Jews and professionals is a serious allegation. Jones, however, was only interested in the part of the allegation concerning his supposed despisal of Jews. It is submitted that if he was truly concerned with saving his reputation, he would not have ignored the other allegations. No doubt Jones was in a favourable position in dealing solely with the allegation that

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he despised Jews. In relation to the defence of justification, with only the one charge being refuted, the defendant was denied the application of section 7 of the Defamation Act 1954, which states that where there are two or more distinct charges against a plaintiff

> a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the remaining charges.

With merely the charge in relation to despising Jews being denied, Cooke, J. struck out all the paragraphs in the statement of claim that had nothing to do with Jews. Consequently, Templeton was unable to rely on the whole speech and prove areas not relied on by Jones. It is still contended, however, that saving reputation could not have been Jones's main incentive to bring the case to court, for although staying with the one allegation was beneficial to him, he was still left with the weight of the accusations concerning bureaucrats, civil servants, politicians, women and professionals.

A far more realistic incentive to sue Templeton was to restore any lost public confidence. The approval of the masses is sought just as highly by election candidates. The assertion of the candidate's integrity during an election campaign is of vital importance. We can see, however, that there are close links between proving one's sound reputation and maintaining public confidence. One follows from the other.

Whether such considerations represent the underlying incentives for Jones to bring this action to court, nevertheless remains doubtful. Robert Jones will always be a national personality who will find it almost impossible to distance himself from the media. Even his recent attempts at

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discouraging the press ended up on the front page of most major newspapers in the country. Despite this recent contretemps with the press, Jones appears to enjoy the limelight and the continuous form of media exposure. Perhaps the tactical manoeuvres of courtroom litigation are far more consistent with the man himself.

Such motives are not evident in all cases, however, where the plaintiff may not be as flamboyant as Robert Jones. It is respectfully submitted that there may be even a greater incentive for defamed politicians to bring a libel action. This, of course, is the awarding of damages. Geoffrey Palmer certainly believes that the defamation action is prized more for "its capacity to produce a pot of gold than for interests which plaintiffs have in their good name"[20] and more specifically in relation to politicians:[21]

> It has been remarked to me that some politicians regard the law of defamation as a form of lump sum superannuation. I have been made aware that colleagues on both sides of the House do not regard proposals for the change of the law of defamation with favour.

This may appear to be a rather harsh attitude to take towards our respected leaders. The idea of the libel action as a form of "superannuation" seems totally contrary to the goals of defamation law and the well founded values it asserts.

The writer considered it necessary, therefore, to put this allegation to the politicians themselves. Two Members from each side of the House were written to and asked to comment on this allegation. The replies were most interesting. The allegation that they or their fellow Members regarded the defamation action as a form of 'lump sum superannuation' was categorically denied. The invariable opinion was that on the contrary, it is the lawyer who benefits most from the action.

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Labour MP for Palmerston North, Trevor de Cleene, wrote[22]

> The notion that politicians get money out of or consider them "lump sum superannuation" is fatuous....
>
> It is because politicians are the most libelled that the writs are issued. Most of the damages go to the lawyers involved by way of costs.

Similarly, Opposition MP for Remuera, Douglas Graham, commented:[23]

> Certainly in my experience, most of the benefits of a libel action are enjoyed by the solicitors involved. Any question of a "lump sum superannuation" is belied by the fact that many successful plaintiffs in fact donate the proceeds of their action to charity.

Whether or not the rebuttal of this allegation was a matter of political integrity, that lawyers' costs represent the majority of damages awarded appears valid. The Evening Post [24] recently quoted a typical defamation case as costing $33,000 in legal fees. However, it is questioned how frequent donations to charity are made. Therefore, while the politicians may refuse to accept Palmer's allegation, we may nevertheless need to take into consideration and appreciate the great material preoccupation of the twentieth century. In this light, our laws may be expected to protect rather different values from those that it protected in previous centuries.

With a number of possible incentives available, including receipt of damages, it is understandable why there is little interest in altering our present defamation laws. Interestingly enough, when the tables are turned and the politician becomes the defendant, the defence of qualified privilege is immediately pleaded. Where then does our politician stand in relation to this defence and what must be proved?

It is usually claimed in defence of a political defamatory statement, that there was a duty, legal, social, or moral to

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make the statement to those with a corresponding duty or interest to hear it (usually a particular group or section in the community). In relation to election speeches it is argued that there is a duty owed by the candidate to the electors to inform them honestly and without malice of any matters which may affect their vote. With this information at hand, the electors are expected to make an informed vote. The existence of such a duty was upheld in the case Braddock v. Bevins,[25] the approach of which was relied on by Templeton where in his statement of defence he claimed that:[26]

> The occasion of the publication of the speech notes referred to in paragraph 3 herein was one of qualified privilege by reason of the social and/or moral duty of the Defendant to make a statement to the general public as to the conduct and the fitness for public office of a declared candidate for Parliament at the next general election and by reason of the corresponding interest of the general public to hear it.

Such an interpretation of 'social and/or moral duty' did not appeal to the Court of Appeal who highlighted the fact that the prevailing opinion in England at the time of the Braddock case was that Lord Greene had gone too far.[27] Cooke, J. then went on to distinguish the two cases, the Templeton case involving 'republication' rather than publication. That is, not only was the alleged defamatory statement published to those at the meeting and then distributed to the press gallery, but it was also republished by the press and media, including the "Eye Witness News" broadcast. It is not until the conclusion of the judgment that his Honour returns to the question of a social and/or a moral duty, and whether such a duty existed to make a statement to the general public as to the conduct of a declared Parliamentary candidate. It was found by the court that: [28]

1. As far as the common law stood, the mere fact that the plaintiff was a declared Parliamentary candidate could not be treated as imposing on the defendant a social or moral duty to make a defamatory statement about him to the general public, and
2. That in relation to the particular circumstances as relied on in the statement of defence, proof that derogatory statements about Jews were so made by the plaintiff would not be enough in the court's opinion to warrant treating the defendant as under any duty to make to the general public in 1983 a statement about the plaintiff's attitude to Jews.

The court concluded by adding "It would be undesirable to say more on the point." [29]

With respect the following submissions are made in relation to these findings of the court. First, the issue of the definition and application of a 'social or moral' duty was virtually ignored. Second, there may well have been a social or moral duty to make such comments about the plaintiff to the general public. Third, a finding that the proof of the plaintiff's derogatory statements was not enough to establish the privilege to make the statements made, begged the point and was irrelevant to the application of this defence.

In relation to the first submission, it is necessary to attempt to define just what is a social or moral duty. In particular it may be of value to look at 'moral duty' and its relationship with politics. This is as old as the privilege itself. [30]

> Judges...have all felt great difficulty in defining what kind of social or moral duty will afford a justification.

Indeed there is no sure fail proof criterion for what does or

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does not constitute a moral or social duty. Lindley, L.J. in Stuart v. Bell [31] said:

> I take moral duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings...

and applied the test

> Would the great mass of right-minded men in the position of the defendant have considered it their duty under the circumstances to make the communications?

These sorts of considerations are very similar to those which establish the defamation in the first place - the standard being applied that of the right-minded person of ordinary intelligence and moral principle. What sort of effect does this test have on politicians making election speeches? It is arguable that the great mass of right-minded people in the position of an election candidate would have considered it their duty, under the circumstances to make the communication.

The question of morality goes further, for it cannot be denied that it is imperative that none but persons of fine, sound character are elected for public office. If a citizen honestly believes that the candidate had acted in a manner that would, in the opinion of right-minded people, disqualify him for such office, then it is that citizen's moral obligation to society as a whole to communicate the facts as he believed them to exist to those who have the power to appoint to the office. [32] But does this give the citizen the right or duty to publish the statement to the general public? There is much authority to the contrary. Duncombe v. Daniell [33] held that a publication "to all the world" during an election campaign was not privileged. This rule was followed in the Canadian

case Douglas v. Tucker [34] where the alleged slander was made in a speech by the Premier to the public at a meeting during an election campaign. Cartwright, J. said: [35]

> The view that a defamatory statement relating to a candidate for public office published in a newspaper is protected by qualified privilege by reason merely of the fact that an election is pending and that the statement, if true, would be relevant to the question of such candidate's fitness to hold office is, I think, untenable.

It is submitted, however, that policy considerations have altered dramatically since 1837, when the Duncombe rule was established.

This brings in the second submission, that there should have been a social or moral duty for Templeton to publish his statement to the general public. In today's society, with the help of the media, political issues in one electorate are reasonably expected to be learnt by the general public. It is almost certainly unavoidable and even desirable for this to occur when the said candidate of the electorate is also the leader of a political party. Surely, then, any information regarding his integrity as a political leader is in the interest of anyone who can vote in favour of a particular party. It follows logically that a Minister of the Crown should be subject to such wide scrutiny. It is even arguable that the ordinary parliamentary candidate should be exposed to the public at large. [36]

> In the age of Party electors are vitally interested not only in the representative but in the government likely to be formed. Accordingly, the policies, principles, and fitness of other candidates in other electorates - especially those who would hold Cabinet post in a putative government - are relevant to the elector.

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Finally, it is hard to understand why in the Templeton case it was said that proof of the alleged statements by the plaintiff would not be enough to warrant treating the defendant as under a duty. For if the defendant was able to prove the said allegations, he would succeed in a defence of justification, rendering the defence of qualified privilege pointless. It appears, therefore, that the court is making a conscious effort not to adopt more than a very narrow interpretation of qualified privilege.

Templeton v. Jones is an excellent example of the courts' present cautious stance in relation to the defence of qualified privilege. There are many more examples, however, of the limits placed on the defence. The privilege may be defeated by excess through bringing in irrelevant matters,[37] misleading reporting[38] or as Templeton illustrates, by broadcasting too far. The proof of malice also defeats the privilege.[39] The information communicated must be 'in' the public interest, not "of public interest" in the sense of public curiosity.[40] The U.K. has even gone as far as creating a statutory provision limiting the privilege altogether during election campaigns.[41] The Defamation Act 1952 applies throughout the United Kingdom but by virtue of Section 18, does not extend to Northern Ireland.

This may be an appropriate point to look at this English section which is about as far removed from the 'free speech' ideal as one can get. Section 10 Defamation 1952 provides that

> A defamatory statement published by or on behalf of a candidate in any election to a local government authority or to Parliament shall not be deemed to be published on a privileged occasion on the ground that it is material to a question in issue in the election, whether or not the person by whom it is published is qualified to vote at the election.

The effect of the section was to annul the Braddock v. Bevins decision which acknowledged the existence of a privilege in such a situation.[42]

Why was there a change in thought? The 1952 debates in the British House of Commons provide a few answers.[43] The Defamation Act 1952, initially known as Bill 21, was presented to the House by Opposition M.P., Mr. Harold Lever. However, the provision itself was an afterthought by the Member for Nelson and Colnes, Mr. Sydney Silverman. On 27 June 1952, after the Bill's second reading, the Attorney-General begged to move that in relation to clause nine (now Section 10) the amendment be made. It was agreed that the effect of the clause should be to prevent a candidate at an election from claiming some special privilege by reason of the fact that he was a candidate. In proposing the amendment of the clause to its present form, the Attorney-General said [44]

> I therefore put down an Amendment which provided in effect, that no candidate at an election should have any special privilege by virtue alone of his being a candidate, and that he should not be able to secure that privilege by a side-wind, as it were.... (own emphasis).

The concern seems to be with the apparent injustice of being able to claim the privilege by the mere fact of being a Parliamentary candidate. Surely, however, such a concern is not inconsistent with the availability of the privilege where the publisher is a candidate, but that the publishing of the statement is of such major public importance that the prevention of its publication could seriously affect the voters properly exercising their suffrage.

In Plummer v. Charman,[45] the English Court of Appeal confirmed the new law of Parliament and threw out the Braddock definition of qualified privilege. However, Plummer's case

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conceded that there may be exceptional circumstances not caught by the section. It was suggested by Lord Denning, M.R. that one such situation might be where an elector makes a public statement to another elector on a matter of common interest to society, in such circumstances that it is privileged. In other words, one really ignores the fact that the publisher is a candidate. It is respectfully submitted, however, that there is not a vast difference between this 'exceptional circumstance' and the non-exceptional Braddock type situation.[46]

Therefore it is questioned just what service this somewhat confusing section provides. If its goal is to prevent the use of the privilege where it is claimed by virtue alone of being a candidate, then it is doing no more than the common law is presently doing. There is no authority whatsoever that qualified privilege is bestowed by virtue alone of being a candidate. As has been seen, there must either be a duty or interest and a corresponding duty or interest before the privilege is even considered. Further, as Plummer's case illustrates, such a section is not going to prevent every candidate from using the privilege at election time anyway. It is not surprising, therefore, that "mother" Parliament's wisdom has not been adopted anywhere else in the Commonwealth. Braddock's case, presumably, is still good law in New Zealand.

The present New Zealand alternative as seen by Cooke, J. is for the courts to [47]

> balance the universality of the suffrage with the means available for identifying and confining distribution to electors...

but as his Honour acknowledges, this is a difficult task today when all citizens over the age of eighteen are entitled to vote

and the means of identifying and confining distribution to electors are very limited. It is almost inevitable that a restricted circular for an electorate will reach the hands of those not entitled to vote in that electorate. It is submitted, therefore, that neither Section 10 nor the 'Cooke, J' rule is a realistic solution to this area of law.

To conclude the discussion of the present state of qualified privilege in New Zealand in relation to politics, it is submitted that the defence is too restrictive. The law as it stands, allows the defence of qualified privilege to be defeated all too readily. This, mounted with our Court's more than cautious stance, means that the defence of qualified privilege, whether brought by Minister, Member or candidate, will rarely succeed. The need to alter the balance maintained by the law of defamation in the direction of freedom of expression is well overdue. This question of the need for reform is dealt with in the next part of this paper.

IV THE FUTURE DIRECTION OF THE LAW

> The present New Zealand law regarding qualified privilege on the political field is probably not wholly logical. It has differences and difficulties of the kind we have mentioned earlier. To extend the scope of the privilege is not altogether without attraction. But it has to be remembered that there are also strong arguments against doing so. 48

Such is the present position as viewed by the court in Templeton v. Jones. This part of the paper intends to compare the competing arguments for and against extending the scope of the privilege, finally drawing some conclusions of its own.

A. The View that Qualified Privilege should be Extended in the Political Arena.

One of the most assertive advocates for extending the

scope of qualified privilege in the political arena is Geoffrey palmer [49] who believes that the fundamental value, freedom of expression, more often than not outweighs the countervailing value, reputation. Having lectured in the United States, Palmer supports much of that country's approach in this area. Under the First and Fourteenth Amendments of the U.S. Constitution (protecting the freedom of speech) the U.S. Supreme Court has made a number of important constitutional decisions.

The leading case New York Times v. Sullivan[50] established that a public official could not recover for defamation where the matter was of public or general interest, unless the official could prove beyond doubt that the publication was false and published either with the knowledge of its falsity or serious doubts as to its truth. The effect of the case was one of disqualifying most public officials from succeeding as plaintiffs in libel actions. However, while extending the scope of the privilege, it also left a number of unanswered questions, [51] most importantly,

1. Who was a public official? and
2. What was the meaning of the actual malice - known truth, reckless disregard test?

The Supreme Court attempted to answer these questions over the next ten years. In 1966, Brennan, J., in Rosenblatt v. Baer [52] said

> The 'public official' designation applies at the very least to those among the hierarchy of government employees who have or appear to the public to have substantial responsibility for or control over the conduct of government affairs.

On the face of it a reasonable enough definition. However,

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in 1967 the Supreme Court decided that the 'public official' test was too narrow and consequently extended the protection to statements made in relation to 'public figures'.[53] This let in such figures as a prominent University athletic director and former football coach and a retired Army general. The test for 'public figure', however, was far from clear.[54]

As far as 'actual malice' was concerned, the U.S. Supreme Court was able to list some helpful requirements.[55] Among the evidence which might have led to a finding of known falsity or reckless disregard were:

i. fabrication of the story by the defendant

ii. reliance wholly on "an unverified anonymous telephone call".

iii. the existence of "obvious reasons to doubt the veracity of the information or the accuracy of his reports."

Ill-will and spite alone, however, were insufficient. The notion that malice included someone who had honest belief but who nevertheless was motivated by spite or ill-will, was not included in the Sullivan approach.

One further landmark decision should be cited. Exactly one decade after the Sullivan case the Supreme Court decided the case Gertz v. Welch.[56] Gertz was an individual with a lengthy career as an author, public speaker and a renowned lawyer for public causes. After a police officer had been convicted of murder, Gertz, the attorney who represented the family of the murder victim, was discussed in a magazine article which inaccurately accused Gertz of being an architect of a "frame-up" of the officer, implied Gertz had a criminal record and identified the attorney as a former official of a

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Marxist organisation. The attorney brought a libel action against the publisher of the magazine. The court identified two different types of public figures.[57] First, the all purpose public figure, "a person of pervasive fame and notoriety". This person is a public figure in all contexts. Second, the limited-purpose public figure who attains this status through involvement in a particular public issue. Any comment unrelated to that public issue has the effect of rendering that individual a private figure for the purpose of that comment. The court decided that Gertz was a private figure for this reason. In dealing with the conflicting arguments over public and private figures, the U.S. Supreme Court provided its most detailed analysis of the balance between reputation and the protection of public comment.[58] In justifying their affording lesser protection to public figures than private individuals, they presented two factors:[59]

1. public figures have a greater opportunity to rebut defamatory statements and
2. are subject themselves to adverse comment as a "necessary consequence of that involvement in public affairs".

However it should be noted that while the public figure plaintiff is being afforded less protection, the public defendant is given more.

In summing up the American development in this field, it is fair to say that although the Supreme Court has run into difficulty in applying the Sullivan approach, it has nevertheless made a serious attempt to protect the constitutional rights of American citizens. However, at the same time one might feel that the courts have gone too far in the direction of protecting

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freedom of expression. For although the arguments in favour of protecting individual reputation were acknowledged in Gertz, the Court never went as far as raising it to constitutional status. While the American approach may have extended the scope of the privilege too far, it does open our eyes to the importance of protecting such fundamental rights as freedom of speech.

With respect, however, the court in Templeton failed to consider in any depth even the smallest extension of the scope of the privilege. In presenting the arguments against extending the scope, the court refers to Gatley,[60] which submits that

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

It is respectfully submitted that an individual seeking public position expects to be exposed to others who may not have respect for their reputation. It is a necessary consequence of entering the political arena. The 'boxing' or 'Roman arena' is not a place one would expect to find a sensitive individual. Why should the 'political arena' be any different? An overly sensitive disposition is certainly not an asset in the game of politics. Of course, the politician is going to say "This is all very well, but I have my private life as well", and this is fair enough. The politician makes a number of sacrifices in his position of public responsibility and will want some sanctity left in life.

The obvious problem created here is defining the 'political arena' itself. How far should it extend, and perhaps more importantly, would it affect different spheres of public life (such as trade and industry)? Anyone in the public's eyes certainly takes a risk at being exposed. The trade unionist,

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top business person, the sporting representative, the diplomat and even the doctor offering a service to the public, all fall within this category. What is unique about politics which should put it in a specially protected category?

One of the most fundamental elements of our Constitution is the 'separation of powers'. While the courts are expected to uphold the Sovereignty of Parliament, the House must uphold the power of the law and protect the individual. To achieve this balance, politicians must be able to debate freely and openly on issues of public importance. For this reason, everything that goes on inside the House is granted absolute privilege. But why should it stop there? Should not this idea of free and open government reach right down to the roots of politics? These sorts of arguments could even be made by candidates at elections, who in openly debating on public issues, are helping electors properly exercise their suffrages and thereby maintain a freely elected democratic government. Conversely, it is equally important that the candidates themselves are subject to the scrutiny of the public.

> Under a form of government like our own there must be freedom to canvass in good faith the worth of character and qualifications of candidates for office, whether elective or appointive, and by becoming a candidate, or allowing himself to be the candidate of others, a man tenders as an issue to be tried out publicly before the people or the appointing power his honesty, integrity, and fitness for the office to be filled. [61]

It is submitted, therefore, that any extension of qualified privilege should be wide enough to include statements made about aspirants to elected office.

An even more important question is whether the scope of the privilege should be wide enough to follow politicians into other spheres of life. Should statements about the private

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life of a politician be protected? Politicians undoubtedly value their private life just as much as anyone else. They give up a great deal of privacy when they enter the political arena and expect a certain degree of public exposure. On the other hand, the politician will argue, surely even they are entitled to the sanctity of privacy at home. This conflict is indeed a complex one to solve, but it is submitted that political integrity must to some extent be reflected in the politician's private life, including his financial and intimate affairs. The scope of the privilege should differ according to the importance of the exposure to the common convenience and the welfare of society. Mere public interest is certainly not enough to protect a statement made in relation to a politician's private life.

Needless to say, the court in Templeton failed to consider even the possibility of an extension not as wide as the Sullivan approach but wide enough to afford better protection to the freedom of expression - a value just as important in the political arena. This 'unease' in adopting a wider extension is prevalent throughout the Commonwealth and particularly evident in the reports of the various law reform committees.

B. The Reform Committees.

> The views of law reform committees are relevant when considering whether the Courts should develop the law in a certain direction. [62]
>
> At the present stage, if any development of the law of qualified privilege is to be made in this country, it falls to the courts. [63]

The 1975 United Kingdom "Faulks Committee on Defamation", [64] in considering the adoption of a privilege similar to that applied in the United States, commented that: [65]

> We oppose it most strongly because that here it would

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in many cases deny a just remedy to defamed persons.

Substantiating this claim the report made three major submissions:[66]

1. That the present British defamation law did not restrain the press in reporting on matters of public concern.

2. The American privilege provides too little protection for the deserving plaintiffs in defamation cases.

3. That the American standard would further complicate an area of law already notorious for its complexities of law and fact.

However, in relation to the applicability of these arguments in New Zealand, one might argue:

1. That the British press and media operate in a completely different environment. The press in the U.K. is larger, stronger and wealthier. It follows that in the U.K., such a level of protection may not be required.

2. While the American privilege may provide too little protection for deserving plaintiffs, should not the deserving defendants be equally protected? The present balance in New Zealand underestimates the importance of freedom of expression and is all too willing to place the burden of law on anyone who feels they have a right and further a duty to make a statement in public interest.

3. It would be extremely difficult to <u>further</u> complicate the tort of defamation. On the contrary the application of a wider privilege would help to establish a fairer and more visible balance between freedom of expression and reputation.

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In 1975 the New Zealand Minister of Justice, the Hon. Dr. A. M. Finlay, appointed the 'MacKay Committee on Defamation', which presented its report in 1977.[67] The Committee followed the approach of the "Faulks" report and while they agreed that the American approach was too wide an extension, they were not nearly as antagonistic to the proposition as their British counterparts. It is significant that Geoffrey Palmer, then a Professor of Law of the Victoria University of Wellington, was on the Committee. There were also three Barristers (including the Chairman), the Secretary of the N.Z. Journalists Union, the Chairman of Directors of N.Z. News Ltd. and a Parliamentary Reporter.

The Report concluded that a new balance should be struck between reputation and free speech. [68]

> ...the balance between reputation and freedom of speech requires some adjustment in favour of free speech and a free press. At the same time we have affirmed the principle that reputation deserves reasonable protection. In making our recommendations we have been careful not to give licence to the careless or vindictive.

In relation to qualified privilege the report made two recommendations. First, that the common law concept of "malice" which defeats the defence, be replaced by a statutory provision which does not use the word "malice" but defeats the privilege where it is proved that the defendant was actuated by ill-will or spite, or where improper advantage of the occasion of publication had been taken.[69] Secondly, that a provision should be enacted which would provide the news media with a special statutory defence of qualified privilege. [70] None of the recommendations made by the Committee has been adopted. This is unfortunate, as the Report highlights the present need for a new balance in the law of defamation.

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It is obvious that the Courts are not prepared to play any significant role in this redressing of a new balance. This may seem contrary to what was said in the Templeton case [71] - that at present if any development is to be made it falls to the Courts. However, it is respectfully submitted that the court in Templeton never seriously considered developing the law of qualified privilege in any significant way. Cooke, J. admitted that himself: [72]

> If there is to be any major change in this field, it should be made by Parliament. The whole subject may well warrant the attention of Parliament. If the subject is brought before the attention of Parliament, the account that we have given of the competing considerations may be of some help.

At least this shows the court's awareness of the possibility that there may be a need for reform. Further, it is genuinely hoped that Parliament will acknowledge the present need for a rebalancing of the law in this area and perform its duty to bring about this new balance. In the light of the recent change in government, a new Minister of Justice and a proposed new Defamation Bill, this rebalancing looks more hopeful than ever.

C. A Possible Form of Extension.

Before making the main submission of this paper, it is necessary to draw the close analogy that exists between politicians and journalists. In many ways they perform the same function. They present the current public issues and to a large extent reflect the thoughts and beliefs of the community. Both politicians and journalists are in addition, considerably prone to having defamation actions brought against them. [73]

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> Politicians and journalists have a lot in common. I know politicians who would have made superb sub-editors. Some Members of Parliament have abilities at headline writing which would match those of any journalist.

It is submitted, therefore, that there should be a similar development of law in regard to these two groups.

The new defence for the news media, recommended by the 'MacKay Committee', would provide qualified privilege for certain statements.[74]

Qualified Privilege for Certain Statements

(1) Subject to the provisions of this section, matter published in a news medium shall be protected by qualified privilege if:

(a) The subject-matter of the publication was one of public interest at the time of publication; and

(b) So far as the matter consists of statements of fact, the person by whom it was published acted with reasonable care in all the circumstances and believed on reasonable grounds that the statements of fact were true; and

(c) So far as the matter is an expression of opinion -

(i) The opinion was at the time of publication the genuine opinion of the person by whom it was published; and

(ii) The opinion was at the time of publication capable of being supported by any statements of fact to which paragraph (b) of this subsection applies, either by themselves or in conjunction with any other facts known at the time of publication to the person to whom the publication was made; and

(d) The defendant has given the person who claims to be defamed by the publication an opportunity to have a reasonable statement of explanation or rebuttal, or both explanation and of rebuttal, published in the same medium as the publication complained of, with adequate prominence and without undue delay.

This appears to be a fair and logical defence. Further, it is submitted that the way it is presently drafted does not appear to limit its application to the news media. Having regard to the close analogy drawn between the media and politicians, it is possible to argue that "matter published in a news medium" does not preclude a politician from using the section where some form of statement has been made through a

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news medium. If such was the case, the politician defendant would be greatly benefited by this section.

If the four main requirements were satisfied the politician defendant could plead the defence of qualified privilege. In its present general terms, the requirement that it be in the "public interest" would not be difficult to satisfy. Gatley[75] itself, acknowledges that "the public conduct of any man who holds, or seeks, a public office or position of public trust, political and state matters..." comes under the heading of "public interest".

The second requirement is that the publisher acted with reasonable care in relation to the facts published and believed them to be true. Not only should this standard be maintained by the news media, but just as importantly, should be maintained by our politicians. If there is going to be free and open debate, it must be done with responsibility and care to achieve the desired effect. The necessity that the publication be capable of being supported by the facts, logically follows on from the idea that publishers, political or journalistic, are expected to act with responsibility.

Finally, it is submitted that the opportunity to have a reasonable statement of explanation and/or contradiction is just as relevant to politics as to the press. The politician seldom distances himself from the media. In turn, the media is more than happy to hear from the politician. If the original statement was published in some form of news medium, it would be be a simple matter for the supposedly defamed politician to rebut the allegation. In fact this law, if adopted, would do no more than to give effect to one of the most important aspects of the political process - the free exchange of comment and rebuttal in the eyes of the public. This is of vital necessity if we are to live in a democracy, where the people

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can see the competing arguments and then make an informed vote every three years. As Palmer has said, let us "not use the law to shelter the public from information about decisions of critical public importance."[75]

Of course, there are obvious problems for the politician defendant the moment a statement is published other than through a news medium. The defence, for example, would not be available if the politician made a defamatory statement in the street. The politician would have to fall back on the common law defence. Simiarly, statements to fellow Members would not be protected outside the House and as has been seen, distribution to the press gallery would also lose the common law privilege. Handing the statement to the press gallery would be a publication in itself and open to a separate course of action.

Therefore, it is plain to see that there is a gap in this solution. The MacKay proposal may not go far enough to help the politician. However, it does serve as an excellent illustration of a possible alternative to the present law.

Another solution may be to adopt a separate statutory qualified privilege for politicians, along similar lines. However, a number of subsequent questions would have to be answered. Again, how far should the privilege extend? Should it include all electoral matters and every political issue? As has been seen "public interest" is a fairly wide ground, and may be decidedly too wide. The words "major-public importance" on the other hand might serve better to limit the defence to a practical level while allowing meritorious cases to raise the defence in relation to certified political statements.

It has also been submitted that the privilege should extend

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to statements made in relation to political candidates and even statements in relation to a politician's private life in extraordinary circumstances. A line has to be drawn somewhere, however, and while this paper does not intend to suggest that other areas should not also be protected, the primary concern has been to deal specifically with the political process. For this reason, it is submitted that such persons as Party Presidents, Trade Unionists and public servants, while vitally important in controlling the affairs of this country, do not sufficiently come within the interests that this paper claims a statutory qualified privilege should protect.

With all these factors in mind, it is submitted that the defence might look something like this:

(1) Subject to the provisions of this section, matter published by a politician shall be protected by qualified privilege if:

(a) The subject-matter of the publication was one of major public importance at the time of publication; and

(b) That the publisher acted with reasonable care in relation to the facts published and believed them to be true; and

(c) Any comment contained in the publication is capable of being supported by the facts as stated or any other known facts, and was the genuine opinion of the person who made it; and

(d) The publisher gave the person claiming to be defamed by the publication an opportunity to have a reasonable statement of explanation or rebuttal published in the same manner, or, if that rebuttal proves impractical, through some form of news medium, with adequate prominence and without undue delay.

(2) For the purposes of this section "politician" means

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any Member of Parliament or any person standing as a candidate to be elected as a Member of Parliament.

Subsection (1) (d) covers the situation where rebutting the statement in exactly the same manner may prove difficult or impractical. If the matter is of major public importance, obtaining the interest of the media or press should not prove difficult at all.

This section, therefore, would provide adequate protection to those in the political arena who feel it their utmost duty to communicate to the public a matter of major public importance. It would also give the defamed person a quick and efficient means of answering the allegation. Consequently, both the interests that are claimed to be important to the politician - reputation and freedom of expression - would be protected.

We must not lose sight of the fact that some politicians are not overly enthusiastic to alter the present law.[77]

> I do not think it is necessary to specifically protect politicians by statute. Whilst they have a duty of disclosure they also have a duty to be responsible. If both duties are exercised, then no damages should be awarded.

It is submitted, however, that statutory protection would assist the fair balancing of the duty to disclose facts and the duty to be responsible. Further, the section should not merely be seen as a source of protection for the politician but also as a means for protecting the best interests of society at large. The welfare of society is of fundamental importance and the public will be in a better position to make up their minds on issues of national and regional importance, if politicians can neither sue nor be sued with the prevailing

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ease that exists in New Zealand today.

D. The Effect of the Proposed Statutory Privilege on Templeton's Case.

The application of such a privilege in the Templeton case, would have without doubt brought about a different result. In relation to the case, the following arguments could have been made based on the drafted privilege:

(1) Templeton undoubtedly comes within the section.

(a) The subject-matter of the publication was certainly one of major public importance. Jones' standing (leader of the New Zealand Party) and the nature of the allegations (that he despises Jews) was enough in itself to bring the statement within this requirement.

(b) Templeton acted with reasonable care in relation to the facts he published and believed them to be true. Prima facie, there is nothing to show that Templeton acted unreasonably. Templeton's statement was backed up with well presented and seemingly reliable facts.

(c) The statement was supported not only by the facts stated but also the facts struck out by the trial judge. If this type of privilege was created, it would allow the consideration of all the known facts - something which Templeton was unable to do. The consideration of any facts which might give rise to a privilege seems much fairer.

(d) Finally, if this defence had been available, and Jones was given the opportunity to rebut the

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allegation in the same manner (through a speech to the Ohariu Branch of the National Party, followed by distribution to the Parliamentary press gallery) it is submitted that Jones would have saved his reputation far more effectively than through the courts - the speech no doubt being reported to the general public within a day or so. It was a year before the trial was heard.

Further, if that had not proved possible for Jones, a statement straight to the press would have satisfied this requirement. In actual fact, Jones made a statement of sorts which was published in the New Zealand Truth, exactly one week after Templeton's release of his statement to the Parliamentary press gallery.[78]

> Tinkerbell, your time's up now.
> Readers will be aware of my candidacy for Ohariu against sitting member Hugh Templeton, otherwise known in the electorate as Tinkerbell...
> Here is a man whose snout has never left the public trough; who lives in a taxpayer-provided free home with taxpayer-provided chauffeur transport, free electricity, free travel and even part of his salary free from taxation. Here is a man safely immune from the trials of daily living who suddenly sees his comfortable perch at the top of the ladder threatened and has sunk deep into the mud in an effort to save himself.

Unfortunately, such a statement did little to resolve the feud between the two men or rectify Jones' good name. A satisfactory rebuttal would have to go a great deal further to answer the allegation in question. This statement makes no reference to Jones' supposed despisal of Jews at all.

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V THE EFFECT OF A BILL OF RIGHTS

With the White paper for a New Zealand Bill of Rights having been presented by the Hon. G.W.R. Palmer, Minister of Justice, to the House of Representatives, it may be of interest to briefly consider the effect a Bill of Rights would have on the law of defamation. Article 7 provides that

> Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

There comes to light an immediate conflict between the Bill and the law of defamation. However, the freedom protected under the Bill "while basic and of broad scope...is obviously subject to important limits imposed by the law."[79]

The other relevant Article is Article 3.

> Justified Limitations.
> The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Therefore, if a law was challenged, the court would have to:

1. Consider whether freedom of expression was infringed; and
2. Ask whether the limit was a reasonable one which is demonstrably justifiable in a free and democratic society.

The White paper suggests that for the most part, in respect of the existing law, the answer to 2. would be 'Yes'.[80] Would this include the law of defamation? Is the law of defamation a reasonable limit which can be demonstrably justified in a free and democratic society? As has been seen, access to protection of reputation is an important democratic right. The White paper would seem to agree. "Thus freedom of expression...does not carry with it the right...to defame

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others...." [81] However, this does not mean to say that certain aspects of defamation which appear to underestimate the right of freedom of expression will not be subject to control under the Bill.

On the face of it, there is a reasonable argument that the existing law of qualified privilege is too narrow and therefore, falls beyond being a reasonable limit which can be demonstrably justified in a free and democratic society. The problem is determining what a democratic society considers to be a reasonable limit in the law of defamation. The American approach would find very few reasonable limits, whereas the English approach would abound with them. Nevertheless, the argument that the existing law of qualified privilege could be too narrow strongly supports the notion that the defence of qualified privilege should be extended before the adoption of the Bill of Rights.

If the Bill is to be adopted, the courts will have to play a new role in this country. They must be prepared to play a larger part in maintaining a fair balance between reputation and freedom of expression. No longer will they be able to use the 'separation of powers' argument as an excuse not to make any significant change in the law.

VI CONCLUSION

Having looked at the issues both narrowly and broadly, it has been intended to create a reasonable perspective of the relationship between defamation and politics in New Zealand. It has been the goal of this paper to express the genuine concern for the present need for reform. At last, there is a glimmer

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of hope, that we are about to see a long needed change in this area. It is hoped that a discussion of some of the relevant issues has been of some benefit.

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FOOTNOTES

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2 [1984] 1 N.Z.L.R. 448.

3 Toogood v. Spyring (1834) 1 C.M.&R. 181, 193.

4 Prosser, Law of Torts (4 ed. West Publishing Co., Minn., 1971) 796.

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9 Idem.

10 Braddock v. Bevins [1948] 1 K.B. 580, 591.

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12 Ibid. 592.

13 Ibid. 593.

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16 Research carried out by G. Palmer and presented in "Defamation and Privacy Down Under" (1979) 64 Iowa Law Review 1209.

17 Palmer, supra. n. 1, 266.

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23 In his letter dated 18 June 1985.

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29 Ibid. 460.

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38 Eyre v. N.Z. Press Association Ltd. [1968] N.Z.L.R. 736.

39 Horricks v. Lowe [1975] A.C. 135; Brooks v. Muldoon [1973] 1 N.Z.L.R. 1.

40 Brooks, supra. n.39.

41 Section 10 Defamation 1952 (U.K.)

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44 Idem.

45 [1962] 1 W.L.R. 1469, 1472.

46 Ibid. 1472.

47 Templeton, supra. n.2, 457.

48 Ibid. 458.

49 Supra. n.1, 16, 18.

50 376 U.S. 254 (1964)

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51 For a full discussion of the issues raised in Sullivan, see D. Zillman "The American Approach to Defamation" (1980) 9 Anglo.Am.R. 316.

52 383 U.S. 75, (1966) at p.85.

53 Curtis Publishing Co. v. Bults 388 U.S. 130 (1967).

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55 St. Amant v. Thompson 390 U.S. (1968).

56 418 U.S. 323 (1974).

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60 Paragragh 488, n.65.

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73 Palmer, supra. n.18, 10.

74 Supra. n.67, para. 237.

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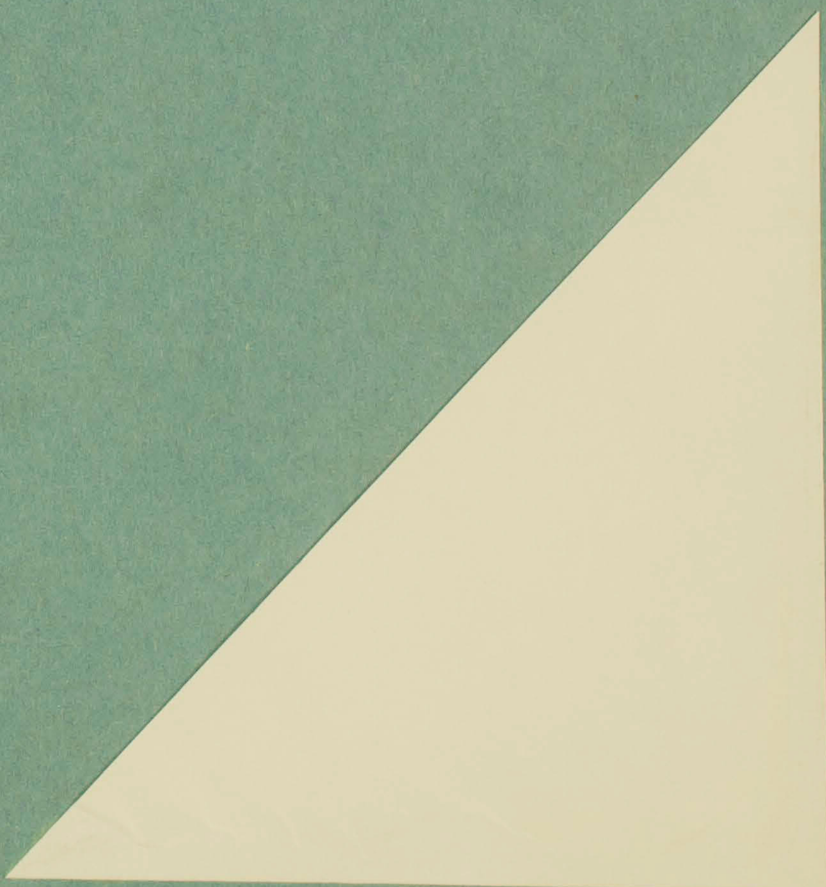

1X HA HARWOOD, R. M. Defamation in the political arena.