Devesh Awmee

With Great Power Comes Great Responsibility: An Analysis of the New Public Interest Defence to Defamation Claims

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Abstract

The New Zealand Court of Appeal recently gave judgment in Durie v Gardiner *recognising a discrete public interest defence to defamation claims. The defence is a welcome addition to New Zealand's defamation laws. This paper analyses the public interest defence. In particular, it evaluates whether the defence achieves the right balance between the rights of freedom of expression and protection of reputation, whether the defence would extend to criminal accusations, and why the Court of Appeal was correct in recognising it as a discrete one. It also explores how the defence could be applied to non-media defendants, such as social media users and bloggers. The recognition of reportage in New Zealand as a subset of the public interest defence and its difficulties is also discussed.*

Key Words: Defamation, public interest, responsible communication, responsibility, reportage, qualified privilege, media, chilling effect.

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I Introduction

The recognition of a public interest defence to defamation claims arising from mass publications going beyond political discussion has been long-awaited in New Zealand.[1] At the heart of whether such a defence should be recognised is the balancing of two fundamental rights: the right to protection of reputation and the right to freedom of expression.[2] Freedom of expression in New Zealand is a fundamental right contained in s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA).[3] It can only be restricted by limitations at law that are demonstrably justified in a free and democratic society.[4] Defamation law is one such limitation.[5] A person may not, subject to defences, make false statements that damages the reputation of another.[6] New Zealand had not struck the right balance between the two rights and a "re-centring"[7] of defamation law was required. Fortunately, in the recent decision of *Durie v Gardiner*, the Court of Appeal had done this by striking "a new balance"[8] and recognising a discrete public interest defence in New Zealand.

The new defence is an important contribution to New Zealand's defamation laws because it facilitates the publication of untrue defamatory statements in certain circumstances where the subject matter is in the public interest. It also finally puts New Zealand in line with other common law jurisdictions in the Commonwealth, such as Canada,[9] and the United Kingdom.[10]

This paper will analyse the new public interest defence. Part II will discuss the position of the law before the recognition of a public interest defence. It will particularly focus on the

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[1] Nine To Noon "Ursula Cheer: Public interest in defamation" (Podcast, 12 September 2018) Radio New Zealand <www.radionz.co.nz>.

[2] *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 at 1179.

[3] New Zealand Bill of Rights Act 1990, s 14.

[4] New Zealand Bill of Rights Act, s 5.

[5] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [3.2.8].

[6] Ursula Cheer "Defamation" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 839 at 841.

[7] Alastair Mullis and Andrew Scott "The swing of the pendulum: reputation, expression and the re-centring of English libel law" (2012) 63 NILQ 27 at 28.

[8] *Durie v Gardiner* [2018] NZCA 278 at [56].

[9] See *Grant v Torstar* [2009] 3 SCR 640.

[10] See Defamation Act 2013 (UK), s 4.

development of common law qualified privilege and its limitations in protecting untrue defamatory statements outside the sphere of political discussion. Part III will set out and discuss the elements of the new defence. Part IV will evaluate the new defence. It will argue that the defence strikes the right balance between the rights of freedom of expression and protection of reputation. Whether the defence would extend to criminal accusations will also be discussed. Moreover, it will also address why the Court of Appeal was correct to not recognise the defence as an extension of qualified privilege. Part V will provide guidance on how the defence would apply to non-media defendants. It will focus on Twitter-users and bloggers but will also provide general guidance for other social media users. Finally, Part VI will explore the Court of Appeal's decision to recognise reportage in New Zealand as a subset of the public interest defence. It will discuss how reportage could apply in New Zealand and highlight the difficulties that its recognition poses to defamation law.

II The Position Before the Recognition of a Public Interest Defence

It is important to set out what the New Zealand position was prior to the recognition of the public interest defence. This Part will do just that. First, it will focus on the missed opportunities to recognise a public interest defence as either a discrete defence or extension to qualified privilege. Second, it will look at the development of the law regarding the defence of qualified privilege. In particular, it will look at the Court of Appeal's decision in *Lange v Atkinson*. It will also discuss subsequent cases to illustrate the limitations imposed by *Lange* and why New Zealand needed a public interest defence.

A Missed Opportunities

The pathway to recognising a public interest defence has been turbulent. Throughout the 1960s and 1970s, the New Zealand courts had the opportunity to either recognise a discrete public interest defence or extend the defence of qualified privilege.[11] The most significant of these decisions was the Court of Appeal's decision in *Truth (NZ) Ltd v Holloway*. In that case, an article was published in a newspaper which accused a Cabinet Minister of being willing to rig import licences.[12] The defendant argued the article was published on an

[11] See *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 (CA); *Dunford Publicity Studios Ltd v News Media Ownership Ltd* [1971] NZLR 96 (SC); *Brooks v Muldoon* [1973] 1 NZLR 1 (SC); and *Templeton v Jones* [1984] 1 NZLR 448 (CA).

[12] *Truth (NZ) Ltd v Holloway*, above n 11, at 79.

occasion of privilege because "import licences affected the lives of everyone in the country" and were therefore in the public interest.[13] Unfortunately, it was held that:[14]

> [T]here is no principle of law, and certainly no case that we know of, which may be invoked in support of the contention that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest.

The decision of *Truth* also emphasises the conservative stance of early decisions, which preferred to strike a balance that favoured the protection of reputation over freedom of expression. As such, there was a reluctance by the courts to afford the media a greater access to a privilege-type defence due to the risk that this would tip the balance in favour of freedom of expression.[15]

Another missed opportunity came with the refusal of Members of Parliament to enact a recommendation made in a 1977 report published by the Law Reform Committee on Defamation.[16] The Committee was chaired by Sir Ian McKay and the report later became known as the "McKay Report". The McKay Report recommended, among other things, a statutory defence for the media.[17] This defence proposed that any member of the media would enjoy qualified privilege if they had acted with reasonable care, given the person defamed an opportunity to publish a statement explaining or rebutting the defamatory statement, and the subject matter of the publication was in the public interest.[18] Sir Geoffrey Palmer believes the reason why this recommendation was not included in the Defamation Bill, which became the Defamation Act 1992, was because Members of Parliament did not like reforming the law of defamation and thought "that the law of defamation is a useful thing with which to beat the media".[19] This infers that Members of

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[13] At 80.

[14] At 83.

[15] See also *Douglas v Tucker* [1952] 1 SCR 275; *Globe and Mail Ltd v Boland* [1960] SCR 203; *Banks v Globe and Mail Ltd* [1961] SCR 474; and *Jones v Bennett* [1969] SCR 277 where similar reasoning was seen in Canada by the Canadian Supreme Court.

[16] W R Atkin "Defamation Law in New Zealand 'Refined' and 'Amplified'" (2001) CLWR 237 at 240.

[17] Committee on Defamation *Recommendations on the Law of Defamation* (1977) at 58.

[18] At 58 and 59; see also C R French "Defamation Law Reform – A Special Defence For the News Media?" (1979) 4 OLR 370.

[19] Geoffrey Palmer *Constitutional Conversations: Geoffrey Palmer talks to Kim Hill on National Radio 1994-2001* (Victoria University Press, Wellington, 2002) at 175; see also Geoffrey Palmer "The Law of Defamation in New Zealand – Its Recent Evolution and Problems" in Jeremy Finn and Stephen Todd (eds)

Parliament were unwilling to give the media more freedom. However, as will be discussed below, the courts began to change their position through expanding the defence of qualified privilege.

B Qualified Privilege

There are occasions where the law regards the right of one person to speak their mind or convey information as being of more importance than the right of another to their reputation.[20] Statements made on such occasions are described as being "privileged"[21] because the "common convenience and welfare of society" requires untrammelled communications.[22] There are two mains types of privilege: absolute privilege, and qualified privilege. Absolute privilege allows a person to say anything at all even if they know what they are saying is false or they say it with malicious intent.[23] Occasions of absolute privilege include statements made during judicial proceedings and parliamentary proceedings.[24] However, for the purposes of this paper, only common law qualified privilege will be addressed in detail.

1 Common Law Qualified Privilege

If an occasion is one of qualified privilege, then the defendant is immune from defamation proceedings.[25] However, the defence is said to be qualified because the plaintiff can defeat it.[26] Section 19 of the Defamation Act 1992 states that a defence of qualified privilege will fail if the plaintiff can prove that "the defendant was predominantly motivated by ill will towards the plaintiff" or took "improper advantage of the occasion of publication."[27] The Defamation Act sets out types of publications protected by qualified privilege.[28] An

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Law, Liberty, Legislation: Essays in Honour of John Burrows QC (LexisNexis, Wellington, 2008) 339 at 347.

[20] Ursula Cheer *Burrows and Cheer: Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at 113.

[21] Cheer, above n 20, at 113.

[22] *Toogood v Spyring* (1834) 1 CM & R 181, 149 ER 1044 (Exch Ch) at 1050.

[23] Cheer, above n 20, at 114.

[24] At 114.

[25] Paul Mitchell *The Making of the Modern Law of Defamation* (Hart Publishing, Portland (OR), 2005) at 145.

[26] Rosemary Tobin and David Harvey *New Zealand Media and Entertainment Law* (Thomson Reuters, Wellington, 2017) at 198.

[27] Defamation Act, s 19; see also *Horrocks v Lowe* [1975] AC 135 (HL) which s 19 was intended to reflect.

[28] Section 16.

example of this is the publication of a fair and accurate report of the parties' pleadings before a court.[29] However, the Defamation Act does not abolish the existence of qualified privilege at common law.[30]

The House of Lords in *Adam v Ward* defined when qualified privilege would exist at common law. It held:[31]

> 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 so made has a corresponding interest or duty to receive it.

This definition of qualified privilege is based on an element of reciprocity in the relationship between the person who makes the statement and the person who receives it. The onus is on the defendant to show this reciprocal duty exists.[32] This reciprocity is essential and there is no privilege if the material is distributed beyond those who have an interest or duty in the subject matter of the communication.[33]

Qualified privilege is likely to be available to specialist publications which convey matters of particular interest to their specific readership.[34] However, it is of limited use to the media and other situations where there has been a mass publication to the public generally.[35] This is because it would often be very difficult to show that everyone who is receiving the publication has an interest or duty to receive it. However, there have been rare cases where qualified privilege has been arguable, despite there being a mass publication.[36] Examples of these are the decisions of *BMW NZ Ltd v Pepi Holdings Ltd*, and *Julian v Television New Zealand Ltd*.

In *BMW*, *The Independent*, which was a weekly business newspaper, published to its readers that BMW NZ had called into question the importation of BMW's with wound-

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[29] Defamation Act, sch 1, cl 5.

[30] Defamation Act, s 16(3).

[31] *Adam v Ward* [1917] AC 309 (HL) at 334 per Lord Atkinson.

[32] Tobin and Harvey, above n 26, at 198.

[33] *Adam v Ward*, above n 31, at 334 per Lord Atkinson.

[34] *Pauanui Publishing Ltd v Montgomerie* [2004] NZAR 702 (CA) at 712; see also *Chinese Herald Ltd v New Times Media Ltd* [2004] 2 NZLR 749 (HC).

[35] Cheer, above n 20, at 124.

[36] At 128.

back odometers.[37] Hansen J held that this was protected by qualified privilege as the New Zealand public had a right to know about clocked odometers and without the publication, they would not have learnt about the problem.[38]

In *Julian*, TV One had broadcast a story about a water-purifying device. The broadcast had descried the device as a "rip-off" and the distributor of the device was said to have "duped" thousands of people.[39] The plaintiff alleged the broadcast was false and defamatory.[40] Salmon J held, at a hearing to determine preliminary questions, the occasion of the broadcast could reasonably be held to be a privileged one.[41] His Honour stated that this was because the public had an interest in receiving information about a product sold nationwide, and the media had a reciprocal interest to disseminate the information.[42] However, whether the defence could actually apply was to be determined at trial.[43]

2 Lange *Privilege*

Previously, the courts had been reluctant to extend qualified privilege to matters published by the media to the public generally.[44] However, towards the end of the 20th century, there was shift away from protection of reputation towards freedom of expression.[45] The "ground breaking"[46] decision in *Lange* was the first major breakthrough in expanding the defence of qualified privilege where there had been mass publication. In that case, Atkinson published an article in the *North and South* magazine.[47] The article criticised Lange's performance as Prime Minister and Leader of the Labour Party, alleging that he did not approach his task seriously or professionally.[48]

In the High Court, Elias J (as she then was) held that a defence of qualified privilege could be extended to generally published political discussion.[49] On appeal, the Court of Appeal

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[37] *BMW NZ Ltd v Pepi Holdings Ltd* HC Christchurch CP16 & 28-94, 5 September 1996 at 10.
[38] At 110.
[39] *Julian v Television New Zealand* Ltd HC Auckland CP367-SD01, 25 February 2003 at [11].
[40] At [12].
[41] At [69].
[42] At [69].
[43] At [70].
[44] Cheer "Defamation", above n 6, at 925.
[45] Tobin and Harvey, above n 26, at 202.
[46] Atkin, above n 16, at 241.
[47] *Lange v Atkinson* [1998] 3 NZLR 424 (CA) [*Lange (No 1)*] at 428.
[48] At 429.
[49] *Lange v Atkinson* [1997] 2 NZLR (HC) [*Lange (HC)*] at [51].

accepted that qualified privilege could be extended to protect a statement that had been published generally, and which covered political statements made about Members of Parliament past, present or future.[50] This was because the nature of New Zealand's democracy was such that the public had a proper interest in generally published statements directly concerning the functioning of representative and responsible government.[51] The Court also stated that a strict concept of reciprocity previously required under the common law was not required for this extension.[52]

The decision was appealed again to the Privy Council. The Privy Council ruled it was inappropriate for them to decide the case because of differing local circumstances between the United Kingdom and New Zealand.[53] Instead, it was held that the case should be sent back to the New Zealand Court of Appeal for it to determine the case in light of the recent House of Lords Decision of *Reynolds v Times Newspapers Ltd*.[54] The *Reynolds* decision recognised in the United Kingdom a species of qualified privilege which applied to mass publications on matters of public concern.[55]

The Court of Appeal ultimately reaffirmed its previous decision and refused to follow *Reynolds*.[56] This is because New Zealand was distinguishable from the United Kingdom due to the smaller population,[57] the responsible media culture,[58] and the differences between NZBORA and the European Convention on Human Rights.[59] The principles of qualified privilege applying to political statements that are published generally were summarised as follows:[60]

> (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

[50] *Lange (No 1)*, above n 47, at 428.
[51] Tobin and Harvey, above n 26, at 202.
[52] *Lange (No 1)*, above n 47, at 441.
[53] *Lange v Atkinson* [2000] 1 NZLR 257 (PC) [*Lange (PC)*] at 264.
[54] At 263.
[55] *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 (HL) at 626 per Lord Nicholls.
[56] *Lange v Atkinson* [2000] 3 NZLR 385 (CA) [*Lange (No 2)*] at [37] – [41].
[57] At [35].
[58] At [34]; see also Karl du Fresne *Free Press, Free Society* (Newspaper Publishers Association of New Zealand, Wellington, 1994) at 26 and 34.
[59] *Lange (No 2)*, above n 56, at [30].
[60] At [10] and [41].

directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.

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

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

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

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

In summary, the privilege was a general one attaching to discussion about Members of Parliament.[61] It did not require an examination of the circumstances, in particular whether or not the media behaved responsibly.[62] However, the privilege could be negated if the plaintiff proved that the defendant was motivated by ill will or otherwise took improper advantage of the occasion of publication under s 19 of the Defamation Act.[63] Notably, the concept of "improper advantage" was extended beyond common law malice and could be satisfied if the journalist was reckless or irresponsible of if they displayed a cavalier approach to the truth.[64]

3 Subsequent Decisions of the New Zealand Courts

Since the *Lange* decision, there was argument that the defence should be broadened to cover any matter of genuine public interest.[65] The Supreme Court hinted that the common law could develop a public interest defence but unfortunately did not comment further.[66] However, there were a number of cases, particularly at High Court level, which showed

[61] Cheer, above n 20, at 130.

[62] At 130.

[63] *Lange (No 1)*, above n 47, at 468.

[64] *Lange (No 2)*, above n 56, at [39] and [47].

[65] Rosemary Tobin "Political Discussion in New Zealand: Cause for Concern" [2003] NZ Law Review 215 at 234.

[66] *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [32].

"an appetite" for expanding the defence.[67] Of significance are the cases of *Osmose New Zealand v Wakeling*,[68] *Dooley v Smith*,[69] *Cabral v The Beacon Printing and Publishing Co*,[70] and *Lupton v Fairfax*.[71] These cases emphasise New Zealand's push to recognise a public interest defence as an extension of qualified privilege. They also illustrate the limitations of *Lange* and why the law needed to change. They will now be set out.

In *Osmose*, the High Court appeared to extend the qualified privilege recognised in *Lange* by accepting it could apply to matters of general public interest.[72] The plaintiff, Osmose, supplied timber preservative products and alleged the defendants made false and damaging statements about those products.[73] These statements were reported on Television New Zealand, Radio New Zealand, and in newspapers. The defendants applied for the media to join the action as third parties.[74] However, Harrison J released the media because they had published the statements on an occasion of qualified privilege.[75] His Honour found that the statements published were of public concern because it related to the leaky home crisis and the Government had endorsed Osmose's product after inquiring into the leaky homes crisis.[76] It also showed a possible systemic failure in the building industry.[77] This case emphasises the limitations of *Lange* and illustrates why it never made sense to limit the defence to political discussion. A publication regarding a product used in the building industry at a time where there was a leaky home crisis ought to have warranted more protection from a defamation claim than political discussion.

Dooley v Smith appears to be less clear than the others of the courts' willingness to expand *Lange*.[78] The plaintiff, Dooley, sought a declaration that the defendants, Smith and Shahadat, had defamed him by making statements to the media.[79] All three parties were

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[67] Cheer, above n 20, at 140; see also Ursula Cheer "The Influence of Canadian Charter Jurisprudence on Freedom of Expression in Defamation in New Zealand" (Research Repository, University of Canterbury, 2010) at 26;

[68] *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841 (HC).

[69] *Dooley v Smith* [2012] NZHC 529.

[70] *Cabral v The Beacon Printing & Publishing Co Ltd* [2013] NZHC 2684.

[71] *Lupton v Fairfax New Zealand Limited* [2016] NZHC 1801.

[72] Cheer, above n 20, at 131.

[73] *Osmose*, above n 68, at [5] and [13].

[74] At [25].

[75] At [46].

[76] At [47] and [50].

[77] At [50].

[78] Cheer, above n 20, at 131.

[79] *Dooley v Smith*, above n 69, at [1].

elected trustees of a charitable trust.[80] The trust was established to manage a $92 million payment from the government after it had stopped logging indigenous forests on the West Coast.[81] *Lange* privilege was not argued before the Court.[82] However, Lang J made an obiter comment stating there was no logical reason why *Lange* could not extend to statements about the performance of those elected to positions of responsibility in other public institutions.[83] These were the circumstances of this case as the trust managed public assets and carried out public activities.[84] His Honour then went on to apply this extended version of *Lange* but held that it would not be successful on the facts because the defendants were motivated by ill will and took improper advantage of the occasion.[85] The decision was then appealed to the Court of Appeal. Unfortunately, the Court of Appeal did not make a definite ruling on the issue and instead left it open to be argued on another day.[86]

In *Cabral*, *The Beacon* published an article about a local development project which the plaintiff was funding. The article disclosed, truthfully, that the plaintiff was a convicted fraudster.[87] However, the plaintiff argued it was defamatory as it also suggested that the plaintiff was misusing the project's funds.[88] The defendants pleaded qualified privilege.[89] The Court held that qualified privilege was not available.[90] This was not because the plaintiff was not a Member of Parliament. Instead, the Court came to this conclusion because the published article was not in the public interest.[91] Therefore, this case suggested that qualified privilege could extend to cover matters of public interest.[92]

In *Lupton*, the defendant published a story about the plaintiff, a local doctor, accusing her of failing to detect a pregnancy.[93] The plaintiff argued that the story conveyed a number of meanings which were untrue and defamatory.[94] The defendant pleaded qualified

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[80] At [7] – [9].
[81] At [5].
[82] At [156].
[83] At [171].
[84] At [174].
[85] At [186].
[86] *Smith v Dooley* [2013] NZCA 428 at [74].
[87] *Cabral*, above n 70, at [2].
[88] At [4].
[89] At [8].
[90] At [41].
[91] At [40].
[92] Cheer, above n 20, at 133.
[93] *Lupton*, above n 71, at [3].
[94] At [26].

privilege,[95] and argued that New Zealand should extend qualified privilege to matters of genuine public interest.[96] The Court held it was arguable for the defendant that "a more general public interest-based qualified defence may now be part of New Zealand law."[97] It also found that the "publication must be concerned with matters that are of genuine public concern" such that "freedom of expression ought to prevail".[98] These comments appear to endorse the idea of a public interest defence as an extension to qualified privilege.[99] They also emphasise the eagerness of the Court to strike a new balance in defamation between freedom of expression and the right to protection of reputation. However, the defence failed on the facts. The Court found that the article was not of genuine public interest as there was no "significant public safety or other national concern (as in *Osmose*)".[100]

All four of these cases illustrated that the law needed to be changed and that *Lange* was unnecessarily limited in its application. It did not make sense that some publications which were arguably more in the public interest than political discussion did not enjoy the same protection under *Lange*.[101] This was especially the case when the subject matter involved other public institutions, the spending of public funds, or a matter which concerned the majority of New Zealanders. The High Court in these decisions appeared to have recognised this problem and tried to get around the limitations in *Lange* by recognising a pragmatic public interest defence within qualified privilege. This was used to cover situations which it believed deserved protection from a defamation claim.[102] However, the cases also demonstrate that such a pragmatic approach would not have applied all the time,[103] and that the subject matter needed to be something of genuine public interest if it was to enjoy privilege.

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[95] At [28].

[96] At [76].

[97] At [99].

[98] At [100].

[99] Steven Price "Defamation Issues" (paper presented to New Zealand Law Society Media Law Seminar, February 2017) at 94.

[100] *Lupton*, above n 71, at [105] and [106].

[101] Morning Report "New public interest defence a long time coming – Ursula Cheer" (Podcast, 1 August 2018) Radio New Zealand <www.radionz.co.nz>.

[102] See *Osmose*, above n 68; and *Cabral*, above n 70.

[103] See *Dooley v Smith*, above n 69; and *Lupton*, above n 71.

III The Recognition of a Public Interest Defence

A Durie v Gardiner

1 Facts

The issue of whether a public interest defence is recognised in New Zealand finally came before the New Zealand courts again in *Durie v Gardiner*. Sir Edward Durie and Donna Hall (the plaintiffs) issued defamation proceedings in the High Court against the Māori Television Service (Māori TV) and one of its reporters, Heta Gardiner (the defendants).[104] The proceedings were in regard to a story which was broadcast on Māori TV and later put up on its website.[105] The plaintiffs contended that these contained various defamatory statements.[106] They sought damages and a recommendation for publication of a correction.[107]

The defendants argued that the words did not bear the alleged defamatory meanings.[108] Alternatively, they argued that even if the words did bear the alleged defamatory meanings, they would nevertheless be protected by the defence of honest opinion or a defence which they described as "Qualified Privilege/Public interest defence".[109]

2 The Reasoning of the High Court and the Court of Appeal

In the High Court, Mallon J held that it was "tenable" for a public interest defence to be recognised in New Zealand and that: [110]

> [I]t is… necessary, that such a defence be recognised if freedom of expression is to be given its proper weight in this country. If a publisher does not have a defence when they have reasonably or responsibly published material containing a defamatory imputation on a matter of public interest it is difficult to see how the limit imposed on freedom of expression is one which is justified.

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[104] *Durie v Gardiner*, above n 8, at [5].
[105] At [5].
[106] At [26].
[107] At [28].
[108] At [29].
[109] At [29].
[110] *Durie v Gardiner* [2017] NZHC 377, [2017] 3 NZLR 72 [*Durie v Gardiner (HC)*] at [105].

The decision was then appealed to the Court of Appeal where the Court focused on the following questions:[111]

> Is there a public interest defence in New Zealand to defamation claims arising from mass publications? And if so, what is its scope?

In a unanimous judgment, the Court of Appeal accepted that a public interest defence to defamation claims was available in New Zealand.[112] The substantive judgment on this issue was given by French J, who Winkelmann J agreed with. Her Honour began her analysis by emphasising that the law of defamation aims to strike a balance between the right to freedom of expression and the right to protection of reputation.[113] This is achieved by making "a value judgment informed by local circumstances and guided by principle".[114] Her Honour then stated it was:[115]

> … time to strike a new balance by recognising the existence of a new defence of public interest communication that is not confined to parliamentarians or political issues, but extends to all matters of significant public concern and which is subject to a responsibility requirement.

There were six reasons, based on societal and legal development, for why the Court decided to recognise a public interest defence:[116]

(1) There is more power residing outside of the political sphere and there is increased public expectation in the accountability of non-political groups.
(2) There have been significant changes in mass communications due to new technologies.
(3) The emergence of social media and the "citizen journalist" has changed the nature of public disclosure.
(4) NZBORA, in particular the right to freedom of expression, has become more prominent.
(5) The importance of juries in defamation trials has diminished.

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[111] *Durie v Gardiner*, above n 8, at [1].
[112] At [56] and [104].
[113] At [53].
[114] At [53].
[115] At [56].
[116] At [56].

(6) The significance of other common law jurisdiction, such as the United Kingdom and Canada, which have developed public interest defences.[117]

Many of these reasons show the significant legal developments over the last 18-years since *Lange*. Interestingly, it also shows that the common law method is effective in adapting and creating new law to respond to changing circumstances.[118] Back when *Lange* was decided, the courts seemed to think it was only published statements regarding political discussion which was of "proper interest"[119] to the public. There was also nothing outside of newspapers, radios, magazines, and television broadcasts that could be used to disseminate information to the general public. However, the Court of Appeal in *Durie v Gardiner* has now recognised that the public now has a proper interest in a wide range of things extending beyond political discussion. The Court has also considered the significance of technology and social media in this area, which did not exist when *Lange* was decided. This is an important aspect which the law must keep up with because it has allowed people other than the mainstream media to easily publish statements to the general public.

Furthermore, as mentioned above, one of the reason for not adopting the *Reynolds* approach, which was the United Kingdom equivalent to a public interest defence based on responsible communication, was because New Zealand's media culture was distinguishable from the United Kingdom.[120] This was not the first time New Zealand had taken a different route from the United Kingdom because of differing circumstances.[121] However, the recognition of a public interest defence suggests that New Zealand is not exceedingly different from the United Kingdom. The way the media industry in New Zealand has developed is evidence of this. Since *Lange*, many New Zealand media outlets have become big corporations owned by overseas interests, as opposed to small locally-

[117] See *Grant v Torstar*, above n 9; *Reynolds*, above n 55; and Defamation Act 2013 (UK), s 4 which has codified *Reynolds*.

[118] For a more comprehensive analysis of the common law method in New Zealand, see Bevan Marten and Geoff McLay "Should New Zealand Shirk Its Obligations? A Critical Perspective on Private Law Scholarship" (2016) 47 VUWLR 429.

[119] *Lange (No 2)*, above n 56, at [10].

[120] See *Lange (No 2)*, above n 56, at [34] – [35] and [40].

[121] See *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL); and *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) which show the different approaches taken by the United Kingdom and New Zealand in regard to council liability for building defects.

owned businesses.[122] Competition between these media outlets has also increased, especially with the emergence of social media.[123] There is also more of a move into entertainment and a stronger desire for profit.[124] This has arguably led to the media in New Zealand becoming more intrusive in order to obtain stories to attract more viewers and readers.[125] These factors suggest that the media in New Zealand is not overly different from the tabloids in the United Kingdom.

B The Elements of the Defence

Before setting out the elements of the new defence, it is important to note that the new defence is "not part of the rubric of qualified privilege."[126] Instead, it is a discrete defence.[127] The Court also abolished the privilege recognised in *Lange*, stating it had now been subsumed by the new defence.[128] The correctness of these rulings will be discussed further in Part IV.

For the defence to succeed, two elements must be satisfied:[129]

(1) the subject matter of the publication was of public interest; and
(2) the communication was responsible.

The onus of proof is on the defendant to satisfy both elements.[130] It is also for the trial judge to determine whether the two elements of the defence have been established based on the primary facts determined by a jury.[131] French J also stated that the defence is

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[122] Merja Myllylahti *New Zealand Media Ownership 2017* (AUT Centre for Journalism, Media and Democracy, December 2017) at 45 – 46.

[123] Damien Venuto "Four of New Zealand's biggest media companies form ad exchange alliance, aim to take on Google and Facebook" (8 October 2015) StopPress <www.stoppress.co.nz>; see also Eric Frykberg "Social media no competition to journalism – ComCom" (20 October 2017) Radio New Zealand <www.radionz.co.nz>.

[124] Palmer "The Law of Defamation in New Zealand", above n 19, at 352 and 359.

[125] See Jess McAllen "If it's public is it fair game? Why we as media need to change the way we report on social media" (17 February 2016) The Spinoff <www.thespinoff.co.nz>.

[126] *Durie v Gardiner*, above n 8, at [82].

[127] At [82].

[128] At [86].

[129] At [58].

[130] At [59].

[131] At [63].

available to everyone who publishes material of public interest in any medium and does not just protect journalists.[132]

In determining whether the subject matter of a publication was of public interest, French J stated:[133]

> [T]he subject matter should be one inviting public attention, or about which the public or a segment of the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.

This definition is likely to include matters ranging from science and arts to the environment, religion, and morality.[134] Professor Ursula Cheer suggests that it would definitely cover matters in relation to taxes,[135] local government,[136] large businesses, the police,[137] the military, and the secret service.[138] This is a significant addition to defamation law because it recognises the power and importance of the media to disseminate information relating to other topics, besides political discussion, that are of real public interest.[139] However, it is unlikely to open up the door for a person, particularly members of the media, to responsibly publish something that is just of interest to the public. An example of this is gossip or a story that "merely feeds curiosity or prurient interest in the private lives of public figures or celebrities"[140] which turns out to be untrue. Therefore, caution ought to be taken.

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[132] At [59].

[133] At [65].

[134] *Grant v Torstar*, above n 9, at [106].

[135] See *Vigna v Levant* (2010) 223 CRR (2d) 1 (ONSC) at [65] where the Ontario Superior Court of Justice held that publishing information about the spending of tax payers' dollars is a matter of public interest.

[136] Tompkins Wake "Court of Appeal recognizes new public interest defence to defamation claims" (27 September 2018) <www.tompkinswake.co.nz>.

[137] See *Quan v Cusson* [2009] 3 SCR 712 at [31] where the Canadian Supreme Court held that the "misdeeds of those who are entrusted by the state with protecting public safety" is a matter of public interest.

[138] Nine To Noon, above n 1.

[139] Tania Goatley and Harriet Young "Responsible Communication on a matter of public interest – *Durie v Gardiner* [2018] NZCA 278" (2 August 2018) Bell Gully <www.bellgully.com>.

[140] Garry Williams "The new defence of responsible communication on a matter of public interest" (31 August 2018) New Zealand Law Society <www.lawsociety.org.nz>.

In regard to whether the communication was responsible, her Honour stated that this was to be determined by having regard to all the circumstances of the publication.[141] The Court listed relevant factors that may be considered. These include:[142]

(1) the seriousness of the allegation;
(2) the degree of public importance;
(3) the urgency of the matter;
(4) the reliability of the source;
(5) whether comment was sought from the plaintiff and accurately reported;
(6) the tone of the publication; and
(7) the inclusion of a defamatory statement which was not necessary to communicate the matter of public interest.

However, it is important to note that this list is not exhaustive and, in some cases, not all the factors will be relevant.[143] As such, they are not to be applied as "a series of hurdles" which need to be satisfied.[144] Rather, they are to be used "as an illustrative guide to what might constitute responsible [communication] on the facts of a given case".[145] This ensures that the defence does not require such a high standard whereby its availability becomes "illusory"[146] to those who argue it. These factors must also be applied in a "practical and flexible manner with regard to the practical realities and with some deference to the editorial judgment of the publisher".[147] This is due to journalists often facing tight deadlines and having to make snap decisions. Therefore, if we scrutinise them too much, then media freedom is undermined.[148] As such, there should be no hindsight bias.

[141] *Durie v Gardiner*, above n 8, at [66].
[142] At [67].
[143] At [68].
[144] *Jameel v Wall Street Journal Europe* [2007] 1 AC 359 (HL) at [33] per Lord Bingham; see also David Hooper "The Importance of the *Jameel* Case" [2007]18 Ent LR 62 at 62; Russell L Weaver and others "Defamation Law and Free Speech: *Reynolds v Times Newspapers* and the English Media" (2004) 37 VJTL 1255 at 1303-1307; and A J Bonnington "*Reynolds* Rides Again" (2006) 11 Comms L 147.
[145] *Grant v Torstar*, above n 9, at [73]; see also Kate Beattie "New Life for the *Reynolds* 'Public Interest Defence'? *Jameel v Wall Street Journal Europe*" (2007) 1 EHRLR 81.
[146] *Grant v Torstar*, above n 9, at [73].
[147] *Grant v Torstar*, above n 9, at [68].
[148] Jacob Rowbottom *Media Law* (Hart Publishing, Oxford, 2018) at 92.

IV An Evaluation of the New Public Interest Defence

Overall, the recognition of a public interest defence has been viewed as a great thing for New Zealand.[149] However, it is not free from any issues. This section, therefore, aims to evaluate the defence. It will discuss three things. First, it will evaluate whether the defence achieves the right balance between the rights of freedom of expression and protection of reputation. Second, it will discuss whether the defence will extend to criminal accusations. Finally, it will discuss whether the Court of Appeal was correct to recognise the defence as a discrete one, rather than as a species of qualified privilege.

A The Right Balance Between Right to Reputation and Freedom of Expression?

As has been mentioned, defamation law is about balancing two conflicting rights: the right to freedom of expression and the right to protection of reputation.[150] This section examines whether the recognition of a public interest defence in New Zealand achieves the right balance. It will discuss three things before concluding that the defence does achieve the right balance between the two conflicting rights. First, it will briefly discuss the application of NZBORA in defamation law. Second, it will analyse the "chilling effect" in New Zealand and how the public interest defence reduces it. Finally, it will discuss the defence's impact on the right to protection of reputation.

1 NZBORA

Freedom of expression is enshrined in s 14 of NZBORA where it is stated that "[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."[151] On the other hand, the right to protection of reputation is not enshrined in NZBORA. This may suggest New Zealand places greater importance on freedom of expression. However, s 28 of NZBORA states

[149] See Williams, above n 140; Radio New Zealand "Court recognises new public interest defence in defamation claims" (31 July 2018) <www.radionz.co.nz>; Sophie Boot and Sam Hurley "Court of Appeal recognises new public interest defence to defamation claims" (31 July 2018) The New Zealand Herald <www.nzherald.co.nz>; Leith Huffadine "Why new public interest defence for defamation cases matters" (1 August 2018) Stuff <www.stuff.co.nz>; Chapman Tripp "New public interest defence to defamation claims" (1 August 2018) <www.chapmantripp.com>; Morning Report, above n 101; and Māori Television "Māori Television leads new defence in defamation cases" (31 July 2018) <www.maoritelevision.com>.

[150] Dario Milo *Defamation and Freedom of Speech* (Oxford University Press, New York, 2008) at 1.

[151] New Zealand Bill of Rights Act, s 14.

that rights which are not expressed are not affected.[152] The Court of Appeal has held that the right to protection of reputation is one such right.[153]

It must also be noted that NZBORA was intended to only have vertical effects. This means it would only apply and protect private citizens against the three branches of government and bodies exercising public functions.[154] However, Tipping J has stated that NZBORA will "inform the development of the common law in its function of regulating relationships between citizen and citizen."[155] This has been evident within defamation law where the courts have considered and given effect to NZBORA.[156] *Durie v Gardiner* is also consistent with this as French J considered the "increasing prominence of [NZBORA] including the right to freedom of expression in our jurisprudence" as a factor in favour of recognising a public interest defence.[157]

2 The "Chilling Effect"

The term "chilling effect" originates from the United States of America in the context of its First Amendment right to free speech.[158] Frederick Schauer suggests that "[a] chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from doing so".[159] Its impact in New Zealand, in the sphere of defamation law, was put elegantly by Elias J (as she then was) in the High Court decision of *Lange*. Her Honour said:

> The basis of the concern is a recognised "chilling effect" which inhibits dissemination of information and comment on matters of public interest because of the risk of liability in damages or exposure to costly litigation. Because of the uncertainties of outcome in litigation, the difficulties of proof in a manner acceptable in Court, and the costliness of the process, defamation laws are feared to inhibit not only false speech made in good faith but true speech as well.

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[152] New Zealand Bill of Rights Act, s 28.

[153] *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA) at 56.

[154] New Zealand Bill of Rights Act, s 3.

[155] *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [229]; see also Andrew Geddis "The Horizontal Effect of the New Zealand Bill of Rights Act as applied in *Hosking v Runting*" [2004] NZ Law Rev 681.

[156] *Lange HC*, above n 49, at 32; *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722 at [141]; and *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [67].

[157] *Durie v Gardiner*, above n 8, at [56].

[158] United States Constitution, amend I.

[159] Frederick Schauer "Fear, Risk, and the First Amendment: Unravelling the 'Chilling Effect'" (1978) 58 BU L Rev 685 at 693; see also *New York Times v Sullivan* 376 US 254 (1964).

Prior to the recognition of the public interest defence, defamation law was inconsistent with freedom of expression and produced a chilling effect that limited the ability of the media, in some cases, to report on matters in the public interest.[160] This was the case even with the extension of qualified privilege recognised in *Lange*. The law prevented the free flow of information outside of political discussion. This is because a publisher had to be certain they could establish a defence of honest opinion or truth before publishing a statement just in case a defamation claim was ever brought against them.

As a result, even if a publisher had acted responsibly by verifying the facts and reliability of sources, they may have refrained from publishing an important story in the public interest due to the risk of being sued if their story was found to be false.[161] This could have been a strong disincentive to engage in reporting where there is a higher risk of error but where there was a genuine public interest.[162] Accordingly, this also had the further effect of preventing the public from ever learning about the full truth on a particular matter in the public interest.[163] McLachlin CJ in the Canadian Supreme Court described this effect as turning defamation into "a weapon by which the wealthy and privileged stifle the information and debate essential to a free society."[164]

The recognition of a public interest defence *reduces* the chilling effect out of defamation because a publication no longer must be true or an honest opinion. It also shifts the focus from what was published to the steps taken to produce a fair, accurate and balanced report.[165] This recognises the importance of investigative journalism in an effective democracy and promotes the free exchange of ideas which is an "essential precondition of

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[160] See Ursula Cheer "Reality and Myth: The New Zealand Media and the Chilling Effect of Defamation Law" (PhD in Law Dissertation, University of Canterbury, 2008) at 231-232; Ursula Cheer "The Chilling Effect – Defamation and the Bill of Rights" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (LexisNexis, Wellington, 2008) 363 at 364-365; Ursula Cheer "Defamation in New Zealand and Its Effects on the Media – Self-Censorship or Occupational Hazard?" [2016] NZ L Rev 467 at 524; and Ursula Cheer "Myths and Realities About the Chilling Effect: The New Zealand Media's Experience of Defamation Law" (2005) 13 TLJ 259 at 299.

[161] *Grant v Torstar*, above n 9, at [53]; see also Eric Barendt and others *Libel and the Media: The Chilling Effect* (Oxford University Press, New York, 1997) at 190-191.

[162] Rowbottom, above n 148, at 89.

[163] *Grant v Torstar*, above n 9, at [54].

[164] *Grant v Torstar*, above n 9, at [39].

[165] Dean Jobb "Court rulings dissect responsible communication defence" JSource <www.j-source.ca>.

the search for truth".[166] Accordingly, the more information that is disseminated into the public sphere, the more likely misconceptions and errors are likely to be exposed and what survives will usually be the truth. This is fundamental to a functioning democratic society.[167]

The defence's recognition also loosens "the shackles on the freedom of expression afforded to the media in matters of public interest."[168] The media and even non-media now have more freedom to report on matters in the public interest that extends beyond political discussion about Members of Parliament. As such, stories criticising business leaders, public servants, lobbyists, journalists and others on a matter of public interest no longer have to be diluted or suppressed so much that they lose all impact. This is an important breakthrough because it never made sense why the privilege recognised in *Lange* was limited to political discussion about Members of Parliament, particularly when there are other public figures who affect our lives.[169]

It is, however, important to reiterate that the recognition of a public interest defence only *reduces* the chilling effect and some chill will remain. A defendant would still need to establish that what they are publishing is in the public interest and that they have behaved responsibly.[170] This responsibility element will often be difficult to assess as it depends on the circumstances.[171] This may cause a degree of uncertainty, particularly in borderline cases.[172] Therefore, a publisher may not be confident that they would satisfy this test and may refrain from publishing something even if it is in the public interest. The difficulties of assessing responsibility is more so for non-media individuals. This will be discussed in Part V.

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[166] *R v Keegstra* [1990] 3 SCR 697 at [173] per McLachlin J dissenting; see also Dean Jobb "Responsible Communication on Matters of Public Interest: A New Defence Updates Canada's Defamation Laws" (2010) 3 J Int'l Media & Ent L 195 at 217.

[167] *Switzman v Elbling* [1957] SCR 285 at 306 per Rand J; see also Rowbottom, above n 148, at 89.

[168] *Charman v Orion Group Publishing Ltd* [2008] 1 All ER 750 (CA) at [71] per Ward LJ.

[169] Cheer "Defamation", above n 6, at 930 – 931; see also Cheer "The Influence of Canadian Charter Jurisprudence on Freedom of Expression in Defamation in New Zealand", above n 67, at 25; and *Reynolds*, above n 55, at 625 per Lord Nicholls.

[170] *Durie v Gardiner*, above n 8, at [58].

[171] At [69].

[172] *Reynolds*, above n 55, at 623 per Lord Nicholls.

3 Protection of Reputation

The recognition of a public interest defence shifts the focus from the truth or falsity of the defamatory statements to whether or not the defendant acted responsibly.[173] This facilitates the publication of untrue statements which can ruin a person's reputation, as the defence would only apply when a publisher has gotten something wrong. Therefore, a person who has had their reputation ruined would be left without a remedy. This appears to tip the balance in favour of freedom of expression and erode on the right to reputation.

However, this is misconceived. The defence does effectively balance the two rights because the defendant must show they behaved responsibly for it to succeed.[174] This element is essentially a safeguard for reputation because it incentivises publishers to make sure they get things right. It also illustrates that "[a]n individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway" to free speech.[175] Lord Nicholls emphasises this further in *Bonnick v Morris* where his Lordship stated:[176]

> Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputation of individuals. Maintenance of this standard is in the public interest and the interest of those whose reputations are involved.

Also, even though the defence allows the media to engage in investigative reporting without the automatic risk of a defamation suit, this does not mean the media and other reporters should, and will, publish everything. It can be expected that they would adhere to their ethical practices to verify and obtain the plaintiff's side of the story before publication. Therefore, even though journalists are given considerable latitude by the new defence, they still have a price to pay for it by meeting a standard of responsible communication.[177] This justifies the damage which may be caused to a person's reputation when something is in the public interest.

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[173] *Grant v Torstar*, above n 9, at [60].

[174] *Durie v Gardiner*, above n 8, at [58].

[175] *WIC Radio v Simpson* [2008] 2 SCR 420 at [2].

[176] *Bonnick v Morris* [2003] 1 AC 300 (PC) at [23].

[177] Sarah Gale "Qualified Privilege in Defamation and the Evolution of the Doctrine of Reportage" (2015) 23 Tort L Rev 1 at 5.

B Could it Extend to Criminal Accusations?

In *Durie v Gardiner*, the Court of Appeal was silent as to whether or not the new public interest defence could extend to criminal accusations. Therefore, there is some uncertainty as to whether it would apply to these statements, especially in light of the Court of Appeal's decision in *Vickery v McLean*. In that case, the Court of Appeal held that generally published allegations of criminal conduct could not be protected under *Lange* qualified privilege because it is "demonstrably not in the public interest to have criminal allegations, even if bona fide and responsibly made, ventilated through the news media."[178] Tipping J expressed concern that mass publication of criminal accusations, before they had been properly investigated, would result in the denigration of the criminal justice system.[179] This is because it would lead to trial by media.[180]

The New Zealand position in *Vickery* is in contrast to other common law jurisdictions, such as the United Kingdom and Canada, where the courts have held that a public interest defence could extend to mass publications of criminal accusations in certain circumstances.[181] This section will briefly set out how criminal accusations are dealt with under a public interest defence in these jurisdictions. It will then be argued that if the issue were to arise in New Zealand, then *Vickery* should not be followed.

1 United Kingdom

The leading decision on this issue is *Flood v Times Newspapers Ltd*. In that case, Flood was a detective with the Extradition Unit of the Metropolitan Police Service.[182] *The Times* published an article alleging the plaintiff had been accused of corruption for taking bribes from Russian exiles and was under investigation.[183] After six months, the police investigation concluded that there was no evidence that the plaintiff had acted corruptly.[184] The plaintiff sued in defamation.

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[178] *Vickery v McLean* [2006] NZAR 481 (CA) at [19].

[179] At [19].

[180] At [19]; see also William Steel "Responsible publication of criminal accusations in New Zealand – the case for change" (LLB (Hons) Dissertation, Victoria University of Wellington, 2013) at 22 for a detailed analysis on the merits of this point.

[181] See *Flood v Times Newspapers Ltd* [2012] 4 All ER 913 (SC); and *Grant v Torstar*, above n 9, at [111].

[182] *Flood*, above n 181, at [2] per Lord Phillips.

[183] At [2] per Lord Phillips.

[184] At [2] per Lord Phillips.

The United Kingdom Supreme Court found it was in the public interest for the accusations to be published.[185] This was emphasised by the fact that the accusations were made against a police officer who had an important public function to play in society.[186] Lord Mance also considered that a journalist's motivation in publishing an article could be relevant to the public interest inquiry.[187] Here, the journalist was concerned the police were not investigating the allegations property.[188] Therefore, it was in the public interest to publish the article as this would encourage a thorough investigation. Additionally, the Court accepted that it was in the public interest for Flood to be named because an anonymous article would have led to the unfortunate result of the entire Extradition Unit being blamed.[189]

The Court also found that *The Times* had acted responsibly in publishing the article. It found that *The Times* had taken reasonable steps to verify the allegations by obtaining as much information as they could and insisting to meet the unnamed source in person.[190] The article itself was also examined and found to be "balanced in content and tone".[191] It indicated that the references to the corrupt police officer only suggested it was Flood, not that it was actually him who accepted bribes.[192] The article also expressed that it was based on information from an unnamed source and that all the parties concerned had been approached and offered the opportunity to comment.[193] It also presented Flood's denial of the allegations.[194]

2 Canada

Canada has not had a case which directly deals with this issue. However, in *Grant v Torstar*, where a public interest defence to defamation claims was first recognised, the Supreme Court did expressly acknowledge that allegations of "corruption or other criminality" may

[185] At [179] per Lord Mance, [68] per Lord Phillips, [119] per Lord Brown, [185] per Lord Clarke, and [195] per Lord Dyson.
[186] At [119] per Lord Brown, [178] per Lord Mance, [185] per Lord Clarke, and [195] per Lord Dyson.
[187] At [165] per Lord Mance.
[188] At [165] per Lord Mance.
[189] At [74] per Lord Phillips, [113] per Lord Brown, and [169] per Lord Mance.
[190] At [156] per Lord Brown.
[191] At [180] per Lord Brown.
[192] At [4] per Lord Phillips.
[193] At [180] per Lord Mance.
[194] At [4] per Lord Phillips, and [180] per Lord Mance.

be a matter of public interest.[195] The Court also recognised that such allegations are serious and "demand more thorough efforts at verification than will suggestions of lesser mischief."[196] This appears to increase the standard of responsibility required by the defendant.

3 What New Zealand Should do?

The United Kingdom and Canadian jurisprudence shows us that the Court of Appeal took a wrong turn in *Vickery* and that the public does have an interest in knowing about serious criminality in certain circumstances.[197] Also, if the *Vickery* position on criminal accusations were to remain, then this would have "an undesirable chilling effect"[198] in the law, as it would undermine the desire in *Durie v Gardiner* to facilitate public discussion and evaluation of matters which are in the public interest. It also does not make sense to exclude criminal accusations from the ambit of a public interest defence. This is pointed out by Professor Burrows who states that "[i]t would be ironic if wrongdoing so serious as to criminal conduct could never be disclosed to the voting public whereas lesser peccadillos could."[199]

Furthermore, Professor Cheer appears to argue that the availability of such a defence to criminal accusations would not always succeed as there would be a higher standard of responsibility required by the defendant.[200] It is likely that this would be a sliding scale. Thus, the more serious the allegations, the higher the standard of responsibility required by the defendant. This would be consistent with how the defence was applied in *Flood*. Also, it is likely that whenever criminal allegations are sought to be published, responsible communication would *always* require the defendant to make diligent efforts to contact and seek comment from the person who is being defamed.[201] If a publisher is unable to do this, they should refrain from publishing the accusations as the chances of a successful defamation claim brought against them would increase.

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[195] *Grant v Torstar*, above n 9, at [111].

[196] At [111].

[197] Nine To Noon "Law with Ursula Cheer" (Podcast, 28 March 2012) Radio New Zealand <www.radionz.co.nz>.

[198] Steel, above n 180, at 26.

[199] John Burrows "Media Law" [2002] NZ L Rev 217 at 218.

[200] Nine To Noon "Law with Ursula Cheer", above n 197.

[201] *Hansen v Tilley* (2009) 177 ACWS (3d) 551 (BCSC) at [64].

C A Discrete Defence and not a Species of Qualified Privilege

As was mentioned above in Part III, the public interest defence is not an extension or species of qualified privilege like the *Lange* extension.[202] Instead, the Court of Appeal recognised it as a discrete defence and abolished the form of qualified privilege recognised in *Lange*.[203] This section argues that the Court was correct to do this. It will also examine why the Court abolished *Lange* and how the new defence will impact common law qualified privilege.

1 Why the Court was Correct

It has been suggested that a public interest defence based on responsible communication is a form of qualified privilege because it is consistent with the reciprocal duty test from *Adam v Ward* mentioned in Part II. The rationale for this was that if the subject matter is in the public interest, then the duty-interest element follows automatically and if the publisher had acted irresponsibly, then there is no interest to receive the information.[204] However, this reasoning is problematic and only "superficially attractive".[205] It is artificial to say that if something is in the public interest, the media have a moral or social duty to communicate it and the public has a moral or social duty to receive it if it has been communicated responsibly and that if it has not been communicated responsibly, then there is no reciprocal interest. This is because, in reality, if something is not communicated responsibly, there may still be a moral or social duty to receive the information, especially if the matter is in the public interest. As such, it is more coherent to treat the public interest defence as "a different jurisprudential creature from the traditional form of qualified privilege".[206] There are three reasons for this.

First, qualified privilege traditionally arose because of the occasion on which the publication occurred. The occasion being one where there was a reciprocal duty to publish and receive the information. Alternatively, a public interest defence does not arise from the occasion. Instead, it arises because the subject matter of the publication is a matter of public

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[202] *Durie v Gardiner*, above n 8, at [82].

[203] At [82] and [86].

[204] *Reynolds*, above n 55, at 657 per Lord Hobhouse; see also Cheer, above n 20, at 140 – 141.

[205] Cheer, above n 20, at 126.

[206] *Loutchansky v Times Newspapers Ltd* [2002] All ER 652 (CA) at [35]; *Jameel*, above n 144, at [46] per Lord Hoffmann and [146] per Baroness Hale; and *Flood*, above n 181, at [38] per Lord Philips.

interest.[207] Therefore, focus is placed on the substance of the publication, rather than on the occasion. As such, it is awkward to treat it as a form of qualified privilege.

Second, unlike qualified privilege, there appears to be no question as to whether the privilege has been lost. In effect, there is no shifting of the onus onto the plaintiff to prove there was malice under s 19 of the Defamation Act. This is because part of the defence is that the defendant must show they behaved responsibly. This will take into account the propriety of the defendant's conduct.[208] Therefore, if it is satisfied that the defendant did act responsibly, then we can infer the defendant did not act with any malice.[209] This appears to leave no room for a s 19 inquiry.[210] As such, it has no relevance when a public interest defence is argued.

Finally, as has been recognised by the Canadian Supreme Court, qualified privilege is developed based on the underlying principle that certain communications, even if untrue, ought to be protected from civil liability because of its social utility to society.[211] The recognition of a public interest defence is not grounded on such a principle. Instead, it has developed "more like a rights-based defence",[212] particularly focusing on freedom of expression values and the failure of the current law to achieve the right balance between this right and the right to protection of reputation.[213] Thus, it is conceptually incoherent to treat it as a form of qualified privilege.

2 *Abolishment of* Lange *Privilege*

The Court of Appeal in *Durie v Gardiner* abolished the privilege recognised in *Lange*. It stated that it had been "effectively subsumed in the new defence".[214] It could be suggested that this was not necessary, and that political discussion could continue to operate as a separate category governed by *Lange*. However, this section argues that it would be incoherent and confusing to do so.

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[207] *Grant v Torstar*, above n 9, at [92].

[208] *Durie v Gardiner*, above n 8, at [83].

[209] *Lougheed Estate v Wilson* 2014 BCSC 2073 at [105].

[210] *Durie v Gardiner (HC)*, above n 110, at [60].

[211] *Grant v Torstar*, above n 9, at [94].

[212] Cheer "The Influence of Canadian Charter Jurisprudence on Freedom of Expression in Defamation in New Zealand", above n 67, at 27.

[213] *Durie v Gardiner*, above n 8, at [56].

[214] *Durie v Gardiner*, above n 8, at [86].

Professor Cheer states that political discussion is certainly something that would come within the public interest defence.[215] It is also likely that most publications where a public interest defence would be relied on is where there has been a publication relating to political matters. The Court of Appeal rightfully recognises this and states that to govern these matters by "qualified privilege would be highly unsatisfactory."[216]

There would also be confusion for people if there were two defences available.[217] This is caused by the way in which the two defences operate. Under *Lange,* the privilege is easily obtained and it is up to the plaintiff to argue that the defendant acted with malice or was reckless as to the truth of the statement in order to negate the privilege.[218] Alternatively, under the new public interest defence there is no shifting of the burden.[219] Instead, the burden stays on the defendant to argue the publication is in the public interest and that they behaved responsibly.[220] It does not make sense to retain a conceptually different test for publications relating to political discussion when the same outcome is likely to occur under a public interest defence based on responsible communication.

3 Impact on Common Law Qualified Privilege

Since the new defence subsumes the privilege recognised in *Lange*, qualified privilege will return to its traditional form as defined in *Adam v Ward*.[221] This would narrow the application of qualified privilege to situations where a reciprocal duty and interest to publish and receive the information exists between persons or a group of persons. In particular, it would apply in situations where the subject matter is not one of public interest, but there is still a reciprocal duty between the person publishing it and the person or group of persons receiving it. However, even if the subject matter is in the public interest, then common law qualified privilege could be an easier alternative to take if the information has only been distributed to a person or a group of persons and a reciprocal duty exists. This is because the person who published the statement would not bear any onus to establish that they behaved responsibly. Rather, the burden would be on the plaintiff to show that the

[215] Nine To Noon, above n 1.
[216] *Durie v Gardiner*, above n 8, at [85].
[217] *Durie v Gardiner*, above n 8, at [85].
[218] *Lange (No 2)*, above n 56, at [39].
[219] *Durie v Gardiner*, above n 8, at [59].
[220] At [58].
[221] *Adam v Ward*, above n 31, at 334 per Lord Atkinson.

privilege has been lost because the defendant was malicious or took improper advantage of the occasion.[222]

Overall, this is a beneficial outcome because the reciprocal duty test in *Adam v Ward* does not appear to suggest qualified privilege was intended to ever extend to false information published to the public generally. Rather, the case law in multiple jurisdictions, such as the United Kingdom, Canada, and Australia, appears to suggest it was intended to only apply to communications between persons, or a group of persons.[223]

V How Would the Defence Apply to Non-media Defendants?

What is significant about this defence is that it does not just protect the mainstream media.[224] The protection extends to non-media defendants. This would include people who publish on blogsites and social media platforms, such as Facebook, Twitter, and Instagram. The Court of Appeal in *Durie v Gardiner* does not elaborate on how the responsibility factors of the defence would apply to non-media defendants. However, it does acknowledge there will be difficulties in doing this but that it can be worked out on "a case by case basis".[225]

This Part seeks to provide some guidance as to how the defence would apply to non-media defendants. Particular focus will be placed on Twitter-users, and bloggers. It will discuss two things. First, it will explain how technology has led to an increase in people other than the media disseminating information to the general public. Second, it will discuss how the New Zealand courts could analyse the responsible communication element of the defence for non-media defendants.

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[222] Defamation Act, s 19.

[223] See *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL); *Laughton v Bishop of Sodor and Man* (1872) LR 4 PC 495 (PC); *Adams v Coleridge* (1884) 1 TLR 84 (QB); *Lawless v Anglo-Egyptian Cotton and Oil Co* (1869) LR 4 QB 262 (QB); *Loveless v Earl* [1999] EMLR 530 (CA); *Daniels v British Broadcasting Corp* [2010] EWHC 3057 (QB); *Toogood v Spyring*, above n 22; *Jones v Bennett*, above n 15; *Hunter v Chandler* (2010) 189 ACWS (3d) 262 (BCSC); *Attorney-General v Wright* [2007] NZAR 740 (HC); and *Ryabikhina v St Michael's Hospital* (2011) 200 ACWS (3d) 996 (ONSC).

[224] *Durie v Gardiner*, above n 8, at [59].

[225] At [60].

A Technology and Non-media Individuals

In a changing world where technology is becoming more dominant, the principles of defamation have become more complicated and magnified in the technological age. The traditional model of news publishing and dissemination of information involved the use of radio, television, and newspapers.[226] Those who used these methods to disseminate information are known as the mainstream media.[227] However, new technologies and the Internet have driven a revolution in regard to the distribution of information.[228] These new technologies have come in the form of blogsites and social media platforms, which are available to everyone and allow for instantaneous communications.[229] Therefore, the mainstream media no longer holds a monopoly over the dissemination of news and commentary. This has led to many information disseminators falling outside of the traditional model of radio broadcasts, television and newspapers. Moreover, it has also led to a significant increase in non-media individuals disseminating information to the general public.[230] These non-media individuals have often been described as "citizen journalists".[231]

B What is Responsible Communication for Non-media Defendants?

There are conceptual difficulties in applying the responsible communication factors to non-media defendants. This is because they are aimed at investigative journalism and are drawn from the professional standards of the mainstream media.[232] Eric Barendt has acknowledged there may be difficulties in modifying these requirements to accommodate non-media defendants using new technologies.[233] If we require non-media defendants to have the same standard of responsibility as the mainstream media, then this would limit

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[226] Law Commission *The News Media Meets "New Media": Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at [34].

[227] Tobin and Harvey, above n 26, at 1.

[228] Tobin and Harvey, above n 26, at 28.

[229] McCague Borlack "Defamation in the Internet Age: The Law and Social Media" (June 2017) <www.mccagueborlack.com>.

[230] McCague Borlack, above n 229.

[231] *Durie v Gardiner*, above n 8, at [56].

[232] Gale, above n 177, at 4; and Hillary Young "The scope of Canada's responsible communication defence" in Andrew Kenyon (ed) *Comparative Defamation and Privacy Law* (Cambridge University Press, Cambridge, 2016) 17 at 21.

[233] Eric Barendt "*Reynolds* revived and replaced" (2017) 9 Journal of Media Law 1 at 12.

freedom of expression.[234] However, if these requirements of responsibility are abandoned when assessing non-media defendants, then this would strike a balance too much in favour of freedom of expression to the detriment of reputation rights.[235]

To get around these conceptual difficulties of applying the responsible communication factors to non-media defendants, Steven Price suggests that what is responsible will depend on the type of publisher and the platform they are disseminating information on.[236] In light of this, the paper will now discuss how we can evaluate responsible communication for a Twitter-user, and a blogger. It will also make some recommendations to non-media defendants who use social media and blogsites generally.

1 Twitter-users

Twitter is a social media platform in which people communicate in short messages of no more than 280-characters called "tweets".[237] These tweets are viewed by other Twitter-users who have decided to "follow" the Twitter-user.[238] Twitter has become one of the leading social media platforms in the world. [239] This popularity has led to some users becoming the subject of defamation claims in recent times.[240] However, there has not yet been any cases within the common law which have examined how a public interest defence would apply to a non-media Twitter-user.

The number of followers a Twitter-user has should be a key determinant in determining the standard of responsibility.[241] The more followers would mean there is a higher standard of responsibility because the statement is disseminated to a greater number of people and has the potential to cause greater harm. As such, we would expect celebrities and other

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[234] Ian Cram *Citizen Journalists: Newer Media, Republican Moments and the Constitution* (Edward Elgar Publishing, Cheltenham, 2015) at 140 – 143.

[235] Barendt, above n 233, at 12.

[236] Steven Price "What the new public interest defence really means for media and defamation" (2 August 2018) The Spinoff <www.thespinoff.co.nz>.

[237] Paul Gil "What is Twitter & How Does It Work?" (5 February 2018) Lifewire <www.lifewire.com>.

[238] Gil, above n 237.

[239] Statista "Most famous social network sites worldwide as of July 2018, ranked by number of active users (in millions)" (July 2018) <www.statista.com>.

[240] See for example *Elliot v Flanagan* [2017] NI 264 (QB); *Monroe v Hopkins* [2017] EWHC 433 (QB); *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB); *Rizvee v Newman* 2017 ONSC 4024; and *Murray v Wishart*, above n 156.

[241] Paul Bernal "A defence of responsible tweeting" (2014) 19 Communications Law 12 at 17.

high-profile individuals, who are not part of the media, to exercise more caution before sending out a tweet.

It is likely a non-media Twitter-user would not be expected to "fact check" to the extent the mainstream media would have to. This is especially the case if they are relying on mainstream media news sources. However, there is likely to be an expectation that a Twitter-user would check any links or sources they rely on or attach to their tweet before publishing it.[242] This would involve checking to see whether the source is credible. It would also involve the Twitter-user checking to see if, on the face of the source, there is something wrong or contradictory. If a Twitter-user did suspect that something on the face of the source was wrong or contradictory to what they know or what has been said in the past, then this would be a factor to suggest they behaved irresponsibly.

As mentioned above, a tweet has a limit of 280-characters.[243] This would make it difficult for a Twitter-user to be able to give both sides of the story and achieve a balanced tone in publishing their statements. As such, it must be taken into consideration and be a key element in determining whether or not a Twitter-user has behaved responsibly. However, if it was possible for the Twitter-user to not include the defamatory statement when communicating on the matter of public interest, then this would be a factor suggesting irresponsible behaviour.

2 Bloggers

Assessing whether a blogger has acted responsibly is more contentious. In *Slater v Blomfield*, Asher J acknowledged that there was a difference between bloggers and the mainstream media.[244] However, his Honour held that if a blogsite has the purpose of disseminating news and there is some commitment to publishing news regularly, then the blogger *could* be considered a journalist.[245] Applying this reasoning in the context of the public interest defence suggests a sliding scale in determining the standard of responsibility required of a blogger. As such, it is possible that a blogger could be held to a similar standard as an investigative journalist.

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[242] Bernal, above n 241, at 17.

[243] Aliza Rosen (@alizar) "Excited to share that after weeks of extensive data analysis and feedback, we're expanding our character limit to 280!" <https://twitter.com/alizar/status/928004625600479232>.

[244] *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835 at [48].

[245] At [54].

Canadian jurisprudence has also shown that a blogger can be held to the same responsibility standard as an investigative journalist. In *Vigna v Levant*, the defendant published defamatory statements about the plaintiff on his blogsite.[246] Despite being a blogger, the Court nevertheless referred to the responsibility requirements (which are the same as in New Zealand) and assessed the defendant as if he was an investigative journalist.[247] The Court appears to have done this because the defendant was not only a blogger, but was also a journalist, political commentator and lawyer.[248] This suggests a blogger's characteristics would be considered in assessing whether or not they behaved responsibly.

Drawing guidance from the *Slater v Blomfield* and *Vigna v Levant* decisions, it can be inferred that whether a blogger has behaved responsibly would depend on their particular characteristics, resources, and the audience size of the blog. This is because we cannot presume a blogger, even one who could be considered a journalist under *Slater* would have the resources to carry out the necessary checks similar to a mainstream media outlet.[249] This is consistent with Matthew Collins who states that more leeway would be accorded to a diligent blogger who publishes defamatory statements if they have made all the inquires that were reasonably available to them, than to a journalist who publishes the same allegations without pursuing the full range of additional investigations and sources available to them by reason of their professional standing and associations.[250] Nevertheless, for a blogger to establish that they behaved responsibly we would expect them to check any links and sources they have used in putting their blog post together. This is similar to a Twitter-user. However, unlike Twitter where the character-limit is capped at 280, blog posts often do not have such restrictions. Bloggers are therefore expected to attempt to give both sides of the story and achieve a balanced tone. At the very least, we would expect a blogger to give the person defamed a right of reply.[251] If this does not happen, then this would infer irresponsible behaviour.

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[246] *Vigna v Levant*, above n 135, at [2].

[247] At [66] – [85].

[248] At [3].

[249] Gale, above n 177, at 4.

[250] Matthew Collins *Collins on Defamation* (Oxford University Press, New York, 2014) at [12.77]; see also Jacob Rowbottom "In the shadow of the big media: freedom of expression, participation and the production of knowledge online" (2014) 3 Public Law 491 at 499.

[251] Young, above n 232, at 31.

3 General Recommendations

There are four things non-media defendants using social media or blogsites could do to avoid defamation claims being brought against them, or at the very least bolster their chances of establishing a public interest defence if they are reporting on a matter that is in the public interest. First, non-media individuals should treat everything they say on the Internet as if it was going to be published in a newspaper or broadcast on the radio or television. This means they should, to the best of their ability and with the resources they have available to them, verify facts and be aware of the potential size of the audience of their statement. Verifying facts would involve checking to make sure any links and resources used are from credible sources. Second, depending on character-limits, a non-media defendant should always try and give both sides of the story and achieve a balanced tone. Third, if a non-media defendant has doubts as to the truth of a statement, even after doing all they can to verify it, then they should refrain from publishing the statement altogether. Finally, users should tighten up their privacy settings.[252] This would limit the number of people capable of reading the statement and mitigate the harm caused to a person's reputation.

VI Reportage

Reportage protects the neutral reporting of third-party allegations which are important for the fact that they were made, regardless of their truth.[253] Under the previous law, it was not clear whether reportage formed part of defamation law in New Zealand. In *Peters v Television New Zealand*, Andrews J made obiter comments stating that reportage was not supported within the *Lange* framework.[254] However, in *Durie v Gardiner*, a majority in the Court of Appeal recognised that reportage does form part of New Zealand's defamation laws as a subset of the public interest defence.[255]

This section will examine the Court's decision on this issue. Three things will be discussed. First, it will explain when reportage will apply. It will also illustrate how reportage works with reference to two United Kingdom decisions. Second, it will explain the Court of Appeal's ruling on reportage in *Durie v Gardiner*. It will also discuss when its application

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[252] McCague Borlack, above n 229.

[253] Price, above n 99, at 103.

[254] *Peters v Television New Zealand Ltd* HC Auckland CIV-2004-404-003311, 1 October 2009 at [48] and [49].

[255] *Durie v Gardiner*, above n 8, at [81].

would be justified and how it may apply in New Zealand. Finally, it will discuss the difficulties reportage poses to New Zealand's defamation laws.

A When Does Reportage Apply?

Reportage may apply when the public is entitled to be informed of third-party allegations, without having to wait for the publisher to verify the facts and commit to one side.[256] For reportage to be successfully argued, the publisher must report on the allegations "without adoption or embellishment or subscribing to any belief in its truth"[257] and must do so in a fair, disinterested, and neutral way.[258]

Under reportage, the public interest does not lie in the content of the reported allegations.[259] This distinguishes reportage from cases where the public interest in the published allegation lies in its content. In those cases, the public interest in learning about the allegation lies in the fact that it may be true.[260] Rather, under reportage, the public interest lies in the fact that the allegation has been made in the first place.[261] An illustration of how reportage operates can be seen in the United Kingdom decisions of *Al-Fagih v HH Saudi Research Marketing (UK)* and *Roberts v Gable*.

1 Al-Fagih v HH Saudi Research Marketing (UK)

In this case, the defendants' newspaper published articles about a dispute between two members of a Saudi Arabian political organisation (based in the United Kingdom), Al-Fagih and Al-Mas'aari.[262] The articles had repeated defamatory allegations made by Al-Mas'aari against Al-Fagih. These allegations said that Al-Fagih was a liar and "purveyor of malicious sexual gossip".[263] The defendants took no steps to verify the accuracy of these allegations.[264]

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[256] Matthew Collins *The Law of Defamation and the Internet* (3rd ed, Oxford University Press, New York, 2010) at [13.30].
[257] *Roberts v Gable* [2008] QB 502 (CA) at [53].
[258] *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2002] EMLR 215 (CA) at [52].
[259] Collins, above n 250, at [12.79].
[260] *Flood*, above n 181, at [77] per Lord Phillips.
[261] Collins, above n 250, at [12.79].
[262] *Al-Fagih*, above n 258, at [1] and [2].
[263] At [23].
[264] At [4].

The Court of Appeal held that reportage was available on the facts as a special form of the *Reynolds* defence.[265] There was a public interest in the fact the allegations had been made because it revealed a political dispute within a political organisation.[266] Furthermore, the articles were published in a neutral way,[267] and the newspaper had not adopted or endorsed the allegations.[268]

2 Roberts v Gable

In this case, the defendant's magazine had been following a feud between different factions of the British National Party (BNP).[269] The defendant published an article reporting on the conflicting positions arising from allegations and cross-allegations of criminal offences being made by BNP factions against one another.[270]

Eady J held that the defendant was protected by the defence of reportage. His Honour also reiterated that it was "a special example" of the *Reynolds* defence.[271] There was a public interest in the fact the allegations were made because the BNP regularly placed candidates before the electorate.[272] The defendant also reported the allegations in a neutral way and did not adopt them.[273] Therefore, it did not matter that the defendant did not check the reliability of the source,[274] verify the allegations,[275] or seek comment from the plaintiff.[276] His Honour also emphasised that reportage is focused on the way in which the allegations are reported.[277]

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[265] At [52].
[266] At [49].
[267] At [54].
[268] At [39].
[269] *Roberts v Gable*, above n 257, at [8] and [9].
[270] At [26].
[271] At [60].
[272] At [18] and [27].
[273] At [16] and [34].
[274] At [29].
[275] At [28].
[276] At [32].
[277] At [16].

B The Recognition of Reportage in New Zealand

The majority of the Court of Appeal in *Durie v Gardiner* recognised reportage as a subset of the public interest defence because it rested "on both elements of the new defence."[278] This is in contrast to Brown J who dissented on this point and held that if it was to be recognised, then it should be treated as a discrete defence.[279] The majority held it would be available in "special and relatively rare"[280] circumstances "where the public interest in the fact of the allegation is overwhelming and so compelling on its own that urgent reporting of it is justified without further investigation."[281] This infers that if the circumstances are one of reportage, then the way in which we assess responsible communication differs.

Recognising reportage is partly justified due to its application being rare. An example used by the majority to illustrate a situation where it would be available was where somebody has published allegations made by the Governor-General that a senior Cabinet Minister is taking bribes.[282] This suggests a very high threshold for reportage and it is likely a court would only apply it if the allegations suggest a "possible constitutional crisis"[283] or corruption on the part of an individual who exercises an important public function. The impact that these allegations could have if they are found to be true justifies reporting it right away without first having to investigate and verify them.

The example given by the majority also suggests the source of the allegations would be critical to the inquiry. Therefore, the media and non-media should be weary before publishing third-party allegations. It would not be justified to publish allegations made by anyone without taking steps to investigate and verify them. Accordingly, we would expect reportage to only apply where someone publishes allegations made by a reliable source such as, for example, the Prime Minister, Leader of the Opposition, government ministers, or a chief executive of a government department. Scrutinising the source of the allegations is also crucial if the application of reportage is to be limited to a "rare situation" as the majority of the Court of Appeal intended.[284]

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[278] *Durie v Gardiner*, above n 8, at [72] and [81].
[279] At [113].
[280] At [75].
[281] At [76].
[282] At [76].
[283] *Durie v Gardiner*, above n 8, at [76].
[284] *Durie v Gardiner*, above n 8, at [75].

C The Difficulties of Reportage

The recognition of reportage as a subset of the public interest defence has been welcomed by various people and the media in other jurisdictions.[285] However, its recognition is not free from any difficulties. Reportage is conceptually incoherent and appears to be contrary to the principles of defamation law. There are three reasons for this. First, it undermines the protections provided by defamation law. Second, it is incoherent to place it within the framework of a public interest defence. Finally, it relies on a dichotomy which is fundamentally unsound.

1 Undermines the Protections Provided by Defamation Law

Reportage would be available to protect the republication of a wide range of third-party allegations which could cause significant harm to reputations. This is because as long as there is a public interest in making those allegations, and the publisher does not adopt them, then a public interest defence would be available. The scope of the public interest defence is, therefore, widened. This appears to not strike the correct balance between the rights of freedom of expression and protection of reputation as it opens up the door for more people to be defamed without any recourse to a remedy, despite the allegations being false. It is also incorrect that mass publications should be entitled to more protections at the expense of damaging the reputation of another.

The recognition of reportage also undermines the well-established repetition rule. The repetition rule states that it is not a defence to a defamation action for the defendant to prove they were repeating what they had been told.[286] Instead, every republication of a defamatory statement is to be treated as a new one, and each publisher is liable as if the defamatory statement had originated from them.[287] Busuttil suggests that it does not seem correct that a claimant is unable to obtain any redress because the defendant has not subscribed to or adopted a third-party allegation which they are reporting on and essentially repeating.[288] There is also a fine distinction between determining whether a defendant has

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[285] Jason Bosland "Republication of Defamation under the Doctrine of Reportage – The Evolution of Common Law Qualified Privilege in England and Wales" (2011) 31 OJLS 89 at 109.

[286] *Stern v Piper* [1996] 3 All ER 385 (CA) at 389.

[287] Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [15.15]; see also *Truth (New Zealand) Ltd v Holloway* [1961] NZLR 22 (PC) at 25 – 26.

[288] Godwin Busuttil "Reportage: a not entirely neutral report" (2009) 20 Ent LR 44 at 48.

or has not adopted the allegations.[289] Also, whether the allegations have been adopted or not would unlikely make a difference in how the reputation of the claimant is impacted.[290] This is because, in reality, damage to an individual's reputation is caused by the appearance of a statement in a publication, regardless of whether the publisher subscribed to that statement or not. Therefore, it is not justified to depart from the repetition rule in circumstances where reportage could be argued.

2 Incoherent to place Reportage within the Public Interest Defence

The availability of a reportage argument under a public interest defence may disincentivise defendants from verifying important facts because, in certain circumstances, a defendant would be absolved from taking steps to verify facts in assessing whether they acted responsibly.[291] Kovach and Rosenstiel emphasise that the verification of facts is the essence of journalism.[292] Therefore, it seems incorrect to allow a public interest defence in certain situations when a journalist has not done this. This idea is emphasised by Davies who states:[293]

> Journalism without checking is like a human body without an immune system. If the primary purpose of journalism is to tell the truth, then it follows that the primary function of journalists must be to check and reject whatever is not true.

Furthermore, the idea that a journalist may not have to verify important facts is also inconsistent with the framework of the public interest defence which is based on responsible communication. Usually, responsible communication would involve the defendant verifying important facts, especially if they are part of the mainstream media.[294] It seems counter-intuitive to allow a public interest defence in a situation of reportage when more often than not the journalist who has published the allegations has the ability to verify them. Accordingly, reportage allows journalists to not perform the basic functions of their profession.[295]

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[289] See *Curistan v Times Newspapers Ltd* [2008] 3 All ER 923 (CA) at [54]-[55], which shows the fine distinction between adoption and non-adoption in the context of the repetition rule.

[290] Busuttil, above n 288, at 48.

[291] *Charman*, above n 168, at [48].

[292] See Bill Kovach and Tom Rosenstiel *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect* (Prima Publishing, Rocklin, 2007).

[293] Nick Davies *Flat Earth News* (Vintage Publishing, London, 2008) at 51.

[294] Busuttil, above n 288, at 49.

[295] Davies, above n 293, at 59 – 60.

3 An Unsound Dichotomy

Reportage is based on the idea that the public interest is in regard to the fact the allegations are made and not in the contents of the allegation. This distinction is elusive and would be difficult to apply in practice. Steven Price has described this distinction as "slippery".[296] Even if the allegations are reported neutrally and the defendant does not subscribe to its truth, the fact that it has been made will not avoid the public from concluding as to the truth of the defamatory statement.[297] This is emphasised by the idea that in reality, the possibility that the allegation is true will be material to a defendant's decision to publish.

VII Conclusion

This paper analysed the new public interest defence to defamation claims. Its recognition is a welcome addition to New Zealand's defamation laws and finally puts New Zealand in line with other Commonwealth jurisdictions. In evaluating the defence, this paper found three things. First, the defence does achieve the correct balance between the rights of freedom of expression and protection of reputation. Second, it is likely that the defence would extend to the publication of criminal accusations, despite the Court of Appeal's previous position in *Vickery*. Finally, the Court of Appeal was correct to recognise the defence as a discrete one.

The paper also drew attention to and discussed the uncertainties in applying the defence to non-media defendants. It provided guidance on how the responsibility element could be assessed in relation to social media users, particularly Twitter-users and bloggers. It also put forward recommendations which social media users and bloggers should consider when publishing statements. It will be interesting to see how this will play out in the future as the case law develops.

Furthermore, the recognition of reportage in New Zealand as a subset of the public interest defence was discussed. It was found that reportage should only apply in rare situations where the reporting of third-party allegations suggests a possible constitutional crisis or corruption on the part of person who performs a public function and the source of those allegations is credible. However, it also drew attention to the difficulties that reportage

[296] Steven Price "Defamation – Qualified Privilege" (paper presented to New Zealand Law Society Media Law – "rapid change, recent developments" Seminar, April 2008) at 89.
[297] Nadine Zoë Armstrong "The Emerging Defence of Reportage" (2009) 40 VUWLR 441 at 465.

poses to New Zealand's defamation laws, in particular its incoherence as a subset of the new public interest defence.

Word Count

The text of this paper (excluding cover page, abstract, table of contents, footnotes and bibliography) comprises of exactly 11,959 words.

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