

# The Influence of Canadian Charter Jurisprudence on Freedom of Expression in Defamation in New Zealand

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## 1. Introduction

In this paper, I examine the impact of the Canadian Charter of Rights and Freedoms on defamation law in New Zealand. The topic turned out to be a continuation of my previous work on how the common law could be, and is being, modified in ways which minimise potential chilling effects on freedom of expression. Here I discuss the recent extension of the defence of qualified privilege in both jurisdictions, in the New Zealand *Lange* cases,<sup>1</sup> and in the very recent decision of the Supreme Court of Canada in the *Torstar* case.<sup>2</sup> To my delight, it is also a story of how the common law, (with a little help from statute), is constantly reinvigorating and reinventing itself, not only within separate jurisdictions, but also between them – essentially a rich, robust process of fertilisation and cross-fertilisation of ideas, analysis and experience.

The common law, the essential elements of which were medieval English customs,<sup>3</sup> survived political and constitutional crises, civil wars, and violence and disorder, to become a law of the world by adoption, together with the language, into the British colonies.<sup>4</sup> By then it was generally accepted to be the laws as stated by the judges, otherwise known as case law, bolstered and reinforced by a system of precedent. In such a system, principles of law are derived from decisions in actual cases, but, as Oliver Wendell Holmes explains, each new decision must follow syllogistically from existing precedents.<sup>5</sup> Naturally, such a system carries within it the inherent risk of becoming frozen in time, and so Holmes reveals what he

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<sup>1</sup> *Lange v Atkinson* [1997] 2 NZLR 22 (HC); *Lange v Atkinson* [1998] 3 NZLR 424 (CA) (*Lange No. 1*); *Lange v Atkinson* [2000] 1 NZLR 257 (PC); *Lange v Atkinson* [2000] 3 NZLR 385 (CA) (*Lange No. 2*).

<sup>2</sup> *Grant v Torstar Corp* 2009 SCC 6, (22 December 2009).

<sup>3</sup> Arthur R Hogue, *Origins of the Common Law*, (Indiana University Press: 1966), 227.

<sup>4</sup> Roscoe Pound, *The Spirit of the Common Law*, (Beacon Press, 1963), Ch 1; Hogue above, n. 3, 235.

<sup>5</sup> Oliver Wendell Holmes, *The Common Law*, (Little, Brown and Company, 1923), 35.

refers to as the ‘secret root’ of the common law. The judges, he suggests, are too wise to ‘sacrifice good sense to a syllogism.’ Hence, when case law principles become antique and decrepit ‘new reasons more fitted to the time have been found for them, ...they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.’<sup>6</sup> Importantly, however, this new form has to come from somewhere other than the inside of a judge’s skull. Good common law judges are constantly looking outside of themselves and outside of legal rules established over the centuries to give context to their judgments. In this country they will look to other New Zealand cases, and comparatively to similar cases in other jurisdictions where relevant.

Thus, New Zealand common law, transplanted from the United Kingdom, has been transformed. Sir Ivor Richardson has noted the dramatic fall in the citation of English decisions as a striking feature of the fifty year history of our permanent Court of Appeal.<sup>7</sup> This he puts down to the increasing prominence of indigenous statute law, and a substantial increase in the body of New Zealand case law available for citation since 1960.<sup>8</sup> Although Sir Ivor notes a third development, being our heightened sense of independent nationhood and of our ability to shape our own law independently assisted by the ease of drawing on developments elsewhere,<sup>9</sup> I prefer to see increasing independence as a natural driver of the other developments already noted.

A mark of maturing independence is a continuing interest in the experience of others. In the first 30 years of the New Zealand Court of Appeal, we tended to favour our nearest neighbour, Australia, when citing overseas cases. That has also changed. Whereas Canadian, American and international decisions hardly registered before 1990, now they do, quite significantly.<sup>10</sup> Sir Ivor Richardson suggests this is because of increasing recognition being

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<sup>6</sup> Holmes notes: ‘... just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten’. See above, n. 5, 35-36.

<sup>7</sup> ‘The Permanent Court of Appeal: Surveying the 50 years’, in *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years*, Ed Rick Bigwood, (Hart Publishing, 2009), 297, 309.

<sup>8</sup> Ibid, 310-311.

<sup>9</sup> Ibid, 310.

<sup>10</sup> Ibid, 311. In 2007, the figure was almost 5 percent of cases cited by the Court of Appeal. See also Jeremy Finn, ‘Sometimes Persuasive Authority: Dominion Case Law and English Judges, 1895-1970,’ in *The Grand Experiment – Law and Legal Culture in British Settler Societies*, Eds Hamar Foster, Benjamin L Berger, and A R Buck (UBCPress, 2008), 101.

given to international human rights and treaties, and reflects the experience and receptiveness of our increasingly travelled judges and lawyers.<sup>11</sup>

The discussion of the *Lange* cases and *Torstar* which follows demonstrates that these two cases have all these features. I will suggest that the most recent advances within the common law of defamation in New Zealand, in which new reasoning has been found, and new content and forms developed, appear to be significantly influenced by the Canadian Charter and by the contemporaneous development of human rights jurisprudence in a number of jurisdictions. More than this, I will suggest the New Zealand jurisprudence has played a significant part in recent development of Canadian defamation law. Like Holmes, I regard this as a process of growth, where law always approaches, but never quite reaches, consistency. To adapt Holmes, the common law ‘... is forever adopting new principles from [national and international] life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off.’<sup>12</sup>

## **2. Freedom of expression, the Bill of Rights and defamation in New Zealand**

Of course, freedom of expression<sup>13</sup> existed as a right prior to the enactment of the New Zealand of Rights Act 1990 (the Bill),<sup>14</sup> but this ‘über-right’ and indeed, all of the rights in the Bill, were both confirmed and preserved by it.<sup>15</sup> However, bills of rights can and should be transformative,<sup>16</sup> moving areas of the common law which impact on rights in directions hitherto neglected, or allowing development of more sophisticated principle to occur at a speedier pace. In short, although freedom of expression could have been taken account of by New Zealand courts prior to 1990, the enactment of the Bill has elevated the rights consciousness of the general public, the media and the legal fraternity in New Zealand. This has flowed through into the case law, although not consistently. The *Lange* decisions,

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<sup>11</sup> Ibid.

<sup>12</sup> Above, n. 5, 36.

<sup>13</sup> See the New Zealand Bill of Rights Act 1990, s 14: Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

<sup>14</sup> See *Lange No 1*, n. 1 above, 460-461. See also s. 28 of the Bill.

<sup>15</sup> See the long title to the Bill: a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; also s. 2 and Paul Rishworth in Rishworth P, Huscroft G, Optican S and Mahoney R, *The New Zealand Bill of Rights* (OUP, 2003).

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<sup>16</sup> Ibid.

however, are powerful examples of real transformation, although the rights discourse is not as developed as it would be in Canada.

### 2.1 *Basis of defamation law*

In this jurisdiction, defamation is principally a civil wrong that gives the injured party a right to claim substantial damages. The action has been the branch of the law that the media fear most. Although my own work has demonstrated that concerns about the chilling effects of defamation law are somewhat overstated in New Zealand,<sup>17</sup> it is true that damages in defamation cases can be high, especially if the plaintiff is a well-known person with a substantial reputation to lose. Defamation proceedings can be unpredictable because not only are some of the rules vague, but also defamation trials are often with a jury, which must determine many of the important issues, sometimes with unexpected results. Furthermore, there are very technical rules of pleading requiring specialist legal advice. In general, the requirements of the tort are still regarded by some as overly plaintiff-friendly.

The Defamation Act 1992 was an attempt to simplify and rationalise this branch of the law, but whether this object has been achieved remains unclear. Although the statute has refined certain elements of the law and offers some new remedies, it is still basically a common law subject,<sup>18</sup> - for example, the definition of 'defamation' remains untouched. It is necessary to look to the case law, including that from the United Kingdom and Australia and other common law jurisdictions.

Furthermore, in relation to defences, any privilege of the media to report statements that are untrue is a qualified privilege only. Here, the occasion, rather than the speaker or publisher, is protected. Thus, to attract common law qualified privilege, publication must be made only to persons who have an 'interest or duty' to receive it, which is known as the 'shared interest test'. Usually excessive publication will not be privileged, and usually, national and international publication by the media is seen as excessive. Therefore, the most profound

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<sup>17</sup> See 'Myths and Realities about the chilling effect: The New Zealand media's experience of defamation law' (2005) 13 *Torts Law Journal* 259; 'Defamation in New Zealand and Its Effects on the Media – Self-Censorship or Occupational Hazard?', [2006] NZLRev 467-524; 'The Chilling Effect – Defamation and the Bill of Rights', *Law, Liberty, Legislation: Essays In Honour of John Burrows QC*, LexisNexis, (2008, J Finn and S Todd, eds).

<sup>18</sup> See generally for the following: J Burrows and U Cheer, *Media Law in New Zealand* (5<sup>th</sup> ed, 2005, OUP) Chs 2-3.

development in recent years in relation to defences in defamation has been the appearance of an extended form of qualified privilege applying to a particular form of political statements which are published widely. I now turn to explain why in *Lange* the courts rebalanced the equation somewhat in favour of defendants, using freedom of expression discourse and to some extent, our Canadian-influenced Bill of Rights.

## 2.2 *The Lange decisions*

In *Lange v. Atkinson*<sup>19</sup> David Lange, former New Zealand Prime Minister and former leader of the New Zealand Labour Party, sued Mr Joe Atkinson, a lecturer in political studies at the University of Auckland, and the publishers of the magazine, *North and South*, over an article and cartoon in which Mr Atkinson criticised Mr Lange's record as prime minister and compared his performance as party leader unfavourably with that of current leaders. The defendant pleaded both ordinary qualified privilege and a new defence called political discussion, relying on Australian developments.<sup>20</sup> Justice Elias in the High Court reconsidered the existing defence of common law qualified privilege, and held that, contrary to the previous position, factually inaccurate political discussion might be protected by it.<sup>21</sup> The only precondition of availability tentatively suggested by the judge was a requirement of honest belief in what was published.<sup>22</sup>

The decision was appealed to the Court of Appeal, and in *Lange No 1*<sup>23</sup> that Court decided that qualified privilege may protect a statement which is published generally, and covers statements which directly concern the functioning of representative and responsible government. Like the High Court, the Court of Appeal decided not to require a standard of reasonable behaviour when publishing political statements. The defence failed only if the plaintiff proved that the defendant was predominantly motivated by ill will towards the plaintiff or otherwise took improper advantage of the occasion of publication.<sup>24</sup> Ill will is

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<sup>19</sup> [1997] 2 NZLR 22.

<sup>20</sup> In *Lange v Australian Broadcasting Corporation*, the High Court of Australia had extended the categories of qualified privilege to protect a communication made to the public on a government or political matter: (1997) 71 ALJR 818. See also Andrew Kenyon, 'Lange and Reynolds Qualified Privilege: Australian and English Defamation Law and Practice, [2004] MULR 13.

<sup>21</sup> *Lange* above n. 19, 45-46.

<sup>22</sup> *Ibid*, 49.

<sup>23</sup> *Lange v Atkinson* [1998] 3 NZLR 424.

<sup>24</sup> Previously malice, now set out in the Defamation Act 1992, s 19. Section 19(1) provides: In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that,

established if it is shown the defendant did not believe what was published, or published the matter recklessly, not caring whether or not the words are true.

The decision was appealed to the Privy Council,<sup>25</sup> and was heard at the same time that the equivalent English decision, *Reynolds v Times Newspapers*<sup>26</sup> was heard by the House of Lords, by the same judges: Lords Nicholls, Steyn, Hope, Hobhouse, and Cooke, the latter from New Zealand. The Board recorded its anxiety that the New Zealand Courts had reached their decisions without being able to consider the House of Lords' decision in *Reynolds*. It therefore strongly suggested the New Zealand Court of Appeal would wish to take *Reynolds* into account and took the unusual course of allowing the appeal and remitting the matter back to New Zealand for further hearing.

At this point, however, the attempted influence of the 'old country' was resisted to some extent and we see the New Zealand court maintaining independence while at the same time, drawing on other common law jurisdictions to a limited extent. Thus, in *Lange No 2*, the Court of Appeal affirmed its previous decision, but went on to elucidate and delimit it.<sup>27</sup> The Court summarised its conclusions about the defence of qualified privilege as it applies to political statements which are published generally as follows:<sup>28</sup>

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

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

(3) In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with

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in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.

<sup>25</sup> *Lange v. Atkinson* [2000] 1 NZLR 257 (PC).

<sup>26</sup> [1999] 4 All ER 609.

<sup>27</sup> *Lange v. Atkinson* [2000] 3 NZLR 385.

<sup>28</sup> *Ibid*, at 390-391 and 400.

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

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

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

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

Therefore, the privilege is a generic one attaching to subject-matter coming within the category of discussion about MPs past, present or future. It does not require an examination of the circumstances of publication (in particular, of media behaviour) in each case before determining whether the occasion is to be treated as one of qualified privilege (as was decided in *Reynolds* in the United Kingdom, discussed further below).<sup>29</sup> In New Zealand, once a factual matrix passes through the subject matter gateway, section 19 of the Defamation Act provides protection against press irresponsibility by mandating loss of the defence if ill will or misuse of the opportunity to publish exists.<sup>30</sup>

### 2.3 *The Lange decisions and the Bill of Rights – the Canadian influence*

The *Lange* case reveals Charter influence both directly and indirectly. By this, I mean the judgments make reference to the New Zealand Bill of Rights (modelled on the Canadian Charter), and all the judges use general freedom of expression discourse in the form of discussion of potential chilling effects flowing from defamation law. I intend to discuss these references but will first briefly address the prior question of whether the Bill of Rights can and should apply to areas of private law such as defamation

There is no statutory requirement to carry out a human rights or bill of rights analysis in relation to actions between private citizens. New Zealand's Bill was intended to have only vertical effects: it applies to the three branches of Government and bodies exercising public

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<sup>29</sup> Ibid, 400.

<sup>30</sup> See n. 24 above.

functions,<sup>31</sup> and thus in general only protects private citizens from the state.<sup>32</sup> In spite of this, it is clear that a process of constitutionalisation of our private law is ongoing. Although there is some disagreement,<sup>33</sup> the New Zealand judiciary appears to accept it must take account of the rights in the Bill somehow when resolving disputes between private citizens and when developing the common law.<sup>34</sup> Because this process does not produce directly enforceable rights, the horizontal effect is usually regarded as weakly or strongly indirect.<sup>35</sup> In New Zealand, it is given content in two ways: by arguing that judges are simply bound by the Bill as the judicial arm of the state, or by arguing that judges are implicitly required to take account of the values expressed in the Bill of Rights. The judiciary appears to endorse or use both approaches. It will become apparent below that similar approaches are taken in Canada, and indeed, were applied by the Supreme Court in *Torstar*.

The question of horizontal effect of New Zealand's Bill of Rights cannot be fully explored here. However, I consider that the argument of Rishworth and others that indirect horizontality in the common law is not only inevitable, but desirable,<sup>36</sup> is compelling, and opposing arguments to be rather arid. Defamation claims are suffused with a very high level of public interest which implicates the state as well as the individual private citizens involved. Lepofsky correctly suggests that there are public interest values on both sides of the equation. The value of a person's good name and reputation goes to personal dignity and worth as a human being,<sup>37</sup> but also allows us to interact socially, to survive

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<sup>31</sup> The New Zealand Bill of Rights Act 1990, s 3.

<sup>32</sup> See Paul Rishworth, 'Human Rights', (2005) (1) *NZLRev* 87.

<sup>33</sup> Ibid, and see Andrew Geddis, 'The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*', (2004) 4 *New Zealand Law Review* 681.

<sup>34</sup> Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, (2007, 3<sup>rd</sup> ed), 1176. See also *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350, [89]. Various approaches seem to have been accepted in the United Kingdom also – see eg: Jonathon Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble,' [2003] *Cambridge LJ* 444; Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act', (2003) *Modern Law Review* 726, *McKennitt v Ash* [2005] EMLR 10, para [49], *Murray v Express Newspapers plc(2) Big Pictures (UK) Limited* [2007] EWHC 1908 (Ch), para [18], and see Phillipson's view of *von Hannover* in 'The 'right' of privacy in England and Strasbourg compared', *New Dimensions in Privacy Law* (2006, CUP, Andrew Kenyon and Megan Richardson, eds) 184, 185.

<sup>35</sup> Jane Norton, '*Hosking v Runting* and the Role of Freedom of Expression', (2004) 10 *AULR* 245, 249.

<sup>36</sup> Rishworth et al, n. 15 above, 104.

<sup>37</sup> Lepofsky M D, 'Making Sense of the Libel Chill Debate: Do Libel Laws Chill the Exercise of Freedom of Expression?' (1994) 4 *NJCL* 168, 197.



economically, and to maintain self-image and worth.<sup>38</sup> Democratic values are also served by defamation law because there is a public interest in not deterring good candidates for public office from seeking office by leaving them vulnerable to defamation.<sup>39</sup> As to freedom of expression, the values underlying it have been identified as its role in facilitating the emergence of truth in the marketplace of ideas, in maintaining and supporting open democracy, and in promoting the ultimate good of a liberal society where citizens are able to say and publish to others what they want as an expression of their liberty.<sup>40</sup> As part of the common law, defamation develops incrementally, and for it to do so without taking account of the Bill of Rights in some way would be to ignore these profound forms of public interest,<sup>41</sup> would produce distorting effects within constitutional law, and would also be seriously out of step with other common law jurisdictions.<sup>42</sup> Elias J recognised this in the High Court in *Lange* when she said: ‘The modern law of defamation represents compromises which seek to achieve balance between protection of reputation and freedom of speech. Both values are important. Both are public interests based on fundamental human rights’.<sup>43</sup>

Unsurprisingly, then, Elias J accepted both arguments about application of the Bill in *Lange*:<sup>44</sup>

In my view, the New Zealand Bill of Rights Act protections are to be given effect by the Court in applying the common law...The application of the Act to the common law seems to me to follow from the language of s 3 which refers to acts of the judicial branch of the Government of New Zealand, a provision not to be found in the Canadian charter... The New Zealand Bill of Rights Act 1990 is important contemporary legislation which is directly relevant to the policies served by the common law of defamation. It is idle to suggest that the common law need not conform to the judgments in such legislation. They are authoritative as to where the convenience and welfare of society lies.

Elias J did not set out a detailed approach to the Bill. However, she saw it as requiring a balancing of rights in defamation cases and as allowing the common law to prescribe limits to

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<sup>38</sup> Ibid, 198.

<sup>39</sup> Tipping J in *Lange No 1*, 474.

<sup>40</sup> Tipping J in *Hosking v Runting* [2005] 1 NZLR 1, [233], Rishworth et al, n. 15 above, 309.

<sup>41</sup> See also Joseph, n. 34 above.

<sup>42</sup> See Jane Norton, n. 35 above, 250-252, and Rishworth et al, n. 36 above, 104-105. This is so in spite of the differing constitutional arrangements in those jurisdictions.

<sup>43</sup> *Lange*, n. 19 above, 30.

<sup>44</sup> Ibid,

freedom of expression when it is balanced with rights of reputation.<sup>45</sup> In carrying out this balancing, Elias J considered such broad issues as the value of speech and protection of individual dignity,<sup>46</sup> whether the Bill can apply horizontally,<sup>47</sup> the requirements of the law of defamation in New Zealand,<sup>48</sup> the different approaches in other jurisdictions, the chilling effects doctrine,<sup>49</sup> the position and power of the news media,<sup>50</sup> the political background,<sup>51</sup> matters relevant to remedies,<sup>52</sup> and the state of the privilege defence in New Zealand.<sup>53</sup> Similarly, in the Court of Appeal, the Court endorsed the approach of Elias J to horizontality,<sup>54</sup> and a balancing of values within the whole of the law of defamation was carried out. However, in discussing the Bill of Rights, it was emphasised that ‘principles, freedoms, international texts and comparative experience must in the end be assessed in a local context.’<sup>55</sup> This language marries independence with a willingness to look outwards.

Hence, all of the judgments have a strong comparative element, in which the leading Canadian case at the time, *Hill v Church of Scientology of Toronto*<sup>56</sup> received attention. In *Hill*, the Supreme Court of Canada upheld a defamation award of \$1.6m in favour of the plaintiff, a Crown lawyer, based on statements made about his behaviour in litigation which involved the defendants. The latter, invoking freedom of expression in s 2(b) of the Canadian Charter, asked the Supreme Court to adopt the malice test applied by the Supreme Court of the United States in *New York Times v Sullivan*,<sup>57</sup> which gives priority to freedom of expression. In the US, public officers only succeed in defamation claims if they demonstrate that the defamatory statement was made either with ‘knowledge that it was false or with

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<sup>45</sup> *Lange*, n. 19 above, 45, discussing s 5 of the Bill, which provides: Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

<sup>46</sup> *Ibid*, 31.

<sup>47</sup> *Ibid*, 32.

<sup>48</sup> *Ibid*, 32-36.

<sup>49</sup> *Ibid*, 36-37.

<sup>50</sup> *Ibid*, 43.

<sup>51</sup> *Ibid*, 45-46.

<sup>52</sup> *Ibid*,

<sup>53</sup> *Ibid*, 43-44.

<sup>54</sup> *Lange No 1*, 451.

<sup>55</sup> *Ibid*, 467. In *Lange No 2*, a similar, though more specific approach is taken, as the Court was revisiting issues referred to it by the Privy Council.

<sup>56</sup> (1995) 126 DLR (4th) 129.

<sup>57</sup> *New York Times v Sullivan* 376 U.S. 254 (1964).

reckless disregard of whether it was false or not." The *Hill* Court declined to change Canadian law at that point, in spite of the Charter.

The Court of Appeal in *Lange* distinguished *Hill* and explained that the elements relevant to public interest which might have prompted a change in that case were missing. *Hill* did not involve the media or political commentary about government policies or figures, the change asked for was a radical change to the common law, and the *Hill* court was seen as rightly cautious in the circumstances. However, the New Zealand Court observed a hint of a sea-change in Canadian defamation law, from a narrow approach taken by the Supreme Court in the 1950s and 1960s in cases involving political leaders, contrasted to more recent decisions of provincial Courts of Appeal where it had been given a wider role.<sup>58</sup> It will be apparent from the discussion of *Torstar* below that this hinted change detected by the New Zealand court was more than accurately identified.

Tipping J, who wrote a separate but concurring judgment in *Lange No 1*, focused on the role of a responsible press in particular. For this judge, rights go with responsibilities and he is sceptical about the exercise of those responsibilities.<sup>59</sup> Although Justice Tipping indicated he would like to impose a reasonableness requirement on the extended defence in New Zealand, and was worried the balance might be wrong without it, he did not do so in the end.<sup>60</sup> He hoped that the provision in s 19 of the Defamation Act that the defence is lost where there is ill will or taking advantage of the ability to publish would allow some examination of the issue of reasonable care.<sup>61</sup> The language of responsibility was used repeatedly by this judge: 'Responsible journalists in whatever medium ought not to have any concerns about such an approach...qualified privilege is not a licence to be irresponsible.'<sup>62</sup> This approach means that in New Zealand a publisher who has not checked sources, or perhaps not obtained the other side of the story, may find it hard to assert a genuine belief in the material, and the issue of recklessness or carelessness can be raised. Therefore, media methods may be investigated in New Zealand, but at the stage after the occasion of publication is said to be privileged, where the plaintiff wants to suggest s 19 of the Defamation Act should apply to deprive the media

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<sup>58</sup> *Lange No 1*, 448, 450-452.

<sup>59</sup> *Ibid*, 473.

<sup>60</sup> *Ibid*, 474-5.

<sup>61</sup> *Ibid*, 475, 476-477.

<sup>62</sup> *Ibid*, 402.

defendant of the defence because of ill will. As already stated, this is in contrast to the approach taken in the United Kingdom.<sup>63</sup>

*Lange* did not produce a new defence to defamation claims. While it has come to be seen as momentous, the *Lange* courts did not want to be seen to be actually changing the common law. Although Justice Elias was inclined to take a position which was sympathetic to the media, in the end, she tempered her approach with caution. While prepared to adjust the balance between freedom of speech and protection of reputation as a value judgment, informed by local circumstances and guided by principle,<sup>64</sup> Elias J acknowledged that whether there is a need to provide additional protection for the media turned in part on a sociological assessment of the vulnerability or power of the news media and that a Court may not be sufficiently informed about that.<sup>65</sup> She therefore ultimately directed that the two defences pleaded in the interlocutory application, extended qualified privilege and political discussion, be pleaded as one – qualified privilege. A new defence of political discussion was not pursued in the Court of Appeal. However, in that court, Tipping J directly addressed the issue of change to the common law in this manner: ‘But if this Court is to develop the law of qualified privilege, it must be a bona fide development, and not the creation of a new defence. While the line can be fine, development is the prerogative of the common law, while creating a new defence is the prerogative of the legislature’.<sup>66</sup> Thus, the *Lange* defence remains part of qualified privilege.

#### 2.4 *Developments since Lange*

It will be obvious that the *Lange* litigation is the strongest recent example of development of the common law of defamation in New Zealand, and this has been motivated by concerns about freedom of expression. I have argued that the development has been influenced, though not ultimately determined, by the Canadian Charter and Charter jurisprudence. However, *Lange* privilege has been slow to consolidate and grow from there, with only a few significant reported cases so far, years apart. Nonetheless, indications are that the defence has potential to grow into a true public interest defence. I turn now to outline these developments, and then the relevant contemporaneous developments in the United Kingdom.

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<sup>63</sup> See also the discussion below at 2.5.

<sup>64</sup> *Lange v Atkinson* [1997] 2 NZLR 22, 43.

<sup>65</sup> *Ibid*, 44.

<sup>66</sup> *Lange No 1*, 473.

In the only Court of Appeal decision on the defence, *Vickery v McLean*<sup>67</sup> the Court was asked to extend the defence beyond the limited subject matter of discussion about past, present or future Members of Parliament. It refused to apply the defence to statements about local council employees, but the judgment contains obiter dicta that it might apply to local as well as national politicians.<sup>68</sup> As many predicted, the subject matter of the defence is apparently open to expansion. However, the Court also stated a limitation, that allegations of serious criminality did not attract the defence, because they should not be disseminated too widely. Overall, the judgment is cautious.

More recently, *Osmose New Zealand v Wakeling*<sup>69</sup> surprised many commentators, because the High Court, in the context of a striking out action, appeared to extend the defence by treating it as one of public interest. Osmose made and supplied timber preservative products, and it alleged two individuals, Dr Wakeling and Dr Smith, made false and damaging statements about those products. Although some of the statements were published in the media, unusually, Osmose did not pursue any media interests, alleging instead that the first and second plaintiffs were responsible for the chain of publication. However, Wakeling and Smith joined Television New Zealand, Radio New Zealand, APN New Zealand and Fairfax New Zealand as third parties, in a procedure rarely used for defamation. This decision of Harrison J dealt with applications by the media to have the third party notices set aside.

The judge made a strike out order, because he was in no doubt that the articles published by the newspapers were published on an occasion of qualified privilege, and that the broadcasters which published would be protected by the defence of qualified privilege if the plaintiff had sued them directly. Harrison J found the articles were published on occasions of qualified privilege because the material published was of public concern. This was based on the fact that New Zealand has significant home ownership, and in recent years has had to confront a high national incidence of leaky homes suggesting some systemic failure in the building industry which has justified government intervention. Furthermore, the government had endorsed Osmose's product following an inquiry into leaky homes.

The finding of public interest appears to break down the limitation imposed in *Lange*, that the subject matter to which the defence of constitutional qualified privilege can apply is

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<sup>67</sup> Unreported, Court of Appeal, CA 125-00, 20 November 2000.

<sup>68</sup> *Ibid*, [17], per Tipping J.

<sup>69</sup> [2007] 1 NZLR 841.

discussion about politicians, past, present or future. Harrison J did not justify his decision on the basis of extending *Lange*, but spoke instead in generalised terms about public interest, as if that were already sufficient to trigger the defence. However, it is a significant jump from *Lange* to *Osmose*, and the latter does not appear to take the leap on the basis of precedent.

The other aspect of *Osmose* which is striking is the treatment of the question of loss of the privilege. As outlined above, *Lange* established that a defendant must not be motivated by ill-will against the plaintiff, must not take improper advantage of the occasion of publication, and should not be reckless, in the sense of irresponsible, in publishing the statements. On the question of misuse of the occasion, Harrison J accepted that the content of the publications by TVNZ, APN and Fairfax contained a range of views, not just those of Dr Wakeling and Dr Smith, and therefore this did not indicate misuse of the opportunity to publish. An alternative argument was raised that the media might have known that Dr Wakeling had previously been engaged by *Osmose*'s leading competitor and that Dr Smith was politically motivated. The judge thought that such arguments, if accepted, amounted to admitting that the defendants themselves had ulterior motives, which would deprive them also of qualified privilege as a defence to the main action. A final argument sought to establish that the media third parties had published with reckless indifference to the truth or otherwise of the statements of Wakeling and Smith. Here the judge considered the defendants faced the same problem of being themselves tainted by such arguments, which suggested they were not trustworthy and reliable despite being an apparently well-qualified scientist and a senior politician. The judge would not deprive the media of the defence.

*Osmose* is problematic. Had the plaintiffs in *Osmose* pursued Dr Wakeling and Dr Smith and the media parties jointly, I believe these difficulties with the qualified privilege defence may not have arisen. All defendants would have raised the qualified privilege defence, and it would have fallen to the plaintiffs, not Wakeling and Smith, to plead particulars of ill will or misuse of the opportunity to publish.<sup>70</sup> The Defamation Act recognises that the ill will of a joint defendant does not infect another so as to lead to loss of qualified privilege,<sup>71</sup> and the approach of the court should reflect this. Because of the unusual form the proceedings took in *Osmose*, it is arguable the judge treated the behaviour of media and non-media parties as too

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<sup>70</sup> Defamation Act 1992, s 41.

<sup>71</sup> *Ibid*, s 20(2).

much alike and in too generalised a fashion – in other words, he failed to give due weight to the special position of the media as the fourth estate.

One other High Court decision deserves mention because it makes comment on potential development of *Lange*. Before I discuss it and *Torstar*, however, it is necessary to briefly consider the position in the United Kingdom.

### 2.5 *The continuing influence of the ‘old country’*

I have referred above to the *Reynolds* case which was decided just before the *Lange* litigation concluded. *Reynolds v Times Newspapers Ltd*<sup>72</sup> involved an English newspaper article which accused former Taoiseach Albert Reynolds of dishonesty. The House of Lords did not adopt a generic defence, but went on to hold that the duty/interest test could apply to general publication by the media. The scope of the defence was wider than *Lange* political discussion, with Lord Nicholls referring instead to ‘...matters of serious public concern.’<sup>73</sup> This covers such topics as the governance of public bodies, institutions, and companies which give rise to a public interest in disclosure, but excludes matters which are personal and private.<sup>74</sup> Having apparently altered the balance of the law in favour of the media, the House directly imposed conditions of care on those claiming the defence by stating a 10 point code of journalistic conduct.<sup>75</sup> The *Reynolds* code ossified for a time, unduly restricting the usefulness of the defence.<sup>76</sup> However, in *Jameel v Wall Street Journal*,<sup>77</sup> the House of Lords rejected this inflexible approach. In *Jameel*, the privilege metamorphosed into the *Reynolds* ‘public interest’ defence,<sup>78</sup> indicating that the material, and not the occasion, is protected, and that the defence is being developed with the media in mind.<sup>79</sup> The context of the article as a

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<sup>72</sup> [2001] 2 AC 127.

<sup>73</sup> Ibid., 204.

<sup>74</sup> Lord Cooke acknowledged in *Reynolds* that other public figures than politicians exercise great power over the lives of people and greatly influence public opinion or act as role models: *ibid*, 220. This might even extend to the activities of celebrities.

<sup>75</sup> They were: the seriousness of the allegation, the nature, source and status of the information, steps taken to verify the information, urgency of publication, whether comment was sought, whether the article contained the gist of the plaintiff’s side of the story, the article’s tone, and the circumstances of publication: *ibid*, 205, per Lord Nicholls. His Lordship did emphasise that the comments were illustrative only.

<sup>76</sup> See eg: *James Gilbert Ltd v Mirror Group Newspapers Ltd* [2000] EMLR 680.

<sup>77</sup> [2006] UKHL 44, [2007] 1 AC 359.

<sup>78</sup> *Ibid*, [46], per Lord Hoffman, [146], per Baroness Hale.

<sup>79</sup> Although it is available to non-media defendants, provided responsibility is exercised: *Seager v Harper* [2008] UKPC 9.

whole is used to determine public interest,<sup>80</sup> so if an allegation is serious, the article has to make a real contribution to that.<sup>81</sup> The next question is still whether steps taken to gather the information were responsible and fair, but the 10 *Reynolds* criteria are pointers only, not a series of hurdles to be overcome. Weight is to be given to the professional judgment of the editor or journalist in the absence of evidence of any slipshod approach.<sup>82</sup>

Thus, in the United Kingdom, one inaccurate fact in a generally true article might not be irresponsible.<sup>83</sup> Regard is had to matters such as the steps taken to verify information and the opportunity to comment. In *Jameel*, the article published about the use of bank accounts to channel funds for terrorist organisations was clearly of public interest. The other relevant factors which confirmed the existence of media responsibility were that the article was unsensational, it was by an experienced specialist reporter and approved by senior staff, and although a response was sought at a late stage, it would not have been particularly useful anyway.<sup>84</sup> *Jameel* has been described in a later case as ‘...releasing the shackles on the freedom of expression afforded to the media in matters of public interest.’<sup>85</sup>

*Reynolds* privilege is also apparently beginning to subdivide into further special forms in the United Kingdom – the first of these is called neutral reportage or simply reportage. This manifestation of the defence is very attractive, because if certain conditions are met, the journalist need not have attempted to verify. In *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd*<sup>86</sup> the defendant was a small newspaper with a circulation of 1500 in London, part-owned by the Saudi-Arabian royal family, and supportive of the Saudi Arabian government, which reported a dispute between prominent members of a Saudi-Arabian dissident political organisation. The report stated that the reporter had been told by one party that the other had spread malicious rumours and allegations of immoral behaviour about him. The Court of Appeal held by majority that *Reynolds* privilege could protect a report of defamatory allegations and counter-allegations where attribution was clear, the matter was of proper interest to the reader, and the reporter did not adopt the allegations.<sup>87</sup> In a case of true

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<sup>80</sup> *Jameel*, n 77 above, [48] per Lord Hoffman, [111] per Lord Hope.

<sup>81</sup> *Ibid*, [51].

<sup>82</sup> *Ibid*, [33], per Lord Bingham.

<sup>83</sup> *Ibid*, [34].

<sup>84</sup> *Ibid*, [35].

<sup>85</sup> *Charman v Orion Group Publishing Ltd* [2008] 1 All ER 750, [71], per LJ Ward.

<sup>86</sup> [2001] EWCA Civ 1634.

<sup>87</sup> *Ibid*, [65], [67] and [68].



reportage, for example, where a political dispute is fully, fairly and disinterestedly reported, the reporter need not even verify the information.<sup>88</sup>

The Court of Appeal went on to apply the doctrine in a case called *Roberts v Gable*,<sup>89</sup> where Ward LJ clarified the following requirements:<sup>90</sup>

- the information must be in the public interest;
- in a true case of *reportage* there is no need to take steps to ensure the accuracy of the published information;
- the report as a whole must simply set out in a neutral fashion the fact that something has been said without adopting the truth;
- the judge rules objectively on the effect of the article as a whole, by looking at all of the circumstances relevant to the gathering of the information, in particular, the manner and purpose of reporting;
- if the journalist adopts the report or fails to report in a fair, disinterested and neutral way, the only possible defence will be *Reynolds* responsibility;
- the *Reynolds* responsibility factors are still relevant, adjusted as may be necessary for the special nature of *reportage*, and looked at in all the circumstances;
- *reportage* can protect serious allegations as well as scandal-mongering – reported criminality does not automatically require verification, but may be relevant to the question of public interest;
- relevant factors properly applied include the position of the protagonists in public life but there is no requirement that the defendant be a responsible prominent person or the claimant be a public figure as required under US law;
- urgency is relevant to the weight given to editorial decisions, but every story must be judged on its merits at the moment of publication.

The Court accepted that in this case, Mr Gable was merely reporting conflicting positions arising from allegations and cross-allegations of criminal offences being made by British National Party factions against each other, and not necessarily their truth or falsity. This was so in spite of the use of one sarcastic reference in the article, because as a whole, it did not adopt

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<sup>88</sup> Ibid, [52]. Arguably, in fact, verification is inconsistent with the objective reporting required.

<sup>89</sup> [2007] EMLR 457. See also Mr Justice Eady in *Prince Radu of Hohenzollen v Marco Houston & Sena Julia Publications Ltd* [2007] EWHC 2735.

<sup>90</sup> Ibid, [61]. These points are paraphrased.

any position to the allegations, and the sarcasm was judged to be speculative.<sup>91</sup> The article was also responsible in terms of the 10 *Reynolds* factors. Crucially, however, Sedley LJ commented that neutral reportage must modify the repetition rule, and so should be used restrictively.<sup>92</sup>

Finally, *Charman v Orion Group Publishing Ltd*<sup>93</sup> was celebrated as the first case where *Reynolds* responsibility was argued successfully by a book publisher.<sup>94</sup> The decision also contains an excellent explanation of the difference between an ordinary *Reynolds* public interest defence and reportage. The latter was not available to the defendant book publishers because the author of a book '*Bent Coppers*' had written an investigative account or 'inside story' of police corruption, by 'sniffing out information like a bloodhound', rather than acting as a 'watchdog barking to wake us up to the story already out there'.<sup>95</sup> Working methodically through the 10 media conduct requirements, although not required to, Ward LJ observed the parties had accepted the public interest element in the very serious allegations made, and found the author had used varied sources, and had taken all steps possible to verify the information.<sup>96</sup> The claimant had rebuffed attempts to get his side of the story, but in any event, this was contained in the book. The tone of the book was essentially factual in context and unsensational. Readers were left to form their own impression. The circumstances of the publication were not relevant. However, while there was no urgency as for newspapers or broadcasters, this criterion did have some relevance. The book was not a 'perishable commodity', but the lack of urgency was taken into account and actually weighed against the defendant, because greater care is to be expected of authors and publishers in such circumstances.<sup>97</sup> However, Sedley LJ refused to engage in a retrospective editorial function, and held that even though the book was a selective and evaluative account, it was within the bounds of responsible journalism.<sup>98</sup>

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<sup>91</sup> Ibid, [66].

<sup>92</sup> Ibid, [74]. See *Torstar*, 3.4 below.

<sup>93</sup> [2008] 1 All ER 750.

<sup>94</sup> See eg: Ward LJ, [83]: 'I see no reason at all for confining responsible journalism to newspapers and magazines. It must be extended to the authors and publishers of books.'

<sup>95</sup> Ibid, [49].

<sup>96</sup> Sedley LJ agreed in 4 paragraphs: *ibid*, [88]-[91]. Hooper LJ used a very close textual analysis to conclude that the defendant had engaged in responsible journalism: *ibid*, [92]-[259].

<sup>97</sup> Ibid, [83].

<sup>98</sup> Ibid, [90].

This on-going refinement of the public interest or responsible journalism defence, and the further fracturing of it into an even more specialist defence such as reportage, represent a sea-change in English defamation law which must mediate any real chilling effects existing in that jurisdiction. These are changes to substantive law which provide more accessible defences for the media. Although they require responsible media behaviour, it appears the question of responsibility is now being dealt with in the United Kingdom in a manner which is realistic and cognisant of media interests.

## 2.6 *Responsible journalism and neutral reportage in New Zealand*

Our highest courts have not considered since *Lange* whether the common law in New Zealand should follow the *Reynolds* line of development.<sup>99</sup> However, I conclude this section by noting a recent decision of the New Zealand High Court where an argument that the principles of responsible reportage and neutral reportage be adopted in New Zealand was rejected. In *Peters v Television New Zealand*<sup>100</sup> various media had published reports concerning allegations about Mr Peters contained in an affidavit which had been tabled in Parliament. Some years after filing the claim, Mr Peters sought leave to file a notice that he intended to allege the defendants were motivated by ill will or took improper advantage of the occasion of publication (and would thereby lose defences of qualified privilege). TVNZ's counsel argued that refusal to grant leave would not be a miscarriage of justice for Mr Peters because the broadcasts and Website articles published by media were clearly covered by qualified privilege in the sense of the public interest defence developed in *Reynolds*, or its special form of neutral reportage. Justice Andrews rejected this and found no support in *Lange No 2* for neutral reportage in New Zealand because *Lange* required the occasion and subject matter to qualify, while *Roberts v Gable* requires merely that the fact of an allegation be reported. The judge stated: 'I am bound by the Court of Appeal'.<sup>101</sup> This is literally true. However, *Jameel* and *Roberts v Gable* were decided post-*Lange*, and our superior courts must continue to examine the overseas experience. If Mr Peters continues his action, the matter of any extension of the defence can be raised again at the substantive hearing, and the body of overseas law, which now includes *Torstar*, is quite compelling. I turn now to examine the Canadian case.

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<sup>99</sup> See *APN Ltd and TVNZ Ltd v Siminovich Fisheries* [2009] NZSC 93, [31].

<sup>100</sup> Unreported, High Court, Auckland, CIV 2004-404-003311, 1 October 2009, Andrews J.

<sup>101</sup> *Ibid*, [48]-[49].

### 3. The Canadian experience – *Torstar*

Given the incorporation of freedom of expression values into the law of defamation in Australia, the United Kingdom and New Zealand, it is somewhat surprising that Canadian jurisprudence, which has exerted influence on our rights discourse, has been lagging behind. *Torstar* has changed all that, and in some areas, gone further, in part by seizing on and using the experience in the other common law jurisdictions.

#### 3.1 *Rights-talk*

The *Torstar* decision<sup>102</sup> is a model of clarity and pragmatism. In it, the Supreme Court of Canada modified the common law of defamation by creating a public interest defence which it called ‘responsible communication on matters of public interest.’<sup>103</sup> The case arose from statements contained in an article published by a newspaper about a private golf course development which Mr Grant proposed to carry out on a large lakefront property on the Twin Lakes, Ontario. The article reported the views of local residents criticising the development and expressing suspicion that political influence had been exercised behind the scenes by Mr Grant. One resident was quoted saying ‘Everyone thinks it’s a done deal...’. The reporter had attempted to verify the facts and had sought comment from Mr Grant, who did not respond.<sup>104</sup> Mr Grant sued the reporter, the newspaper and its affiliates and the resident quoted in the piece.

Chief Justice Beverley McLachlin, who visited New Zealand in 2003 as the New Zealand Law Foundation’s Distinguished Visiting Fellow, delivered the judgment for the Supreme Court. The Chief Justice has pointed out that the Charter emphasises the need for courts to reconcile individual rights with a strong Canadian tradition of collective and group rights. She refers to the balancing test used in Canada to do this, which is borrowed from European thinking. Under the *Oakes* test, government limitations on individual rights are only justified if there is a pressing and substantial reason for the limit, and the incursion is proportionate in the sense of being rationally connected to the reason, does not unreasonably impair the right,

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<sup>102</sup> *Grant v Torstar Corp* 2009 SCC 61, 22 December 2009.

<sup>103</sup> *Ibid*, [7], [65],

<sup>104</sup> *Ibid*, [8]-[17].

and on balance, produces more benefit than detriment.<sup>105</sup> Thus, Charter decisions come down to a critical balance between individual rights and the broader public interest.

We see this reflected in the *Torstar* case. Canadian judges are more used to rights talk than New Zealand's, in part because our Bill of Rights is younger and is not supreme – it is like the Bill of Rights which preceded the Charter in Canada. Of that Bill, Chief Justice McLachlin has said that it effected only modest advances, and further, that 'a bill of rights may not amount to much unless it is interpreted and applied in a meaningful way.'<sup>106</sup> Therefore *Torstar* contains much more rights talk than *Lange*, in particular when looking at the case for changing the law.

### 3.2 Change – the arguments from principle

The Supreme Court looked first at the arguments from principle. The prior question as to whether the Charter should apply to private law was answered in a similar, though more powerful manner than was accepted in the *Lange* case – 'The constitutional status of freedom of expression under the Charter means that all Canadian laws must conform to it. The common law, though not directly subject to Charter scrutiny where disputes between private parties are concerned, may be modified to bring it into harmony...'<sup>107</sup> Holmesian theory about the common law is also embraced. Thus 'the courts will, from time to time, take a fresh look at the common law and re-evaluate its consistency with evolving societal expectations through the lens of Charter values.'<sup>108</sup>

The three core rationales behind free speech theory are then examined in the judgment – the argument from democracy, the Millian ideal of the marketplace of ideas, and the contribution to self-realisation of the individual. The first two are accepted as engaged where the media reports on matters of public interest, as is the argument that the existing Canadian defamation defences might have a chilling effect on political and democratic speech. This is weighed against the competing value of protecting reputation and in a complementary sense, privacy. The plaintiffs had made an argument that altering the defence to some form of responsible

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<sup>105</sup> 'Constitutions as Civic Conversations: Canada and the Charter of Rights and Freedoms,' in *A Canadian Judgment – The Lectures of Chief Justice Beverley McLachlin in New Zealand, April 2003*, (The Centre for Commercial & Corporate Law Inc, 2004) Eds Andrew Stockley and David Rowe, 52, referring to the test in *R v Oakes* [1986] 1 SCR 103.

<sup>106</sup> *Ibid*, 50.

<sup>107</sup> *Torstar*, [44].

<sup>108</sup> *Ibid*, [46].

journalism would shift the focus in defamation from truth or falsity to the behaviour of the defendant, thus obscuring the plaintiff's purpose. The Court rejected this, stating that libel law takes a balanced approach in reflecting both plaintiff and defendant interests.<sup>109</sup> Arguments about the costs of litigation being increased were also unsuccessful. The pragmatism of the Court is apparent in its negation of procedural objections and in its stated desire to create a defence that is workable and fair to both parties.<sup>110</sup> It concludes '[w]hen proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know.'<sup>111</sup>

### 3.3 Change – *jurisprudential arguments*

The Supreme Court then turned to a jurisprudential analysis. It found that a comparative analysis of case law developments in the other common democracies supported the same outcome. The analysis involved looking at the situation in the USA, the United Kingdom, Australia, New Zealand and South Africa. Of New Zealand, the Court notes that we rejected the *Reynolds* idea of journalistic responsibility playing a role in the scope of privilege because it appeared to detract from the role of the jury and would add to uncertainty in the law which would itself have a chilling effect. The *Lange* outcome is seen as being narrower as to scope of privileged subject matter, but as perhaps offering stronger protection overall. Ultimately, though, New Zealand is lumped in with the other non-US jurisdictions in taking a middle path with a defence which allows 'publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest.' This middle path is chosen by the Canadian court also. Using Charter language, the decision is 'buttressed by the argument from Charter principles...[and] represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Canadian society.'<sup>112</sup>

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<sup>109</sup> Ibid, [47]-[57].

<sup>110</sup> Ibid, [64].

<sup>111</sup> Ibid, [65].

<sup>112</sup> Ibid, [86]-[86].

### 3.4 *The elements of the defence*

The Court then clarified the nature of the defence in more detail, using the prior comparative analysis. First, the defence is to be new and separate from the traditional qualified privilege defence, in part because it is not the occasion which is protected, but the published material, and because qualified privilege was seen as based on social utility, rather than free speech values.<sup>113</sup> Second, to ensure adaptability to new media, the defence is to apply to responsible communication on matters of public interest and is not tied to any concept of publication.<sup>114</sup> The question of public interest is not to be determined in isolation, but in the context of the publication as a whole. No single definition of public interest is offered. However, it is not confined to discussion of government or political matters. The subject matter must invite public attention or substantially concern the public because it affects the welfare of citizens or attracts considerable public notoriety or controversy. Some segment of the public must have a genuine stake in knowing about the matter. This element is not to be characterised narrowly.<sup>115</sup>

The judgment then deals with the factors which will be relevant to whether a public interest defamatory communication is made responsibly. The factors are the seriousness of the allegation, the public importance of the matter, the urgency of the matter, the status and reliability of the source, whether the plaintiff's side of the story was sought and accurately reported, whether including the defamatory statement was justifiable, whether the statement's public interest lay in the fact that it was made rather than its truth (reportage) and a catch-all category of other considerations where relevant. The list is stated differently from that used in *Reynolds* although on the whole it probably covers much the same ground. Where it does differ is in creating the category 'other'. The Supreme Court does not think the issue of tone will always be relevant and therefore, it has become an occasional factor only.

A significant change, the effects of which are unclear, is the statement in *Torstar* that under the defence, a jury will no longer have to settle on a single meaning as a preliminary matter. Instead, responsibility is to be assessed in relation to any range of meanings the words are capable of bearing. This means that arguments about meanings are confined to the defences

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<sup>113</sup> Ibid, [88]-[95].

<sup>114</sup> Ibid, [96]-[97].

<sup>115</sup> Ibid,

of truth and honest opinion and the prior approach whereby the defendant's intention as to meaning is irrelevant is no longer of universal application.

The recognition of reportage is, however, one area of significant overlap with UK law. In adopting this form of the defence, *Torstar* is significant in confronting clearly the issue of how it has altered the rule that repeating a defamation is just as unlawful as the original publication it is based on. The judgment makes it clear that the repetition rule is necessary in an internet age, but simply will not apply in relation to the public interest defence in the exceptional circumstances of reportage. So where it is found that there is public interest in reporting what was said in the context of a dispute, and the report makes attribution preferably with identification, acknowledges it has not been verified, both sides of the dispute are set out fairly and the context is given, the repetition rule is cast aside. The judge is to instruct the jury on this exception when applicable.<sup>116</sup>

Finally, *Torstar* deals with the roles to be played by judge and jury. Under Canadian law, the judge is to decide whether a statement is on a matter of public interest and therefore attracts the defence, and the jury decides on the evidence whether the defence is successful, using the relevant factors, including whether there was justification to include defamatory statements in the article. Maintaining a central role for the jury is in contrast to the situation in the United Kingdom, where *Reynolds* left the jury to determine primary facts only, and the judge to make the actual decision on responsibility. Kenyon's empirical research has revealed that English juries can be required to make numerous detailed factual determinations, 'all on tiny bits of fact about who said what, what was the journalist told and did the journalist phone twice to check or only once', with the answers then being ultimately interpreted by judges.<sup>117</sup> The Supreme Court wished to avoid such difficulties arising at trial. Therefore, under *Torstar*, juries decide whether communication has been responsible in light of any meanings the words can reasonably bear, and can take the defendant's intention as to meanings into account in the assessment.<sup>118</sup>

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<sup>116</sup> Ibid, [119]-[121].

<sup>117</sup> Andrew Kenyon, 'Lange and Reynolds Qualified Privilege: Australian and English Defamation Law and Practice, [2004] *MULR* 13.

<sup>118</sup> Ibid, [127]-[135].



#### 4. Conclusion – *Torstar*'s Influence on New Zealand Law

*Torstar* has the potential to continue the process of reciprocal enrichment of the common law I identified at the outset. Of course, it may do this in either a negative or a positive manner, in the sense that New Zealand's superior courts may either adopt or reject elements of the decision into our own law. Back in 2003, Tobin suggested that the New Zealand Court of Appeal had responded rather defensively to *Reynolds* in *Lange No 2* in refusing to develop New Zealand law along the same lines. She suggested that the subject matter of the defence, at least, be enlarged.<sup>119</sup> Further analysis of the *Osmose* case<sup>120</sup> demonstrates why I hold the same view.

##### 4.1 *Public interest*

The case against the media was settled in *Osmose*, but in spite of the lack of detailed reasoning in the High Court judgment about the question of public interest, I do support this aspect of it. This is because if more than lip service is to be paid to freedom of expression, the political discussion defence should not be interpreted in a restrictive way. There was genuine public interest in the *Osmose* publications, and the topic of leaky buildings is exactly the sort of subject matter to which the defence should be extended in New Zealand, thus drawing our law closer to that in the United Kingdom and Canada. It was accepted in *Lange* that our media is more responsible than that in the United Kingdom, and so it is incongruous for our law to be more restrictive of freedom of expression than that jurisdiction.

*Lange* qualified privilege is an embryonic public interest defence. It is clear that the confinement of subject matter as outlined in *Lange* cannot be maintained on a principled basis, and in any event, is beginning to break down. The principled reasons for privileging statements about national or local politicians, for wishing to protect against potential chilling effects of defamation law in relation to that sort of discussion, must be the basic arguments about freedom of expression recognised in *Torstar* – the arguments from democracy and the marketplace of truth ideal. But those arguments also support a wider public interest defence.

Further, *Torstar* recognises that the issue is one where freedom of expression is placed at the centre of the analysis, rather than as an add-on or afterthought, because of Charter values.

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<sup>119</sup> Rosemary Tobin, 'Political Discussion in New Zealand: Cause for Concern', [2003] *NZLRev*

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<sup>120</sup> See the discussion at 2.4 above.

Our courts are beginning to more explicitly recognise the values flowing from our own Bill of Rights, itself modelled on the Canadian experience. I have argued elsewhere that our courts need to carry out a more explicit Bill of Rights analysis in cases involving the private law which nonetheless trigger human rights such as freedom of expression.<sup>121</sup> *Torstar* is an excellent example of how this might be done, in a straightforward, non-technical fashion.

Finally, as a matter of practical reality, it is clear from my ongoing discussions with media throughout the country that *Lange* is regarded as a public interest defence and is being argued as such in informal settlements in threatened defamation claims.

#### 4.2 *Responsible communication*

As to the conditions in which the *Lange* defence may be lost, I contend that a series of guidelines such as those in *Torstar* can and should be developed within the New Zealand approach of relying on s. 19 of the Defamation Act after a finding that occasion is privileged. Very few cases have tested any aspect of this in our jurisdiction. Certainly, nothing has ever been put to a jury. However, I think *Osmose* demonstrates that some guidelines would assist in the application of the provision. The High Court in that case allowed the character of the originator of allegedly defamatory statements to determine the question of irresponsibility of the media, when it is the specific behaviour of the media, made up of a number of elements, which should determine the issue. *Lange* made it very clear that the privilege must be responsibly used: ‘There is no public interest in allowing defamatory statements to be made irresponsibly – recklessly – under the banner of freedom of expression’.<sup>122</sup>

Arguably the Court in *Osmose* got the application of s 19 wrong. It was prepared to accept that none of the media third parties conducted any inquiries, yet in spite of this, they were entitled to the defence. Even reputable parties are perfectly capable of getting things horribly wrong, so it may clearly be irresponsible not to check the reliability of sources. The Court of Appeal has recently noted that qualified privilege ‘is concerned with the terms and

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<sup>121</sup> ‘The Chilling Effect – Defamation and the Bill of Rights’, *Law, Liberty, Legislation: Essays In Honour of John Burrows QC*, LexisNexis, (2008, J Finn and S Todd, eds).

<sup>122</sup> *Lange No 2*, at [48]. More recently, In *Simunovich*, the Court of Appeal noted that where media repeat what is said by others, many more people are likely to think badly of a plaintiff, partly because they will assume the media would not have reported unless there was something in the story: n. 99 above, [90]. Although the Court was discussing the repetition rule in this context, this observation also supports principled development of the media responsibility limb of the *Lange* qualified privilege defence.

circumstances in which the defamatory statement came to be repeated.’<sup>123</sup> Therefore, the reputation of the defendants should be but one feature of what must be a multi-faceted inquiry. The question which should have been asked by the High Court in *Osmose* was not how apparently reputable the defendants were, but what it was reasonable for the media in question to do in all of the circumstances. The issues which should also have been considered were the degree of public interest in the story and any risk of public alarm it might cause, the risk to the commercial and reputational interests of the plaintiff, and how easy it would be to check accuracy and get the other side of the story. These aspects would be covered by the guidelines in *Torstar*.

The question of the full content of guidelines and how judges and juries should deal with them in New Zealand will have to wait for another day, but the *Torstar* list is a good starting point for the discussion, and the United Kingdom jury experience is also instructive. The concern of the *Lange* courts that explicitly imposing responsibility requirements will further chill defamation law by adding to the cost and length of trials can be met by observing that effective implementation of s 19 of the Defamation Act requires this anyway. Recklessness and carelessness are behavioural judgments which can only be made using a fact-specific circumstantial analysis. Guidelines are very effective in this context, and coincidentally provide Bill of Rights’ transparency as well.

#### 4.3 *A stand-alone defence?*

As to whether the defence would be stand-alone, rather than remaining part of qualified privilege, again, lack of space prevents a full analysis being carried out in this conclusion. I simply note here that although I have proposed a series of guidelines dealing with media responsibility which would not disturb the current position of the defence as a sub-set of qualified privilege, if the subject matter is extended and the defence becomes one of public interest, then, as suggested in *Torstar*, it begins to look less and less a specialised part of defamation law and more like a rights-based defence. Given that there is increasing scope for parallel development of such a defence in the law of privacy, a stand-alone defence is more logical.

#### 4.4 *Reportage*

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<sup>123</sup> *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350, [92].

Finally, I think adopting the concept of reportage is a good idea too. Although successful use of this particular manifestation of a public interest defence would be rare given the general character of media reporting currently, it is a defence which encourages both media responsibility and full reporting, thus serving freedom of expression while illustrating exactly the sort of ‘rights with responsibilities’ approach our judges appear to be interested in. It does require recognising an exception to the repetition rule, but this is acceptable given that the defence should only apply in rare, well-defined circumstances when all conditions are met.

#### 4.5 *The future*

What then, is the future for New Zealand defamation law? Claims both here and in the United Kingdom appear to be declining.<sup>124</sup> In New Zealand, there is also ample anecdotal evidence that defamation is becoming less of a concern to the media than the developing tort of privacy.<sup>125</sup> Furthermore, Palmer goes so far as to suggest that the tort of defamation might even fall into disuse in the next 30 years, as a relic of a previous media age.<sup>126</sup>

I think it more likely that significant distinctions between defamation and privacy may begin to disappear,<sup>127</sup> while the use of these torts continues to decline. The orthodox understanding has been that defamation provides a remedy for untrue statements while privacy provides a remedy for true intimate statements. Common law judges have the power to take the emphasis off the truth or untruth element in each tort and put it instead on the public interest defence based on responsible journalism. If these torts implode in this fashion, what do we have then? One possibility is the ascension of rights-based jurisprudence, in the form of a

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<sup>124</sup> Professor Dame Hazel Genn, ‘Civil Justice Reform and the Role of ADR’, Paper delivered as New Zealand Law Foundation Distinguished Visiting Fellow, Christchurch, 17 September 2009. Reform of procedural rules has led to a decline in civil claims generally. One media lawyer has commented that the decrease in defamation claims may have occurred because the UK media is much more used to interacting with its audience and dealing with complaints as they arise: See ‘Fewer libel cases reaching a verdict’, [guardian.co.uk](http://guardian.co.uk), 9 October 2008, [www.guardian.co.uk/media/2008/oct/09/medialaw.pressandpublishing](http://www.guardian.co.uk/media/2008/oct/09/medialaw.pressandpublishing) See also *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding observations of the Human Rights Committee*, Human Rights Committee, Ninety-third session, Geneva, 7-25 July 2008, GE.08-43342

<sup>125</sup> This non-empirical observation is based on my regular discussions with New Zealand media representatives.

<sup>126</sup> Rt Hon Sir Geoffrey Palmer, ‘The Law of Defamation in New Zealand – Its Recent Evolution and Problems’, *Law, Liberty, Legislation: In Honour of John Burrows QC*, LexisNexis, (2008), 339, 357.

<sup>127</sup> Judge Patrick Moloney QC has commented that in future it is likely an increasing number of claims will be brought jointly in both causes of action: ‘Privacy: The New Libel?’, *Protecting the Media 2008*, IBC Conference, (UK) 1 September 2008.

claim for loss of autonomy, dignity and integrity, based on either publication of true or untrue facts, which may be defended on the basis of public interest. The latter would clearly be satisfied if the material contributes to an important public debate or the functioning of a democracy, and the communication involved is responsible. Such an outcome is entirely possible in both New Zealand and Canada, and in both jurisdictions, distantly-related Bills of Rights will have played a fundamental role in the process, as well as comparative jurisprudence.