

Notes for RNZ slot from Ursula Cheer (Professor) Canterbury University, 28 March 2012

1. Defamation today. I will talk about a significant decision from the UK Supreme Court involving the very important developing qualified privilege defence - the *Flood* case. (We should have a decision in the Chris Cairns case by then too, so I will mention that briefly as well).
2. The *Flood* case is important for NZ because it indicates how qualified privilege might develop as a defence over here. This decision was a unanimous one which dealt with what we call a preliminary question as to whether Times Newspapers could rely on a defence of qualified privilege in relation to an article it had published with the headline 'Detective accused of taking bribes from Russian exiles'. The article contained allegations about a Mr Flood, who was a Detective Sergeant in the Extradition Unit of the Metropolitan Police. In the article, DS Flood was identified as possibly being a police officer at the centre of allegations about bribe taking in return for information from the Extradition Unit.
3. Three journalists had been investigating the allegations using an unnamed source, and did not believe the police were following up the allegations properly so attempted to contact Mr Flood. At that stage a formal investigation commenced. The Times then published a print and online article in June 2006 in which it detailed the allegations, identified Mr Flood and described the investigation being carried out. Six months later the police investigation reported that it had found no evidence which would support the allegations.
4. These were very serious allegations and Mr Flood sued. There were arguments raised as to the meanings of the article, but the important aspect of this decision was really about the identification of the plaintiff and whether there was public interest in this.
5. The qualified privilege defence as developing in the UK is called the Reynolds or Jameel defence, after two previous important cases in which it arose. Basically, the defence means that defamatory material can be published to the world at large where public interest justifies publication. This really

means a matter of public concern. Sometimes it is called the 'right to know' test. The other part of the equation is responsible journalism - journalists can only claim the defence if their journalism has been responsible. So the courts will look at things like the seriousness of the allegation, the steps taken to verify, the source of the information, the urgency involved, whether comment has been sought and so on.

6. *Reynolds* privilege attaches to a defamatory publication which may properly be in the public interest notwithstanding that it may be untrue and may therefore leave the defamed individual with no opportunity to vindicate his or her reputation and no compensation for its destruction. The defence has moved from appearing useful to media, to being applied rather restrictively with perhaps too much emphasis on journalistic responsibility, to being applied in a more light handed way which better recognises the realities of being a journalist. *Flood* really confirms that more light handed approach.
7. As was said in the case, *Reynolds* privilege is not reserved for the media, but it is the media who are most likely to take advantage of it, for it is usually the media that publish to the world at large. The privilege has enlarged the protection enjoyed by the media against liability in defamation. As you have so often heard me say about matters involving publication of speech, : It is a balancing process. The importance of the public interest in receiving the relevant information has to be weighed against the public interest in preventing the dissemination of untrue defamatory allegations, with the injury that this causes to the reputation of the person defamed.
8. Another way of looking at this is to say the court must ask itself the following question: should whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?
9. So provided the test of responsible journalism is met, publication is justified if the subject matter of the article is of sufficient public interest. In *Flood*, a lot of supporting facts had been published - the allegations and alleged supporting evidence. What was published in this case was essentially a summary of the case against the suspect, based in part on anonymous

sources, before even the police have investigated the allegations, let alone charged the suspect. And Flood was identified. Was that in the public interest and had the journalists been responsible?

10. Here the judges held it was in the public interest that both the accusation and most of the facts that supported it should be published. The story, if true, was of high public interest. The allegations were the whole story - interest was not merely in the fact of police corruption, but in the nature of that corruption. The object of the Extradition Unit of the Metropolitan Police was to assist in the due process of extradition. The accusation was that there were grounds for suspecting the respondent of selling sensitive information about extradition for the benefit of Russian oligarchs who might be subject to it. What was suggested was not merely a corrupt breach of confidentiality, but the betrayal of the very object of Flood's employment by the police.
11. The judges also thought the journalists' motivation in publishing could be relevant too. Here one of the journalists' concerns was that the police did not appear to be investigating the allegations properly. The fact that the publication of the article would not merely inform the public of the particular allegation of corruption being investigated but would also tend to encourage its speedy and thorough investigation was counted in the public interest evaluation.
12. The publication of Flood's name was looked at closely, as perhaps it could have been concealed. Flood was not a public figure, his name would have meant nothing to most readers. However, overall this did not detract from responsible journalism because the detail could not be released without the name or at least implicating Flood. Furthermore, if he were not named, others would be implicated.
13. As to responsibility, the focus in the case was really on a possible duty on journalists to verify. The court took care to emphasise that this means verification *in all the circumstances*. Looking at the circumstances, the court did not take a heavy-handed approach and refused to use hindsight to damn the journalists. It found that the journalists had been reasonably satisfied, on the basis both of the "supporting facts" and of the actions

police had initially taken that there was a serious possibility that Sergeant Flood had been guilty of corruption. The journalists had obtained as many documents as they could. They had not just relied upon intermediaries, but had insisted on meeting the insider who was the source, and had taken into account the possibility that he had an axe to grind in making the suggestions of corruption.

14. Tone and content of the article were also examined closely. It was said that references to the corrupt police officer in documents seen by the journalists "could" be a reference to Flood, not that it was actually him. It was also made clear that the whole investigation was based on information from an unnamed source - not an "unknown source". The article also made clear that all parties concerned had been approached and offered the opportunity to comment, and that the conduct was categorically denied on all sides - Overall, the article was seen as moderate in its tone and phrasing.
15. So publication of the article was in the public interest, despite its immediate damaging effect on DS Flood's reputation.
16. As Lord Brown emphasised, this decision does not mean every anonymous denunciation to the police will attract this privilege, otherwise the court would have legalised a "charter for malice". But the defence will protect a denunciation of a public officer on a matter of obvious public importance and interest, which justifiably appears to journalists to be supported by a strong circumstantial case.
17. The judgments contain references throughout to giving 'latitude to the press', to enhancing freedom of expression, and giving weight to the judgment of journalists and editors not only as to the nature and degree of the steps to be taken before publishing material, but also as to the content of the material to be published in the public interest. However, it is clear that this largesse will not apply where the professional judgment of the editor or journalist was made in a "casual, cavalier, slipshod or careless manner."
18. So, overall a positive decision for the media in the UK. This is the third time that the privilege has been considered by the highest court there and

the second time the defence has succeeded on final appeal. *Flood* is interesting for NZ because we have a developing qualified privilege defence which arose from the *Lange* case. It does not clearly apply to publications in the public interest yet, though I believe it will inevitably be expanded to do so. We have a further difficulty because in the *Vickery* case, the Court of Appeal indicated that our defence cannot be used where allegations of serious criminality are involved. I have always thought that is not right and there must be high public interest in such allegations, but the balancing required would work by making the requirement for responsibility high in such cases too. I hope our law goes that way.

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