

Notes for Media Slot Nine To Noon Wednesday 11 July 2012
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1. I want to discuss two New Zealand defamation cases today, both of which tend to show an increasing relaxation or opening up of the law in ways which will benefit media.
2. Before I do this, I need to briefly refer to a previous, but reasonably well-known case - *Lange v Atkinson*. That case, listeners might recall, was where 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. After the case went to the Court of Appeal twice and also the Privy Council, we ended up with a new defence of qualified privilege applying to political statements which are published generally.
3. It was held that the wider public has a proper interest in 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. This means a proper interest does exist in 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. In other words, this defence or privilege is a generic one attaching to subject-matter coming within the category of discussion about MPs past, present or future. So if media (or anyone) publishes such information, it passes through a subject matter gateway, meaning the defence is available even if the publisher makes a false statement. In other countries like the UK, press have to behave responsibly before getting the protection of such a defence. In New Zealand, section 19 of the Defamation Act provides protection against press irresponsibility by stating that the defence will be lost if the publisher is motivated by ill will or misuses the opportunity to publish. So you can't claim the defence

if you have published the words hoping to destroy the MP, or even if you have been reckless or cavalier with the truth. Some care must be demonstrated.

5. Although there have been considerable developments with defences like this overseas, we have had few cases in NZ. It always seemed apparent though, that the door was now open and the defence would develop in ways that benefited media even more. In the only Court of Appeal decision on the defence, *Vickery v McLean*, the Court refused to apply the defence to statements about local council employees, but the judgment did hint that it might apply to local as well as national politicians, and I think it would certainly be argued on that basis now.

6. In 2007, the High Court in *Osmose New Zealand v Wakeling* surprised many commentators, because the Court appeared to extend the defence by accepting it could apply to a matter of general public interest, not just to discussion about MPs. Osmose was a company that made and supplied timber preservative products, and it alleged two individuals, Dr Wakeling and Dr Smith, made false and damaging statements about those products. When media were to be joined as third party defendants, Harrison J set the third party notices aside, because he was in no doubt the media would be protected by the defence of qualified privilege if the plaintiff had sued them directly. The judge found the articles were published on occasions of qualified privilege and the material published was of public concern because New Zealand has significant home ownership, and in recent years has had to confront the leaky homes issue. The government had endorsed Osmose's product following an inquiry into leaky homes, and so the matter of leaky homes and the product itself was one of general public interest.

7. So, at a stroke, the High Court broke down the limitation imposed in *Lange*, that the subject matter to which the defence could apply is only discussion about politicians, past, present or future. Although *Osmose* is only a High Court decision, and cannot bind even other High Courts, and certainly cannot bind the Court of Appeal (where *Lange* was decided) or the Supreme Court, you can often identify changes in the law occurring at this level when a body of similar High Court decisions builds up. So I have been waiting to see if this would happen.
8. And indeed, we now have another High Court decision from Greymouth which also extends the applicability of this defence

beyond discussion about MPs. In *Dooley v Smith* (March 2012), Mr Dooley sought only a declaration from the court that Messrs Smith and Shahadat had defamed him. All three men were elected trustees of a registered charitable trust called Development West Coast. The trust was established to manage the \$92 million payment from government after it had stopped logging of indigenous forests on the West Coast. Members came from various councils and districts, with some, such as the parties in this litigation, being voted on. There were also independent trustees from bodies like the NZ Law Society.

9. In the claim, Mr Dooley said that the defendants had each made defamatory statements about him to the media. It is often said that plaintiffs go for the deep pockets in suing in defamation, but this case is interesting in that the claimant did not pursue media for publishing the statements, and did not seek damages - he simply wanted a declaration to put his reputation to rights. The remedy of declaration was included in the Defamation Act to encourage a change of focus away from damages, and this case seems to be a perfect example where a declaration was appropriate.
10. In any event, the judge held that the circumstances in which qualified privilege can apply may never be closed and so he saw no logical reason why *Lange* should be restricted to statements about the performance of those elected to parliament. The public have a legitimate interest in being informed about the performance of those elected to positions of responsibility in other public institutions. This would be so especially where the institution manages public assets and carries out public activities, as with the DWC.
11. The judge then went on to apply the defence to see if it would be successful. He found it would not be, because both defendants were motivated by ill will in making the statements to the media. Ill will has to be the predominant motive, not just a partial one. In this case, the evidence used by the judge to find ill will arose from things like letters to the editor previously sent, lack of care taken in checking facts, and going public with the damaging statements by a press release when the facts could have been checked privately. So although the defence could have covered the subject matter, in the end, neither defendant was successful in using it. Mr Dooley got his declaration.

12. Therefore, *Dooley* is another example of the *Lange* defence being extended, although it is arguable that the judge did attach some importance to the requirement that the party concerned be elected in some way. Whether that will be required in the future is for another day. This case involved non-media defendants, but could benefit media as it shows it is worth arguing *Lange* even when you get it wrong about public figures or the activities of public bodies, as long as your dominant motivation in publishing is not ill will towards the claimant.
13. And this development has been affirmed by another on-going claim that has some way to go. I won't say much about it at this stage, but the claims have been filed by Joe Karam against two self-represented website publishers for statements made on two websites, and against Fairfax for reference to those websites in four Fairfax publications, about the outcome and fallout from the David Bain retrial. This claim raises fascinating issues which have not been dealt with in New Zealand, such as whether or not deep or shallow links to websites amount to publishing what is on the website, what sort of defences website publishers have, and what amounts to honest opinion online.
14. But for the purposes of the discussion about qualified privilege today, the case is also interesting because Fairfax intends to argue qualified privilege as a defence. This means the defence will have to be argued as applying to Joe Karam. Mr Karam states in the claim that he is known nationally and internationally as a high profile sportsman and author. He is therefore a public figure who is not an MP, or elected to any public body. Fairfax will have to convince the court that the defence should still apply to him.
15. What is also interesting about the case is that Fairfax has pleaded a special form of the qualified privilege defence which has been accepted in the UK and Canada in various forms, but has not yet been accepted here. This is called neutral reportage, and the idea here is that a defendant may be able to claim protection for reporting of speech involved in both sides of a dispute so long as that reporting is neutral. In a true case of *reportage* there is no need to take steps to ensure the accuracy of the published information, but the report as a whole must simply set out in a neutral fashion the fact that something has been said without adopting the truth. In this form of the defence, every story must be judged on its merits at the moment of publication.

16. I would like some form of neutral reportage to be adopted here, although it should not develop in a form that encourages complete lack of responsibility. There must still be some investigation into media behaviour before the defence can be claimed. The matter must be one of public interest also, not just gossip.

17. Either way, the outcome of the Karam claims will be of great interest, and I will keep you posted as to developments. At the moment, the parties are skirmishing around what can be pleaded, and the claims are being reduced to some manageable form. But if they don't settle, we will see new law being made.

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