Public interest, Torstar and the Lange Cases

Notes for RNZ slot from Ursula Cheer (Associate Professor) Canterbury University, 24 February 2010.

1. Wednesday, I want to discuss the very recent decision of the Supreme Court of Canada in the *Torstar* case.[1] This important decision has opened up the law of defamation for media in Canada. It also demonstrates nicely how common law systems of law are part of a robust process of fertilisation and cross-fertilisation of ideas, analysis and experience. The Supreme Court used a comparative analysis to reach its decision, by looking at developments elsewhere, including New Zealand. And in turn, this decision could influence where our law goes in the future.

2. The New Zealand leading case in this area, the *Lange* case, was significantly influenced by the Canadian Charter and by the contemporaneous development of human rights jurisprudence in a number of jurisdictions. Now it seems the New Zealand jurisprudence has played a significant part in this recent development of Canadian defamation law.

Background

3. In New Zealand (and Canada), 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, 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

[1] *Grant v Torstar Corp* 2009 SCC 6, (22 December 2009).

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.

4. 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, - 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.

5. 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 development in recent years in relation to defences in defamation has been the appearance of an extended form of qualified privilege in the *Lange* case, applying to a particular form of political statements which are published widely.

6. In *Lange v. Atkinson* 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. By the time the case had gone to the High Court, the Privy Council and the Court of Appeal twice, we ended up with a generic privilege which attaches to subject-matter coming within the category of discussion about MPs past, present or future. However, 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 the United Kingdom in a case called *Reynolds*). But in New Zealand, once the publication 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.

Torstar

7. 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 countries.

8. The *Torstar* decision is a model of clarity and Canadian 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.' The case arose from statements contained in an article published by a newspaper about a private golf course development which a 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. Mr Grant sued the reporter, the newspaper and its affiliates and the resident quoted in the piece.

9. The Supreme Court looked first at the arguments from principle. The three core rationales behind free speech theory were 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 were accepted as engaged where the media reports on matters of public interest. This was weighed against the competing value of protecting reputation and in a complementary sense, privacy. The pragmatism of the Court is apparent in its rejection of procedural objections and in its stated desire to create a defence that is workable and fair to both parties. It concluded '[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.'

10. The Supreme Court then found that a comparative analysis of case law developments in the other common democracies supported the same outcome. The Court looked at the situation in the USA, the United

Kingdom, Australia, New Zealand and South Africa. Of New Zealand, the Court noted the *Lange* outcome might be narrower than the approach in the UK as to scope of privileged subject matter, but as perhaps offering stronger protection overall. Ultimately, though, New Zealand was 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.

11. So Canada ended up with:

- First, the defence is new and separate from the traditional qualified privilege defence;
- 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. 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. This element is not to be characterised narrowly;
- Lack of responsibility can destroy the defence. The factors looked at 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;

12. The recognition of reportage is one area of significant overlap with UK law. This means that where 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, there is no need to verify and the repetition rule, whereby even those who just repeat what others have said can defame, is cast aside.

Effects of Torstar in New Zealand

13. *Torstar* has the potential to influence the law in New Zealand. The High Court rejected extension of the defence in the *Peters v TVNZ* case last year, but I believe that *Lange* qualified privilege is an embryonic public interest defence and would be seen this way if our higher courts consider the matter now in the light of *Torstar*. It is clear that the restriction of subject matter 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.

14. As to the conditions in which the *Lange* defence may be lost, I think 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 that some guidelines would assist in the application of the provision. The *Torstar* list is a good starting point.

17. Finally, I think adopting the concept of reportage is a good idea too. Although successful use of it 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.

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