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Common Origin, Different Outcomes in Political Communication Defence: Using Principle and Policy to Trim the Square Peg

Abstract
In the past few years there has been considerable development in Commonwealth countries in the law of qualified privilege as it relates to political communication. Australia was the first to adopt an approach inconsistent with earlier authorities, in the High Court decision of Lange v ABC. The former Prime Minister of New Zealand also presented the opportunity for the New Zealand Court of Appeal to follow suit with their decision in Lange v Atkinson. This case proceeded to appeal in the Privy Council and the decision was handed down at the same time as the English decision of Reynolds v Times Newspapers Ltd. The latest instalment in the political communication saga is the New Zealand Court of Appeal's reconsideration of Lange v Atkinson.

Keywords
qualified privilege, political communication, Australia, New Zealand, United Kingdom

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COMMON ORIGIN, DIFFERENT OUTCOMES IN POLITICAL COMMUNICATION DEFENCE: USING PRINCIPLE AND POLICY TO TRIM THE SQUARE PEG*

By Jodie O'Leary+

In the past few years there has been considerable development in Commonwealth countries in the law of qualified privilege as it relates to political communication. Australia was the first to adopt an approach inconsistent with earlier authorities, in the High Court decision of *Lange v ABC.*[1] The former Prime Minister of New Zealand also presented the opportunity for the New Zealand Court of Appeal to follow suit with their decision in *Lange v Atkinson.*[2] This case proceeded to appeal in the Privy Council and the decision was handed down at the same time as the English decision of *Reynolds v Times Newspapers Ltd.*[3] The latest instalment in the political communication saga is the New Zealand Court of Appeal's reconsideration of *Lange v Atkinson.*[4]

Despite the fact that all three Commonwealth countries are 'parliamentary democracies with a common origin,'[5] the highest courts in the land have managed to develop their own unique tests to provide protection from defamation to commentators on political communication. Further, application of each of these tests could possibly yield a different outcome. This is because in Australia the subject matter protected is comment on a politician's conduct, which includes local comment on overseas politicians, while in the United Kingdom the scope seems wider but the focus is limited to national

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* This title was derived from an article by Loveland I, 'The Constitutionalisation of Political Libels in English Common Law' [1998] PL 633 at 638-639. Discussing the *Reynolds* decision he stated 'What [the English Courts] have not done in any systematic way is to set about reshaping the peg to produce a closer fit between our common law and our political culture.'

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1 (1997) 189 CLR 520; 145 ALR 96.

2 [1998] 3 NZLR 424.

3 [1999] 3 WLR 1010; [1999] 4 All ER 609.

4 [2000] NZCA 95 (21 June 2000) http://www.austlii.edu.au/nz/cases/NZCA/2000/95.html at 30 July 2000 (Copy on file with author)

5 Ibid para 1.

newspapers.[6] Finally in New Zealand, although the content of the defence may be wider in scope, its reach is limited to information about members or potential members of parliament.[7]

The aspect of the common origin relevant here is the once shared notion of qualified privilege espoused in 19th Century cases such as *Toogood v Spyring*[8] and *Davies v Snead*[9], and epitomized in Lord Atkinson's dictum as the duty/interest test:

> A privileged occasion is…an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.[10]

So why the deviation from this common view?

This article aims to answer this question specifically while broadly considering the use of principles and public policy in decision making and whether such an approach should be confined to the legislature. Attention will be given to the impact of conventions, constitutions, bills of rights and relevant statute law. Observations will also be made about the local political and social conditions in each nation and their effect on the decisions. The court in *Lange v Atkinson*[11] recognised that although all of the approaches perceive a need for striking a balance between freedom of expression and protection of reputation, the tests depend on the particular country's situation.

Comparison is important as:

> every jurisdiction can benefit from examinations of an issue undertaken by others. Interaction between jurisdictions can help to clarify and refine the issues and the available options, without prejudicing national autonomy.[12]

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6 Ibid para 8.
7 Loveland I, 'The Constitutionalisation of Political Libels in English Common Law' [1998] PL 633 at 640.
8 (1834) 1 CM & R 181, 193: 'common convenience and welfare of society' call for frank communications on questions of fact.
9 (1870) LR 5 QB 608, 611: there are some circumstances where a person is so situated 'that it becomes right in the interests of society' to tell certain facts to another.
10 *Adam v Ward* [1917] AC 309 at 334.
11 Above n 4 para 2.
12 Ibid para 4.

The Cases and the Tests: Former Prime Ministers and the Media

Australia: *Lange v ABC* (1997) 189 CLR 520

David Lange, the former Prime Minister of New Zealand, brought a defamation action against the Australian Broadcasting Corporation (ABC) for statements published about him on the program 'Four Corners', during his time in office. ABC argued the constitutional defence of implied freedom of political communication and the extended common law defence of qualified privilege espoused in *Theophanous v Herald & Weekly Times.*[13] A number of other interested parties were also given leave to make submissions as to whether *Theophanous*[14], and the other decision on this issue, *Stephens v West Australian Newspapers Ltd,*[15] should be re-argued.[16]

The court agreed that although it was not necessarily bound by its previous decisions it should only review them cautiously.[17] However, here they decided there was no need to overturn either of the prior cases because there was no clear majority. Due to Justice Deane's difference in reasoning no binding principle emerged.[18] Ultimately the court held:

> the appropriate course is to examine the correctness of the defences pleaded in the present case as a matter of principle and not of authority.[19]

Unusually, all seven members of the court handed down a joint judgment declaring the constitutional defence of implied freedom of political communication as pleaded was bad in law. However, an adapted expanded defence of qualified privilege, without the requirement for reciprocity of interest, might be allowed if further particulars were provided.

The court held that this defence provided the freedom to discuss government and political matters, extending to communication concerning the conduct, performance and fitness for office, not just of the executive branch but of

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13 (1994) 182 CLR 104.
14 Ibid.
15 (1994) 182 CLR 211.
16 Flint D, 'Defamation Law Revised' (August 1997) 9(3) Australian Press Council News 8.
17 Above n 1 at 189 CLR 554.
18 Ibid at 555.
19 Ibid at 556.

statutory and public authorities with reporting responsibilities to the legislature or minister.[20] This is because the public had a legitimate interest in knowing about these bodies who may affect them.[21]

It was emphasised that this protection was not limited solely to communication during election time. This was due to the fact that most of the information electors require to make decisions comes in the period after the last election, before the calling of the next.[22]

The court further noted that the considerations when awarding this extended privilege defence are twofold. Firstly, the publication must be reasonable, that is, the publisher must show they have reasonable grounds for believing the truth of the matter, not believe it is untrue and take steps to verify its correctness as well as, where practicable, publishing a response from the defamed person.[23] Secondly, if the person defamed proves the publication was actuated by malice (an improper purpose – other than communicating government or political information or ideas) they will defeat the defence. It was further explained that the motive of causing political damage or evidence of the vehemence of an attack or statement would not be sufficient to show that it is improper, given the nature of the subject matter.[24]

United Kingdom: *Reynolds v Times Newspapers Ltd and Ors* [1999] 3 WLR 1010

The former Prime Minister of Ireland (Albert Reynolds) brought the libel action in this case against a publication in the Sunday Times in England. The article in question purportedly implied he had been dishonest during his time in office, particularly in relation to an extradition request from the government of Northern Ireland. This was particularly significant as Mr Reynolds, dubbed in the article 'Ireland's Peacemaker and Mr Fixit', had previously been active in promoting the Northern Ireland peace process.[25] The Sunday Times argued an extended qualified privilege in defence.

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20 Ibid at 560.
21 Ibid at 561.
22 Ibid.
23 Ibid at 574.
24 Ibid.
25 Trindade FA, 'Defaming Politicians: the English Approach' (1999) 115 LQR 175 at 178.

At first instance a single judge determined the article was not protected under qualified privilege and the jury found for the plaintiff, but damages were only awarded in the amount of one penny.[26] Reynolds appealed,[27] and the Sunday Times cross-appealed on the question of qualified privilege.

The Court of Appeal determined that qualified privilege would not apply to this situation, but it significantly altered the traditional test, in two ways:

1. The duty/ interest test was held to apply to media reports to the public at large.

2. It identified a third arm to the test; 'the circumstantial test', which examined the nature, status, source and other circumstances of the material and its publication to determine whether it was in the public interest to be protected. It was this test that the Sunday Times failed to meet.[28]

The House of Lords subsequently gave leave to the defendants to appeal against this ruling.[29] On a 3:2 majority the defendants still failed in their appeal on the facts. All five Lords agreed there was no generic protection against defamation for reporting political speech, nor should the circumstantial test be adopted. However they supported the Court of Appeal's 'forward looking analysis of the common law'[30] in relation to availability of qualified privilege to media reports published to the world at large.

This defence initially requires the party asserting privilege to satisfy the onus of proof that the occasion itself was privileged.[31] Unlike Australia this is not confined solely to political information.[32] However, Lord Hope stressed that election cases would be within the elements of duty and interest,[33] but he further developed the view that other public people engaging in public conduct should be subject to the privilege.[34] This is because other people may be role models or may affect or influence the public opinion just as much, if not more,

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26 Above n 3 at 1014.
27 On matters not necessary to disclose in this article.
28 Rimmell K, 'A New Public Interest Defence for the Media? The House of Lords' Decision in *Reynolds v Times Newspapers Ltd'* [2000] 11 Ent LR 36 at 37.
29 Above n 3 at 1015.
30 Ibid at 1020.
31 Ibid at 1051.
32 As Lord Cooke explained, ibid at 1041.
33 Above n 8 at para 141.
34 Ibid.

than politicians.[35] Any limitation of the privilege to politicians or political speech would therefore be outdated.[36]

The test became one of qualified privilege, 'based on a weighing of the particular circumstances of the case'.[37] This is not a separate requirement but becomes a part of determining whether it is in the public interest to satisfy the duty/interest test. Lord Steyn stated that the concept of public interest is already well known.[38] Indeed Lord Bingham CJ in the Court of Appeal described:

> matters such as the governance of public bodies, institutions and companies which give rise to a public interest in their disclosure, but excluding matters which are personal and private.[39]

Lord Nicholls outlined a list of factors, which was stressed to be non-exhaustive.[40] Those relevant for comparison include:

- The nature of the information: If the charge is serious the public will be more likely to be misinformed and greater harm will be generated to the individual.[41]
- The source: If informants do not have direct knowledge or have another purpose, such as revenge or monetary gain, this would go against the public interest in disclosure.[42]
- The steps taken to verify the information.
- The urgency of the matter, because news often only has a limited life span.[43]
- Whether comment was sought from the plaintiff or their side of the story published.

Lord Nicholls noted problems with the heavy onus on the plaintiff to prove malice, namely that the defendant did not honestly believe the statement, being

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35 Ibid at para 103.
36 Ibid at para 143.
37 Ibid at para 86.
38 Ibid at para 83.
39 *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862 at 909, cited in Rogers WVH, 'Privilege and the Media' (1999) 7 Tort L Rev at 15.
40 Above n 3 at 1027.
41 Trindade FA, 'Defamatory Statements and Political Discussion' (2000) 116 LQR 185 at 188.
42 Ibid.
43 Ibid.

either aware that it was untrue or indifferent to its truth.[44] This was explained as insufficient to safeguard reputation, considering the difficulty in the plaintiff accessing the newspaper's information or sources.[45] The newspaper argued that self-regulation was the answer, yet their Lordships rejected this approach because of the lack of general confidence in the press in the United Kingdom.[46] Consequently the House of Lords noted the importance of looking at the circumstances of the case to also determine malice.[47] But it was emphasised that a newspaper's reluctance to reveal a source should not be evidence of malice.[48] It has been said that this requirement was stipulated so that the House of Lords did not contradict the European Court of Human Rights in *Goodwin v United Kingdom.*[49]

New Zealand: *Lange v Atkinson* [2000] NZCA 95

Member of Parliament and former Prime Minister of New Zealand, David Lange, contended he was defamed. This time he alleged he was defamed in an article written by political scientist and journalist, Joe Atkinson and published in the nationally circulated, monthly magazine, 'North and South'. This article was critical of Mr Lange's political performance, allegedly imputing he was 'irresponsible, dishonest, insincere, manipulative and lazy.'[50] The defendants argued along the lines of a new defence of qualified privilege, as developed in the High Court of Australia.[51]

Originally the New Zealand High Court heard this action, and Elias J found that the defence of qualified privilege could apply to published comments relating to the suitability or conduct of members or potential members of Parliament.[52] On appeal,[53] the Court of Appeal upheld this defence and, as Elias J had done in the court below, they rejected the Australian requirement of reasonableness. It has been suggested that the effect of this finding was to

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44 Above n 3 at 1057.
45 Ibid at 1024.
46 Ibid.
47 Ibid at 1058.
48 Ibid at 1027.
49 (1996) 22 EHRR 12, cited in above n 41 at 189.
50 Above n 41 at 185.
51 At the time of the original action the defence was based on the outcome of *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.
52 See Trindade op cit above n 41 at 189.
53 [1998] 3 NZLR 424.

establish qualified privilege as a generic defence to defamation actions relating to political communications in New Zealand.[54]

On further appeal the Privy Council eventually remitted the decision back to the Court of Appeal to reconsider its decision in the light of the newly decided English authority of *Reynolds*.[55] The Privy Council did not require the Court of Appeal to make a particular decision. It could in fact, if so obliged in New Zealand's circumstances, retain its original finding, even though that finding was in effect wider than either of the tests proposed in England or Australia.[56]

The Court of Appeal in reconsideration did in fact maintain its original decision with only a slight modification. The result is that there is an extended qualified privilege defence for statements published generally about the functioning of representative government as far as it involves their capacity to meet their public responsibilities. In determining whether statements involve capacity, the court looks to matters of public concern, which in turn affects the question of whether the extent of the publication is justified.[57] The added explanation in the remitted case was that the publication of the statement must be on a qualifying occasion.[58] Therefore if the author has taken improper advantage of the occasion, because the publication is motivated by ill will against the plaintiff, or otherwise, it will not qualify.[59] This motivation may be concluded from the fact that the publisher deliberately stated falsehoods or cannot assert a genuine belief in the truth, as they were reckless or indifferent.[60] The degree of care that they must take in determining the truth will depend on the occasion (the width of the publication),[61] and the gravity of the allegation.[62]

The basis for the differences

Each court has thus paid heed to its particular country's situation.

Constitutions, Conventions, Bill of Rights

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54 Ibid at 190.
55 Above n 3.
56 Above n 4 at para 1.
57 These requirements are set out in numbered format in above n 2 at 468.
58 Above n 4 at para 41.
59 Above para 42.
60 Ibid para 44.
61 Ibid para 46.
62 Ibid para 48.

The Australian decision was mostly constitutionally based. The Constitution of Australia does not enshrine the express freedom of speech or communication. Nor is there a Bill of Rights. However, it must be noted that the current political environment still includes debate as to whether Australia should adopt a Bill of Rights. The founding fathers thought that the common law provided adequate protection of this fundamental human right,[63] as there was nothing to prevent it.[64]

Instead the High Court of Australia through a series of cases found that particular rights, including the freedom of political communication, could be implied from the Constitution.[65] This implication first occurred in 1992 in two significant cases,[66] where the freedom was derived from the sections of the Constitution dictating a system of government requiring the people to elect their responsible representatives. Brennan J stated that inherent in this is

> freedom of public discussion of political and economic matters…It would be a parody of democracy to confer on the people the power to choose their Parliament but to deny the freedom of public discussion from which people derive their political judgements.[67]

Two 1994 cases followed this lead to narrowly hold that the implied freedom of political communication created a defence to defamation if the defendant could show that the information published was not false, they did not publish recklessly and the publication was reasonable in the circumstances.[68] These cases also sparked discussion on whether the freedom expanded the Common Law defence of qualified privilege, which was previously rarely allowed to publishers targeting a large audience.[69] It was held that the constitutional freedom transgressed the original requirement to show a duty upon the publisher to distribute matters of interest to its readers.[70]

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63 Butler D and Rodrick S, *Australian Media Law* (1999) LBC Information Services, Sydney at 14.

64 Dawson J in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 182.

65 Jones T, 'Freedom of Political Communication in Australia' (1996) 45 ICLQ 392.

66 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

67 *Nationwide News* (ibid) at 47.

68 Above n 13 and n 15.

69 Walker S, '*Lange v ABC*: the High Court Rethinks the 'Constitutionalisation' of Defamation Law' (1998) 6 TLJ 9 at 12.

70 Ibid.

In *Lange,*[71] the High Court affirmed the implication from the Constitution of the freedom of communication. It stated that the text and structure of the Constitution, particularly ss6, 7, 24 and 128 necessitated this.[72] These sections recognise that people choose the members of the Senate and the House of Representatives (who are accountable to the people), and decide whether to amend the Constitution. However, the court disagreed with *Theophanous,*[73] contending that this freedom did not confer a positive right, but instead operated as a limiting condition on the federal, state, territory and Common Law of the country, as this is 'one system of jurisprudence.'[74] These laws are subject to the Constitution by virtue of covering clause five.[75] The court held 'within our legal system, communications are free only to the extent that they are left unburdened by laws that comply with the Constitution.'[76] Therefore laws (including the Common Law of qualified privilege) would be read down if they infringed this freedom in terms, operation or effect and were not reasonably appropriate or adapted to fulfill their legitimate object of protecting personal reputation.[77]

Similarly to Australia, in the United Kingdom there has been in the past no express constitutional freedom of communication, logically as there is no written Constitution. Instead English constitutional law must have regard to Common Law and statute. Until October 2000 there has been no legislative provision expressing such a freedom.[78] Therefore, the freedom was residual in effect,[79] and seems in the past to have been overshadowed by the need to protect reputation.[80]

The United Kingdom Human Rights Act 1998 however will have a significant impact, and arguably already has, on the outcome of any litigation regarding freedom of communication. This is due to the starting point in the European Convention for the Protection of Human Rights and Fundamental Freedoms, from which the Act was drawn. This bound the United Kingdom externally as a

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71 Above n 1.
72 Ibid at 571.
73 Above n 13.
74 *McArthur v Williams* (1936) 55 CLR 324.
75 Rendering the Constitution 'binding on the courts, judges and people of every State and every part of the Commonwealth notwithstanding anything in the laws of any State' cited in above n 1 at 564.
76 Above n 1 at 567.
77 Ibid.
78 In October 2000 the United Kingdom Human Rights Act 1998 comes into force.
79 Barendt E, *Freedom of Speech* (1987) Clarendon Press, Oxford at 29.
80 Above n 28 at 36.

matter of international law. The Convention starts from the premise of freedom of expression. It has been said to be essential for a democratic society and core to that concept is the freedom of political debate.[81] This acts as a limit on signatory States such as the United Kingdom when they aim to restrict publication and circulation of political speech. Now, the United Kingdom Human Rights Act has provided a direction to the courts in deciding freedom of expression matters to have particular regard to the importance of the convention right in determining whether certain information should be published, as a matter of domestic law.[82] It has been said that this will effectively restrict the courts to be consistent with its requirements in their development and application of the Common Law.[83] The specific reference in article 10 of the European Convention seems to override the Common Law contentions regarding publication to a mass audience, as the public has a right to receive and impart information and ideas without interference from a public authority.[84] However, there is a limitation in Article 10(2), if it is necessary to protect the reputation or rights of others. But it are to be noted that these exceptions must be interpreted narrowly.[85]

It is important to consider further that Article 8 of the Convention is also included in the United Kingdom Act, preserving the right to privacy.

New Zealand's Constitution has similar provisions to the Australian Constitution relating to elections, responsible government and requiring referendums for amendment.[86] However, a significant difference is that New Zealand has an established Bill of Rights,[87] based on the International Covenant of Civil and Political Rights. The court in *Lange* stated the importance of the provisions of the Bill of Rights regards to the Common Law of defamation. 'They are authoritative as to where the balance of convenience and welfare of society lies.'[88]

The Bill of Rights ensures the right to vote in elections of members of the House of Representatives, the right to freedom of expression and other rights.[89] There

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81 *Lingens v Austria* (1986) 8 EHRR 407 at para 41 and 42.
82 Section 12(4) of the UK Human Rights Act 1998.
83 Rogers WVH, 'Privilege and the Media' (1999) 7 *Tort L Rev* 15 at 17.
84 Article 10(1) European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
85 *Oberschlick v Austria* (1995) 19 EHRR 389.
86 See the discussion in *Lange v Atkinson,* above n 2 at 455.
87 New Zealand Bill of Rights Act 1990.
88 Above n 2 at 431, citing the original decision in the High Court at 32.
89 Not relevant to the purposes here.

is a notable omission of the right to privacy, but if the act is read subject to the International Covenant of Civil and Political Rights, regard may need to be had to Article 17 which gives a guarantee as to this right.[90] Further section 5 of the Bill of Rights, provides that any restriction on the rights and freedoms must be reasonable, that is, justified in a free and democratic society.

Local political, legal and social conditions

The Court of Appeal in *Lange v Atkinson*[91] outlined a number of factors that influenced its decision making.

Social and political factors

New Zealand does not have the same problems in relation to tabloid press, as its British counterparts. This is because of its small population and the fact that its daily papers do not generally have a large circulation, and are more regionally based, creating less competition.[92] Conversely, the United Kingdom's large population and large circulation of daily publications, competing for readership, has the possibility of causing more harm, so that a more intrusive restraint on the press may be necessary.[93] In the middle of these two extremes is Australia, which has some publications with large circulation combined with smaller regional publications. Therefore, Australia's test should fall between the United Kingdom and New Zealand in terms of protection of reputation and the responsibility of restraint on the press. However, it must be noted that although it may be the case that as yet New Zealand and perhaps also Australia have not encountered the 'invasion of personal privacy, fabrication of interviews, and obtaining of information by dishonest means' that run rife through the United Kingdom,[94] that may not be a distinction to make in the long term.

Further, the court noted that New Zealand was distinct in that it was a small, close-knit society and the population's relationship with the government necessitated strong feelings of accountability. This was further explained, as the government was one of the main providers of resources.[95] The United Kingdom by contrast has a very large population with more privatisation. Australia on the other hand is unique because of its combination of high-density city areas

90 However, this is not directly binding.
91 Above n 4.
92 Above n 4 at paras 34 and 35.
93 Ibid at para 35.
94 Ibid.
95 Ibid at para 32.

with sparse regional areas. The government's involvement in everyday national life is affected because it is less likely that political exploits could be as easily canvassed by means other than the media, such as word of mouth or personal involvement. Justice McHugh justified the accountability in Australia in these terms:

> [I]n the last decade of the 20th century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys…Information concerning the exercise of those functions and power is of vital concern to the community.[96]

Another aspect the New Zealand Court of Appeal considered was that of the electoral process. It stated that the New Zealand system differed in a large respect from that of Australia and the United Kingdom as it allows voters to vote nationally for their preferred party.[97] In the United Kingdom and Australia, elections are still run solely on a constituency basis.[98] This means that if you were voting in the New Zealand system you would place more reliance on freedom of expression, as your voting has a direct effect. In the other systems, you do not necessarily rely on the ultimately elected party's conduct.

Legal factors

The other laws in the particular jurisdiction may also have an effect on the courts' reasoning.

As mentioned above, the International Covenant of Civil and Political Rights, which New Zealand is a signatory to, has a provision for privacy. Australia is also a signatory to that Covenant,[99] and the United Kingdom will be bound in October to guarantee privacy due to the Human Rights Act. However, neither the United Kingdom nor Australia have any other right to privacy enshrined in statute, nor protection at Common Law. In contrast, New Zealand courts have developed an independent tort of invasion of privacy.[100] This means that

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96 Above n 15 at 264.
97 Above n 4 at para 26.
98 Ibid.
99 Above n 63 at 274.
100 *Tucker v News Media Ownership Ltd* (unreported, NZ HC, Jeffries J, 20 October 1986) cited in above n 63 at 278.

politicians may have recourse to this action if private facts about them are made public and are highly offensive and objectionable.[101]

Other legislative provisions that show New Zealand's attitude towards openness of political information include its Official Information Act 1982, that permits information to be available unless there is good reason for non-disclosure.[102] Australia has similar sections in the Freedom of Information Act 1982, however it is not as broad in scope as it does not always allow access to Cabinet or Ministerial documents if the public interest requirement is not met.[103] The United Kingdom does not have any such provisions and instead the Crown's papers are still in the Crown's hands.[104]

Further, each jurisdiction must have regard to its respective Defamation Acts. In New Zealand, the Court of Appeal noted Elias J's comments that while the Defamation Act 1992 introduced significant reforms, it 'did not…attempt to supplant much of the Common Law or to stifle its development through judicial decisions.'[105] However, it did remove some criminal offences in relation to criminal libel, which remain in the United Kingdom legislation.[106] This possibly allows the press more freedom.

The Defamation Act had some impact on the judgement in *Lange v Atkinson*[107] as the expanded defence of qualified privilege was required to be consistent with section 19, due to subsection two, which stated the common law test of malice was replaced. Therefore the concept of malice is excluded unless the defendant is motivated by ill will or takes improper advantage of the occasion. Further the Australian requirement of reasonableness (also developed from the Defamation Act of New South Wales) was held to be inconsistent, as it would introduce a wide factual inquiry as to fault.

It must be further noted that in the United Kingdom the Defamation Act 1952 had a significant effect on political communication when it reversed the decision in *Braddock v Bevins*,[108] which found that a local election address was

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101 *Bradley v Wingnut Films* [1993] 1 NZLR 415 cited in ibid.
102 Above n 2 at 463.
103 Above n 4 at para 27.
104 Ibid.
105 Above n 2 at 431.
106 Above n 4 at para 31.
107 Above n 2 at 434.
108 [1948] 1 KB 580.

protected by qualified privilege.[109] Instead the House of Lords explained that parliament relied on the defence of comment on a matter of public interest as sufficient protection.[110]

Reasoning from principle or public policy grounds

The concept of qualified privilege and its use in regard to political communication has been explained as reasoning from principle, not rules.[111] This is because it would be impossible to exhaustively list all the possible situations that should be covered for the general welfare of society, when it is continually changing. Instead the common convenience test allows the court to decide what is just in a specific situation, as a restricting factor rather than imposition of binding authority. Parke B in *Toogood v Spyring* stated that using principle in this way is to be preferred as 'the hounds of law sometimes lose the scent of the principle in looking for the likely cover for the game.'[112]

However, it could be said that reasoning with such elements as the local political, legal and social conditions and finding a variance in outcomes from similar authorities, is an example of reasoning from policy. The analysis of those elements and the consideration of the constitutional and legislative basis in each country identifies the goals that each country has in relation to freedom of expression. Indeed the High Court of Australia has recognised that public policy considerations are rampant in the decisions on this issue.[113]

Some judges have explicitly stated that the courts should not alter the continuum of the Common Law simply in the interest of social change.[114] For instance Parke B stated that judges must not be given the right to make laws according to what is good and prohibit everything they think evil.[115] However, this attitude does not seem prevalent and there is now more obvious recourse to public policy in decision making,[116] because the Common Law should evolve and change. That elasticity has been recognised as important for:

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109 Above n 3 at 1019.
110 Ibid.
111 Above n 2 at 438.
112 Above n 8 at 394-395.
113 *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632 at 655.
114 *SGIC v Trigwell* (1978) 26 ALR 67.
115 Stone J, *The Province and Function of Law* (1946) Associated General Publications Pty Ltd, Sydney at 496.
116 Davies M, *Asking the Law Question* (1994) The Law Book Co Ltd, Sydney at 41.

> those who administer it to adapt it to the varying conditions of society…to avoid the injustice which arise when the law is no longer in harmony with the wants and usages and interest of the generation to which it immediately applies.[117]

However, there are inherent problems in this process of change. There are difficulties in reconciling the use of authority to shape decisions; while increasingly moving away from binding rules. This has been alluded to by many learned writers. In fact the late Professor Julius Stone asked, 'what magic at the heart of the system of stare decisis can transform a symbol of immobility into a vehicle of change?'[118] He further explained the competing lines of thought. First there is the duty of the courts to amend transactions which are contrary to public policy and the need for them to decide difficult new cases. On the other hand, the court has a duty to follow settled rules in their application.[119]

Does the peg fit?

Despite these fundamental difficulties with the process of reasoning from policy, it does occur. So which jurisdiction's shaping of the peg is the most valid in terms of legal reasoning?

In Australia, the privilege protects communication relating to both domestic and foreign politicians. There is social justice involved in determining that the conduct, performance and fitness for office of domestic politicians should be subjected to media scrutiny with fewer limitations placed on commentary. The expansion of qualified privilege, in a modern era of advancing technology and mass communication, was necessary so as not to infringe the implied freedom of political communication for mistaken but honest publications of defamatory political matter to a large audience.[120] Further, the goal of accountability of politicians is alluded to in Australian legislation providing for access to information. However, it may be that the development to include foreign politicians is in effect outside what is necessary for the effective operation of representative and responsible government enshrined in the Constitution, and the common convenience and welfare of the Australian society.

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117 *Wason v Walter* (1868) 4 LR QB 73 at 93 cited in above n 7 at 643.
118 'The Ratio of the Ratio Decidendi' (1959) 22 MLR 597.
119 Above n 115 at 496.
120 Above n 1 at 113.

The concept of reasonableness and malice was included as a matter of public policy, but modelled on statutory provisions. This was to ensure that the balance was not tipped too far in favour of publication to a large audience, when there is a possibility of major damage to reputation.[121] This is necessary when there is no remedy in privacy legislation or Common Law action. The advantage of reasonableness seems to be that the person with access to the information about sources and knowledge of belief in the truth has the onus of proving it. This may be considered necessary because of the need to ensure an appropriate professional attitude in the press, particularly in view of its important role in a geographically disperse country. As many Australians rely on the media for their information, there should be attempts to ensure its truthfulness and a right of reply.

The United Kingdom's House of Lords decision was probably most influenced by public policy considerations.

Previous authority seemed to work from a preferred position of protecting reputation.[122] This was the primary concern, with the public interest in open discussion on political affairs, only a secondary consideration.[123]

Then, in expanding the concept of qualified privilege, the court explained it was necessary in the new landscape of the law.[124] Lord Steyn noted that while English precedent has not yet recognised the duty of the press to inform the interested public about political matters, it was an open space in the law that the courts, particularly the House of Lords, could fill and finally settle.[125] They did so, using the future United Kingdom Human Rights Act as a foundation, and dissemination as the primary concern, but with strict requirements.

However, this reasoning has been criticised as unnecessary in the light of United Kingdom statutory provisions, which accorded protection to certain communications, often over and above Common Law.

> Parliament had unambiguously established that there were many instances in which everyman had to endure the most egregious of lies being told about him without having any possibility whatsoever of legal redress, even if the disseminator knew the information was untrue.[126]

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121 Above n 1 at 116.
122 Above n 28 at 36.
123 Above n 7 at 642.
124 Above n 3 at 1029.
125 Ibid at 1036.
126 Above n 7 at 642.

These instances include Article 9 of the Bill of Rights 1689 and the Parliamentary Papers Act 1840, as well as the extension of qualified privilege in the Defamation Act 1952.[127] However, even if this is the starting premise from which the reasoning proceeds, it still involves using policy as it is left to the courts to decide if public interest requires the Common Law to develop and change.[128]

The United Kingdom approach in not confining privilege to political communication may be problematic to explain in terms of its local political, social and legal circumstances. It is not consistent with the European convention, which requires that the laws of signatory states provide less protection for political figures than private individuals.[129] Further, in the conditions mentioned about circulation and tendency for tabloids to invade privacy, with no Common Law or statutory protection of privacy available, this scope may not be appropriate, unless the criminal libel offences, still in operation, are enforced.[130]

The consequences of introducing a prerequisite of public interest to determine whether the reciprocity requirement is satisfied is another illustration of the United Kingdom's reliance on policy. This may be chillingly unpredictable and effectively gives 'the court an undesirable and individuous role as a censor or licensing body.'[131] There is also further uncertainty in using public interest to determine whether there has been malice. This is partly because the concept of public interest is not defined precisely and limited to what is legitimate and proper rather than 'an interest which is due to idle curiosity or desire for gossip.'[132]

As stated, the New Zealand test does not rely on any public interest requirement such as reasonableness, and allows the press greater freedom of publication. The court explained that the introduction of these requirements would upset the balance of precedent regarding freedom of expression which has been 'carefully and methodically worked out over a long period.'[133] No other qualified privilege occasion has such a requirement and it would be

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127 Ibid.
128 Ibid.
129 Above n 7 at 640.
130 This is not likely according to above n 4 at para 31.
131 Above n 41 at 187.
132 *Webb v Times Publishing* [1960] 2 QB 535 at 569.
133 Above n 25 at 177.

difficult then to draw the line between which occasions should be covered by reasonableness. If effect was given to this requirement it may lead to 'creating essentially a new defence which is the prerogative of Parliament and not a bona fide development of the Common Law defence.'[134] However could not similar arguments be raised about creating an initial qualified privilege for media defendants? Maybe the distinction is because New Zealand's legislative environment does not permit the introduction of reasonableness,[135] while the Bill of Rights expressly provides for freedom of speech and parliament seems to want to promote political accountability.

Nevertheless, it has been argued that the denial of these public interest tests may leave current or future politicians without redress.[136] This may not necessarily be the case as the New Zealand test still has innate restrictions, such as whether the matter is in the politician's public capacity and whether it is a qualifying occasion. Further, there are added protections in New Zealand's privacy laws.

It seems that the Australian test does, as suggested,[137] fall between the wide allowances for the press in the New Zealand privilege and the stricter requirements in the United Kingdom. The onus of proof to defeat the privilege in New Zealand still remains with the person alleging the defamation. In Australia and the United Kingdom, it is up to the press to show that their publication was reasonable or in the circumstances, in the public interest.

However, in the United Kingdom, this public interest test needs to be satisfied at an earlier time, that is, in determining whether indeed the public has an interest in the information published at large. In Australia this is accepted unless the media cannot show the publication is reasonable. The problem with including the circumstances in determining privilege has been demonstrated. When a source is not authoritative, the publication is not privileged, even without recourse to the question of malice and even if the publisher took reasonable precautions to establish the truth.[138] This is justified as protecting politicians from being victims of reckless or deliberate press commentary. Yet,

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134 Above n 2 at 474.
135 Above n 2 at 469.
136 The Law Commission of New Zealand in 'Defaming Politicians: a Response to *Lange v Atkinson*' NZLC PP33, Sept 1998, Wellington, New Zealand at 4, cited in above n 25 at 178.
137 Above at page 75 under social and political factors.
138 Above n 7 at 645.

even if the wider Australian test was used Reynolds may have been sufficiently protected.[139]

Courts or Parliament

The courts have gone about instigating change in the area of qualified privilege for media defendants. But it is debatable whether they should in fact be making such decisions, ultimately on grounds of public policy. Instead it has been argued that this should be left to parliament, in a democratic society, as the courts should not be involved in a process of casting value judgments of this kind.[140] Stone explained that 'public policy may not be extended to new classes of case, for that would be judicial usurpation of the legislative function.'[141] In both *Lange v Atkinson*[142] and *Reynolds*[143] the court addressed this issue and justified why it was indeed the correct body to make these decisions.

Lord Nicholls, in *Reynolds,* stated that the Common Law has always previously accepted the role of the courts and parliament to determine whether an occasion is privileged.[144] He further explained that the court was the most appropriate body because it can be impartial and independent of government.[145] Further, it is accustomed to deciding disputed issues of fact and has made findings as to whether an occasion is privileged for the past 150-200 years,[146] including its application to political debate.[147] But it must be noted in *Reynolds* that there was no argument that another body should instead be given that responsibility.[148]

Moreover, there is always the possibility for Parliament, if it found the courts development of the Common Law doctrine unsatisfactory, to pass legislation, either 'restoring the orthodox position',[149] or changing the requirements to something more desirable. However, parliament has essentially not interfered

139 Ibid at 646.
140 Above n2 at 462.
141 Above n 115 at 495.
142 Above n 2 at 462.
143 Above n 3 at 1025.
144 Ibid.
145 Ibid.
146 Above n 7 at 637.
147 Above n 2 at 462.
148 Above n 3 at 1025.
149 Loveland I, 'Reform of Libel Law: the Public Law Dimension' (1997) 46 ICLQ 561 at 589.

with the courts role in the process of developing qualified privilege.[150] The New Zealand Court of Appeal recognised parliament's opportunity in the Defamation Act 1992 to 'strike afresh the balance between the right to freedom of expression and the right of the individual to reputation.'[151]

While the parliament did in fact make some reform, it did not introduce the proposed changes relating to a special defence for the media. The court speculated about the reasons for the parliament's failure to implement such changes. These reasons included the possibility that parliamentarian's had self-interest in protecting their privacy and reputation or alternatively the recognition that the courts were the most suited to develop this law in an incremental fashion.[152] Finally, the court noted that either way, the parliament had not taken action and as such it was left to the court to make new developments.[153]

This reasoning may not be sound, because it could be argued that the parliament in specifically reforming some areas while refraining from introducing the media defence, was implicitly denying its validity.

Nevertheless, although in general it is more appropriate for parliament to legislate on such policy-influenced matters, here there is a special consideration. That is, because the media is the watchdog of parliament, so parliament may not be of assistance. However, as discussed, accountability is important in all of these jurisdictions and the need for the courts intervention could be attributed to an extension of the separation of powers doctrine. Further, in determining these issues and developing its tests, the courts have regard to the parliament and, in a democratic society, the people's attitude to freedom of expression. Perhaps to clarify the judges' role the Common Law should develop a similar rule to that alluded to by Stone from the Swiss Civil Code. That is 'where the law is silent or unclear the judge must decide the case as if he were a legislator.'[154]

Wood or plastic?

So which type of peg is the best?

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150 Above n 2 at 462.
151 Ibid.
152 Ibid.
153 Ibid.
154 Above n 115 at 500.

As mentioned earlier, each jurisdiction's decision and development of the tests in relation to qualified privilege for media defendants is based on the conditions existing in that country. Therefore it is difficult to compare and ultimately conclude whether one version is innately better than another. What works in the United Kingdom or New Zealand may not be suitable for Australia, and vice versa.

However, there are significant hurdles in the reasoning in the United Kingdom and it is suggested that the test is not appropriate or adapted to its purposes and will produce too much uncertainty. Conversely, while the New Zealand decision is appropriate to the circumstances that apply in that country at present, it may be too permissive for the press in the future. Therefore, although Australia's approach may not be consistent with earlier authority, its application of public policy in the reasonableness requirement seems to be the most suited to its current environment and conducive to future developments.