Privy Council Appeal No. 71 of 1998

D.R. Lange *Appellant*

v.

(1) J.B. Atkinson and
(2) Australian Consolidated Press NZ Limited *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 28th October 1999

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Steyn
Lord Cooke of Thorndon
Lord Hope of Craighead
Lord Hobhouse of Woodborough

*[Delivered by **Lord Nicholls of Birkenhead**]*

This appeal concerns a defence of "political expression" pleaded in a libel action. The plaintiff applied, in advance of the trial, to strike out this plea as disclosing no defence known to the law. Elias J. dismissed the application. The Court of Appeal, comprising Richardson P., Henry, Keith, Blanchard and Tipping JJ., dismissed the plaintiff's appeal. The judgments of Elias J. and the Court of Appeal are reported at [1997] 2 N.Z.L.R. 22 and [1998] 3 N.Z.L.R. 424. The Court of Appeal granted the plaintiff leave to appeal to their Lordships' Board. The trial of the action is yet to take place.

The plaintiff in the action is Mr. David Lange, a former Prime Minister of New Zealand and former leader of the New Zealand Labour Party. In October 1995 the magazine *North and South*, which circulates throughout New Zealand, published an article by the first defendant, Mr. Joe

Atkinson. The publisher of *North and South* is the second defendant, Australian Consolidated Press NZ Ltd. At the time the article was published Mr. Lange was a senior member of the opposition in Parliament.

As conveniently summarised by the Court of Appeal, the article is generally critical of Mr. Lange's performance as a politician and as Prime Minister, and casts doubt on his recollection of certain events in which he was involved. Its flavour can be gauged from the accompanying cartoon, also said to be defamatory, which depicts Mr. Lange at breakfast being served a packet labelled "Selective Memory Regression for Advanced Practitioners". There are also some mildly adverse observations on his time as a student and as a practising lawyer, but they are incidental to the main theme. The sixteen passages complained of are set out in the judgment of Elias J. They are said to mean that Mr. Lange is irresponsible, dishonest, insincere, manipulative and lazy.

In addition to defences of truth, honest opinion and failure to mitigate damage, the defendants pleaded a defence of "political expression" (paragraph 41) and qualified privilege (paragraph 43). The former plea was novel. It was based on the majority judgments of the High Court of Australia in *Theophanous v. The Herald & Weekly Times Ltd.* (1994) 182 C.L.R. 104 and *Stephens v. West Australian Newspapers Ltd.* (1994) 182 C.L.R. 211. In short, the plea was that the article and the offending words related to matters which had previously been the subject of public comment by Mr. Lange himself made as a member of Parliament and as a political commentator and columnist. They concerned Mr. Lange in his capacities as a member of the New Zealand House of Representatives, the leader of the parliamentary Labour Party and the official opposition and the Prime Minister of New Zealand. They dealt with his performance in those capacities, and they were written and published for the purpose of bringing readers' attention to matters relevant to an informed consideration of that performance. Further, the article was written without malice, was not published recklessly, and was reasonable in the circumstances, having regard to the first defendant's belief in the truth of the articles, the steps taken beforehand to check and research, and the absence of malice and recklessness.

Paragraph 43 of the defence was a more conventional plea of qualified privilege. This paragraph alleged that the article was published in the circumstances and for the purpose set out in paragraph 41, and that the first defendant had a duty to write and publish the article and the New Zealand public had an interest in receiving the information in the article.

As noted by Elias J., the issue raised by the application was whether, in the context of political speech, the common law currently strikes an appropriate balance between the two principles of reputation and free speech. In a wide-ranging judgment, Elias J. considered the various factors bearing on this issue. A summary would not do justice to the judgment, nor is a summary necessary having regard to the conclusion their Lordships have reached in this important matter. However, some salient points in the judgment must be mentioned. The judge observed that the balance ultimately must be a value judgment informed by local circumstances and guided by principle. In the defence of qualified privilege the common law has made the judgment that it is for the common convenience of society that speech which cannot be proved to be true is protected. Any "adjustment to the common law" should be by application of the existing defences of honest belief or qualified privilege, as suggested by the Court of Appeal in *Hyams v. Peterson* [1991] 3 N.Z.L.R. 648, 657. The contemporary legislative and social background needs to be considered if the common law is to keep abreast with the expectations of modern society. Political debate is at the core of representative democracy. Comment upon the official conduct and suitability for office of those exercising the powers of government is essential to the proper operation of a representative democracy. The transcendent public interest in the development and encouragement of political discussion extends to every member of the community. It would be wrong for such communications, if made to the general public, to have a lesser protection than is available to sections of the community able to point to a common interest which may be of no direct public value. Political discussion inevitably on occasion will entail the making of statements likely to injure the reputations of others. The common law defence of qualified privilege should apply to claims for damages for defamation arising out of political discussion. Political discussion is discussion which bears upon the function of electors in a

representative democracy by developing and encouraging views upon government.

The judge's conclusion was that the defence of political expression should be re-pleaded as part of the defence of qualified privilege. The plea of absence of malice should not be carried over into the amended pleading. Re-introduction of concepts of malice wider than those identified and restated in the Defamation Act 1992 is inconsistent with the Act and should not be permitted. Similarly with the plea of reasonableness: a requirement of reasonableness would introduce a wide factual inquiry inconsistent with the statutory restatement of the defence of honest opinion. There are good reasons why the two defences of honest opinion and qualified privilege should conform on the question of fault. Once the circumstances of legitimate political discussion have been established, the only appropriate condition for raising qualified privilege should be honest belief. The defendants had a tenable defence.

Elias J. delivered her reserved judgment on 24th February 1997. A few months later, and before an appeal from this decision was heard by the Court of Appeal, there was a development in the Australian jurisprudence. On 8th July 1997 the High Court of Australia, in *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520, decided unanimously that qualified privilege applied to communications to the public of information, opinions and arguments concerning government and political matters, subject to the publisher proving reasonableness of conduct.

In the Court of Appeal [1998] 3 N.Z.L.R. 424 Richardson P., Henry, Keith and Blanchard JJ. dismissed Mr. Lange's appeal, for substantially the same reasons as Elias J. They said at page 428:-

> "We hold that the defence of qualified privilege applies to generally-published statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to be members, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities."

The court emphasised that its decision was limited to those elected or seeking election to Parliament. Tipping J., who had also contributed to the main judgment, delivered a concurring judgment of his own.

Again, their Lordships will not attempt to summarise the erudite and comprehensive review undertaken by the Court of Appeal. For present purposes it suffices to mention that the court drew attention to the particular features existing in New Zealand which are the constitutional context in which political discussion takes place: the constitution of New Zealand as a democracy based on universal suffrage; the change in access to government documents brought about by the Official Information Act 1982; the New Zealand Bill of Rights Act 1990; and the abolition, in 1992, of the long-standing offences of criminal libel and publishing untrue matters calculated to influence votes during an election campaign or a local election or poll.

The Court of Appeal, at pp. 469-470, rejected the incorporation of a requirement of reasonableness into the defence of qualified privilege:-

> "The basis of qualified privilege is that the recipient has a legitimate interest to receive information assumed to be false. How can that interest differ simply because the author has failed to take care to ensure that the information is true?"

The Court of Appeal gave its judgment on 25th May 1998. Six weeks later, on 8th July, the English Court of Appeal delivered its judgment in *Reynolds v. Times Newspapers Ltd.* [1998] 3 W.L.R. 862. In that case the issue was similar, in that it concerned a claim to qualified privilege for political discussion in a newspaper. There was a difference between the two cases. The *Lange* case concerns the conduct of a member of the New Zealand Parliament. As already noted, the Court of Appeal limited its judgment to those elected or seeking election to Parliament. The *Reynolds* case did not concern the conduct of a member or former member of the United Kingdom Parliament. Mr. Reynolds, the plaintiff, was a member of the Irish Parliament (Dail Eireann). The English Court of Appeal, however, did not frame its judgment as narrowly as the New Zealand Court of Appeal.

In short, the English Court of Appeal declined to follow the approach of the New Zealand Court of Appeal in the present case. The English Court of Appeal held that qualified privilege is available when (1) the publisher is under a duty to those to whom the material was published to publish the material in question and (2) those to whom the material was published had an interest to receive the material and (3) the nature, status and source of the material and the circumstances of its publication were such that the publication should in the public interest be protected in the absence of proof of express malice.

Their Lordships' Board heard the present appeal a few days before their Lordships, in their capacity as members of the Appellate Committee of the House of Lords, heard oral argument in the *Reynolds* case. The House upheld the decision of the (English) Court of Appeal but not its formulation of three questions. The House decided that the common law should not develop "political information" as a new subject-matter category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever its source and whatever the circumstances. Rather, the established common law approach to publication of mis-statements of fact to the general public remains essentially sound. Whether such a publication is in the public interest or, in the conventional phraseology, whether there is a duty to publish to the intended recipients, depends upon the circumstances, including the nature of the matter published and its source or status.

Against this somewhat kaleidoscopic background, one feature of all the judgments, New Zealand, Australian and English, stands out with conspicuous clarity: the recognition that striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions. These conditions include matters such as the responsibility and vulnerability of the press. In their Lordships' view, subject to one point mentioned later, this feature is determinative of the present appeal. For some years their Lordships' Board has recognised the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy. The present case is a prime instance of such a case.

As noted by Elias J. and the Court of Appeal, different countries have reached different conclusions on the issue arising on this appeal. The courts of New Zealand are much better placed to assess the requirements of the public interest in New Zealand than their Lordships' Board. Accordingly, on this issue the Board does not substitute its own views, if different, for those of the New Zealand Court of Appeal.

This approach has been adopted in cases, such as *Invercargill City Council v. Hamlin* [1996] A.C. 624, where a line of New Zealand authorities stretched over some years. But the existence of a line of authority is not essential. In principle, the approach is equally applicable where the case under appeal has no local ancestry. An instance of this arose earlier this year, in *W v. W* [1999] 2 N.Z.L.R. 1. The present case is of the latter character.

In the Court of Appeal Tipping J. expressed unease at the absence of any requirement that the speaker or writer must take reasonable care to ascertain the facts. He accepted "with some hesitation" at page 477 that the defence of qualified privilege should be developed so as to apply to political discussion. A requirement of reasonableness, in the sense of taking such care with the facts as was reasonable in the circumstances, cannot be introduced as a condition or element of the proposed development, but such a reasonableness consideration could be relevant to whether the defendant took improper advantage of the occasion. Whether an occasion has been misused lends itself more readily to notions of reasonableness than if such a concept were introduced as an absolute precondition to qualified privilege. Their Lordships observe that this suggestion underlines still further the range of solutions open to the various national courts when developing their own common law in this difficult area.

It was submitted for the appellant that a development of the law as effected by the Court of Appeal is a matter for Parliament. The appellant relied on several factors. In 1984 the Court of Appeal expressed the view that any major change in this field should be made by Parliament: see *Templeton v. Jones* [1984] 1 N.Z.L.R. 448, 459. Far from making any change, Parliament did not include in the Defamation Act 1992 the media defence recommended in

1977 in the report of the Committee on Defamation (the McKay report). Parliament thus determined that the status quo represented by the existing state of the law should prevail. In 1996 the Court of Appeal accepted that in any policy decision the courts should bear in mind the recent expression of parliamentary will contained in the Act of 1992: see *Television New Zealand Ltd. v. Quinn* [1996] 3 N.Z.L.R. 24, 73. In 1997 Richardson P, in *Reg. v. Hines* [1997] 3 N.Z.L.R. 529, 539 warned judges of the need to be conscious of the respective roles of the three branches of government: the larger the public policy context, the less well able the courts are to weigh the considerations involved. In its decision in the present case, it was submitted, the Court of Appeal usurped the role of Parliament by removing a fundamental protection from those involved in politics. The court usurped the democratic process it sought to protect.

The Court of Appeal no doubt considered all these points. Here again, their Lordships are of the view that these were matters for the decision of that court. There are no hard and fast rules about which matters are suitable for judicial development and which are not. Whether an issue is appropriate for judicial resolution depends upon a weighing of factors better undertaken by the courts of New Zealand than by the Board.

Their Lordships thus accept that there is a high content of judicial policy in the solution of the issue raised by this appeal; that different solutions may be reached in different jurisdictions without any faulty reasoning or misconception (see *Australian Consolidated Press Ltd. v. Uren* [1969] 1 A.C. 590, 644); and that within a particular jurisdiction the necessary value judgment may be best made by the local courts.

Their Lordships come now to the one feature which has given them cause for anxiety. In the course of their judgments both Elias J. and the Court of Appeal undertook an analysis of the English case law. However, when doing so neither the Chief Justice of New Zealand, as she now is, nor the New Zealand Court of Appeal had the advantage of considering the judgment of the English Court of Appeal in *Reynolds v. Times Newspapers Ltd.* or the speeches in the House of Lords on the further appeal in that case. In a decision unanimous on this point the House has now held

that, by ordinary principles of the common law of England, qualified privilege may apply to political discussion in all the circumstances of a particular publication, but that there is no generic privilege for political discussion. To that extent the judgment of the English Court of Appeal, itself unanimous, has been affirmed. This result in England has been reached after taking into careful account both the New Zealand and the Australian *Lange* decisions.

Thus, due to the accident of timing, when considering this issue the English courts have had the benefit of the New Zealand and Australian *Lange* decisions, but the New Zealand courts have not had the benefit of the English decisions in *Reynolds*. For the reason already given, the English case law is by no means determinative of the issue arising in the present case. But an appraisal of the English case law is an important part of the background against which the courts in New Zealand are assessing the best way forward on this important and difficult point of the common law. This is not surprising. Even on issues of local public policy, every jurisdiction can benefit from examinations of an issue undertaken by others. Interaction between the jurisdictions can help to clarify and refine the issues and the available options, without prejudicing national autonomy.

Their Lordships consider that the advent of the decision of the House of Lords in *Reynolds* is a matter the New Zealand Court of Appeal would wish to have the opportunity to take into account when formulating the common law of New Zealand on this issue. In order to achieve this end, and in this unusual situation, their Lordships are of the view that the appropriate course is formally to allow this appeal and remit the matter to the Court of Appeal for further hearing.

Their Lordships emphasise that they do not suggest that at the further hearing the New Zealand courts are bound to adopt either the English or the Australian solutions. Nor do they seek to influence the New Zealand courts towards either of these solutions. If satisfied that the privilege favoured in the judgment now under appeal is right for New Zealand, although wider than has been held acceptable in either England or Australia, the New Zealand Court of Appeal is entitled to maintain that position. Nevertheless, in the light of the comparative case law which has now emerged, including the clarification of the English common

law in *Reynolds*, their Lordships think it appropriate to give the New Zealand Court of Appeal the opportunity to reconsider the issue. After all, the three countries are all parliamentary democracies with a common origin. Whether the differences in details of their constitutional structure and relevant statute law have any truly significant bearing on the scope of qualified privilege for political discussion is among the aspects calling for consideration.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed. The decision and order for costs made by the Court of Appeal should be set aside, and the appeal should be remitted to the Court of Appeal for rehearing. The composition of that court for the rehearing need not be the same and may be larger; that is entirely a matter for the court itself. There should be no order for costs of the appeal to their Lordships' Board. The costs of all proceedings in New Zealand are matters for the New Zealand courts.