IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA176/2017
[2018] NZCA 278

BETWEEN	EDWARD TAIHAKUREI DURIE First Appellant	
	DONNA MARIE TAI TOKERAU HALL Second Appellant	
AND	HETA GARDINER First Respondent	
	THE MĀORI TELEVISION SERVICE Second Respondent	

Hearing:	26 October 2017 (further submissions received 28 March 2018)
Court:	French, Winkelmann and Brown JJ
Counsel:	F E Geiringer, S J Price and G M Davidson for Appellants W Akel and J W S Baigent for Respondents
Judgment:	31 July 2018 at 2 pm

JUDGMENT OF THE COURT

A The respondents' application to adduce further evidence is declined.

B The appeal is allowed in part. References to "qualified privilege", "*Lange v Atkinson*", and "reportage" are struck out from the respondents' qualified privilege/public interest defence. The respondents' defence of public interest in respect of the first website story before the video clip was posted is also struck out. The appeal is otherwise dismissed.

C There is no award of costs.

REASONS

FRENCH AND WINKELMANN JJ

(Given by French J)

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Introduction

[1] Is there a public interest defence in New Zealand to defamation claims arising from mass publications? And if so, what is its scope?

[2] Those are the key questions posed by this appeal. They arise from an interlocutory decision of Mallon J in the High Court, declining to strike out a defence pleaded by a television broadcaster in proceedings brought by the appellants.[1]

[3] As the Judge noted, the defence pleaded relies on developments in the United Kingdom and Canada which to date have not yet been adopted by appellate

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1 *Durie v Gardiner* [2017] NZHC 377, [2017] 3 NZLR 72.

authority in this country.[2] The current appeal thus affords this Court its first opportunity to consider these developments, and how they might affect the landmark decisions of *Lange v Atkinson*.[3]

Background

[4] The appellants are prominent New Zealanders. Sir Edward Durie is a retired High Court Judge and at all relevant times co-chair of the New Zealand Māori Council.[4] Ms Donna Hall is a lawyer with a high profile, specialising in Māori legal issues. She is married to Sir Edward.

[5] Sir Edward and Ms Hall issued defamation proceedings in the High Court against the Māori Television Service (Māori TV) and against one of its senior news reporters, Mr Heta Gardiner. The proceedings relate to a story broadcast on Māori TV and put up on its website.

[6] In total there were four publications:

(a) A television broadcast as part of the Te Kāea news programme on 3 August 2015 between 5.30 and 6 pm (the Te Kāea broadcast).

(b) A website story put up on 3 August 2015 at 6.01 pm (the first website story).

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2 At [36]. See in the High Court: *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841 (HC); *Peters v Television New Zealand Ltd* HC Auckland CIV-2004-404-3311, 1 October 2009; *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010; *Dooley v Smith* [2012] NZHC 529; *Cabral v The Beacon Printing & Publishing Co Ltd* [2013] NZHC 2684; and *Karam v Parker* [2014] NZHC 737. Three decisions delivered since Mallon J's decision in this case are: *Craig v Slater* [2017] NZHC 735, [2017] NZAR 637; *Hagaman v Little* [2017] NZHC 813, [2017] 3 NZLR 413; and *Low Volume Vehicle Technical Assoc Inc v Johnson* [2017] NZHC 2846.

3 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) [*Lange (No 1)*]; and *Lange v Atkinson* [2000] 3 NZLR 385 (CA) [*Lange (No 2)*].

4 As explained more fully by Mallon J, the New Zealand Māori Council is a statutory body with "functions including promoting, encouraging and assisting Māori to advance their physical, economic, industrial, educational, social, moral and spiritual well-being. It has been involved in significant litigation on behalf of Māori in accordance with that function." The Act that established the New Zealand Māori Council provides for District Māori Councils, which have members elected every three years, and those District Māori Councils elect the New Zealand Māori Council members. See *Durie*, above n 1, at [4]–[9].

(c) An amended website story put up on 6 August 2015 (the amended website story).

(d) A television broadcast on a weekly current affairs programme Native Affairs on 31 August 2015 (the Native Affairs programme).

[7] In order to understand the issues, it is necessary to set out the sequence of events leading to the publications in some detail. The following account, which the parties agree is accurate, borrows extensively from Mallon J's judgment.

[8] On the morning of 3 August 2015, the head of Māori TV's news and current affairs Ms Maramena Roderick was contacted by a confidential source. The source whom Ms Roderick regarded as reliable informed her of conflict within the Māori Council. At Ms Roderick's request, the source forwarded her a copy of an email as well as a document purporting to be minutes of a Māori Council executive meeting held on 28 July 2015.

[9] The email was dated 31 July 2015 and had been sent to Ms Hall by Mr Maanu Paul the other co-chair of the Māori Council. The email advised Ms Hall that her law firm had been dismissed as the Māori Council's legal representative in proceedings regarding the Trans-Pacific Partnership Agreement and that she was to hand over her file to another lawyer.

[10] The minutes recorded resolutions and statements made at the 28 July meeting which pre-dated the email. The minutes included statements that:

(a) Ms Hall had not followed the Māori Council's instructions. She should be dismissed and a complaint made to the Law Society if evidence were received that her firm was undermining the Council's mana.

(b) According to the Tāmaki Makaurau District Māori Council, Sir Edward had a conflict of interest when briefing the Council's legal business. He had instructed Ms Hall to apply to put him back on the board of the Crown Forestry Rental Trust as the Māori Council's representative

without Mr Paul's knowledge or the consent of the executive. Processes to mitigate the risk of conflict had not been put in place and a legal services roopu should be formed to instruct and manage all legal claims until the Law Society provided a clear directive on the conflict issue.

(c) The Te Tai Tokerau District Māori Council had complained Ms Hall had set up two new Māori committees in that district without consultation. If she had done this at the instance of Sir Edward, then he needed to be held to account and if not Ms Hall was breaching Māori Council tikanga. The executive resolved that the legal services roopu undertake an investigation and report back.

(d) The Māori Council's legal team was the only legal team not ready to proceed with an urgent hearing relating to a claim before the Waitangi Tribunal.

(e) Ms Hall was running a campaign that was damaging the Tāmaki Makaurau District Māori Council's mana and she and Sir Edward were whipping up a level of hatred not witnessed before.

[11] Ms Roderick regarded the matters in the email and minutes as of high public interest and concern to Māori, having regard to the Māori Council's leadership role in Māoridom and its success in achieving significant change and development on behalf of Māori over many years. She considered the documents indicated a serious breakdown of relationships within the Māori Council.

[12] Ms Roderick then assigned the story to Mr Gardiner with a view to it being broadcast that evening between 5.30 pm and 6 pm on Māori TV's flagship news programme Te Kāea.

[13] Mr Gardiner made contact with Ms Hall at approximately 1.45 pm. She claimed Mr Paul had no authority to dismiss her. When asked by Mr Gardiner if

she would like to speak on camera to give her perspective, she said she was busy until 4 pm and to call her then.

[14] Mr Gardiner then arranged to interview Mr Paul by telephone at 2.30 pm. Mr Paul confirmed the minutes were an accurate record of the meeting. After the interview, Mr Gardiner texted Ms Hall confirming he had now interviewed Mr Paul and wanting to make arrangements to interview her at 4 pm. She was not however free of her commitments and could not be contacted until just after 5 pm.

[15] Ms Hall emailed Mr Gardiner at 5.15 pm. She advised there were elections pending for the Māori Council executive and until the election was held, the current executive was only supposed to be acting in a caretaker role. The election was hotly contested and causing some people to make regrettable statements. The meeting recorded in the minutes was not a properly constituted meeting of the executive. There were documents that easily showed the defamatory allegations in the minutes were false, but it was not possible in the time available to provide a detailed response. There would be a Māori Council meeting on 5 to 6 September at which Ms Hall was confident the allegations would be shown to be false and not endorsed by the Māori Council. Māori TV should not publish the allegations in the minutes because it would be acting as the mouthpiece of people who were making deliberately hurtful and false allegations for their own political purposes.

[16] Mr Gardiner conferred with his producers. It was too late to add Ms Hall's statement to the story which was about to go on air. It was agreed that Mr Gardiner would instead do a live piece at the end of the story to explain that Ms Hall's statement had just been received and to set out her statement.

[17] The story was duly broadcast on Te Kāea on 3 August 2015 during the later part of the programme's 5.30 pm to 6 pm time slot. It was broadcast in Māori with English subtitles. There were also visuals showing extracts from the minutes. An English transcript of the broadcast reads as follows:

> The NZ Māori Council (NZCM) has [dumped] their legal counsel, Donna Hall and her firm, Woodward Law from their TPPA claim. Heta Gardiner has this exclusive report.

Only last month, the Māori Council was fighting to stop the TPPA. But it's problems from within that are corroding the council. Today we learnt that they've dumped their legal counsel.

[Maanu Paul] It's come to our attention that Woodward Law wasn't listening to our directives, so we removed them.

Maanu Paul sent an email to Donna Hall last week advising that her firm, Woodward Law, was being dismissed as its TPPA counsel. Neither parties are disclosing much about the fallout. But Te Kāea has also obtained a copy of last week's council minutes, which outlines a severe breakdown in the relationship. The minutes record say:

- That Woodward Law be dismissed as NZMC legal counsel for the TPPA Claim.

- That if evidence is received that Woodward Law is undermining the mana of the NZMC, then a complaint to the NZ Law Society be prepared and filed.

- A clear breach of the directives given to Woodward Law.

[Maanu Paul] We have the authority in these matters.

The minutes also record allegations that there is a conflict of interest with Donna Hall and her husband Taihākurei Durie. The council's Tāmaki Makaurau branch claimed that:

"Taihākurei as the husband of Donna Hall, the Principal of Woodward Law has put himself under risk of certain conflict of interest unless processes mitigating that risk were put in place. That did not happen. In other words, Taihākurei instructed his wife to file an application to put himself back on the CFRT Board without bringing the matter to the Executive. Had he done so and resiled from voting, the conflict could have been dealt with appropriately."

It claims that in 2014 Woodward Law filed an application for Taihākurei to be given a second term as a Māori Trustee on the Crown Forestry Rental Trust (CFRT) Board without the consent of the Māori Council. The minutes also record Titewhai Harawira accusing Donna Hall of running a smear campaign during the triennial elections and that:

"Titewhai has served on this DMC for over 40 years and has never witnessed the level of hatred being whipped up by Donna Hall and Eddie [Taihākurei]."

So, is this the beginning of the end for this relationship?

[Maanu Paul] When the NZ Council meets next, they will decide on such matters.

The council has resolved to form a legal services subcommittee to investigate the allegations and meet with Woodward Law.

We cross now to our political reporter Heta Gardiner. Heta, what did Donna Hall have to say today?

> Rahia, I just spoke to Donna Hall and that is why she didn't feature in my story today, her statement came too late. It's safe to say that Donna Hall is livid. In regard to the members mentioned in our report, she says, "These are not truly statements from the Executive but are rather the personal statements of some disgruntled Māori Council members. There is no privilege that attaches to these statements." She goes on to say that at the meeting in September she is confident that the allegations will be shown to be false.

[18] The first website story was put up on Māori TV's website at 6.01 pm on 3 August 2015. The original script from the Te Kāea broadcast was uploaded, but without the video clip containing the summary of Ms Hall's response. It had still to be processed. The video clip became viewable about 7.41 pm. The online story was in English only. It was identical to the Te Kāea broadcast with the exception of the following:

(a) reference in the second sentence of the broadcast to Mr Gardiner having this exclusive report was not included in the website story;

(b) the website story did not include quotation marks around the following words:

> In other words, Taihākurei Durie instructed his wife to file an application to put himself back on the CFRT Board without bringing the matter to the Executive. Had he done so and resiled from voting, the conflict could have been dealt with appropriately.

(c) the website story included the following additional words:

> Furthermore, the minutes reveal concerns from the council's Tai Tokerau branch that Donna Hall had set up Māori committees in their district without consulting them and that:
>
> "… we need to establish who is instructing Woodward Law to go into other districts. If it is Taihākurei, then he needs to be held to account. If it is Donna Hall is instructing herself, this is another breach of the NZMC tikanga and processes."

(d) the website story did not include the direct comments from Mr Paul; and

(e) the website story did not include the cross to Mr Gardiner and his summary of what Ms Hall had to say.

[19] Later in the evening of 3 August 2015, Mr Gardiner offered Ms Hall another opportunity to be interviewed the next day to refute some of the accusations, but did not receive a response. The next communication was in fact a letter dated 5 August 2015 from a lawyer representing both Ms Hall and Sir Edward. The letter contended the broadcast and website story were defamatory and, had Māori TV allowed a reasonable time, could easily have been refuted by documentation. The letter requested immediate removal of the website story together with a retraction and apology.

[20] On 6 August 2015 Māori TV updated the website story. This was to include the last part of the Te Kāea broadcast in which Ms Hall's response was discussed. It also included (minutes after initially going online) the quotation marks missing from the first website story.

[21] On 5.42 pm on 7 August 2015, Māori TV removed the website story but did not agree to the other demands in the lawyer's letter. Its position as conveyed to Ms Hall and Sir Edward's lawyers was that further inquiries had indicated a very different view to that advanced by Ms Hall and that Māori TV considered the story was likely to develop. It therefore refused to agree not to re-publish the minutes. It again invited Ms Hall and Sir Edward to be interviewed.

[22] Ms Roderick considered the issues required further coverage in order she says to give viewers a better understanding of the dispute. This led to the Native Affairs broadcast on 31 August 2015. Ms Hall and Sir Edward declined to be interviewed, but provided a statement denying the allegations and saying the resolutions passed at the meeting were invalid and based on incorrect information. We interpolate here that the appellants do not sue Māori TV in respect of this broadcast although it does form part of a claim for aggravated damages.

[23] There were no further developments until a meeting of the Māori Council on 16 April 2016 when Sir Edward was elected sole chairperson for a term of three years. This was reported by Māori TV on its Te Kāea programme. The report also appeared on Māori TV's website. The story included an on-camera interview with Sir Edward, and Mr Paul's response to the election result.

[24] Other media reported on the election result. Earlier, four news outlets — Fairfax Media, Radio New Zealand, Television New Zealand and Waatea News — had published stories on 3 or 4 August 2015 about the Māori Council dismissing Ms Hall and (in varying degrees) her response.

The pleadings

[25] The statement of claim treats each of the first three publications (the Te Kāea broadcast, the first website story and the amended website story) as separate causes of action.

[26] It contends that each publication contained statements that in their natural and ordinary meaning were defamatory of Ms Hall and Sir Edward. The defamatory meanings are identified as follows. In relation to Sir Edward, that he:

(a) Acted in a position of conflict of interest by instructing his wife to apply for his reappointment to the Crown Forestry Rental Trust without notifying the Māori Council or seeking its consent.

(b) Acted unlawfully and unprofessionally by not obtaining the Māori Council's consent to his bid for reappointment.

(c) Breached his responsibilities to the Māori Council by not obtaining its consent.

(d) Acted dishonestly by not telling the Māori Council of his bid for reappointment

(e) Placed his own interests and those of his wife over those of the Māori Council and Māori people.

(f) Conducted himself so as to give rise to a reasonable cause to suspect he acted improperly and without Māori Council approval to set up committees in Tai Tokerau.

(g) Was running an unjustified smear campaign in an unprecedented manner that involved whipping up hatred in relation to the elections.

[27] In relation to Ms Hall, that she:

(a) Conducted herself so as to justify being dismissed.

(b) Failed to follow the Māori Council's instructions.

(c) Breached her professional ethical obligations.

(d) Acted unlawfully.

(e) Acted in a position of conflict of interest in making an application on behalf of the Māori Council for her husband to be reappointed to the Crown Forestry Rental Trust without notifying the Māori Council or obtaining its consent.

(f) Acted unprofessionally and unlawfully by not obtaining that consent.

(g) Breached Māori Council tikanga by setting up committees without consulting the local council.

(h) Conducted herself so as to give rise to a reasonable cause to believe she had undermined the mana of the Māori Council in a manner that breaches Law Society obligations.

(i) Conducted herself so as to give rise to a reasonable cause to believe she had acted without instructions in setting up committees.

(j) Was running an unjustified smear campaign in an unprecedented manner that involves whipping up hatred in relation to the elections.

(k) Breached her responsibilities to the Māori Council.

(l) Placed her own and her husband's interests over those of the Māori Council and Māori people.

[28] The statement of claim seeks compensatory (including aggravated) damages and punitive damages as well as a recommendation for publication of a correction.

[29] The statement of defence contends the words do not bear the alleged defamatory meanings. It also pleads other defences including the defence of honest opinion and a defence described as "Qualified Privilege/Public interest defence". This latter defence, which Māori TV told Mallon J is its primary defence, is pleaded in the following terms:

> **Qualified Privilege/Public interest defence**
>
> To the extent that the words complained of … were published, those publications were protected by qualified privilege in that they were neutral reportage, and/or subject to the *Lange v Atkinson* privilege; or an extension thereto; and/or were responsible journalism/communications on matters of public interest; or protected by a sui generis public interest defence.

The strike-out application

[30] Sir Edward and Ms Hall applied to strike out the defence of honest opinion and the qualified privilege/public interest defence on the grounds neither of those defences could possibly succeed.

[31] Much of the argument in the High Court focused on whether the qualified privilege defence in the terms pleaded was as a matter of law available in this country. After an extensive review of the authorities, Mallon J concluded that it was,[5] and further that it could not be said the defence would inevitably fail on the facts.[6]

[32] Justice Mallon also refused to strike out the honest opinion defence.[7] The appellants have not appealed that part of her judgment and we therefore do not address honest opinion any further.

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5 *Durie*, above n 1, at [105].
6 At [112]–[114].
7 At [145].

[33] We turn now to consider the issues on appeal. It was common ground that Mallon J's review of the case law, the facts of each case and the rulings in each case was comprehensive and accurate.[8] We therefore do not consider it necessary for us to traverse the authorities in the same detail, other than to provide a brief summary of the relevant legal background.

[34] It should also be noted that in this Court unlike the High Court, the appellants were prepared to concede that some form of public interest defence might now exist in New Zealand. The focus of the argument was therefore more on the boundaries of such a defence and its application to the facts.

Is there a general public interest defence to defamation claims in New Zealand and if so, what is its scope?

[35] For convenience we again set out the defence as pleaded by Māori TV.

> To the extent that the words complained of … were published, those publications were protected by qualified privilege in that they were neutral reportage, and/or subject to the *Lange v Atkinson* privilege; or an extension thereto; and/or were responsible journalism/communications on matters of public interest; or protected by a sui generis public interest defence.

Legal background

[36] The classic definition of qualified privilege is that it arises where the maker of the impugned communication has "an interest or duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it".[9] Where the privilege arises, it protects false and defamatory assertions of fact. It is qualified as opposed to absolute because the privilege may be lost if the plaintiff proves the maker of the statement took improper advantage of the occasion of publication or was predominantly motivated by ill-will.[10]

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8 The appellants disputed some of Mallon J's conclusions regarding what they say are the constraints of reportage but ultimately these were not significant for the purposes of the appeal.

9 *Adam v Ward* [1917] AC 309 (HL) at 334.

10 Defamation Act 1992, s 19.

[37] In the first *Lange v Atkinson* decision, this Court extended the scope of the defence of qualified privilege as it had traditionally been understood by holding that mass publications concerning Members of Parliament, or those wanting to be elected to Parliament, were capable of attracting the defence if the allegations related to their fitness for office.[11]

[38] This was new because previously the courts had taken a narrow view of the reciprocity of interest required as between communicator and recipient when it came to generally published statements. With a few limited exceptions such as fair and accurate reports of official statements, hearings and meetings, the courts had consistently refused to recognise either that news disseminators had a duty to publish matters which were of public interest and importance, or that the general public had a legitimate interest in learning of such matters.[12] In *Lange* however, this Court said a strict concept of reciprocity was not essential.[13]

[39] This Court did however reaffirm the traditional view as to when the privilege would be lost, declining to follow Australian authority and import a new requirement that a media defendant must prove it had acted reasonably in publishing the story.[14]

[40] In the second *Lange v Atkinson* decision,[15] this Court reconsidered its approach[16] in light of a later House of Lords decision *Reynolds v Times Newspapers Ltd* which had taken a different view.[17] This Court considered *Reynolds* was distinguishable in the New Zealand context and accordingly reaffirmed its earlier decision.[18] In distinguishing *Reynolds*, the Court relied on such matters as the more responsible media culture in New Zealand,[19] the smaller population,[20] and differences

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11 *Lange (No 1)*, above n 3, at 467–468.
12 See *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 (CA); *Dunford Publicity Studios Ltd v News Media Ownership Ltd* [1971] NZLR 961 (SC); and *Brooks v Muldoon* [1973] 1 NZLR 1 (SC).
13 At 441.
14 At 469–470. Compare *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.
15 *Lange (No 2)*, above n 3.
16 At the direction of the Privy Council: *Lange v Atkinson* [2000] 1 NZLR 257 (PC).
17 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL).
18 *Lange (No 2)*, above n 3, at [37]–[41].
19 At [34].
20 At [35].

between the New Zealand Bill of Rights Act 1990 and the European Convention on Human Rights.[21]

[41] In *Reynolds*, the House of Lords had accepted the traditional approach was inappropriately chilling free speech and that publication about matters of public interest to the world at large should be capable of attracting qualified privilege. However, it rejected the suggestion that a public interest privilege should be limited to political information, the publication of which would be privileged whatever the circumstances. That approach was considered unsound in two respects. First, in the view of their Lordships there was no principled basis for distinguishing political discussion from discussion of other matters of serious public concern. And secondly, to ignore the circumstances of publication would mean inadequate protection for reputation.[22]

[42] Instead, the House of Lords held that when the mass media makes a claim for privilege, the question of whether the duty/interest test is satisfied (or put more simply, whether the public is entitled to know) must be answered on the facts of each case, taking into account, the following non-exhaustive factors:[23]

(a) the seriousness of the allegation;

(b) the nature of the information;

(c) the source of the information;

(d) the steps taken to verify the information;

(e) the status of the information;

(f) the urgency of the matter;

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21 At [28]–[30]; referring to the Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953); scheduled to and given the force of law by the Human Rights Act 1998 (UK).

22 *Reynolds*, above n 17, at 204.

23 At 205.

(g) whether comment was sought from the plaintiff;

(h) whether the article contained the gist of the plaintiff's side of the story;

(i) the tone of the article; and

(j) the circumstances of the publication, including the timing.

(The *Reynolds* factors).

[43] Applying those criteria to the facts before them, the Law Lords held that because the article in question had made serious allegations about the behaviour of the Irish Prime Minister in Parliament without mentioning his explanation, the allegations were not ones the public was entitled to know and thus the publication was not one that should in the public interest be protected by qualified privilege. The newspaper's appeal was accordingly dismissed.[24]

[44] As noted by Mallon J, the approach in *Reynolds* was both wider than *Lange* and narrower. It was wider because it was not confined to publications about Members of Parliament or politics, but narrower because of its responsible journalism factors.[25]

[45] We would add however that to a significant extent the latter point of distinction between *Reynolds* and *Lange* may be more apparent than real. That is because in the second *Lange* decision, this Court explained that the assessment of whether the occasion is privileged — that is, determining the existence of the required shared interest between publisher and public — was not just about the subject matter. It also included an inquiry into the circumstances or context of the publication, including actual content. In other words, not every statement about a politician pertaining to the performance of his or her role would be automatically privileged.[26]

[46] All of the *Reynolds* factors are capable of being described as being part of the circumstances and context of the publication and it is therefore arguable that if the

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24 At 206.
25 *Durie*, above n 1, at [83].
26 *Lange (No 2)*, above n 3, at [13] and [21]–[23].

Lange approach were applied to the facts of *Reynolds*, the result would be the same. Significantly, in a subsequent decision of this Court it was confirmed that the seriousness of the allegation — the first *Reynolds* factor — should be taken into account in determining whether the *Lange* defence was available.[27]

[47] Following *Reynolds*, the House of Lords and United Kingdom Supreme Court emphasised in two further decisions — *Jameel v Wall Street Journal Europe Sprl* and *Flood v Times Newspapers Ltd* — that the *Reynolds* factors were not a series of hurdles, but an illustrative guide as to what might constitute responsible journalism and that it was not for the courts to micromanage the editorial practices of media organisations.[28] It appears this was a response to criticism that although the defence was meant to foster free expression and a free press, the *Reynolds* factors were being applied in such a way that made it almost impossible for the defence to ever succeed.[29]

[48] Another important feature of the post-*Reynolds* English case law was the emergence of the concept of neutral reportage or reportage.[30] It was held in several cases that mass publication of the fact of an allegation made by someone else was capable of attracting privilege without requiring the publisher to verify whether the allegations were well founded, provided the reporting of the allegation was without adoption of the allegation or embellishment. This represented a significant departure from the well-established rule that someone who repeats a defamatory allegation is no less liable than the person who originated it.[31] (The repetition rule).

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27 *Vickery v McLean* [2006] NZAR 481 (CA) at [17]–[18].

28 *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359; and *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 AC 273.

29 See Eric Barendt "*Reynolds* revived and replaced" (2017) 9 JML 1 at 1; Jason Bosland "Republication of Defamation under the Doctrine of Reportage: The Evolution of Common Law Qualified Privilege in England and Wales" (2011) 31 Oxford Journal of Legal Studies 89 at 90–91; Kate Beattie "New Life for the Reynolds 'Public Interest Defence'? *Jameel v Wall Street Journal Europe*" (2007) 1 EHRLR 81; Andrew Scott "The Same River Twice? *Jameel v Wall Street Journal Europe*" (2007) 12 Comms L 52; Jacob Rowbottom "Libel and the Public Interest" (2007) 66 CLJ 8; David Hooper "The Importance of the Jameel Case" (2007) 18 Ent LR 62; and Andrew T Kenyon "*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice" (2004) 28 MULR 406 at 412 and 423–424.

30 *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634 at [65] and [67]–[68]; *Jameel*, above n 28, at [62] per Lord Hoffmann; *Roberts v Gable* [2007] EWCA Civ 721, [2008] QB 502 at [53] and [60]; *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972, [2008] 1 All ER 750 at [48]–[50]; and *Flood*, above n 28, at [77]. And see Godwin Busuttil "Reportage: A Not Entirely Neutral Report" (2009) Ent LR 44 at 45; and Bosland, above n 29.

31 See *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL) at 260.

[49] It will be recalled that "reportage" is part of Māori TV's pleaded defence.

[50] There has since been legislative amendment in the United Kingdom with the enactment of s 4 of the Defamation Act 2013. Section 4 states:

> **4 Publication on matter of public interest**
>
> (1) It is a defence to an action for defamation for the defendant to show that—
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
>
> (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
>
> (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
>
> (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.
>
> (5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
>
> (6) The common law defence known as the Reynolds defence is abolished.

[51] The explanatory notes describe the provision as based on the *Reynolds* common law defence and as intended to reflect the principles established in that case and subsequent cases. Section 4(3) concerns reportage.[32]

[52] Meantime in Canada, in 2009, the Supreme Court of Canada also had occasion to consider the same issues in the landmark decision of *Grant v Torstar Corp*.[33]

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[32] Explanatory Notes at [29] and [32]. These were written by the Ministry of Justice, and were not endorsed by Parliament.

[33] *Grant v Torstar Corp* 2009 SCC 61, [2009] 3 SCR 640.

It concluded that the law of defamation in Canada should be modified to recognise a new defence of responsible communication on matters of public interest. Such a defence would, the Court said, represent "a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Canadian society".[34] As will become apparent, we have found the *Torstar* decision particularly helpful.

Our analysis

[53] The law of defamation seeks to strike a just balance between two cherished rights — the right to protection of reputation (intimately related to the protection of personal privacy)[35] and the right to freedom of expression which includes the freedom to impart and receive information and ideas. Striking the balance is "a value judgment informed by local circumstances and guided by principle".[36]

[54] In the *Lange* decisions, this Court altered that balance in favour of freedom of speech. It did so essentially because it considered the existing law gave insufficient recognition to the media's critical role in a modern democracy as the channel for exchange of news and opinions among the public as a whole. The value of informed political public debate was seen as high. This Court must also have been mindful of the public interest in effective investigative journalism, something which the current law of qualified privilege was seen as impeding by preventing the publication of true (but not provably true) stories.

[55] The Court was not prepared to follow *Reynolds* and extend the scope of the privilege beyond political discussion. It considered that to do so would be to alter the structure of the law of qualified privilege in a way which would add to uncertainty and reduce the role of the jury in defamation trials.[37] The Court also considered that introducing a responsible journalism test was not warranted in this country due to important differences between the New Zealand media and the English media. The

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34 At [86].

35 *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 at 1179; quoted in *Lange v Atkinson* [1997] 2 NZLR 22 (HC) [*Lange* (HC)] at 31; and *Lange (No 1)*, above n 3, at 450.

36 *Lange* (HC), above n 35, at 43; cited with approval by this Court in *Lange (No 1)*, above n 3, at 432.

37 *Lange (No 2)*, above n 3, at [24]–[25].

Court quoted a statement from the former Minister of Justice to the effect that media intrusion into the daily lives of New Zealanders was "rather tame" compared with the situation in the United Kingdom and that the standard of New Zealand journalism was superior.[38] New Zealand, the Court said, had "not encountered the worst excesses and irresponsibilities of the English national daily tabloids",[39] noting also that the circulation of the British national papers far exceeded that of any New Zealand newspaper.[40]

[56] Eighteen years later however, we consider it is again time to strike a new balance by recognising the existence of a new defence of public interest communication that is not confined to parliamentarians or political issues, but extends to all matters of significant public concern and which is subject to a responsibility requirement. Although the existence of such a defence was rejected in *Lange*, we consider that subsequent societal and legal developments justify recognising it now. In particular, we point to the following:

(a) Significantly greater power resides outside the political sphere than it did at the time *Lange* was decided and there is increased public expectation in the accountability of non political groups. As noted by the authors of *The Law of Torts in New Zealand*, there are many types of public figures, other than politicians and state employees, who are involved in the formation of policy or who in other ways have a major impact on the economy and the lives of New Zealanders.[41] In those circumstances it is illogical to confine the defence to political discussion. This is, we consider, reflected in several High Court decisions where inroads were made by judges who clearly felt overly constrained by the limits of the *Lange* defence.[42] The recognition of a

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38 At [34]; quoting Sir Douglas Graham, who was then Minister of Justice, in Karl du Fresne *Free Press, Free Society* (Newspaper Publishers Assoc of New Zealand, Wellington, 1994) at 26 and 34.

39 At [34].

40 At [35].

41 Ursula Cheer "Defamation" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thompson Reuters, Wellington, 2016) 839 at 930.

42 See Cheer, above n 41, at 931–934; and the cases above n 2.

new public interest defence is in our view a logical extension of those cases.

(b) The significant changes in mass communication arising from new technologies whereby statements can be published in seconds to a mass audience potentially numbering in the millions. Comparisons between the reach of a defamatory statement in New Zealand as opposed to that in England are plainly no longer relevant considerations.

(c) The emergence of social media and the "citizen journalist" which has radically changed the nature of public discourse. Bloggers and those who comment on blogs, tweeters, and users of Facebook and other social media are modern phenomena largely unknown to the Court in *Lange*. While the mainstream New Zealand media may still be as responsible as the Court in *Lange* considered it was, the proliferation of unregulated bloggers and other commentators who can be reckless means that the imposition of a responsibility requirement is highly desirable and a necessary safeguard for reputation and privacy rights. It would also provide much needed clarity and certainty in an unregulated world. The other alternative would be to deny the defence altogether to anyone other than the mainstream media but we do not consider that drawing such a distinction would be justified either as a matter of logic, policy or principle. Non-media commentators have an important role to play.

(d) The increasing prominence of the New Zealand Bill of Rights Act including the right to freedom of expression in our jurisprudence; the greater exploration of the boundaries of that right and a closer consideration of the right to privacy, all of which in combination justify extending the scope of the defence beyond political discussion by mainstream media but subject to a responsibility requirement.

(e) The diminishing importance of the jury in defamation trials,[43] which undermines concerns expressed in *Lange* about the effect of *Reynolds*.

(f) The developments in other common law jurisdictions.

[57] Finally, we note there is nothing in the Defamation Act 1992 which would preclude recognition of such a defence.[44]

[58] Building on the English and Canadian case law, we consider the elements of the new defence should be:

(a) the subject matter of the publication was of public interest; and

(b) the communication was responsible.

[59] On both issues, the defendant bears the onus of proof. As already mentioned, in light of new technologies which enable anyone to communicate to the world at large, it is a defence that should be available to all who publish material of public interest in any medium. We therefore follow the approach taken in *Torstar* and do not style the defence as one of responsible journalism, but rather responsible communication on a matter of public interest.[45]

[60] We acknowledge the difficulties of applying some aspects of the responsibility criteria to non-media defendants who communicate defamatory material in quite different ways to the mainstream media.[46] However we do not consider these to be insuperable. They are capable of being worked out on a case by case basis as has occurred in England.

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43 Section 11 of the Defamation Act 2013 (UK) abolished the right to trial by jury; and see the discussion in *Yeo v Times Newspapers Ltd* [2014] EWHC 2853 (QB), [2014] EMLR 32 at [58]–[71] and [76]–[79]; and *Cook v Telegraph Media Group Ltd* [2011] EWHC 763 (QB) at [114]. See also *Craig v Slater*, above n 2, at [38] where Toogood J held the complexity of the qualified privilege defences advanced necessitated a judge alone hearing.

44 See further at [79] below.

45 *Torstar*, above n 33, at [96]–[97].

46 Barendt, above n 29, at 11–12.

[61] What then should be the respective roles of judge and jury in relation to the new defence? On this issue, there was a divergence of opinion in *Torstar*. The majority held it was for the trial judge to decide whether the communication relates to a matter of public interest, but for the jury to determine whether it was responsible.[47] Dissenting solely on this point, Abella J considered both elements should be determined by the judge.[48] Her view is consistent with the approach in *Reynolds*.[49] In *Lange*, the issue was left open.[50]

[62] All counsel in this case agreed that in the event we decided to recognise a new defence of public interest, we should adopt the approach advocated by Abella J. We have come to the same view for the following reasons:

(a) Unlike the Canadian Supreme Court, we are not constrained by any specific legislative provisions. The majority in *Torstar* considered that to deny a central role to the jury breached a provision in the Ontario Libel and Slander Act 1990.[51]

(b) The issues of public interest and responsibility are so interconnected it is desirable they be determined by the same decision maker. As noted by Abella J, there is very little conceptual difference between the two elements of the defence.[52]

(c) Determining whether a communication has met the applicable standard of responsibility involves mixed questions of fact and law. It is a highly evaluative exercise better suited to judicial assessment.

(d) Requiring juries to determine whether a communication was responsible is likely to result in lengthy and complicated jury questions. Defamation jury trials are already notorious for their complexity, length

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47 At [100] and [128]–[135].
48 At [142]–[143].
49 *Reynolds*, above n 17, at 205D–E per Lord Nicholls, 215–216 per Lord Steyn, and 236F–237 per Lord Hope; see also *Jameel v Wall Street Journal Europe Sprl* [2005] EWCA Civ 74, [2005] QB 904 [*Jameel* (CA)] at [70].
50 *Lange (No 1)*, above n 3, at 470–471; and *Lange (No 2)*, above n 3, at [25].
51 *Torstar*, above n 33, at [131]–[133]; referring to Libel and Slander Act RSO 1990 c L-12, s 14.
52 At [142].

and cost. Recognition of a new defence should not compound that problem.

(e) Concerns expressed by the majority in *Torstar* that the English approach entails a complex back and forth between the jury determining the primary facts and the judge determining responsibility can be minimised by appropriate trial management.[53]

(f) Those concerns are strongly outweighed by the obvious advantages of having a reasoned decision from a judge about whether the media has acted responsibly.

(g) The Abella J approach is consistent with a growing recognition that because defamation trials are often so complex, it is inappropriate for juries to be expected to determine mixed questions of fact and law.[54]

[63] Accordingly, in a case tried by a jury in New Zealand, it will be for the trial judge to determine whether the two elements of the defence are established based on the primary facts as found by the jury.

[64] In determining whether the subject matter of the publication was of public interest, the judge should step back and look at the thrust of the publication as a whole. It is not necessary to find a separate public interest justification for each item of information. As already mentioned, public interest is not confined to publications on political matters. It is also not necessary the plaintiff be a public figure.

[65] Defining what is a matter of public interest in the abstract with any precision is a notoriously difficult exercise. Trial judges are however likely to find the discussion of public interest in *Torstar* of assistance. There it was said that to be of public interest the subject matter should be one inviting public attention, or about which the public or a segment of the public has some substantial concern because it

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53 See *Torstar*, above n 33, at [134].
54 See above n 43.

affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.[55]

[66] As regards determining whether the communication was responsible, that is to be determined by the judge having regard to all the relevant circumstances of the publication.

[67] Relevant circumstances to be taken into account may include:

(a) The seriousness of the allegation — the more serious the allegation, the greater the degree of diligence to verify it.

(b) The degree of public importance.

(c) The urgency of the matter — did the public's need to know require the defendant to publish when it did, taking into account that news is often a perishable commodity.[56]

(d) The reliability of any source.

(e) Whether comment was sought from the plaintiff and accurately reported — this was described in *Torstar* as a core factor because it speaks to the essential sense of fairness the defence is intended to promote. In most cases it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond. Failure to do so also heightens the risk of inaccuracy. The target may well be able to offer relevant information beyond bare denial.[57]

(f) The tone of the publication.

(g) The inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

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55 *Torstar*, above n 33, at [99]–[106].
56 *Reynolds*, above n 17, at 205B–C per Lord Nicholls.
57 *Torstar*, above n 33, at [116].

[68] The list of factors is not exhaustive and in some cases the circumstances may be such that not all factors in the list are relevant. In some cases, publishing defamatory allegations from an unidentified source may not be responsible. In other cases it may be responsible if for example the publisher had good reason to consider the source reliable and the article made it clear it was relying on a confidential source or sources. In short, the factors must be applied in a practical and flexible manner with regard to the practical realities and with some deference to the editorial judgment of the publisher, particularly in cases involving professional editors and journalists.

Reportage

[69] The Court has not been able to agree whether reportage — the neutral reporting of attributed allegations — should be regarded as a separate defence, distinct from the new public interest defence. At [104] to [114] Brown J explains why he considers it is conceptually different and also why its recognition is problematic. The majority of us (French and Winkelmann JJ) however take a different view and what follows from [70] to [81] is the opinion of the majority.

[70] The majority agrees with the English and Canadian authorities that reportage should not be regarded as a separate defence.[58] In our view, it would be illogical to do so when correctly analysed reportage can be seen to rest on both public interest and responsible communication, the scope of what amounts to responsible being necessarily tailored to the nature of the particular public interest at issue.

[71] In the context of a situation where the public interest concerned lies in the fact the allegation was made, rather than the truth of its contents, the publisher may be relieved of the usual responsibility obligation of attempting to verify the contents as distinct from verifying the making of the allegation but that is not the end of the responsibility inquiry. The court will also consider whether, viewing the publication as a whole, the publishers have made it clear they do not subscribe to any belief in the truth of the allegation and have not adopted it as their own. Relevant considerations will include whether the source of the information is disclosed in the publication and

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[58] *Flood*, above n 28, at [35]; relying on *Roberts v Gable*, above n 30, at [60]; and *Torstar*, above n 33, at [121].

the tone of the publication,[59] including whether the allegations have been embellished.[60] Timing may also be relevant. If, for example, the allegation or its context was stale or there was some other ulterior reason for the timing of the publication, then reportage may not be available even if the report was otherwise full, fair and neutral.[61]

[72] To put it another way, the concept of neutral reportage rests on both elements of the new defence. The fact it has its own label does not make it in substance a separate defence.

[73] In *Torstar*, the Supreme Court's treatment of reportage suggests that the existence of a dispute between the originator of the defamation and the person defamed is required.[62] Although that is also a requirement under the new statutory defence in the United Kingdom,[63] we would prefer not to circumscribe the concept in that way. In our view, making the existence of a dispute a prerequisite is likely to divert attention away from the core principle of public interest to unhelpful and potentially distracting arguments about what constitutes a dispute, including whether a denial of an allegation is sufficient to create a dispute. In principle and as a matter of logic, there is no reason why a public interest defence could not in an appropriate case protect the disinterested repetition of a unilateral allegation.[64]

[74] In his separate judgment, Brown J expresses concern that allowing a reportage defence lacks coherence and that in light of the repetition rule, it makes little sense that a publisher can publish a defamatory statement without the belief in its truth and be absolved from liability because the publisher indicates that it did not adopt the allegation. However, as was pointed out in *Roberts v Gable*, the repetition rule only concerns the scope of the defence of justification in report cases.[65] It does not limit

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59 *Roberts v Gable*, above n 30, at [70].

60 *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17 at [72]–[73]; *Roberts v Gable*, above n 30, at [61(5)]; and *Charman*, above n 30, at [48].

61 *Roberts v Gable*, above n 30, at [70]. See generally Matthew Collins *Collins on Defamation* (Oxford University Press, Oxford, 2014) at [12.78]–[12.85].

62 See at [76] and [120].

63 Defamation Act 2013 (UK), s 4(3).

64 *Charman*, above n 30, at [91] per Sedley LJ.

65 *Roberts v Gable*, above n 30, at [56]–[59] per Ward LJ; referring to *Al-Fagih*, above n 30, at [36].

the scope of qualified privilege and (we would add) the scope of other defences based on concepts of public interest.

[75] A further concern raised by Brown J is that reportage could create a perverse incentive for journalists not to engage in one of their fundamental roles, the verification of important facts.[66] This, and a related concern that it represents too great an inroad into reputation and privacy rights are however, in our assessment, met by the fact that reportage has been and is to be viewed as a special and relatively rare situation.[67]

[76] The reality is that, in the vast majority of cases, if there is public interest in an allegation it will lie in the fact the allegation is or may be true (that is, its contents), not in the fact it was made — a distinction which, contrary to Brown J, we consider is intelligible and workable. Reportage will only be available in circumstances where the public interest in the fact of the allegation is overwhelming and so compelling on its own that urgent reporting of it is justified without further investigation. A hypothetical example of such a situation might be the fact that the Governor-General has alleged a senior Cabinet Minister is taking bribes, thereby triggering a possible constitutional crisis.

[77] The stakes for publishers — mainstream or otherwise — who do not attempt to verify the truth of the defamatory allegation are high. They are likely to do so at their peril and accordingly the incentive to make the attempt remains high.

[78] Unlike Brown J, we also do not consider that recognition of reportage is in any way inconsistent with the existence of qualified privilege defences under the Defamation Act relating to the reporting of public meetings, inquiries, court hearings and the like.[68] In those cases, the public interest underlying the privilege derives from the location where the statement is made, not the fact it was made.

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66 At [105] below.

67 *Flood*, above n 28, at [77] per Lord Phillips; Alastair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet and Maxwell, London, 2013) at 666; and *Roberts v Gable*, above n 30, at [74].

68 Sections 16–18 and sch 1.

[79] The Defamation Act does not purport to be a code and,[69] as *Lange* demonstrates, the statutory qualified privilege defences have not precluded the courts from expanding the scope of qualified privilege or recognising new categories of qualified privilege. If, as Brown J accepts, the Defamation Act does not preclude us from recognising a new defence of public interest, then there is in our respectful view no logical justification for singling out reportage. We note too that the same statutory defences relied on by Brown J were contained in the equivalent United Kingdom statute in force at the time the first reportage cases were decided.[70] Yet, none of the appellate judges involved in those cases ever expressed concern that the recognition of such a concept ran counter to Parliament's intention or created any tension requiring reconciliation.[71]

[80] To sum up, in the view of the majority as with the *Reynolds* approach, the new defence thus involves a spectrum.[72] At one end is reportage where the mere fact of the statement being made is itself of public interest and is reported as being of public interest. Further along the spectrum is a situation as in *Flood* which involved the publication not only of the fact of the plaintiff's investigation for corruption, but the nature of the alleged corruption. There the House of Lords said the press could not disclaim all responsibilities for checking their sources as far as practical, but provided the article was of real and unmistakeable public interest and was fairly presented, the press were not required to produce primary evidence of the information given by sources.[73] Further still along the spectrum that may however be necessary.

[81] Finally, we record that although reportage need not be pleaded as a separate defence, it should be pleaded as a particular of the public interest defence.

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69 For example, s 16(3) of the Defamation Act provides "[n]othing in this section limits any other rule of law relating to qualified privilege."

70 Defamation Act 1996 (UK), sch 1.

71 The 2002 decision relied upon by Brown J, *English v Hastie Publishing Ltd* [2002] All ER (D) 11 (Feb) (QB), where some caution was expressed is a first instance decision.

72 *Flood*, above n 28, at [158] per Lord Mance.

73 At [158].

Other aspects of the new defence

[82] In the interests of doctrinal coherence, we consider that, as is the case in Canada,[74] the new defence should be a standalone defence and not part of the rubric of qualified privilege.

[83] Although the English version of the defence was identified in *Reynolds* as a species of qualified privilege, this characterisation was subsequently considered misleading by several Law Lords in both *Jameel* and *Flood*. As they pointed out, correctly analysed, the *Reynolds* defence is a different jurisprudential creature from the traditional form of privilege.[75] It arises primarily because of the subject matter of the publication — a matter of public interest — and not the occasion on which it is published, as in the traditional form. Unlike the traditional form, there is also no question of the "privilege" being defeated by showing the privilege was abused (malice), because the propriety of the defendant's conduct is built into the conditions under which the material is privileged. This in turn impacts on the incidence of the onus of proof. Under the traditional form of qualified privilege, it is for the plaintiff to prove the privilege is lost because of malice on the part of the defendant, whereas under the *Reynolds* defence and the defence recognised in this judgment, it is for the defendant to prove he or she acted responsibly.

[84] Where then does recognition of this new defence in New Zealand leave cases involving parliamentarians and political discussion?

[85] For the reasons already discussed, we consider the same sorts of considerations which will apply under the new defence also apply currently under *Lange* in relation to politicians, and therefore outcomes are likely to be the same. However, to leave Members of Parliament or political discussion as a separate category to continue to be governed at least nominally by qualified privilege would be highly unsatisfactory. Such a distinction would not be justified in either principle or policy and it would create confusion.

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74 *Torstar*, above n 33, at [88]–[95].

75 *Jameel*, above n 28, at [46] per Lord Hoffmann (with whom Lady Hale agreed); and *Flood*, above n 28, at [38] per Lord Phillips. Lord Phillips first applied the phrase "different jurisprudential creature" in *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2001] EWCA Civ 1805, [2002] QB 783 at [35].

[86] We therefore conclude that the form of qualified privilege recognised in *Lange v Atkinson* should no longer be an available defence, being effectively subsumed in the new defence of public interest. We direct that all references to "qualified privilege" and "*Lange v Atkinson*" in Māori TV's pleaded defence of "Qualified Privilege/Public interest" should be struck out.

[87] Before turning to apply the new defence to the facts of this case, it is necessary for us to first address an application to adduce further evidence on appeal.

Application to adduce further evidence

[88] Māori TV sought leave to adduce further evidence for the purposes of the appeal. The proposed further evidence consisted of evidence relating to events after the publication of the amended website story.

[89] In our view, as a matter of principle, the conduct of the publisher for the purposes of the defence must be assessed as at the time of publication.[76] What was the position as it appeared then to those responsible for publication?[77] Evidence of subsequent events and conduct may lead to inferences about conduct at the earlier time but Māori TV does not suggest that is the case here. The proposed evidence is therefore irrelevant to this appeal and the application is accordingly declined.[78]

[90] We now turn to consider whether on the pleaded facts and uncontested evidence, there is no prospect of Māori TV establishing that the publications concerned a matter of public interest and were the product of responsible communication.

Should the defence be struck out on the facts?

[91] In the High Court, the Judge's focus was understandably very much on the issue of whether the defence existed. Her consideration of whether the new defence

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[76] Mullis and Parkes, above n 67, at 655.
[77] *Flood*, above n 28, at [122] per Lord Mance; and *Jameel*, above n 28, at [62] per Lord Hoffmann.
[78] That is not to say the evidence will be irrelevant at the hearing.

would inevitably fail on the facts of the case was therefore limited and did not consider each publication separately as was required.

[92] On appeal, it was common ground that all three publications were on a matter of public interest. We agree, having regard to the leadership role of the Māori Council in Māoridom and its importance in New Zealand society generally. That must be so whether the thrust of the story is described as dissension within the Council as argued by Māori TV, or whether the thrust is allegations of wrongdoing impacting on the workings of the Māori Council as argued by the appellants.

[93] The key issue in dispute on appeal is whether the second element of the defence is reasonably arguable, that is to say whether the communications can tenably be regarded as responsible communications.

[94] In holding it was tenable, Mallon J classified the case as a reportage case and held it was reasonably arguable the reporting was responsible and neutral. In our view however, the case is not capable of being classified as a reportage case. One of the most prominent assertions if not the most prominent assertion in all three publications was that Ms Hall had been dismissed. As counsel for the appellants Mr Geiringer submitted, this was portrayed as fact. For reportage to be tenable, it would need to have been clearly and unequivocally conveyed as a central allegation from a third party which Māori TV was not adopting.[79]

[95] We would therefore strike out any reference to reportage in the pleaded defence because it cannot possibly succeed.

[96] We would also strike out as untenable a defence of public interest in relation to the first website story for the period before the video clip was posted.[80] The failure to publish Ms Hall's statement which Māori TV had in its possession is in our view fatal to the defence. It was a fundamental failing.

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79 *Flood*, above n 28, at [77].
80 See at [18] above.

[97] As regards the other publications, which did contain Ms Hall's statement, Mr Geiringer advanced the following further criticisms:

(a) It was irresponsible for Māori TV to have proceeded to publish the story without waiting a reasonable time for Ms Hall's promised documentation and more detailed statement. There was no urgency. Delaying would have assisted Māori TV to find out the truth and correct aspects of the story without compromising its timeliness. In those circumstances, Māori TV could not be said to have taken reasonable steps to verify the story.

(b) It was irresponsible not to make any attempt to contact Sir Edward at all.

(c) In the absence of any transcript of the video clip being made available in the first website story, once the video was posted, Māori TV should have alerted readers that they needed to watch the video to see a summary of Ms Hall's response.

(d) There was no attempt to contact the Māori Council secretary even though Māori TV knew the validity of the meeting was in dispute. The secretary was designated as the Council's primary media contact.

(e) The negligent omission of the quote marks in the first website story.

(f) The video clip only summarised Ms Hall's statement. It did not convey the gist of it. It did not mention her claim to have documentary evidence that would easily disprove the allegations. Nor that she needed more time. Nor did it mention that her critics had ulterior motives, nor the reasons she said the meeting was invalid.

[98] We agree Māori TV appears to face some difficulties but it is important to bear in mind that the assessment of "responsible communication" is not a tick box exercise

and that the strike-out jurisdiction should only be exercised sparingly.[81] The matters raised by Mr Geiringer are, we consider, properly matters reserved for trial and not grounds for strike out.

[99] Māori TV claims for example that in the past Ms Hall has acted as Sir Edward's spokesperson and therefore it was reasonable for Māori TV to assume she would speak on behalf of them both in this instance. It further contends that Ms Hall deliberately delayed sending her response to Māori TV: that she sent her response to the Dominion Post newspaper at 4 pm, but did not send the same response to Māori TV until 5.15 pm, knowing the broadcast would be at 5.30 pm. Issues about urgency and delays raise questions of degree that can only fairly be determined in the light of all the evidence as a whole. We also consider it cannot be said on the evidence before us that Māori TV made no attempts at all to verify the allegations.

Outcome

[100] The application for leave to adduce further evidence is declined.

[101] The appeal is allowed in part. References to "qualified privilege", "*Lange v Atkinson*", and "reportage" are struck out from the respondents' qualified privilege/public interest defence. The respondents' defence of public interest in respect of the first website story for the period preceding the posting of the video clip is also struck out. The appeal is otherwise dismissed.

[102] As regards costs, we consider that this being fundamentally in the nature of a test case, costs should lie where they fall. Accordingly, we make no award of costs.

[103] Finally, we would like to acknowledge the assistance we have gained from the excellent submissions made by counsel on both sides.

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[81] *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

BROWN J

[104] I agree with the judgment of French and Winkelmann JJ concerning the recognition of a new defence of public interest communication which is subject to a responsibility requirement, in particular the analysis at [53]–[68] and [82]–[86]. I am also in agreement with the disposition of the application to adduce further evidence and the appeal itself. I write separately solely with reference to the proposed new defence of reportage.

[105] In my view, the argument advanced by the appellants against the recognition of a reportage defence as part of New Zealand law has much to commend it. Considerations which I find persuasive include:[82]

- First, such a defence lacks coherency. In view of the repetition rule it makes little sense that a publisher can publish a defamatory statement without the belief in its truth and be absolved from liability because it indicates that it does not adopt the allegation.

- Secondly, such a defence could create a perverse incentive for journalists not to engage in one of their fundamental roles, the verification of important facts. Alternatively, it could place a journalist in the unenviable position of not knowing whether he or she should seek to verify an allegation.

- Thirdly, as experience with the hearsay principles tends to indicate, drawing the distinction between allegations that are important for truth and those that are important simply for the fact they are made could prove elusive in practice.

[106] The majority considers that reportage should be viewed as a special and comparatively rare situation,[83] despite extending the defence beyond the limitation

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82 The submission that the boundaries of the defence are far from clear also has merit. The difficulties are highlighted in articles cited by the appellants: Nadine Zoë Armstrong "The Emerging Defence of Reportage" (2009) 40 VUWLR 441; Bosland, above n 29; and Busuttil, above n 30.

83 At [75] above.

explicit in s 4(3) of the Defamation Act 2013 (UK) and implicit in *Torstar*.[84] While the mode of reporting by the mainstream media may not frequently lend itself to a reportage defence, I am not confident that the same can be said of bloggers and other commentators, the emergence of whom is a significant factor in the recognition of the new defence of public interest communication.[85]

[107] A further consideration is the interface with New Zealand's Defamation Act. James Goudkamp observes that, whereas legislation has had little impact on the definitional elements of most torts, defences have been heavily affected by statute.[86] Defamation is a good example with the statutory defences of truth, honest opinion, absolute privilege, qualified privilege and innocent dissemination.[87]

[108] The majority contends that if, as I agree, nothing in the Defamation Act precludes recognition of a defence of public interest communication which is subject to a responsibility requirement then there is no logical justification for singling out reportage. However the fact is that the Act already provides by means of the defence of qualified privilege[88] a limited protection for the media (and others) who merely relay to the public words written or spoken by others.[89] In the case of the matters specified in pt 2 of sch 1, it is a requirement that they be of public interest in any place in which the publication occurs.[90]

[109] I do not consider that the majority's rationale for the statutory qualified privilege defence of mere reporting as deriving from the location where a statement is made is of moment.[91] Item 8 in pt 2 refers to a fair and accurate report of the proceedings at a meeting held in New Zealand that (a) is bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public

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84 See at [73] above; and *Torstar*, above n 33, at [120]–[121].
85 At [56(c)] above.
86 James Goudkamp "Statutes and Tort Defences" in TT Arvind and Jenny Steele (eds) *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, Oxford, 2013) 31 at 31.
87 Respectively ss 8, 9, 13–14, 16, and 21.
88 Sections 16(2) and 18, and sch 1, pt 2.
89 Cheer, above n 41, at [16.11.02(2)].
90 Section 18(1).
91 At [78].

concern and (b) is open to the public, whether with or without restriction. "Meeting" is not defined.

[110] However in *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* Lord Bingham of Cornhill explained that the phrase "public meeting" must be interpreted in a manner which gives effect to the intention of the legislature "in the social and other conditions which obtain today".[92] In his view "a press conference attended by members of the press and perhaps other members of the public has become an important vehicle for promoting the discussion and furtherance of matters of public concern" and there was nothing in the nature of such a conference which took it outside the ordinary meaning of public meeting.[93] It follows in my view that the ambit of the statutory defence is potentially broad and overlaps at least to some extent with the proposed common law reportage defence.

[111] The majority also relies on the absence of any expression of judicial concern that the recognition of reportage runs counter to Parliament's intention.[94] However in *England v Hastie Publishing Ltd*, after noting Lord Bingham's comments in *McCartan* concerning the alternative role of the press as that of reporter,[95] Gray J expressed the view that a court should be reluctant to hold that common law privilege is available to a publication on the ground that it constitutes reportage in circumstances where so to hold would confer greater protection on the publisher than Parliament had deemed appropriate.[96]

[112] Those observations resonate with me. We did not hear argument on the issue of the reconciliation of a reportage defence with the Defamation Act defences. I am mindful of Andrew Burrows' exhortation that statutes and common law must be seen

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92 *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* [2001] 2 AC 277 (HL) at 292 with reference to the equivalent provisions in the Defamation Act (Northern Ireland) 1955.

93 At 292.

94 At [79].

95 *McCartan*, above n 92, at 291. Lord Bingham emphasised the distinction between cases where a journalist is exercising a reporting function as opposed to the function of exploring factual situations and reporting the outcome of such investigations. He explained that in the former, the role of reporter, the press then acts in a very literal sense as a medium of communication.

96 *English v Hastie Publishing Ltd*, above n 71, at [21]. Noted in *Jameel* (CA), above n 49, at [21].

as integrated parts of the whole law of obligations.[97] The common law should not be developed in a manner which is inconsistent with a relevant statute. To adapt *Bennion on Statutory Interpretation*'s metaphor of the floor (the common law) and the rug (a statute),[98] as this Court observed in *Vector Ltd v Transpower New Zealand Ltd* "the rug and the floor must run the same way".[99]

[113] If reportage is to be recognised in New Zealand as a common law defence, then I consider that it should be viewed as a discrete defence rather than merely as a special manifestation of a public interest defence which has a responsible journalism underpinning. I am attracted to the analysis of Sedley LJ in *Charman v Orion Publishing Group Ltd* that the very dependence of a reportage defence on the bald retelling of defamatory statements makes it forensically problematical to fall back upon an alternative defence of responsible journalism.[100] I agree with his view that pleaders may need to decide which it is to be. I do not consider that the majority's proposal that reportage should be pleaded as a particular of the public interest defence surmounts this difficulty.[101] Hence I do not share the majority's perception of the new defence of public interest communication as one embodying the nature of a spectrum which includes reportage, albeit at the furthest point on that spectrum.[102]

[114] Whatever may be the nature and extent of a reportage defence, I agree with the conclusion at [94] and [95] that the present case is not capable of being classified as a reportage case and that consequently any reference to reportage in the pleaded defence should be struck out because it cannot possibly succeed. In those circumstances it is my view that consideration of the issue of recognition of a new defence of reportage and (if adopted) its ambit and characterisation should await a case where the issues are squarely engaged.

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97 Andrew Burrows *The Relationship Between Common Law and Statute in the Law of Obligations* (2012) 128 LQR 232 at 258. He considered that to "view them as if unmixed oil and water is a profound mistake".

98 Oliver Jones *Bennion on Statutory Interpretation* (6th ed, LexisNexis, London, 2013) at 168. The metaphor is not repeated in the 7th edition: Diggory Bailey and Luke Norbury *Bennion on Statutory Interpretation* (7th ed, LexisNexis, London, 2017).

99 *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 (CA) at [53].

100 *Charman*, above n 30, at [91].

101 At [81] above.

102 At [80] above.