[redacted]

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY CP 283/97

BETWEEN: **THOMAS McLEAN**

First Plaintiff

A N D: **CHRISTOPHER JOHN SMALE**

Second Plaintiff

A N D: **GEOFFREY KEITH PHILLIPS**

Third Plaintiff

A N D: **ROSS HAROLD VICKERY**

Defendant

HEARING: 10, 11, 12, 13, 14, 19 April 2000

COUNSEL: *J. Miles Q.C. and A.D. Banbrook* for Plaintiffs
P.T. Finnigan and S. Reeves for Defendant

JUDGMENT: 24th May 2000

RESERVED JUDGMENT OF HAMMOND J

Solicitors: John Holmes, Auckland
Simon Reeves, Auckland

INTRODUCTION

[1] Mr Vickery published statements suggesting that three senior executives of the Papakura District Council might, in the course of their official duties, be guilty of criminal offences in the nature of bribery or corruption.

[2] The plaintiffs considered those statements to be actionable. At trial, the jury found the statements made to be defamatory, and that they were made of each of the plaintiffs. The jury awarded the three plaintiffs $10,000; $35,000; and $10,000 respectively, in damages.

[3] The defendant had raised a defence of qualified privilege. For whatever reason, it was not dealt with at the interlocutory stages of this proceeding. Accordingly, I put an issue to the jury as to whether, in making the statements he did, Mr Vickery was predominantly motivated by ill-will towards the plaintiffs, or otherwise took improper advantage of the occasion(s) of publication. For, such a factual finding would have defeated the plea of qualified privilege. The jury found "no malice" (which also goes some way to explaining the level of the monetary awards in fact made).

[4] The finding of the jury means that I must now determine – as a matter of law – whether the pleaded defence is available to Mr Vickery, in the circumstances of this case.

[5] I have to confess to not having a great deal of enthusiasm for having to deal with the issue now. It overlaps into an area specifically reserved for future consideration by the Court of Appeal in *Lange v Atkinson* viz, whether a defence of "political speech" is available, and if so, how far it runs, in this jurisdiction.

[6] That issue is still under consideration by the New Zealand Court of Appeal, it having been returned to that Court by the Privy Council (*Lange v Atkinson* [2000] 1 NZLR 257). The judgment of Elias J at first instance is reported at [1997] 2 NZLR 22; and the original judgment of the Court of Appeal is at [1998] 3 NZLR 424.

[7] I would have preferred to have had the benefit of any "revisited" judgment of the Court of Appeal, prior to delivering this judgment. As I understand it, the case has been re-argued in that Court. But a routine enquiry indicates that it may be some little time yet before a judgment is delivered.

[8] The difficulty that raises for this case is that the plaintiffs have their verdict from a jury. Not only that, they are senior officers in a local government authority to which the unsuccessful defendant has now been elected. This creates a very difficult situation for the parties, and leaves the possibility of a judgment hanging over their heads, on a day to day basis. For those human reasons, I consider I should proceed to deal with the issue now. In any event, as will become apparent, in my view the defence cannot succeed, on quite conventional grounds.

THE FACTS IN MORE DETAIL

[9] In the latter part of 1996, some members of the Papakura District Council, and some of its senior officials, thought that there might be something to be said for that local authority "contracting out" the provision of water and the disposal of waste water within the area it served. Prior to that time, those undertakings had been the responsibility of the Works Department of the Council.

[10] An informal working group within the Council gave some consideration to such a proposal. On 9 December 1996 the Mayor of the Papakura District Council put the proposition to the Council that the water and waste water businesses should be franchised. That would involve retaining the water and waste water assets in public ownership by the Council. But they would be run by a franchisee, for a long period of time.

[11] One of the distinct difficulties faced by the Council was that Water Care Services Ltd, who were assisting the authority in these services at that time, were proposing significant increases in charges to the Papakura District Council. The Council wanted to get its ratepayers out from under the yoke of sharp rate increases, because of these increases in charges by Water Care Services Ltd.

[12] The Council considered whether it was required to hold public consultations before franchising its water services. It ultimately took the view – and this view was subsequently upheld by a report by the Auditor General – that the Council was not, in this instance, required to hold public consultations. But nevertheless, because "significant strategic public assets" were involved, the Mayor recommended to the Council, and the Council adopted the proposition, that the Council should voluntarily publicly notify the proposal for franchising of these water services under the procedures set out in s716A of the Local Government Act 1974.

[13] That section provides that a local authority has to place a proposal before a meeting of the local authority; it has to give public notice of not less than one month and not more than three months, to allow for submissions. And it had to ensure that persons who made written submissions were "given a reasonable opportunity to be heard by the body to which the

submissions are to be made". The final decision on the proposal has to be made "at a meeting of the local authority".

[14] Because the Christmas period would intervene to diminish the value, to objectors, of a one month period the Mayor's recommendation was that a six weeks period be allowed for submissions. A special meeting of the Council was to be called to hear any submissions which were to be made, commencing on Wednesday 29 January 1997. Council itself determined to make a final decision on 10 February 1997.

[15] All the formalities required under the Local Government Act were complied with. About a dozen persons filed submissions. Generally speaking, they were in favour of the proposal. A number of companies registered their interest in the proposal for franchising, should it proceed.

[16] The plaintiffs in the proceeding before me are Mr McLean, who was and is, the Chief Executive Officer of the Papakura District Council; Mr Phillips, who was and is, the Director of Finance; and Mr Smale who was at all relevant times the Director of Works.

[17] Mr Smale had the principal burden of trying to put together the water franchise proposal, and to shepherd it along. Water services amounted to over 40% of the work of the Department of Works. Mr Smale was accordingly working under the very difficult conditions that if the proposal was successfully implemented, there was every possibility that he would be doing himself out of a job. There would not be enough work left to support his old position. That, ultimately, proved to be the outcome.

[18] The defendant, Mr Vickery, is a long-time resident of the Papakura area. He had been a disappointed candidate for Council in 1995. But he maintained his association with the local Ratepayers Association, and indeed

was Chairman of it. Other members of that association had been elected to Council.

[19] Mr Vickery had concerns about the water franchising proposal. He wanted to say so, firmly. But he faced the practical difficulty of being a person outside Council, and having to direct much of his concerns through persons who were inside the Council. Mr Vickery would go along to Council meetings as Chairman of the Ratepayers Association, and he was expected to scrutinise the Council's affairs. But he was not on the Council. Subsequently – and it is not relevant to any of the matters the jury had to determine – Mr Vickery was himself elected to Council, and that has created the difficult working problem I have already referred to.

[20] Mr Vickery first became aware of the franchising proposal when the agendas for the Council meeting on 10 February 1997 were delivered to him. Up until that time, Mr Vickery was not aware of the proposal. Christmas had intervened, and he was having personal problems relating to his marriage and the death of a close friend in an accident right outside his home.

[21] In any event, the Ratepayers Association met, as was its wont, four or five days before this Council meeting. It discussed the water franchise proposal. The principal concern of this group at this stage was to see that a $5 million bond which was to be posted on termination of the proposed franchise agreement should be brought forward as an "up-front" bond.

[22] Mr Vickery in fact attended the Council meeting on 10 February. There is some dispute as to what in fact happened at that Council meeting. But certainly Mr Vickery, rightly or wrongly, formed the impression that the Council had approved the suggested "re-arrangement" of the bond, and that his group had prevailed on that issue. When the Minutes were circulated and then subsequently confirmed at the next Council meeting, no such re-

arrangement was recorded. Mr Vickery said in evidence this made him "suspicious as to quite what was going on at the Council". He said "I felt that the Council were just rubber-stamping this proposal and pushing it through". And he said, this incident started him looking into "other matters concerning the whole franchise proposal".

[23] It was about this point of time that one Janice Graham came onto the scene. She sent Mr Vickery an extensive document – just under 100 pages – relating to privatisation of services (particularly water), and some information on the partners of United Water. United Water was the prospective franchisee. These partners were said to include Generale Des Eaux. This document suggested that the latter company had been concerned with "corruption scandals in countries overseas".

[24] The Council had resolved on 10 February 1997 to accept the franchise agreement and tender documents from United Water. A significant point, therefore, as to the sequence of events, is that Mr Vickery, and those of his persuasion, were thenceforth always facing a rear-guard action, decidedly after the event.

[25] Mr Vickery is plainly a determined man. He said frankly in evidence that he had determined to somehow embarrass or pressure the Council into reviewing the water franchise proposal. Quite what that would have meant in practical terms was not clear to me. Common-sense suggests that once the agreement had been entered into (as it had) with United Water, then extracting the Council from a binding contractual commitment would be an extremely difficult and problematic exercise, and one which would likely prove very costly.

[26] Mr Vickery was suspicious that the tender to United Water was a "jack up". He tried to get speaking rights at subsequent Council meetings.

He failed. Mr McLean properly reminded him of his avenues of redress if he was aggrieved by a denial of speaking rights. These included an ability to approach the Ombudsman, and the Auditor General.

[27] Mr Vickery seized on those opportunities. The Ombudsman declined to look into the matter because, he said, his jurisdiction did not extend to the decisions of elected officials.

[28] The Auditor General did subsequently look into the matter. He produced a report, in April of 1998. Ultimately, he took the view that the consultation carried out by the Council had met all the special consultative procedures prescribed by the Local Government Act 1994.

[29] By now Mr Vickery was becoming increasingly strident. He made his displeasure known to Mr McLean through another citizens' group he had become affiliated with – Papakura Concerned Citizens – in a letter of 14 April 1997. He said, *inter alia*: "I have witnessed the deterioration of standards and the abuse of power by elected and employed officials of this Council. It has to end now." He then went on to detail his frustrations and concerns at the process which had in fact been followed.

[30] Unsurprisingly, Mr McLean, the Chief Executive Officer, in a reply letter a few days later, asked Mr Vickery to "clarify precisely what [he] meant" by that statement. That invitation was not responded to.

[31] In any event, by now Mr Vickery had determined to "go public" and to try to achieve by informal means what he had not been able to achieve through more formal challenges.

[32] Ms Graham had determined to approach the Serious Fraud Office, in an endeavour to persuade that office to investigate the contractual dealings

of the Council, with United Water. In a letter to the Serious Fraud Office, she said:

> I would like to express concerns about the manner in which the franchise of water and waste water was implemented by the Papakura District Council. I ask that you undertake an immediate investigation into the financial connections of senior administrators and councillors of the Papakura District Council, directly or indirectly, with the winning tenderers and other interested parties. The facts as they present themselves, *suggest criminal irregularities may have taken place*. (Italics added)

[33] Ms Graham went on, in that letter, to suggest that there were three factors "....which constitute suspicion of criminal offences".

- The whole process and the speed with which it was carried through was highly irregular;
- The history of the winning tenderers Generale Des Eaux and Thames Water;
- Despite a formal tender process, "we believe that the winning bid was determined before the whole process started"."

[34] The probabilities have to be very high indeed, as Mr Miles suggested in the course of his submissions to the jury, that this document fomented suspicion in Mr Vickery's mind, at a time when he was already aggrieved by what he regarded as his mishandling at the hands of Council.

[35] Mr Vickery and his associates then issued the first of the documents which is complained of by the plaintiffs in these proceedings. It was a publicly distributed flyer, or pamphlet. It raised questions as to why Council bulldozed this deal through "in the dead of night"; aspersions were cast on the real reason for the Council behaving in that manner; it was said that "no honest attempt" had been made to consult with ratepayers by way of a public hearing; and it went on to suggest that United Water is owned by a French multi-national (Generale Des Eaux) and that that company "has been involved in corruption scandals involving water contracts in three countries".

[36] Mr Vickery and his colleagues then set about getting up a public petition.

[37] Then, on 28 April 1997, a local newspaper called "Our Town – Papakura" published a story circulated throughout that area. It was under the heading "Water Fight Over – All Bar Shouting". In that article, Mr Vickery was quoted as saying, "The Serious Fraud Office is investigating United Water over allegations of bribing city officials in three countries". Mr Smale's name was also distinctly mentioned in that article.

[38] Mr Smale was the Acting Chief Executive at that time. As soon as he saw that article, he consulted the solicitors to the District Council, for the Council, and also on behalf of Mr McLean, Mr Phillips and himself. Those solicitors wrote to the newspaper, suggesting that there had been an actionable defamation. An apology was sought (but no damages), and it was said that the costs of the plaintiff should be met. That newspaper promptly apologised – and in the fullest terms – in an article headed, "No Offence Intended".

[39] Mr Vickery had by now elected to pursue, in his own right, the avenue of an enquiry – if it could be had – through the Serious Fraud Office.

[40] On 3 June 1997 he wrote a lengthy letter to the Assistant Director of the Serious Fraud Office. Many of his prior concerns were reiterated. He asked for a specific investigation of Mr Smale's redundancy package. He said Mr Smale, "will receive an estimated $500,000 redundancy package". (In fact, on the uncontradicted evidence, Mr Smale had received something just over $60,000 in redundancy payments). He asked whether the handling of the water franchise contract by Mr Smale was "....mere incompetence? or was it corrupt?". Mr Vickery went on to suggest that the Serious Fraud Office should question "all councillors and executive staff", and "investigate

[the relevant] international telecommunications six months prior to 14 December 1996". What Mr Vickery was after, was any evidence of a "done deal" evidenced in those telephone conversations.

[41] Then, on 6 June 1997, Mr Vickery wrote a letter which he sent to three newspapers – "Our Town", "The Courier", and "The New Zealand Herald", the latter being a newspaper with a national circulation. That letter was the heart of the plaintiff's case before the jury, and I reproduce it in its entirety:

> "To whom it may concern.
>
> Former Chairman Papakura Residents & Ratepayers Ass. Inc. Chairman Papakura Concerned Citizens.
>
> On Wednesday 14 June 1997 I laid a complaint with the Serious Fraud Office regarding actions of the Papakura District Councils decision to franchise the Water & Wastewater services for up to a fifty year period.
>
> *There was serious enough circumstantial evidence to suggest that criminal irregularity may have taken place.* (Italics added).
>
> I laid this complaint in my own personal capacity as a ratepayer of the Papakura District.
>
> Yours sincerely
>
> Ross Vickery"

[42] On 11 June 1997 the New Zealand Herald, in its Metro section, carried an article by a reporter, Mr Martin Johnston, under the heading "Water Supply Battle Takes a Bitter Turn", which noted that "....Ross Vickery, has laid a complaint with the Serious Fraud Office over the Papakura District Council's decision to franchise its water services". That article also reported Mr Smale's infuriated reaction at the handing over of this letter to the three newspapers.

[43] On 14 June 1997 the Serious Fraud Office informed Mr Vickery that "it did not believe that the various allegations made could be sustained by the available evidence". Judge Jamieson, the Acting Director of the Serious Fraud Office, issued a press release which, amongst other things, said that that office's investigations "included considering the processes adopted and the available documentation and interviewing a number of individuals. We have now concluded our investigation. It is our view that the allegations of dishonesty cannot be sustained on the evidence available". The Serious Fraud Office closed its file.

[44] The following day, the Mayor of the Papakura District Council issued a public call, reported in the Herald for 14 June 1997, in which he was quoted as saying: "It is time for the people who have been running a programme which questions the honesty and integrity of the Council and its officers to apologise".

[45] Mr Vickery never did apologise. Notwithstanding the aspersion in the letter of 6 June that "there was serious enough circumstantial evidence to suggest criminal irregularity", no attempt was made, ever, to justify the allegations in the proceedings in my Court. And in one of the more memorable closing lines in a defamation trial in my experience, in cross-examination Mr Miles closely pressed Mr Vickery as to why, once the Serious Fraud Office report had been released, he did not take up the Mayor's invitation, or, on his own initiative, apologise to the plaintiff. Mr Vickery said: "Because I didn't think they deserved it". North Americans would doubtless categorise that as a "defining moment"; perhaps Mr Miles considered it, "a sublime moment".

[46] It will be readily appreciated from this summary that the plaintiff's case was that this defendant had, vindictively, pursued a determined course

for several months in which he cast aspersions of bribery and corruption against the plaintiffs; and that he has not shown since one jot of remorse, or paid any regard at all to the consequences of his action. The plaintiffs maintain that Mr Vickery had simply "shot his mouth off", or to employ another colloquialism, "fired bullets" without checking them, "bullets" which had been manufactured by others, and which proved to be quite wrong. He made no attempt to justify, and when pressed at trial, he endeavoured to present himself as "merely a concerned citizen".

[47] For his part, Mr Vickery maintained that his quarrel was with the Council itself, and that he was not casting suspicion of criminal guilt on any of the plaintiffs. He endeavoured to suggest that he was really talking about perceived irregularities in appropriate local government processes; rather than "criminality", properly so called. He said he was merely doing his civic duty, in holding this District Council, and its officials, to account. It was said that the words complained of in (particularly) the letter of 6 June 1997 could not be considered to be defamatory; and that even if they were, they did not refer to the plaintiffs, or any of them.

[48] I think it unnecessary to rehearse the directions I gave the jury on these points. They formed part of my summing up. If I was in error in some respect in those directions, then that error is redressable elsewhere. In summary, I held that the words complained of were capable of being defamatory. The jury decided that the words in fact had the meaning alleged by the plaintiffs (an imputation of the suspicion of criminality so strong that it crossed the line, in that people would think there was criminality). The jury also found that the words did refer to all three plaintiffs. But the jury held that the statements made, were not made maliciously. It returned the monetary damages I have already noted.

THE PLEA OF QUALIFIED PRIVILEGE

[49] A defendant must adequately plead the circumstances said to give rise to qualified privilege. (See, *Cranston v New Zealand Trainers' Association* (Court of Appeal, CA 225/99, 22 March 2000, Thomas J)).

[50] In this case, the plea is in these terms:

> That if it shall have been proved that the defendant published any of the words as alleged in the ASC and that such words were in any manner defamatory of the plaintiffs (which is denied) then the defendant claims that such words were published on occasions of qualified privilege in that they were published to persons having a common interest and/or were published on an occasion when the defendant had an interest and duty, legal, political, moral or social, to make such publications or political expressions and those to whom such publications or political expressions were made had a corresponding duty to receive the same and the defendant accordingly relies upon s16 of the Defamation Act 1992. The defendant says further that any such publications or political expressions as proved were made by the defendant in good faith, without malice or without taking improper advantage of the occasion of publication or political expression.

[51] The defendant went on to particularise the defence in this way:

- The defendant held office as Chairman of the Ratepayers and Residence Association Incorporated, and was Convenor of the Papakura Concerned Citizens group.

- The Council owed statutory obligations of openness, accountability, and process.

- The annual plans of the Papakura Council included certain "democratic objectives".

- A long term agreement relating to a critical natural resource – water – was a matter of great public interest.

- There was a corresponding interest and a duty to receive "any such publications or political expressions from the defendant in order to be adequately consulted and informed in respect of the Mayor's proposal to franchise the Papakura District Council's water supply long term ... ".

- The news media had an interest and a duty to receive any such "publications" and "political expressions".

THE POLITICAL SPEECH EXTENSION TO QUALIFIED PRIVILEGE

[52] One of the defences available in a defamation action to a defendant who publishes defamatory statements of fact about another, or others, which are untrue (as in this case) is that of qualified privilege.

[53] A number of occasions of qualified privilege have been created by common law Judges since the famous judgment of Baron Parke in *Toogood v Spyring* (1834) 1 CM & R 181; 149 ER 1044. For instance, statements made in self defence to protect the defendant's own interest; statements made in the discharge of a public or private duty (whether legal, social or moral); and statements made on a subject matter in which both the defendant and the person of whom the statement is published have a legitimate common interest.

[54] The authorities are plain that the list of such occasions of common law qualified privilege is not closed. Novel occasions for the application of defence can be created by Judges, if they advance the general welfare of society and changing conditions (see *Howe v McColough and Lees* (1910) 11 CLR 361, 369).

[55] Whether, and if so how far, qualified privilege attaches to something which, for convenience at this point only, I will compendiously refer to as "political discussion" is a matter of continuing controversy in the British Commonwealth.

[56] The issue is whether the discussion of "political matters" in a newspaper or other media outlets – even if they contain defamatory and untrue statements of fact –should, in the absence of malice, be immune from liability in an action for defamation.

[57] In Australia, in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court of Australia held that though discussion of the conduct of politicians from Australia and elsewhere could come within the protection, the publisher had the obligation of satisfying the Court that its conduct in publishing the defamatory statement was "reasonable". (See the discussion in (1998) 114 LQR 1).

[58] In New Zealand, the Court of Appeal held in *Lange v Atkinson* [1998] 3 NZLR 424 that this new occasion of qualified privilege for political discussion should be accepted. However, it was confined to published statements about the actions and qualities of those currently or formally elected to the New Zealand Parliament, and those with immediate aspirations to be members. The Court of Appeal declined to incorporate the requirement of reasonableness of conduct on the part of the publisher, upon which the High Court of Australia had insisted. In so doing, the Court of Appeal specifically reserved the issue of any extension into the area of local body politics. (See, p.468). (For commentary on the case, see Burrows, *Media Law in New Zealand* (4th ed.), at p63; and see also Law Commission, Preliminary Paper 33, *Defaming Politicians – A Response to Lange v Atkinson*).

[59] The English Court of Appeal also created a new occasion for qualified privilege of this kind in *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862. It held that qualified privilege is available when:

- The publisher is under a duty to those to whom the material was published.

- Those to whom the material was published have an interest in receiving it.

- The nature, status and source of material and the circumstances of its publication are such that the publication should in the public interest, be protected in the absence of proof of express malice.

[60] That decision was appealed to the House of Lords (*Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010). Their Lordships, in upholding (by a majority) the actual decision of the Court of Appeal, held on the facts that the defendant newspaper in that case could not rely on the defence of qualified privilege. The common law in England should not develop communications in the course of political discussion and information as a new occasion or "subject matter" category of qualified privilege whereby all statements which could be described as "political information" would attract such privilege, whatever its source and whatever the consequences.

[61] Lord Nicholls of Birkenhead considered that would "not provide adequate protection for reputation" (p.1027). The other members of the Court (Lords Steyn, Cooke, Hope and Hobhouse) agreed that there should be no blanket or "generic" protection by way of qualified privilege for the statements of fact in the course of disseminating "political information", by which was meant "information, opinion and arguments concerning

government and political matters that affect the people of the United Kingdom" (p.1022).

[62] Lord Nichols articulated a (non-exhaustive) list of matters which a court should take into account when deciding whether a defamatory publication which misstates facts was published in the public interest, and on an occasion of qualified privilege. These include the nature of the information, and the extent to which the subject matter is a matter of public concern. The seriousness of the allegation is relevant. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. The sources of information should also be taken into account. Some informants have no direct knowledge of the particular event. Some have their own axes to grind, or are paid for their stories. Steps taken to verify the information, and the status of information are also important, as is the question whether the allegation has been the subject of an investigation which commands respect. The court should take into account the urgency of the matter – news is often a perishable commodity – and whether comment was sought from the plaintiff. It is also relevant whether the article contained the gist of the plaintiff's side of the story. The tone of the article is significant.

[63] The House of Lords considered that a balancing operation of this nature is better carried out by a Judge in a reasoned judgment (which is then subject to appellate review), than by a jury. The incremental addition to a corpus of law which is such a characteristic feature of the development of the common law would also thereby be preserved.

[64] To return now to the appeal from New Zealand in *Lange v Atkinson* (supra) the Privy Council (having just delivered *Reynolds,* in their capacity as members of the Appellate Committee of the House of Lords) came to the

view 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 including matters such as the responsibility and vulnerability of the press", and that "the Courts of New Zealand are much better placed to asses the requirements of the public interest than their Lordships Board". ([2000] 1 NZLR 257, at p.262). Their Lordships therefore allowed the appeal, and remitted *Lange* to the New Zealand Court of Appeal, for further hearing as that Court might consider to be appropriate.

[65] Two points may be made about this body of case law, which are of distinct relevance in this case.

[66] The first is that courts in Australia, England and New Zealand have all thought it appropriate to endeavour to strike what they have regarded as an appropriate balance between two values – protection of reputation, and freedom of speech.

[67] I make that point because I can discern nothing in the British Commonwealth jurisprudence which presently comes even remotely close to an acceptance of the doctrine espoused in the United States in *New York Times v Sullivan* (376 US 254 (1964)). That latter doctrine effectively throws a blanket of privilege over defamation suits brought by politicians in respect of their political (for which read, practically, "entire") behaviour.

[68] The question whether something approaching the breadth of First Amendment protection in the United States should be adopted into United Kingdom law is carefully explored in the very valuable collection of essays in Loveland (ed.), *Importing the First Amendment – Freedom of Speech and Expression in Britain, Europe and USA* (Hart, Oxford, 1998)). But I think I can fairly and appropriately say, for the purposes of this proceeding, that something like the *New York Times v Sullivan* doctrine is certainly not the

present law in this country; and it looks most unlikely that it will be the law in this country, at least for the foreseeable future. Hence, there is nothing which would conceivably afford Mr Vickery a defence of the breadth which Mr Finnigan appears to be claiming.

[69] A brief historical excursus is appropriate to support this conclusion. It would be a mistake to assume (because we live in now far distant times) that what we today refer to as "freedom of speech" has always prevailed. In fact, for much of the history of English law speech was very distinctly curtailed by a wide variety of devices. Not least was what we today refer to today as "copyright", which was blatantly, at one time, a system of state licensing of accepted views.

[70] It was that kind of repression which triggered Milton's famous 1644 tract, *Areopogitica* which was referred to by our Court of Appeal (at p.460). That extraordinary text with its political, theological, and oratorical language (for Milton was engaged in the revolutionary struggles of the day) yielded up two of the most famous passages ever written on freedom of speech, and which were cited by the Court of Appeal:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?
>
> I mean not tolerated popery, and open superstition, which, as it extirpates all religions and civil supremacies, so itself should be extirpate, provided first that all charitable and compassionate means be used to win and regain the weak and the misled.

[71] Most of the traditional liberal arguments for free speech turn on those sort of sentiments, although they are given a bizarre twist in the hands of judges of Justice O.W. Holme's persuasion, when they take on an economic analogy, under the rubric of a "free trade in ideas".

[72] But however they are put, the traditional liberal arguments for free speech are essentially that unregulated expression promotes the search for truth; the project of self-government; the autonomy of individuals; and the control of concentrated power.

[73] Outside the narrow walls of the law reports, those who attack these traditional liberal arguments argue, in one form or another, that even it if is true that free speech serves those kinds of values to a respectable degree, there are costs associated with liberty which are not sufficiently recognised in the standard liberal accounts. It is said that liberalism is too optimistic about human behaviour and intentions; too complacent, too inattentive to questions of responsibility and virtue; too doctrinal; and quite elitist in its over-zealous regard for intellectual inquiry (thereby disregarding things like faith, affection, tradition, security, and a sense of community). The liberal view of very broad First Amendment type provisions is further said to inadequately address the impact of technology; the potential severity of non-physical harms; and to be a hopelessly miscued distribution of the power created by modern communications. Blanket protection is therefore simplistic, and inevitably wrong.

[74] See, generally, the writings of the political philosopher Alexander Meiklejohn, whose views greatly shaped the arguments of Justice Brennan in *New York Times v Sullivan* (see, Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment" (1965) 79 Harv. Law Rev. 1) and an excellent occasional paper – which appears to be unpublished – by Vincent Blasi, in the Yale Law School Occasional Series, "Milton's *Aeropagitica* and the Modern First Amendment".

[75] The point here is that it is impossible, and, quite unwise, to throw down blanket protection for political speech because, as Judge Learned Hand once put it:

> "...life is complex and universals slippery and perilous ... truth is a dangerous experiment and man a bungling investigator". (Gunther, *Learned Hand: The Man and the Judge* (1994) 387).

[76] The second (and related point) is that British Commonwealth courts have not been prepared, as Elias J put it in *Lange*, to elevate "for all purposes freedom of speech about the right to reputation which is inherent in the dignity of the individual" ([1997] 2 NZLR 22, at p.45). The Court of Appeal specifically endorsed that proposition.

[77] The same point was very well put recently by Sir Stephen Sedley:

> First, lest I be misunderstood, let me say loud and clear that the Miltonic freedom – the freedom to utter criticism or heresy without fear of suppression or reprisal from those who may be angered or embarrassed by it – is of fundamental importance in any free society. But the right to be wrong is a subtler concept. I am not speaking of the right to be eccentric or misguided or a pain in the neck: these are rights which undoubtedly need constitutional protection. But what cannon of civilised living can confer a right to publish factual falsehoods which blight the lives and livelihoods of others? The present English law of fair comment and qualified privilege may be a pretty imperfect way of striking a balance, and a defence of innocent dissemination has been long overdue, but a legal system which cannot protect an individual against the publication of damaging calumny has surrendered one of its most important constitutional functions. (In Loveland, supra, para 68, at p.24)

[78] Some kind of balancing, or adjusting test is required. Even American jurisprudence is moving away from a simplistic "one value or nothing" approach. As Lawrence Tribe noted, in *Constitutional Choices* (1985) at p.191:

> Over the past decade, the Supreme Court has been moved toward a new configuration of First Amendment values. This motion cannot be described simply as protective or nonprotective, interventionist or noninterventionist. The Court has expanded protection in some areas – striking down limitations

> on spending and contributing money, asserting the First Amendment rights of corporations, protecting commercial advertising, and exempting boycott activity by a civil rights organization from economic regulation and tort law – while simultaneously cutting back in other areas – further withdrawing protection from labor picketing, sharply curtailing the free speech rights of government employees, and excluding privately owned public areas from First Amendment scrutiny.
>
> It is important to see these developments not as deviations from timeless principles, but as part of the normal functioning of constitutional adjudication. This is not to say that the Constitution is an empty vessel to be filled with the values of a particular historical period. It is, rather, to suggest that the Constitution exists in intimate relationship with society as a whole and that the constitutional doctrines and choices of any particular period are outcomes of a complex interplay among text, history, and social forces. Whether one's purpose is critical or supportive, arguments grounded in social and historical context may in the long run prove more effective, and would surely be more honest, than outraged assertions of "ancient liberties".

[79] Finding the right balance in a given jurisdiction, and expressing it in doctrinal terms which will adequately inform the day to day conduct of human affairs, is a challenge of no little difficulty. Even the House of Lords was reduced to what academics sometimes (pejoratively) refer to as "washing list jurisprudence". That overlooks Learned Hand's point: all that we can aspire to is greater, rather than less, wisdom, in the particular case.

THIS CASE

[80] Returning to the facts of this case, I can see nothing whatsoever under the law as it stood prior to the developments of which I have just been speaking which would afford Mr Vickery the defence he raises. And, none of the tests which have latterly been suggested in any of the British Commonwealth Courts would assist him either. It is only if some extreme doctrine which would throw a very large generic blanket – with very fuzzy edges – over something which could expansively be called "political speech" could be invoked that he would have any possible defence.

[81] I take the traditional law first. It is important to appreciate that, as a general proposition, there is nothing approaching a "media privilege" for the publication of statements which are merely of interest to the public. It follows that while a statement can be made complaining about the conduct of a public officer – and it will be privileged if directed to a person with some authority or interest in that conduct – the publication of the same statement in the press will (as a general proposition) not be protected.

[82] A very good illustration is a case I mentioned to counsel in the course of argument, although it had not been cited to me - *Cutler v McPhail* [1962] 2 QB 292. That too was a local authority case. A ratepayer who thought that the plaintiff had acted in a corrupt manner as a member of the Council and of certain planning committees (in that he had improperly secured preferential treatment, which the second plaintiffs had knowingly accepted and acquiesced in) made his views known in various ways. He sent a letter to a member of the Council and another to an editor of a magazine. The letter to the magazine was published. The magazine was the official organ of a voluntarily association of residents in the Harrow area and the paper was also sold to the public.

[83] Salmon J held that the letter to the Council was privileged; but the letter to the newspaper was not. "The Council was obviously interested in the same topic as the defendant – namely building development in the Pinner areas". But, the letter sent to the Villager was not privileged, "because the publication is too wide" (p.296).

[84] That is precisely the position in this case. Mr Miles (quite rightly in my view) did not at all object to Mr Vickery making his views (however intemperate) known to the Council, nor to the Serious Fraud Office, nor to the Auditor-General. No prior restraint was ever put in Mr Vickery's way. But

what Mr Miles did object to, and in my view the defence does not extend to, was the scurrilous attempt to influence the news media to publish a statement that there was serious enough circumstantial evidence to suggest that criminal irregularity might have taken place and to thereby "tar" the plaintiffs. That was wider publication than was required. It was (at that point) outside the privilege.

[85] I turn now to the position under the more recent Commonwealth authorities I have referred to. There is no present authority in New Zealand (in the local body area) for a defence of the kind suggested on Mr Vickery's behalf. Nor, for myself, at least in the circumstances of this case, would I be minded to afford any such defence. If I were to adopt the Australian test, Mr Vickery acted most unreasonably. He adopted "bullets" manufactured by somebody else and continued to fire them blindly, without checking, and quite without merit. If I were to apply the factors suggested by Lord Nichols, in each instance the factors there enumerated tell heavily, if not absolutely, against any privilege being afforded the plaintiffs.

CONCLUSION

[86] In my view, in the circumstance of this case, a defence of qualified privilege should be rejected.

[87] There will therefore, be judgment for all three plaintiffs in the sums returned by the jury.

[88] As to costs, there seems to be some doubt as to whether Mr Vickery is legally aided. His grant of aid was totally expended, prior to trial. In the best traditions of the bar – and they are to be commended for this – Mr Finnigan and Mr Reeves stood by their client, and represented him, at trial.

[89] In my view, the plaintiffs should have their costs, on a 2A basis throughout, and with a certificate for second counsel, under the new High Court Costs Rules. If counsel cannot settled the figures on that basis, they can apply to the Registrar.

[90] If Mr Vickery is not legally aided, such an order would, in the usual way, run against him.

[91] But even if he is still legally aided, in my view there are "exceptional circumstances" here which require an order for costs against Mr Vickery personally under s86(2) of the Legal Services Act 1991. The circumstances in which such orders may be made were recently canvassed by Penlington J in *X v Y and The Residual Health Management Unit* (High Court, Hamilton, CP56/94, 5 May 2000). The authorities are there rehearsed, and I need not retraverse them here.

[92] Mr Vickery persisted, right down to the end of trial, in maintaining his stance, and in face of the jury he was still vilifying the plaintiffs. Yet no attempt was ever made to justify. It would, in my view, be quite wrong for him to be allowed to shield himself behind the Act. In perhaps no other areas of the law is personal responsibility so directly in issue, as in defamation cases. Indeed, the time may have come to question whether legal aid should be extended to defamation cases at all. It is not, in England.

Judgment, and costs, for the plaintiffs.

RG Hammond J