IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2015-485-729
[2017] NZHC 377

UNDER	the Defamation Act 1992
BETWEEN	SIR EDWARD TAIHAKUREI DURIE First Plaintiff
	DONNA MARIE TAI KOKERAU HALL Second Plaintiff
AND	HETA GARDINER First Defendant
	THE MĀORI TELEVISION SERVICE Second Defendant

Hearing: 8 and 9 June 2016

Appearances: R Fowler QC, F Geiringer and J Forrest for the Plaintiffs
W Akel and T J Walker for the Defendants

Judgment: 8 March 2017

JUDGMENT OF MALLON J

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Introduction

[1] Sir Edward Durie (the first plaintiff) is a retired High Court Judge and co-chair of the New Zealand Māori Council. Donna Hall (the second plaintiff) is a lawyer and principal in Woodward Law, and Sir Edward's wife. They have brought defamation proceedings arising out of a report broadcast on Māori Television and two articles on its website. The Māori Television Service (the second defendant) is the broadcaster of Māori Television. Heta Gardiner (the first defendant) is employed by Māori Television Service and is the journalist who reported on the matters at issue.

[2] The television report and the articles reported on the Māori Council having "dumped" Ms Hall as legal counsel on important litigation in which it was engaged, as a result of concerns by some members of its Executive about Sir Edward and Ms Hall. The plaintiffs allege statements in the broadcast and website articles meant they had acted unlawfully, unprofessionally, in breach of their responsibilities to the

Māori Council, and placed their own interests over those of the Māori Council and Māori generally amongst other things.

[3] The defendants contend the words do not bear the alleged defamatory meanings. The defendants contend the publications were protected by qualified privilege as being "neutral reportage or, alternatively, responsible communications on matters of public interest". They also rely on the defence of honest opinion. Sir Edward and Ms Hall have applied to strike out these defences on the basis that they cannot succeed.

The facts[1]

The Māori Council

[4] The Māori Council is a statutory body established under the Māori Community Development Act 1962 (the MCD Act).[2] The MCD Act is administered by the Minister of Māori Affairs and the powers conferred by the Act are under the general direction and control of the Minister.[3]

[5] The Māori Council's functions include promoting, encouraging and assisting Māori to advance their physical, economic, industrial, educational, social, moral and spiritual well-being.[4] It has been involved in significant litigation on behalf of Māori in accordance with that function.[5] This litigation includes claims before the Waitangi Tribunal involving the Trans-Pacific Partnership Agreement (TTPA) and Māori interests in water.

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1 An application for strike out is determined on the basis of the facts as pleaded, which are generally assumed to be true (untenable allegations need not be accepted). Affidavit evidence which is not disputed may also be taken into account: *Collier v Pankhurst* CA136/97, 6 September 1999 at [18]; *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566; and *Southern Ocean Trawlers Ltd v Director General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA) at 62-63.

2 Section 17.

3 Section 3.

4 Section 18(1)(c)(i).

5 For example, litigation against the Government to stop the sale of state owned forests which resulted in the Crown Forest Assets Act 1989 and the Crown Forest Rental Trust; Waitangi Tribunal claims concerning Te Reo Māori leading to the Māori Language Act 1987; and protecting Māori interests in radio frequencies, water and fisheries.

[6] The MCD Act provides for the establishment of District Māori Councils.[6] Members of the district councils are elected every three years. There are triennial elections for appointment on the district councils.[7]

[7] The Act also establishes Māori Committees and Māori Executive Committees within district council areas. District councils can alter the boundaries of Māori Committees and Māori Executive Committees or create new Māori Committees and Māori Executive Committees in their area.[8] A Māori Committee performs functions, in relation to Māori within their area, as conferred by the Māori Council.[9] It is subject to the control of the Māori Executive Committee in whose area it operates.[10]

[8] District councils appoint the Māori Council members. Each district council appoints three members to the Māori Council.[11] The Māori Council appoints an Executive, including a Chair. At the time of the publications at issue in this case Sir Edward was co-chair with Maanu Paul.

[9] The Māori Council receives some funding from the Government. For example, in the 2015 budget it received $196,000 as part of Vote Māori Development. This covers its running costs. It does not cover the cost of litigation which the Māori Council undertakes on behalf of Māori. That is funded by donations or other sources.

Māori Television Services

[10] The Māori Television Service is established under the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003. Its responsible Ministers are the Minister of Māori Affairs and the Minister of Finance.[12] The Māori Television Service acts independently from the responsible Ministers, who may not

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6 Sections 14 to 16.
7 Section 20(3).
8 Sections 8(2) and 11(2).
9 Section 10(1).
10 Section 10(2).
11 Section 17(3).
12 Section 6.

direct it in respect of any particular programme or in the gathering or presentation of news or current affair programmes.[13]

[11] Its principal function is as follows:

> **8 Functions of Service**
>
> (1) The principal function of the Service is to contribute to the protection and promotion of te reo Māori me ōna tikanga through the provision, in te reo Māori and English, of a high-quality, cost-effective television service that informs, educates, and entertains viewers, and enriches New Zealand's society, culture, and heritage.

[12] The Māori Television Service has four news and current affairs programmes. These include *Te Kāea* and *Native Affairs*.

[13] *Te Kāea* is broadcast in Te Reo Māori with English subtitles daily at 5.30 pm and 10.30 pm and at 8.30 am Mondays to Saturdays. It is also broadcast twice daily in Te Reo only at 7.30 pm and 10.30 pm. *Te Kāea*'s mission statement is to be "the leader in Māori news, anywhere, anytime." While it aims to broadcast the latest local, national and international stories, its emphasis is on news stories of particular importance or interest to Māori.

[14] *Native Affairs* is a weekly current affairs programme. At the relevant time it was broadcast on Mondays at 8.30 pm. It is now broadcast on Tuesdays at 8 pm and repeated on Sundays at 11 am. It broadcasts stories of importance to Māori and from a Māori perspective.

[15] The Māori Television Service also has an online news platform. It is in Te Reo and English and features news and current affairs video stories.

[16] Heta Gardiner is a senior news reporter for *Te Kāea.* He is an experienced journalist having been a reporter and researcher for Māori television news programmes for many years. He is fluent in Te Reo. Maramena Roderick is head of news and current affairs with the Māori Television Service. She had overall responsibility for the *Te Kāea* and *Native Affairs* broadcasts at issue. She is a

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[13] Section 10.

distinguished journalist, with extensive experience over 30 years in print and television reporting.

Background to the publications

[17] Ms Roderick was contacted by a confidential source on the morning of 3 August 2015. She had dealt with this source previously and regarded the source as reliable. The source informed her of dissension within the Māori Council. The source did not discuss individuals, but referred to conflict within the Māori Council and concern for its future. As was Ms Roderick's usual practice when dealing with confidential sources she asked to see any relevant documents.

[18] Around mid-morning she received a copy of an email sent by Mr Paul to Ms Hall dated 31 July 2015 and a document described as minutes from a Māori Council Executive meeting on 28 July 2015 (the minutes document). The email advised Ms Hall that her law firm, Woodward Law, was dismissed as counsel for the Māori Council in its TTPA claim, that Ms Kathy Ertel was now instructed, and Ms Hall was to hand over her file to Ms Ertel.

[19] The minutes document recorded the following matters:

(a) Ms Ertel was to have been instructed to work with Ms Hall on the TTPA claim but Woodward Law had not approached her to do so. This was a breach of the Executive's directive to Woodward Law. The Māori Council resolved to dismiss Woodward Law from acting on this claim, to instruct Ms Ertel, and to consider making a complaint to the New Zealand Law Society if evidence is received that Woodward Law is undermining the Council's mana.

(b) The Tāmaki Makaurau District Council alleged Sir Edward had a conflict of interest when instructing the Māori Council's legal business. Processes to mitigate the risk of conflict had not been put in place. An example of the conflict was that Sir Edward had instructed Ms Hall to apply to put him back on the Crown Forestry Rental Trust (CFRT) Board without the knowledge of Mr Paul or the consent of the

Executive. It was resolved that a Legal Services Roopu be formed to instruct and manage all legal claims until the Law Society provided a clear directive on the conflict issue, and the Roopu would meet with Woodward Law to receive an update on the claims being managed by that firm.

(c) The Taitokerau District Council had complained that Ms Hall had set up two new Māori Committees in that district without consultation. There was a view that, if Sir Edward had instructed Ms Hall to do this, then he needed to be held to account and, if Ms Hall was instructing herself, this was a breach of the Māori Council's tikanga and processes. The Roopu was to investigate this and report back to the Executive.

(d) There was concern that the Māori Council was the only legal team not ready to proceed with an urgent hearing relating to a geothermal and water claim before the Tribunal.

(e) One attendee expressed the view that Ms Hall was running a campaign that was damaging the Tāmaki Makaurau District Council's mana. In her time on the District Council, this attendee had "never witnessed the level of hatred being whipped up by Donna Hall and Eddie".

[20] Ms Roderick regarded the matters in the email and minutes document as of high public interest and concern to Māori, given the Māori Council's important leadership role in Māoridom and its success in achieving significant change and development on behalf of Māori over many years. The allegations indicated a serious break down of relationships within the Māori Council. The individuals at the meeting were influential and highly respected Māori leaders and they were making serious allegations. Ms Roderick considered the fact the allegations were being made was important.

[21] Ms Roderick considered the events should be reported that evening on *Te Kāea* as the lead provider of television news and current affairs to Māori. The story was assigned to Mr Gardiner. Ms Roderick told Mr Gardiner to immediately contact Ms Hall, to obtain her comment on the minutes and to seek an interview if possible. Ms Roderick knew Ms Hall and Sir Edward both personally and professionally. Ms Hall had a high media profile, was often interviewed on camera, and was media savvy, articulate and forthright. In Ms Roderick's experience Ms Hall was the contact person for Sir Edward. Ms Roderick also told Mr Gardiner to seek an interview with Mr Paul to confirm the minutes document was authentic. Ms Roderick then forwarded the email and the minutes document to Mr Gardiner and had a further telephone discussion with him in which she directed him to keep the questions focussed on the information in the documents.

[22] At 2.52 pm Ms Roderick emailed Mr Gardiner a draft script for the story. She noted the final story would still need to have the normal checks and be approved by the news desk. She also said:

> Because this is legal – you must quote graphics verbatim and in English. Do not try and summarise.
>
> If Donna [Hall] provides statement, ensure you use it in full across your story as these are quite serious allegations and she needs the chance to answer.

[23] Mr Gardiner thought it was best to have two spokespeople, one from each side. He spoke to Ms Hall at about 1.45pm. Ms Hall asked who was making the allegations and said that if it was Mr Paul then he did not have the authority to sack her. She also said he had tried to fire more lawyers than she had shoes, and she had a lot of shoes. Mr Gardiner said he would be interviewing Mr Paul later in the day and asked her if she would like to speak on camera to give her perspective. Ms Hall said she was busy until 4 pm but to call her then. Mr Gardiner was left with the impression she was happy to be interviewed at that time. For her part, Ms Hall hoped she would have time to do an interview but did not commit to doing so.

[24] Mr Gardiner then arranged to interview Mr Paul by telephone at 2.30 pm. Mr Paul confirmed the minutes accurately recorded the resolutions made at the 28 July meeting. After this Mr Gardiner sent a text message to Ms Hall confirming that he

had interviewed Mr Paul and asking what location they might use for an interview at 4 pm. Mr Gardiner did not receive a reply to the text and thereafter made a number of unsuccessful attempts to call her. As matters had transpired Ms Hall was not free from her commitments in order to be able to give an interview. At 5.01 pm Ms Hall sent a text asking for Mr Gardiner's email. At 5.02 pm and 5.03 pm Mr Gardiner replied by text with his email address, noting that Mr Paul had said Ms Hall and her law firm had been removed as counsel for the Māori Council on the TTPA claim and advising that they were going to air in 25 minutes.

[25] At 5.15 pm Ms Hall emailed Mr Gardiner. Her email explained the following matters:

(a) There were elections coming up for the Māori Council Executive which were hotly contested. This was causing some people to make regrettable statements which were not in the interests of the Māori Council or Māori.

(b) The Executive was acting in a caretaker role pending the elections.

(c) The minutes document received by Māori Television Services was not a meeting of the Executive. Some members wished to go beyond the caretaker role. As a result, no agenda had been agreed for the meeting, many people did not attend, the meeting was not quorate and it had no formal standing under the Māori Council's constitution.

(d) The minutes document contained serious defamatory allegations which were denied. Documents easily showed the allegations were false but it was not possible in the time available to provide a detailed response.

(e) Māori Television Services should not publish these allegations because it would be acting as the mouthpiece of people who were making deliberately hurtful and false allegations for their own political purposes.

(f) There would be a Māori Council meeting on 5 to 6 September at which time Ms Hall was confident the allegations would be shown to be false and would not be endorsed by the Māori Council. Ms Hall also expected some of the authors of the minutes document would not remain on the Executive after the meeting.

[26] Mr Gardiner immediately rang his producers. He advised that he had a statement from Ms Hall but it was too late to add it to the story. Therefore he would 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 that statement. The producers agreed with this course of action. The news item was moved to later in the programme to accommodate Mr Gardiner's live piece with Ms Hall's statement.

The broadcast

[27] The story was broadcast on *Te Kāea* on 3 August 2015 during the later part of the 5.30 pm to 6 pm programme time. It was broadcast in Māori with English subtitles. There were also visuals which quoted from parts of the minutes document. The English subtitles together with the quoted extracts from the minutes document were as follows:

> The New Zealand Māori Council (NZCM) [sic] 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 [party] 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 New Zealand 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 DFRT Board without bringing the matter to the Executive."*

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 (Taihākurie)."*

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.

(*These were the sections which appeared on the screen as visuals rather than subtitles.)

The first website story

[28] The story was first put on Māori Television Service's website on 3 August 2015 at 6.01 pm (first website story). The original script was uploaded without the video clip which had yet to be processed. At about 7.41 pm the video clip was viewable online. The online story was in English only. It was identical to the English translation of 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 [sic] 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.

[29] Māori Television Services anticipated this would be an on-going story. At 7.01 pm on 3 August 2015 Mr Gardiner sent a text to Ms Hall seeking an interview the next day. He said this would give her a "bigger chance to tackle some of the kōrero [she] gave and retort some of the accusations." He did not receive a response to the text. He was not involved in further coverage of the Māori Council issues.

Other media

[30] Other media also reported on this matter. Stories were published or broadcast by Fairfax media, Radio New Zealand, *Te Karere* (TVNZ) and Waatea News on 3 or 4 August 2015. These articles referred to the Māori Council dismissing Ms Hall and to varying degrees provided her response.

Complaints

[31] On 5 August 2015 Māori Television Services received a letter from a barrister representing Ms Hall and Sir Edward. The letter contended the broadcast and website stories were defamatory of Ms Hall and Sir Edward and, had the Māori Television Services allowed a reasonable time, could easily have been refuted by the relevant documentation. Without prejudice to Ms Hall's and Sir Edward's further remedies, the letter requested that the website story be removed immediately, that Māori Television Services publish a retraction and apology and agree not to republish the allegations, and costs.

The second website story

[32] At about 12.18 pm on 6 August 2015 the online story was updated to include the transcribed part of the last part of the broadcast in which Mr Gardiner discussed Ms Hall's response and a few minutes later it was updated to include the absent quotation marks (second website story).

Subsequent events

[33] Māori Television Services removed the website story while it looked into the matter further. It did so at about 5.42 pm on 7 August 2015. However it did not agree to the other demands because it considered this would involve taking sides in

the dispute within the Māori Council. Ms Roderick made further enquiries with individuals which indicated a very different view to that advanced by Ms Hall and Sir Edward. Ms Roderick considered the story was likely to develop therefore Māori Television Services could not agree to not republish the minutes document. This view was conveyed to Ms Hall and Sir Edward's barrister. Ms Hall and Sir Edward were further invited to be interviewed about the issues.

[34] Ms Roderick considered the issues required further on-air time for viewers to get a stronger grasp of the dispute. The documentation indicated a level of conflict between respected professionals which had not been seen previously. The further story was broadcast on *Native Affairs* on 31 August 2015. Ms Hall and Sir Edward declined to be interviewed but Sir Edward provided a statement. On the basis of that statement, the broadcasted story included his position. In essence, his position was that the allegations were refuted, the resolutions were invalid and the information on which they were based was plainly incorrect.

[35] Māori Television Services continued to make enquiries about the dispute. There were no new matters arising until a further meeting of the Māori Council on 16 April 2016 at which Sir Edward was elected sole chairman for a term of three years. On 18 April 2016 Māori Television Services reported this development on *Te Kāea.* This story included an on-camera interview with Sir Edward and Mr Paul's response to this development. The report also appeared on Māori Television Services' website on 19 April 2016. Other media also reported on this development.

The law

[36] The qualified privilege pleaded in this case relies on developments in the United Kingdom and Canada. These developments have not yet been adopted by appellate authority in this country. To determine whether the pleaded qualified privilege defence is a tenable one in this country I start with first principles and then consider the case law in this country and elsewhere.[14]

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[14] For a strike out application to succeed the causes of action must be so clearly untenable that it cannot possibly succeed: *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

First principles

[37] The starting point is that "everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form".[15] This is "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[16] One such limit is the law of defamation. Expression which adversely affects a person's reputation is actionable. Historically the common law has "set much store by protection of reputation."[17]

[38] To be actionable the plaintiff must prove the defendant has published a defamatory statement about the plaintiff. A statement will be defamatory if it tends to lower the plaintiff in the estimation of right-thinking members of society generally.[18] The plaintiff does not have to prove the words were false, nor that they caused damage. These matters are presumed. Defamation is a tort of strict liability in the sense that, and subject to some qualifications, it is not relevant to liability that the defamatory words were published in error, the defamation was unintended, the defendant published the words in jest, or the defendant had the best of motives for publishing those words.[19]

[39] There are a number of defences available to a defendant. However each of these has their difficulties and limitations. First, truth is a defence but the burden is on the defendant to prove it and this can be difficult, onerous and costly. Secondly, honest opinion is a defence. However it applies only to expressions of opinion (not assertions of fact) and the defendant must prove the opinion is based on publication facts that are true or substantially true. Thirdly, untrue statements of fact are protected if made on a privileged occasion. Some privileged occasions are specified

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15 New Zealand Bill of Rights Act 1990, s 14.

16 Section 5.

17 *Reynolds v Times Newspaper Ltd* [2001] 2 AC 127 per Lord Nicholls at 129.

18 *The Law of Torts in New Zealand*, Todd (ed) (online edition, Thomson Reuters) at [16.2]-[16.3].

19 Alistair Mulis, Richard Parkes, Godwin Busuttil (ed) *Gatley on Libel and Slander* (12th ed, Sweet and Maxwell, London, 2014) at [1.8]. *Reynolds v Times Newspaper Ltd* above n 17 at 210 per Lord Steyn citing Tony Weir in *Casebook on* Tort (8th ed, 1996) which describes defamation as "the oddest of the torts" because "he [the plaintiff] can get damages (swingeing damages!) for a statement made to others without showing that the statement was untrue, without showing that the statement did him the slightest harm, and without showing that the defendant was in any way wrong to make it (much less that the defendant owed him any duty of any kind)."

in legislation. Others depend on the existence of a reciprocal duty or interest to publish and receive the statement.[20] The privilege recognises for these occasions that it is in the public interest that there be frank and uninhibited communications between the person who makes the statement and the person who receives it.[21] However, traditionally at least, it could not be relied on for statements made to the general public because of the difficulty of establishing the necessary reciprocity of duty/interest.

[40] The media play an essential role in informing the public of matters of common interest and concern. There are many eloquent statements about the importance of this role. Lord Bingham, for example, described it this way:[22]

> The majority [of citizens] can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But [they] cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom ...

[41] The limited scope of the existing defences to a defamation claim pose particular difficulties for media organisations which are involved in the business of reporting matters of public interest to the general public. It is well recognised that the threat of defamation litigation inhibits the media in performing its vital role.[23] The following comment makes this point in relation to the British media:[24]

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20 The much quoted statement of when a privileged occasion arises, from *Adam v Ward* [1917] AC 309 (HL) at 334, per Lord Atkinson, is as follows: "a privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

21 "The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source": *Reynolds* above n 17 at 195.

22 *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277, 290 cited in Andrew Kenyon *Comparative Defamation and Privacy Law* (Cambridge University Press, Cambridge, 2016) at 139.

23 *Lange v Atkinson* [2000] 3 NZLR 385 (CA) [*Lange No 2*] at [24] discusses research in the United Kingdom which concludes "the chilling effect genuinely does exist and significantly restricts what the public is able to read and hear". See also *Grant v Torstar Corp* [2009] SCC 61 at [57] stating the chilling effect "is simply beyond debate".

24 Kenyon above n 22 at [5.4.1].

> Prior to [*Reynolds* and the subsequent] decisions, there was little doubt but that defamation litigation had a significant impact on the willingness of the media to report on matters of public interest. The British media, in particular, was chilled by the threat of defamation litigation. For those who have observed the British media in action, this assertion might seem remarkable. Indeed, some might view the British media as particularly aggressive and particularly willing to publish defamatory allegations despite the potential for an adverse defamation judgement. Our interviews did not bear out this view of the British media, and indeed suggested that the British media was nowhere near as aggressive or bold as one might have assumed. On the contrary, the British media significantly limited its publication practices in order to avoid the threat of defamation liability.

[42] There has been strong criticism in recent years that defamation law does not strike the appropriate balance between protection of reputation and freedom of expression.[25] In New Zealand adjustments have been made in some areas to achieve a better balance. For example the defence of honest opinion is no longer thought to require that the opinion be about something of public interest.[26] And the defence is not defeated by malice, the opinion must simply be a genuine one. These were legislative adjustments made when the Defamation Act 1992 was enacted. However that Act did not take the opportunity to strike afresh the balance between the right to freedom of expression and the right of the individual to protection of reputation and it did not act on a proposal to introduce a special defence for the media.[27]

[43] *Collins on Defamation* describes the position as follows:[28]

> No one, starting from scratch, would devise defamation laws of the kind with which England and Wales, and the rest of the common law world, have been saddled. If they could be represented pictorially, they might resemble Frankenstein's monster: countless complications and piecemeal reforms riveted to the rusting hulk of a centuries-old cause of action. Their central shortcoming is a failure to grapple squarely with the question that lurks, mostly in the background, in every defamation action: *having regard to the nature and substance of the defendant's attack on the claimant's reputation,*

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25 In *Grant v Torstar Corp* above n 23 at [28] the Supreme Court of Canada referred to, for example, RA Smolla "Balancing Freedom of Expression and Protection of Reputation Under Canada's Charter of Rights and Freedoms" in D Schneiderman (ed) *Freedom of Expression and the Charter* (Thomson Publishing, Toronto, 1991) 272 at 282.

26 *Lange v Atkinson* [1988] 3 NZLR 424 (CA) [*Lange No 1*] at 436.

27 At 462.

28 Matthew Collins *Collins on Defamation* (Oxford University Press, Oxford, 2014) at ix. See also *Joseph v Spiller* [2010] UKSC 53, [2011] 1 All ER 947 at [2]: "Over 40 years ago Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 171 referred to 'the artificial and archaic character of the tort of libel'. Some 20 years on Parker LJ in *Brent Walker Group plc v Time Out Ltd* [1991] 2 QB 33, 46 [1991] 2 All ER 753, [1991] 2 WLR 772 commented on the absurdity of the 'tangled web of the law of defamation'. Little has occurred in the last twenty years to unravel the tangle, and this is particularly true of the defence of fair comment."

> *is it justifiable to interfere with the defendant's right to freedom of expression?* When that question comes to the fore in England and Wales, it does so not as the focus of the cause of action, but upon the application of an ultimate balancing test, or cross-check, on the compatibility of domestic principles with international obligations. The significance of that exercise ought not, however, to be understated: in places where the law has not evolved to accommodate human rights concerns, defamation actions are too often blithely decided as if matters of real consequence, in which the public as a whole has an interest, are not in play. (My emphasis.)

[44] Against that background I turn to consider the developments in this country and elsewhere towards, at least to some degree, a public interest defence. These developments were made by the courts and began as an extension to qualified privilege for publications made to the general public in certain circumstances. In the United Kingdom and Canada, where the extension is of wider scope than has so far developed here, it is acknowledged that the privilege is of a different kind from that it developed from.[29] In New Zealand the extension which has so far been developed, has remained resting upon the traditional concept of an occasion of qualified privilege.

Australia: political discussion privilege subject to reasonableness

[45] Of the jurisdictions I discuss, Australia was the first to increase media protection in reporting matters of public interest. A qualified privilege was accepted as applying to government and political matters, defined as meaning matters within the sphere of electoral politics whether at local, state or federal level.[30] It might also extend to discussion of matters concerning the United Nations or other countries. The privilege would not apply unless the defendant showed it had reasonable grounds for believing the defamatory imputation was true, took proper steps so far as they were reasonably open to verify its accuracy, and did not believe the imputation to be untrue.[31] Since this privilege was recognised it has not been extended to other matters of public interest. It has been commonly pleaded but it has rarely succeeded, reportedly because of the high threshold for reasonableness imposed by judges.[32]

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29 *Flood v Times Newspaper Ltd* [2012] UKSC 11, [2012] 2 AC 273 at [27], [38], and [125]. *Grant v Torstar Corp* above n 25 at [85].

30 *Lange v Australian Broadcasting Corp* [1997] 4 LRC 192 (HC).

31 At 218.

32 Kenyon above n 22 at 37.

New Zealand: political discussion privilege

[46] *Lange v Atkinso*n concerned a claim by Mr Lange, a former Prime Minister of New Zealand and at the time a sitting MP, that he had been defamed in an article published in the *North and South* magazine.[33] He claimed the article and accompanying cartoon meant he was dishonest, lazy, insincere and irresponsible. The publishers pleaded a number of defences including a "defence of political expression" and qualified privilege. In essence these defences relied on the public interest in Mr Lange's performance, the responsible manner in which the article had been prepared, and the publisher's responsibility to convey these matters to the public.

[47] These defences were the subject of a strike out application. In the High Court Elias J, as she then was, concluded common law qualified privilege applied to political discussion.[34] She declined to strike out the defences and directed the two pleaded defences be re-pleaded as one. On appeal the Court of Appeal upheld this decision, agreeing the publishers had a tenable defence of qualified privilege.[35] The scope of this defence was described as follows:[36]

> (1) The defence of qualified privilege may be available in respect of a statement which is published generally.
>
> (2) The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.
>
> (3) In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.
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> (4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.

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33 *Lange No 1* above n 26.
34 *Lange v Atkinson* [1997] 2 NZLR 22 (HC) [*Lange (HC)*].
35 *Lange No 1* above n 26.
36 *Lange (HC)* above n 34 at [10]

(5) The width of the identified public concern justifies the extent of the publication.

(As appears from para (3) above this judgment is limited to those elected or seeking election to Parliament.)

[48] The Court rejected the need for the defendant to prove that it had acted reasonably for this defence to apply. In the judgment delivered by Blanchard J (with whom Richardson P, Henry and Keith JJ joined), the Court explained this was because:[37]

(a) The law as it had developed over the last two centuries regarded negligence as an irrelevant consideration in defamation.

(b) Qualified privilege under the Defamation Act 1992 saves the common law and does not incorporate any requirement of reasonable care.

(c) The basis of qualified privilege is a recipient's interest in receiving information which is assumed to be false. This interest does not differ simply because the author failed to ensure the information is true.

(d) A reasonableness requirement would make the statutory requirement of malice essentially redundant.

(e) A requirement of care for political statements would raise the question whether such a requirement should apply in all other areas. This would cause a large change in the balance of the law with freedom of expression when that balance has been worked out methodically over a long period.

(f) If the requirement applied only to political statements, this disadvantages this privilege as against other categories of privilege, whereas principle might suggest there should be an advantage for political statements given their importance.

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37 *Lange No 1* above n 26 at 469 and 470.

[49] Tipping J delivered a separate judgment. His Honour was particularly focussed on whether the loss of the privilege if there was malice (ill-will and improper use of the occasion) provided sufficient protection for individual reputations in the present kind of situation.[38] The Judge considered the width of the publication protected by a political statement privilege made it desirable to have a requirement to take reasonable care to ascertain the facts. He also considered the origins of qualified privilege arguably supported a reasonableness requirement. He considered a requirement for reasonableness would be a desirable ingredient to ensure a fair balance between the competing interests and remained "anxious" that the balance would be wrong without it. However he was "ultimately persuaded" the Court should not introduce this requirement because it was not an ingredient in any other occasion of qualified privilege in New Zealand; it would be difficult to draw the line as to which occasions would have this requirement; and it would be creating a new defence which was Parliament's prerogative rather than developing the common law qualified privilege defence.

[50] The Court of Appeal's decision was appealed to the Privy Council. The Privy Council set aside the Court of Appeal's decision and remitted it back to that Court for reconsideration. The Board considered the Court of Appeal would wish to take into account the decision of, the similarly composed, House of Lords in *Reynolds*[39] which had been heard a few days before the Privy Council hearing.[40] As discussed in more detail below *Reynolds* considered a privilege could arise for communication about matters of public concern, not confined to political discussion, depending on whether in the circumstances the communication was responsible. The Board considered it should not substitute its own views, as set out in *Reynolds*, because "striking a balance between freedom of expression and protection of reputation calls for a value judgment which depends upon local political and social conditions."[41]

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38 At 473 to 475.
39 *Reynolds* above n 17.
40 *Lange v Atkinson* [2000] 1 NZLR 257 (PC) [*Lange (PC)*].
41 At 261.

[51] The Court of Appeal reconsidered the appeal and adhered to its earlier view.[42] The reasons why it rejected a reasonableness or responsible journalism requirement were because:[43]

(a) *Reynolds* altered the structure of the law of qualified privilege in a way which adds to the uncertainty and chilling effect present in this area of the law.[44]

(b) For the reasons set out in *Lange No 1* the Court, in *Lange No 2*, did not consider it necessary or in accord with principle to import into the inquiry for the limited purposes of a political discussion privilege, but not otherwise, a reasonableness requirement.

(c) The development of this head of qualified privilege could be matched with a corresponding expansion of the meaning of "taking improper advantage of the occasion" in order to keep the overall balance right.

(d) There were significant differences between the constitutional and political context in New Zealand and the United Kingdom which reflected societal differences.[45]

(e) The position of the press in the two countries appeared to be significantly distinct. New Zealand has not encountered the worst excesses and irresponsibilities of the English daily tabloids[46] and,

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42 *Lange No 2* above n 23.

43 At [37] to [40].

44 At [24] the Court referred to research into the chilling effect of defamation law and concluded that "uncertainty in both the principles of defamation law and their practical application induce great caution on the part of the media" and this "chilling effect … significantly restricts what the public is able to read and hear" citing Eric Barendt and others *Libel and the Media: The Chilling Effect* (Clarendon Press, Oxford, 1997) at 191-192.

45 The Court considered there to be major differences in the electoral systems, freedom of information legislation, the Bill of Rights Act 1990 as compared with the Human Rights Act 1998 (UK), and that New Zealand has repealed criminal offences restricting public debate on criminal matters. New Zealand is a different, newer, smaller and closer society and the relationship of New Zealanders to their government was an explicit part of the reasoning for enacting the Official Information Act 1982 (at [26]-[32]).

46 As to this, see the Leveson inquiry which exposed details of ethical and illegal activities in some sectors of the press. Lord Justice Leveson "Leveson Inquiry – A Report into the culture, practises and ethics of the press" (November 2012) <www.gov.uk>.

unlike the position here, some of the English daily tabloids have close associations with particular political parties.

[52] The Court of Appeal emphasised the five points in *Lange No 1* were to be read as a whole.[47] It clarified that the five points were "not intended to remove from the assessment whether the occasion is privileged an inquiry into the circumstances or context of the publication."[48] The circumstances included such matters as the identity of the publisher, the context of the publication, the likely audience and the content of the information.[49] For clarity it added a sixth point:[50]

> (6) To attract privilege the statement must be published on a qualifying occasion.

[53] This was intended to reduce the possible width of the publication on political discussion which might be protected. It appears intended to ensure the political discussion is conveyed to the proper audience and therefore still resting upon the duty/interest reciprocity ground (or shared interest as it was described).[51]

[54] Since *Lange No 2* the scope of the defence has come before the courts for consideration on a limited number of occasions, mostly at the High Court level. As some of these decisions consider *Reynolds*, I will first consider *Reynolds* and developments in the United Kingdom and Canada following that decision, before discussing the other New Zealand decisions.

United Kingdom: the Reynolds privilege

[55] *Reynolds*[52] was decided in between the two *Lange* Court of Appeal decisions. It involved a publication in the British mainland edition of a national newspaper, *The Sunday Times*. The article concerned the political crisis in Ireland in 1994 which

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47 Refer [47] above.
48 *Lange No 2* above n 42 at [13].
49 At [13] and [21]. It gave the example of a one-line reference to alleged misconduct of a grave nature on the part of a parliamentary candidate reflecting on his her suitability which appeared in an article in a motoring magazine about that person's activities in motor sport might not be protected. Todd above n 18 at [16.11] says: "apart from this [example] the judgment contains very little guidance on the kinds of circumstance and the features of context which will be relevant. … future courts will have no easy task in deciding where the line is to be drawn."
50 At [41].
51 At [20]-[23].
52 *Reynolds* above n 17.

culminated in the resignation of Mr Reynolds, the prime minister (the Taoiseach) of Ireland, and the collapse of his coalition government. It arose out of inaction by the Attorney-General's office over an extradition warrant for a Catholic priest wanted on charges of sexual abuse on children in Northern Ireland. At that time the Attorney-General was being considered for the position of President of the High Court of Ireland and Mr Reynolds supported his appointment. Mr Reynolds contended the article meant he had deliberately and dishonestly misled the Dáil (the House of Representatives) and his cabinet colleagues by suppressing vital information about the Attorney-General and lying about the information when it came into his possession.

[56] The House of Lords rejected developing a new category of qualified privilege for political discussion as had been developed in Australia and New Zealand. It regarded the distinction between political information and other matters of serious public concern as unsound in principle. The common law enabled the courts to give appropriate weight to freedom of expression on all matters of public concern.[53] It also regarded the New Zealand formulation of the privilege as not providing adequate protection for reputation because it was not subject to any reasonableness or comparable requirement.[54]

[57] It considered the existing balance in the law of the United Kingdom as weighted too heavily in favour of protecting reputation over freedom of expression. It accepted a qualified privilege was available for general publications on matters of public concern depending on the circumstances. Lord Nicholls set out the factors which might be relevant to whether qualified privilege arose in the circumstances. These factors were the seriousness of the allegation, the nature of the information and the extent to which it is a matter of public concern, the source of the information, the steps taken to verify the information, the status of the information, the urgency of the matter, whether comment was sought from the plaintiff, whether the article contained the gist of the plaintiff's side of the story, the tone of the article and the circumstances of the publication.[55] These factors were intended to be

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53 At 204 per Lord Nicholls and at 220 per Lord Cooke.
54 See, for example, at 204 per Lord Nicholls.
55 At 205.

illustrative and not exhaustive of whether the publication was "responsible journalism".[56] The House of Lords accepted some uncertainty came with a test which depended on all the circumstances, but considered this was a necessary part of the new privilege because of the potentially wide scope of the privilege.

[58] As Lord Cooke put it:[57]

> Hitherto the only publications to the world at large to which English courts have been willing to extend qualified privilege at common law have been fair and accurate reports of certain proceedings or findings of legitimate interest to the general public. …the law is being developed to meet the reasonable demands of freedom of speech in a modern democracy, by recognising that there may be a wider privilege dependent on the particular circumstances. For this purpose I think it reasonable that *all* the circumstances of the case at hand, including the precautions taken by the defendant to ensure accuracy of fact, should be open to scrutiny.

[59] Whether a publication is made on a privileged occasion is a question for the Judge. The House of Lords considered this would remain the case for the new qualified privilege. Any disputes of primary fact would be a matter for the jury, if there was one, to decide. But the decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege was a matter for the Judge.

[60] This privilege, which came to be known as the *Reynolds* privilege, differed from traditional qualified privilege. This is because it was based on the subject matter of the publication rather than the occasion on which the statement was published (for example, a reference to a prospective employee or reporting suspected criminal conduct to the police) and once the test of responsible journalism was met it left little room for a separate consideration of malice.[58] On the other hand, a consideration of whether the publication was responsible journalism on a matter of public interest was seen as being consistent with the traditional reciprocal duty to publish and interest in receiving the information on which other occasions of privileged have been recognised.[59] This is because the rationale of the responsible

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56 At 202 and 205.

57 At 225.

58 *Flood* above n 29 at [38] per Lord Phillips, who described the privilege as "a different jurisprudential creature from the traditional form of privilege from which it sprang".

59 At 204 per Lord Nicholls and at 220 per Lord Cooke. See also *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, [2007] 1 AC 359 at [29]-[31].

journalism test is that the public have no interest to read material which the publisher has not taken reasonable steps to verify.[60]

[61] The *Reynolds* privilege was thought to mark a sea change in defamation law. However research into British media organisations indicated that they continued to function as before. Media outlets found the multiple criteria created uncertainty. A cautious approach was therefore taken.[61] The courts were approaching Lord Nicholls' list of circumstances as though they were a prescribed test. There were also some procedural complications through having the jury decide the factual issues to found the privilege.

[62] The *Reynolds* privilege was further considered by the House of Lords in *Jameel*.[62] That case concerned an article in the Wall Street Journal Europe[63] reporting that, at the request of the United States authorities, the central bank of Saudi Arabia was monitoring certain bank accounts to prevent them being used to channel funds to terrorist organisations. The article was published five months after the "9/11" terrorist attacks in the United States. The headline of the article was "Saudi Officials Monitor Certain Bank Accounts" and the sub-heading was "Focus is on Those With Potential Terrorist Ties." The article listed the individuals and companies whose bank accounts were being monitored. This included the trading entity of a prominent Saudi Arabian businessman.

[63] The named businessman brought a claim for defamation. The newspaper relied on the *Reynolds* privilege. At trial the Judge directed the jury to decide what sources the reporter relied on and what efforts were undertaken to obtain the businessman's comments.[64] The jury found the reporter had relied on one source. It found the reporter had spoken to a representative of the businessman the evening before publication, the representative asked for the publication to be postponed so

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60 *Reynolds* above n 17 at 238 per Lord Hobhouse; *Jameel* above n 59 at [32] per Lord Bingham.

61 Kenyon, above n 22. Interestingly, in *Lange No 2* the Commonwealth Press Union and the New Zealand Press Council, who were granted leave to intervene, supported the Court of Appeal's *Lange No 1* test rather than *Reynolds* because of the difficulties for editors and their advisers in deciding whether to not to publish under the *Reynolds* approach: see *Lange No 2* above n 42 at [17].

62 *Jameel* above n 59.

63 The sister publication of the New York based Wall Street Journal.

64 *Jameel v Wall Street Journal Europe SPRL* [2004] EWHC 37 (QB).

that he could contact the businessman who was on business in Japan, and the reporter declined to do so. The trial judge rejected the defence on the basis of the jury's findings on these matters. The Court of Appeal agreed that in the circumstances the test of responsible journalism was not met.[65]

[64] The House of Lords upheld the appeal and dismissed the claim against the publishers. Once a publication, including the defamatory component, passed the public interest test, the inquiry shifted to whether the steps taken to gather and publish the information were responsible and fair (that is, whether it was responsible journalism). The non-exhaustive list of facts set in *Reynolds* were "not tests which the publication has to pass."[66] The "standard of conduct required of the newspaper must be applied in a practical and flexible manner."[67]

[65] In discussing a misdirection to the jury by the trial judge Lord Hoffman said this:[68]

> The fact that the defamatory statement is not established at the trial to have been true is not relevant to the *Reynolds* defence. It is a neutral circumstance. The elements of that defence are the public interest of the material and the conduct of the journalists at the time. In most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth. …

[66] The publication in this case met the *Reynolds* criteria of public interest and responsible journalism.[69] The Wall Street Journal was a respected, influential and unsensational newspaper reporting serious news about international business, finance

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65 *Jameel v Wall Street Journal Europe SPRL* [2005] EWCA Civ 74.

66 *Jameel* above n 59 at [56] per Lord Hoffman.

67 At [56] per Lord Hoffman.

68 At [62].

69 Lady Hale at [148] describes the public interest in this way: "If ever there was a story which met the test, it must be this one. In the immediate aftermath of 9/11, it was in the interests of the whole world that the sources of funds for such atrocities be identified and if possible stopped. There was and should have been a lively public debate about this. Given the nationalities of the hi-jackers, this focussed particularly upon the efforts of the Saudi Arabian authorities. Anti-Saudi feeling was running high in some places. Information that the Saudis were actively co-operating, not only with the United Nations, but also with the United States was of great importance to that debate. This was, in effect, a pro-Saudi story, but one which, for internal reasons, the Saudi authorities were bound to deny. Without names, its impact would be much reduced.

and politics. The subject was of high international importance and an appropriate matter for report by a serious newspaper. The article was written by an experienced specialist reporter and reviewed by senior staff. The article was unsensational in tone and apparently factual in content. The businessman's response was sought, albeit at a late stage, and the newspaper's inability to obtain a comment was recorded. The reporter's decision not to delay the publication would have been significant only if it would have made a difference. In this case it was unlikely the businessman would have had anything helpful to add since it was unlikely he would know whether his trading entity's accounts were being monitored. This was "the sort of neutral, investigative journalism which the *Reynolds* privilege exists to protect."[70] The publication of the names being monitored was an important part of the story.

[67] In *Flood v Times Newspaper Ltd*, the *Reynolds* defence again came before the United Kingdom's highest court for consideration (by then, the Supreme Court).[71] This case concerned an article published in a national newspaper and on its website concerning allegations of corruption involving a serving police officer. The article said Scotland Yard was investigating allegations that a British security company with wealthy Russian clients had paid a police officer for sensitive information. It provided further details about the allegations and named the police officer. It said the officer had not been suspended and he categorically and unequivocally denied the allegations.

[68] Subsequently the officer was temporarily removed while the investigation continued. When the investigation obtained no evidence to support the allegations the officer returned to his post. This was communicated to the newspaper but the article remained on the website unamended. The Judge at first instance found the newspaper and website articles were protected by the *Reynolds* privilege at the time they were first published, but the protection for the website publication ceased to be protected when the newspaper learned of the outcome of the investigation.[72] The Court of Appeal held the publications were not protected by the privilege. This was

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70 At [35] per Lord Bingham.
71 *Flood* above n 29.
72 *Flood v Times Newspapers Ltd* [2009] EWHC 2375 (QB).

on the basis that the journalists had failed to take sufficient steps to verify the details of the allegation and therefore it was not responsible journalism.[73]

[69] The Supreme Court allowed the appeal from the Court of Appeal's decision. It held the newspaper and the website articles were protected by the *Reynolds* privilege at the time they were first published. Whether the website continued to be protected was adjourned for later consideration if it became necessary. The issues before the Court centred on the approach to meaning when the *Reynolds* privilege was claimed; in what circumstances it is in the public interest to report that allegations have been made; and what steps are necessary to verify the information. The Court considered a *Reynolds* privilege must be assessed against the full range of meanings that a reasonable reader might attribute to the publication.[74] Where the publication was of allegations that have been made against a person, the Court considered in the verification steps necessary for responsible journalism differed depending on where the public interest lay.

[70] Where the public interest lay in the fact of the allegation, and was not an allegation made or adopted by the publisher, the full list of circumstances relevant to responsible journalism set out in *Reynolds* did not apply.[75] Specifically responsible journalism did not turn on the journalists attempts to verify the truth of the allegations.[76] This kind of circumstance, of which *Jameel* was an example, is described as reportage.[77] If a reportage defence is made out, the publisher escaped the consequences of the repetition rule.[78] There is, however, a danger in putting reportage in a "special box" of its own.[79] It is an example of when it is appropriate

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73 *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804.

74 At [52] per Lord Phillips; at [111] per Lord Brown.

75 At [77].

76 This point was also made and explained in *Roberts v Cable* [2007] QB 502 (CA) at [61] per Ward LJ as follows: "To qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made. … If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy."

77 It was the fact that substantial Saudi Arabian companies were on the black list that was of public interest.

78 A defendant who repeats a defamatory allegation made by another is ordinarily treated as having made the allegation him or herself.

79 At [35].

in the circumstance to publish defamatory inferences even though the truth of the inferences have not have been verified.

[71] Where the public interest lay in the content of the allegations, that is in the fact the allegation was or might be true, the privilege would normally only be earned where the publisher had taken reasonable steps to satisfy him or herself that the allegation is true.[80] In a *Chase*[81] level one case, the publisher would have to be satisfied on reasonable grounds that the person has been guilty of the matter alleged. In a *Chase* level two case the publisher would have to be satisfied that the evidence showed there were reasonable grounds for the allegation.[82]

[72] The case before the Court was not one of mere reportage. There was public interest in whether the allegations against the officer would be investigated properly by the authorities. However a responsible journalist would have appreciated the article might be read by some readers as indicating there were strong grounds for suspecting the police officer had been guilty of corruption. The Court was satisfied the journalist had made enquiries which showed there was a strong circumstantial case against the officer. The matter was of high public importance. Although the article was undoubtedly damaging to the officer's immediate reputation, it was balanced in content and tone. It did not assert the truth of the allegations, it gave the officer and others involved an opportunity to respond and their denials were recorded. Therefore the requirements of responsible journalism were satisfied.

[73] There has since been legislative amendment in the United Kingdom with the passing of the Defamation Act 2013. The Act provides a defence to an action for defamation for a publication on a matter of public interest.[83] The explanatory notes describe this as based on the *Reynolds* common law defence and intending to reflect the principles established in that case and subsequent cases. Subsection (3) is intended to encapsulate the core of the reportage defence. The explanatory note explains that in this situation the defendant is not required to have verified the

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80 At [78].
81 *Chase v News Group Newspapers* [2002] EWCA Civ 1772.
82 At [79] and [80].
83 Section 4.

information because the report gives a balanced picture. The new defence is as follows:

> **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.

Canada: responsible communications on matters of public interest

[74] The issue of whether to extend qualified privilege for reports to the general public on matters of public interest came before the Supreme Court of Canada in *Grant v Torstar Corp* (after *Reynolds* and *Jameel*).[84] The Supreme Court adopted a new defence protecting responsible communications on matters of public interest. The case concerned an article published in the *Toronto Star* newspaper concerning a proposed private golf course development on the appellant's lakefront estate. The development was opposed by local residents because of concerns about its

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[84] *Grant v Torstar Corp*, above n 25.

environmental impact. The newspaper article reported on this opposition and the residents' concern the appellant was exercising political influence behind the scenes to obtain government approval for the development.

[75] The appellant contended the article accused him of improperly using his influence to obtain government favours. The publishers pleaded an expanded qualified privilege defence based on public interest and responsible journalism. The trial judge ruled against this defence. The jury rejected the defences of truth and fair comment and awarded the appellant substantial damages. A new trial was ordered by the Ontario Court of Appeal on a number of grounds including that the Judge was wrong to reject a defence of responsible journalism and the judge's instructions on fair comment were erroneous.

[76] On appeal to the Supreme Court, the key issue was: "whether the protection accorded to factual statements published in the public interest should be strengthened and, if so, how."[85] The Court considered the existing defences and then turned to the arguments for changing the law.

[77] The first argument was based on principle. The argument was that the chilling effect of the existing law unjustifiably limits reporting facts and strikes the balance too heavily in favour of protecting reputation over freedom of expression. In the lead judgment McLachlin CJ said:[86]

> It is simply beyond debate that the limited defences available to press-related defendants may have the effect of inhibiting political discourse and debate on matters of public importance, and impeding the cut and thrust of discussion necessary to discovery of the truth.

[78] The Judge went on to discuss the need for a balanced approach which properly reflected both the interests of the plaintiff and the defendant. A requirement that the publisher of defamatory material act responsibly provided accountability and was consistent with the reasonable expectations of people in public life whose actions are of public interest. The Judge concluded the current law did not give adequate weight to the constitutional value of freedom of expression. When proper

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85 At [26].
86 At [57].

weight was given "the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know".[87]

[79] The second argument for changing the law was grounded in jurisprudence. Jurisprudence from other common law democracies was reviewed by the Court. This jurisprudence favoured replacing the current law. The question was how the defence should be formulated in Canada. The Court noted the differences in view as to whether the *Reynolds* defence should be considered as an extension of the traditional qualified privilege defence or was a different jurisprudential creature. The Court noted the traditional forms of qualified privilege involve a situation where there is genuine reciprocity of duty and interest whereas this reciprocity is "largely notional" in a journalistic publication to the world at large.[88] The Court considered the familiar categories of qualified privilege should not be compromised by a broad new privilege based on public interest.

[80] The Court decided on a new defence of responsible communication on matters of public interest. The components of this defence were as follows:

(a) The publication must be on a matter of public interest.[89] This was not confined to government and political matters nor was it necessary that the plaintiff be a public figure. This was because:[90]

> The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.

(b) The publication of the defamatory communication must be responsible. Relevant non-exhaustive factors that may assist in

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87 At [65].

88 At [93].

89 There was no single test of what is a matter of public interest. Guidance was found in the cases on fair comment (honest opinion in our context) and s 2(b) of the Charter. The Court set out some formulations. This included where the matter is shown to be inviting public attention, about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached. Mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published (at [103]-[105]).

90 At [106].

> determining this question were the seriousness of the allegation, the public importance of the matter, the urgency of the matter, the status and reliability of the source, whether the plaintiff's side of the story was sought and accurately reported, whether inclusion of the defamatory statement was justifiable, whether the defamatory statement's public interest lay in the fact that it was made rather than its truth, and any other relevant circumstances.[91]

[81] The majority of the Supreme Court considered it was for the judge to decide whether the statement related to a matter of public interest and for the jury to decide whether the defence was established taking into account the relevant factors.[92] The jury did not have to settle on a single meaning. Rather it must assess the responsibility of the communication overall taking into account the range of meanings the words are reasonably capable of bearing. There was no separate inquiry into malice. A publisher who had acted with malice had by definition not acted responsibly.

[82] Like *Lange* in New Zealand and *Reynolds* in the United Kingdom, *Grant* was considered to be a historic victory for freedom of expression.[93] Research in the first five years after *Grant* provides the following information about how the new defence has operated in practice.[94] Of the 34 reported cases in which the defence has been pleaded or argued, 16 have settled. In most cases the defendants were not traditional media defendants. Four were bloggers, other defendants were a public official, a pornography business, the Ontario SPCA and a candidate for the City Council. Some defendants have communicated to a small number of people whereas others have communicated to a large number. Of the 18 decided cases, only three were successful on the basis of the *Grant* defence. All three cases involved journalism. It has been argued the *Reynolds*-based indicia of responsible journalism has led to a

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91 At [110]-[125].

92 Abella J dissented on this point. Her view was that the rationale for the jury's primary role in this area of the law was difficult to sustain in present times and the responsible communication defence involved a highly complex legal determination with constitutional dimensions (at [145]).

93 See Kenyon above n 22 at 17, fn 2.

94 At 24-29.

conservative approach from the courts and it should be replaced with a reasonableness inquiry.[95]

New Zealand decisions after Lange and Reynolds

[83] The New Zealand political discussion defence is both wider and narrower than the position taken in the United Kingdom and Canada. It is wider because it involves no requirement of reasonableness or assessment of responsible journalism against a number of non-exhaustive criteria. It is narrower in that it applies to political discussion rather than all matters in the public interest. Its narrow scope has led to discussion about whether it ought to be extended.

[84] The possibility of extending *Lange* to cover political discussion of local government was raised in *Vickery v McLean*.[96] The Court of Appeal did not decide whether such an extension should be made because it was satisfied that the publication at issue would not fall within any such extension.[97] It did not, however, categorically reject the possibility of an extension of *Lange*. The Court of Appeal went on to also reject that the publication in question was on a privileged occasion by reference to first principles.

[85] Specifically:

> [15] … The price of the freedom is the requirement that the privilege be responsibly used. When the Courts are asked to find that a particular occasion, not directly covered by authority, is one which should attract qualified privilege, the ultimate question is whether it is in the public interest to recognise the privilege and strike the balance between freedom of expression and protection of reputation accordingly. …
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> [18] If, as we hold, the present case cannot be brought within any appropriate development of *Lange No 2*, it is necessary for Mr Vickery to establish his asserted privilege by reference to first principles. He must

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95 At 38 to 39.

96 *Vickery v McLean* [2006] NZAR 481 (CA).

97 The publication was by a disgruntled ratepayer who wrote a letter to the editor in three newspapers stating there was circumstantial evidence of criminal irregularity in a decision over franchising services. The decisions had been made by employees of the local authority. These employees were not policy makers and therefore the publication could not be described as political discussion. Moreover it did not satisfy the sixth criteria (publication on a qualified occasion). It was disseminated too widely: the proper way to communicate alleged criminal behaviour was to the responsible authorities.

> show that it is in the public interest (for the common convenience and welfare of society …) that on an occasion such as the present, freedom of expression should prevail over protection of reputation. More specifically he must show that it is in the public interest for people to be able to make allegations of serious criminal offending, albeit in a bona fide way, to or through the news media.
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> [19] … It is in our view demonstrably not in the public interest …

[86] There are glimmerings of a *Reynolds* style privilege in that discussion albeit that the facts were far from establishing it. The only other decision from the appellate courts provided by the parties is the Supreme Court's decision in *Simunovich Fisheries*.[98] That decision is mainly of relevance to the honest opinion discussion below. However, in relation to the possibility the law should develop a *Reynolds* style privilege, the Court said:

> [31] … Secondly, this Court has not yet had occasion to consider whether *Reynolds* qualified privilege, founded on responsible journalism, should apply in this country. ….
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> [32] ... The possibility of changing the law of New Zealand to accommodate the pleading by defendants of lesser meanings and a *Reynolds* type of qualified privilege is not before the Court in the present appeals. If the defendants had wished to advance these changes, they should have laid a foundation for doing so in their pleadings. The plaintiffs would then have had the opportunity to apply to strike out the relevant pleadings, and their legitimacy could have been before this Court along with the questions now under consideration. It would plainly be undesirable to change the law as to particulars [of the truth and honest opinion defences] for the reason that there were difference between the law of defamation in England and New Zealand, without also addressing whether or not these differences should remain.

[87] The Supreme Court does not suggest in that case the common law in this country could not develop a *Reynolds* style defence. That is not surprising because it is accepted that the categories of qualified privilege are never closed[99] and, as Lord Cooke put it in *Reynolds*, "the common law nowhere stands still."[100]

[88] The remaining decisions are at High Court level. The first of those is *Osmose New Zealand v Wakeling* where a *Reynolds* approach gained some traction. The High Court Judge considered the newspapers in that case would have been protected

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98 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 [*Simunovich (SC)*].

99 At 194 per Lord Nicholls; *Lange No 1* above n 26 at 437.

100 *Reynolds* above n 17 at 222.

by qualified privilege had they been sued.[101] The Judge expressed that view with reference to both *Lange* and *Reynolds*. The publication concerned criticism of the Building Industry Authority for approving treatment of timber used in house construction. The Judge's reasons for why the publications would have been protected were that the subject matter was of public concern, those affected by the "leaky home" problem were widespread, newspapers were an appropriate means of communicating the relevant information, and the information published came from two apparently responsible individuals.

[89] In the next decision, *Peters v Television New Zealand*, the High Court Judge considered it was not open to her to consider a *Reynolds* type defence. The Judge was considering an application for leave for Winston Peters (MP) to serve a s 41 notice.[102] In that context the Judge rejected Television New Zealand's submission that the broadcast was protected by "responsible journalism" or "neutral reportage" privilege. In a brief mention of this submission, the Judge regarded *Lange No 2* as contrary to the existence of any such privilege and that she was bound by that decision.[103]

[90] The next decision is *Lee v The New Korea Herald Ltd*.[104] The High Court Judge did not discuss whether a public interest qualified privilege existed because he considered it would be defeated under s 19 of the Defamation Act (the publisher was indifferent to the truth, made limited attempt to contact the plaintiff before the article was published, and failed to check the accuracy of the information provided).

[91] The next decision is *Dooley v Smith*. The facts of the case raised the possibility of an extension of the *Lange* political discussion privilege to local politics. This was because the defamatory statements concerned a candidate in elections of a local body in charge of a large Government development fund.[105] The parties, however, did not raise whether the *Lange* privilege might apply. The Judge said this was regrettable. He saw no logical distinction in the legitimate interests of

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101 *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841 (HC).
102 *Peters v Television New Zealand Ltd* HC Auckland CIV-2004-404-3311, 1 October 2009.
103 At [48]-[49].
104 *Lee v The New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010.
105 *Dooley v Smith* [2012] NZHC 529.

the public in being informed "about the performance of persons who hold, or may in the future hold, elected positions of responsibility in other public institutions."[106] He considered it was arguable the circumstances gave rise to a qualifying privileged occasion. However it was not necessary to decide this because, even if an extension to *Lange* was available for local political discussion, the Judge considered the defendants were predominantly motivated by ill-will or had taken improper advantage of the occasion. On appeal the Court of Appeal noted the issue had not been the subject of full argument in the High Court. It expressed no view on the matter because it was not an issue on the appeal.[107]

[92] The next decision is *Cabral v The Beacon Printing & Publishing Company Ltd*.[108] A local newspaper published an article which was alleged to convey that the plaintiff, a director of a company set up to build and manage a locally based geothermal power project on Māori land and requiring a very substantial investment, was under investigation for allegedly misusing trust funds. The Associate Judge struck out a defence of qualified privilege. He considered it was not enough that the article was newsworthy. He considered it was necessary the matter be so important that it entitles the defendants to make the statements to its readers even though it is defamatory and is not true.[109] This seems to set the public interest component part of the privilege at a higher threshold than in Canada or the United Kingdom.[110]

[93] The most recent decision provided by the parties is *Karam v Parker*.[111] In that case the High Court rejected an extension of *Lange*. The Judge considered the subject matter, concerning defamatory comments about Mr Karam's motive for supporting David Bain,[112] was far removed from political discussion. The Judge also considered the online forums on which the communications were made were problematic[113] and improper advantage of the occasion had been taken.[114]

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106 At [171].
107 *Smith v Dooley* [2012] NZCA 428.
108 *Cabral v The Beacon Printing & Publishing Company Ltd* [2013] NZHC 2684.
109 At [36].
110 Noted in Todd above n 18 at [16.11].
111 *Karam v Parker* [2014] NZHC 737 at [209]-[214],
112 A person convicted of the murder of his family who, with Mr Karam's support, eventually obtained a retrial at which he was acquitted.
113 This might be debated but the issue does not arise here.
114 In considering these matters the Judge did not have the benefit of assistance from experienced counsel for the defendants as one was self-represented and the other made no appearance.

[94] In short, extensions to *Lange* have so far not gained much traction at the High Court level. In a number of these, however, the circumstances have not warranted it.

Where does this leave the prospects for the privilege pleaded in this case

[95] The plaintiffs submit *stare decisis* prevents this Court from recognising a neutral reportage or public interest defence. The Court of Appeal decided on a defence of political discussion. In doing so it adhered to a traditional form of privilege that protected the occasion, and rejected an approach which involved examining the reasonableness of the publisher's conduct. The plaintiffs submit that a defence of neutral reportage would therefore be contrary to the Court's approach in *Lange* and that this Court is bound by that approach.[115]

[96] It is, however, important to remember the facts of *Lange* concerned political discussion. The decision in *Lange* to expand the traditional categories of qualified privilege for political discussion was a forerunner to the developments in the United Kingdom and Canada. It was motivated by the same underlying principle that an adjustment was required to the law's existing balance between freedom of expression and protection of reputation. The *Lange* decisions do not hold that any other extension of qualified privilege is unavailable. As it was said in *Vickery*:[116]

> When the Courts are asked to find that a particular occasion, not directly covered by authority, is one which should attract qualified privilege, the ultimate question is whether it is in the public interest to recognise the privilege and strike the balance between freedom of expression and protection of reputation accordingly.

[97] If *Lange* is extended beyond political discussion, there is a risk that it would unduly weigh freedom of expression over protection of reputation unless there was a responsibility or reasonableness element incorporated as part of that test. This was the view taken in *Reynolds* if subject matter alone was to found a new privilege. The plaintiff's reputation could be harmed on the slenderest of information unless the

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[115] They also submit that *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 remains good law. There the Court of Appeal held that a newspaper cannot claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest. That submission does not stand in light of the inroads to that case in *Lange*, the overseas developments establishing a new privilege and that the categories of qualified privilege are not closed. Moreover the defendants in this case accept a reasonableness or responsible journalism/communications condition is necessary if the privilege is to apply.

[116] *Vickery v McLean* above n 96 at [15].

plaintiff could prove malice (regarded as being notoriously difficult to prove).[117] Moreover the value of the information to the public depends on its quality as well as its subject matter.[118] This was also the concern that troubled Tipping J in *Lange No 1*, who had "anxiety about creating an erroneous balance" if reasonableness was not a requirement of the new political discussion privilege.

[98] As discussed earlier, the Court of Appeal in *Lange* was concerned about altering the traditional nature of qualified privilege developed over centuries and its impact on the defence of qualified privilege more generally.[119] It is now acknowledged in the United Kingdom and Canada that the new qualified privilege for communications about matters of public interest is a different jurisprudential privilege. Because it is different it is subject to a reasonableness requirement even though the traditional forms of qualified privilege are not.

[99] In *Lange* the Court considered the political discussion privilege did not need a reasonableness test because "taking improper advantage of the occasion" in s 19 of the Defamation Act could be given an expanded meaning. One of the differences between a reasonableness or responsible journalism requirement and this expanded approach is as to who bears the burden of proof. If a publisher wishes to publish something, in the public interest, which is defamatory of a person, should it be on that person to establish the publisher had taken improper advantage of the occasion or should it be on the publisher to show that he or she had acted reasonably or responsibly in publishing the information? In other words it might be acceptable to rely on the responsibility of the press in this country in relation to political discussion reporting as held in *Lange* without requiring that the exercise of responsibility on the particular occasion be proven, but not if the privilege is to be expanded.

[100] It is arguable that if a public interest privilege, incorporating neutral reportage, is to be developed it would be necessary to place the burden on the publisher to prove they have acted reasonably or responsibly. These are issues for future consideration. Likewise the functions of the Judge and a jury in relation to

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117 At 201 per Lord Nicholls.
118 At 202 per Lord Nicholls.
119 Refer [51] above.

whether the privilege is established. However they may ultimately be resolved, the short point is that I do not accept the submission that *stare decisis* prevents this court from accepting, as tenable, a neutral reportage or public interest privilege as pleaded in this case.

[101] The plaintiffs submit there is no evidence that the call for greater media freedom sought on behalf of the defendants in this case is actually needed. They submit it is necessary to keep in mind the sheer power of the media today, the degree of saturation that can take place, the instantaneous and perishable nature of news and the possibility that reputation can be shattered in an instance. They submit the privilege would apply when the media is wrong, yet it is now more than ever important that media reports are accurate.

[102] The answer to this submission is that defamation law is intended to reflect an appropriate balance between protection of reputation and freedom of expression. Other common law jurisdictions have recognised the law was out of balance for responsible publications about matters of public importance despite the publisher's inability to prove the defamatory imputations are true. Otherwise the inability to be sure that the imputations can be proven will unjustifiably chill freedom of expression on matters of public interest.

[103] While expression on political matters is of high value, so too are many other matters. As Lord Cooke put it, when discussing *Lange No 1*:[120]

> It is doubtful whether the suggested new defence could sensibly be confined to political discussion. There are other public figures who exercise great practical power over the lives of people or great influence in the formation of public opinion or as role models. Such, power or influence may indeed exceed that of most politicians. The rights and interests of citizens in democracies are not restricted to the casting of votes. Matters other than those pertaining to government and politics may be just as important in the community; and they may have as strong a claim to be free of restraints on freedom of speech.

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120 *Reynolds* above n 17 at 220. See also Todd above n 18 at [16.11]: "There are other sorts of public figures who are involved in the formation of policy and who affect our lives just as much as members of Parliament … It may even be said that there is little logic in confining the privilege to state employees: members of the private sector, for example bankers, trade unionists and company directors, also have major effects on the economy and thus on citizens. … In the fullness of time the *Lange* privilege may come to apply to all who might be described as 'public figures'."

[104] It cannot be the case that this country should place less weight on freedom of expression when matters of public interest are responsibly communicated than the weight which is placed in the United Kingdom and Canadian courts. The United Kingdom position is, as mentioned, now in legislation.

[105] I therefore conclude the pleaded defence does not fail because the defendants cannot show that such a defence should now be part of the law of this country. In my view it is tenable, indeed necessary, that such a defence be recognised if freedom of expression is to be given its proper weight in this country. If a publisher does not have a defence when they have reasonably or responsibly published material containing a defamatory imputation on a matter of public interest it is difficult to see how the limit imposed on freedom of expression is one which is justified.

Must any such new defence inevitably fail on the facts?

[106] The plaintiffs submit the defence, even if it exists, could not succeed in this case. This submission is based on the criteria set out in *Charman v Orion Publishing Group Ltd*, a decision of the Court of Appeal in England and Wales.[121] That decision, however, pre-dated *Flood* which elucidated the basis for the neutral reportage type of privilege.[122]

[107] For instance, the plaintiffs' submissions refer to the need for there to be a dispute, which involves a cross fire of allegations. They say that here there was no dispute at all. Rather they say the defendants published allegations they received from their source and any dispute was manufactured by the defendants in seeking a response from Ms Hall. However, the same could be said of *Jameel*.[123] There allegations were made that the Saudi businessman's bank accounts were being monitored for possible terrorist connections. The inability to obtain a response from the businessman was recorded. *Flood* described *Jameel* as similar to a reportage case.[124] As the Supreme Court explained in *Flood*, a reportage case arises where the public interest lies in the fact of the allegations.

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121 *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972.
122 *Flood* above n 29.
123 *Jameel* above n 59.
124 *Flood* above n 29 at [36].

[108] Similarly the plaintiffs submit the article must attribute the allegations to someone, preferably by name. They say that is to enable the person defamed to sue that person in respect of the statements made. The plaintiffs say that here the article did not disclose the defendants' source.

[109] However it cannot be the case that to rely on neutral reportage a media defendant must identify their source. The ability of the media to provide information to the public is promoted by allowing people to speak to them in confidence. The protection of journalists' sources has statutory recognition.[125] The defence would be of little use to the media if as a matter of course it had to disclose confidential sources upon whom it relied. A publisher must make a judgement on the reliability of the source. Media defendants may need to provide evidence as to why they regarded their source as reliable in order to show they have acted reasonably or responsibly. For example, in *Jameel* the reporter gave evidence he had relied on a prominent Saudi businessman (source A), confirmed by a banker (source B), a United States diplomat (source C), a United States embassy official (source D) and a senior Saudi official (source E).[126] As noted in *Grant*, "[i]t may be responsible to rely on confidential sources, depending on the circumstances".[127]

[110] Similarly, with reference to the *Charman* criteria the plaintiffs submit the article does not expressly or implicitly indicate its truth has been verified, set out both sides of the dispute, provide the context in which the statements are made, nor neutrally report without adopting the allegations. However, as *Flood* makes clear, neutral reportage is not in a special box of its own. The issue is whether the article was on a matter of public interest and whether in light of all the relevant circumstances it was responsible journalism.

[111] The plaintiffs submit the privilege could not succeed because particular aspects of the report were unnecessary to communicate the fact of a division within the Māori Council leadership and some of the allegations were not clearly identified as coming from third parties (such as the failure to include quotation marks on some of the allegations first published on the website). However, in determining whether

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125 Evidence Act 2006, s 68.
126 *Jameel* above n 59 at [8].
127 *Grant* above n 23 at [115].

the public interest is in the fact of the allegations rather than whether or not there is truth in the allegations, and whether the article is responsible journalism, the focus is on the whole thrust of the article.[128]

[112] In the present case it is arguable the publications were on a matter of public interest. The Māori Council is a statutory body intended to assist Māori. It receives some Government funding. Public confidence in general, and of Māori in particular, in the leadership and administration of the Māori Council is a matter of public concern. The publication concerned a major breakdown within the Māori Council's leadership. Each faction comprised well known and respected Māori leaders. The conflict which had arisen between them involved questions about the Māori Council's representation on an important Waitangi Tribunal claim. The public interest arguably lay in the breakdown of relationships within the Māori Council rather than whether the conduct alleged was true.

[113] It is also arguable that the defendants acted reasonably or responsibly in publishing the allegations made by one faction and the denial from the other side. It is arguable that, read as a whole, the broadcast and the website stories made it clear these were allegations, which the defendants were not adopting. The source was known to Ms Roderick and the information provided was supported by the minutes document and Mr Paul's statements. Ms Hall's response essentially confirmed this action purportedly had been taken, but advised the actions were not legitimate. Ms Hall was understood by the defendants to act as spokesperson for both herself and Sir Edward. Whether it is material that comment was not obtained directly by Sir Edward, that Ms Hall's response was summarised, and that the publication might have been delayed to give Ms Hall more time to respond, were addressed in the submissions before me. The defendants submit it was reasonable to rely on Ms Hall as a contact person for Sir Edward based on their past experience, Ms Hall was contacted in sufficient time for her to seek legal advice and to respond with the key points from her perspective, *Te Kāea*, as a leading provider of Māori news, had an obligations to Māori to publish the story without delay, and that it was clear the story would be an ongoing one and there would be further developments and opportunity to comment. An assessment of these matters, and more generally whether it was

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[128] *Jameel* above n 59 at [34] per Lord Bingham. See also *Roberts v Cable* above n 76.

reasonable or responsible to publish the allegations without knowing whether the matters alleged were true in substance, are matters better assessed in the context of a trial when all the evidence has been heard.

[114] For these reasons I am not satisfied the pleaded defence is untenable on the facts.

Honest opinion

The defence

[115] The requirements for the defence of honest opinion are:[129]

(a) the words complained of are an expression of opinion (the opinion question);

(b) the facts on which the opinion is based are indicated in the publication at issue or are generally known to the public (the publication facts question);

(c) those facts are proved to be true or not materially different from the truth (proving the publication facts);[130]

(d) where the defendant is the author of the opinion, the opinion expressed must be the defendant's genuine opinion;[131]

(e) where the author of the opinion is the defendant's agent or employee, and it did not purport to be the defendant's opinion, the defendant must have believed the opinion was the genuine opinion of the author;[132] and

(f) where the defendant or its agent or employee is not the author of the opinion, and it did not purport to be the defendant's, its agent's or

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129 *Lange No 1* above n 26 at 436.
130 Defamation Act 1992, s 11.
131 Section 10(1).
132 Section 10(2)(a).

employee's opinion, the defendant must have had no reasonable cause to believe the opinion was not the genuine opinion of the author.[133]

[116] The defence has been described as "the very essence of freedom of speech: the right that citizens should be able openly to air their views and exchange criticisms on matters which concern them."[134] It has also been the accepted wisdom of the publication facts requirement in this country that this is so "readers or viewers may assess the validity of the opinion for themselves against the relevant facts truly stated."[135]

[117] Although these requirements are easily stated, their application can be far from easy. Lord Phillips in *Joseph v Spiller* described the defence as "one of the most difficult areas of the law of defamation".[136] This was a decision of the United Kingdom Supreme Court which modified the publication facts question,[137] and explained why, what had become the accepted wisdom on which it was based, was flawed and not in accordance with earlier authority.[138] What this element of the defence required was that the comment identify at least in general terms what had led the commentator to make the comment. This was so that the reader could understand what the comment was about and the commentator could, if challenged, explain, by giving particulars of the subject matter of his comment, why he (or she) expressed the views that he (or she) did.[139]

[118] There are particular pleading requirements for the defence. Specifically, where a defendant alleges that, in so far as the publication consists of statements of fact it is true, and insofar as it consists of opinion it is honest opinion, particulars are required. These particulars must specify the statements alleged to be facts and the facts and circumstances relied on to support the allegation that those statements are

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133 Section 10(2)(b).
134 *Todd* above n 18 at [16.8.01].
135 *Simunovich (SC)* above n 98 at [18].
136 *Joseph v Spiller* above n 28 at [1], referred to in Mulis, Parker and Busuttil above n 19 at [12.3]. His Lordship considered it warranted examination by an appropriate body. Legislative reform in the United Kingdom has followed.
137 Refer [115](b) above.
138 At [100]-[105].
139 At [104]-[105].

true.[140] Even though this legislative requirement is headed "Particulars in defence of truth", it has been held that this applies to the publication facts relied on for the defence of honest opinion and not simply to a defence of truth.[141] Properly pleading the defence in this country has proved challenging, as demonstrated by the litigation involving such pleadings, even though the parties involved have been represented by leaders of the profession in this area.[142]

The challenge to the pleading

[119] The defendants have pleaded the defence of honest opinion. The plaintiffs contend this defence cannot succeed because:

(a) the defamatory meanings conveyed were not capable of being understood as expressions of opinion;

(b) there were no reasonable grounds to believe the opinions of the Māori Council were genuine; and

(c) the publication facts, if properly pleaded, provide an insufficient basis for an honest opinion defence.

[120] The defendants contend the defence is not so clearly untenable that it must be struck out. They do, however, acknowledge that their primary defence is neutral reportage and qualified privilege and that if this is upheld the defence of honest opinion need not be relied upon.

The pleadings

[121] The statement of claim pleads that, in their natural and ordinary meaning, the statements in the first website story meant and were understood to mean that Sir Edward:

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140 Section 38.

141 *Simunovich Fisheries Ltd v Television New Zealand ltd* [2008] NZCA 350 [*Simunovich (CA)*] at [118] and *Simunovich (SC)* above n 98 at [36].

142 *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA), *Simunovich (CA)* above n 141 and *Simunovich (SC)* above n 98.

(a) acted in a position of conflict of interest in instructing his wife to make an application for his reappointment to the CFRT on behalf of the Māori Council without notifying the Māori Council or obtaining its consent to his bid for reappointment;

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

(c) breached his responsibilities to the Māori Council by not obtaining its consent to his bid for reappointment to the CFRT;

(d) acted dishonestly by not telling the Māori Council of his bid for reappointment to the CFRT;

(e) placed his own and his wife's interests 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 in instructing Ms Hall to set up Māori committees in Tai Tokerau; and

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

[122] The statement of claim pleads that, in their natural and ordinary meaning, the statements in the first website story meant and were understood to mean that Ms Hall:

(a) conducted herself so as to create reason for her to be fired by the Māori Council as its counsel for its legal challenge to the Trans Pacific Partnership Agreement;

(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 CFRT without notifying the Māori Council or obtaining its consent to his bid for reappointment;

(f) acted unlawfully and unprofessionally by not obtaining the Māori Council's consent to the application for her husband's reappointment to the CRFT;

(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 New Zealand Law Society obligations;

(i) conducted herself so as to give rise to a reasonable cause to believe that she acted without instructions in setting up committees;

(j) is 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; and

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

[123] The statement of claim pleads that, in their natural and ordinary meaning, the broadcast and the second website story meant and were understood to mean that there was reasonable cause to believe that Sir Edward and Ms Hall had acted in the ways set out at [121] and [122] (respectively) above. In other words, the cause of action for the first website story pleads "tier one" meanings, with the exception of (h) and (i) in relation to Ms Hall. Those two particulars in relation to Ms Hall and

the causes of action for the broadcast and the second website story plead "tier two" meanings.[143]

[124] The honest opinion defence is pleaded as follows:

> 30. In so far as the broadcast and/or the statements … had any of the meanings alleged in … the statement of claim, then such meaning or meanings were conveyed as expressions of opinion.
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> 31. Alternatively, those statements [in the broadcast and website stories] which are expressions of opinion are set out in Schedule II.
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> 32. The statements of fact relied on in support of the defence of honest opinion, and which are true or not materially different from the truth, are set out in Schedule III.
>
> 33. The opinion expressed in the web publications and broadcast did not, in its context and in the circumstances of the publication, purport to be the opinion of the defendants or of any employee or agent of the defendants with the exception of statements numbered 1, 2 and 8* in schedule II which were statements of opinion genuinely held by the first and second defendants.
>
> 34. The defendants had no reasonable cause to believe that the opinion expressed in the web publications and broadcast (with the exception of statements numbered 1, 2 and 8* in schedule II) was not the genuine opinion of members of the Executive of the New Zealand Māori Council who authored the statements.
>
> [*I note this appears to be a typographical error. The relevant opinion in Schedule II appears to be the one numbered 3 – see below.]

[125] Schedule II identifies three statements from each of the website stories and the broadcast which are statements of opinions by the defendants and five statements which are statements of opinions by third parties. These are the same for each of the publications except that the broadcast includes the Te Reo words as well as the English translation. The pleaded opinions for the first website story are as follows:

> *The first web-story – statements of opinion by defendants*
>
> 1. But it is problems from within that are corroding the Council.
>
> 2. But *Te Kāea* has also obtained a copy of last week's Council minutes, which outlines a severe breakdown in the relationship.
>
> 3. So, is this the beginning of the end for this relationship?

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[143] See *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258 and 282, and *Chase* above n 81; referred to, for example, in *Simunovich (SC)* above n 98 at [15].

The first web-story – statements of opinion by third parties

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

5. 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.

6. Had he done so and resiled from voting, the conflict could have been dealt with appropriately.

7. If it is Taihākurei, then he needs to be held to account. If it is Donna Hall is [sic] instructing herself, this is another breach of the NZMC tikanga and processes.

8. Titewhai has … never witnessed the level of hatred being whipped up by Donna Hall and Eddie.

[126] At the hearing the defendants clarified that the publication facts relied upon were all the other statements in the website stories and the broadcast which were not listed as an opinion in this schedule.

[127] Schedule III is headed "statements of fact relied on in support of the defence of honest opinion." However at the hearing, the defendants clarified that was intended to be all the facts and circumstances relied upon to prove the publication facts are true. If that is so, then paragraph [32] of the defence (see above at [124]) is also wrongly pleaded.

[128] In any event, the statements of fact provided in Schedule III are as follows:

1. There was a meeting of members of the Executive Committee of the NZMC on 28 July 2015.

2. The Minutes of that meeting recorded the matters discussed at that meeting.

3. The Minutes recorded that it was resolved by the members of the Executive Committee that:

   (a) Woodward Law be dismissed as NZMC legal counsel for the TPP claim;

   (b) If evidence is received that Woodward Law is undermining the mana of the NZMC, then a complain to the NZ Law Society be prepared and filed;

(c) 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;

(d) In 2014 Woodard Law filed an application for Taihākurei to be given a second term as a Māori trustee on the CRFT Board without the consent of the Māori Council. 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;

(e) The NZMC needed to establish who is instructing Woodward Law to go into other districts. If it is Donna Hall instructing herself, this is another breach of the NZMC tikanga and processes.

4. The Minutes revealed concerns from the NZMC's Tai Tokerau branch that Donna Hall had set up Māori committees in their district without consulting them.

5. The Minutes recorded that Titewhai Harawira accused Donna Hall of running a smear campaign during the triennial elections.

6. The first plaintiff is Co-Chair of the NZMC.

7. The first plaintiff and the second plaintiff are partners.

8. The second plaintiff is the Principal of Woodward Law.

9. Woodward Law has been legal advisor to the NZMC in numerous legal proceedings.

10. The NZMC was opposed to the TPP.

11. Maanu Paul sent an email to Donna Hall advising that her firm, Woodward Law, was being dismissed as its TPP counsel.

Are the pleaded imputations opinions

[129] The defence must plead to the defamatory meanings pleaded by the plaintiff and not to alternative meanings which the defendant contends the words bear.[144] The defendants' pleading at paragraph 30 (set out above at [124]) complies with this requirement. It is in the form regarded as appropriate by the Court of Appeal in *Haines*.[145] It pleads that if the jury finds the publications have any of the meanings alleged, then they are opinions.

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144 *Haines* above n 142 at [54] to [67], [98]; *Gatland v Fairfax New Zealand Ltd* [2016] NZHC 970 at [62] to [67].

145 At [100]-[107].

[130] The defendants' pleading at paragraph 31 (also set out above at [124]) is, however, confusing and defective. It appears to contend that some of the words in the publications are expressions of opinion and identifies which of those are the opinions of the defendants and which are the opinions of third parties. However the statements identified as opinions are statements from the broadcast and the website stories. The defence of honest opinion applies to the pleaded meanings which the jury accept the broadcast and websites bear, not to other opinions expressed in the publications. The use of "alternatively" is also confusing because it appears to be contending that, even if the pleaded meanings are not opinions, there were the following alternative opinions in the publications. This paragraph should be deleted from the statement of defence as should Schedule II.

[131] The question is whether any of the plaintiffs' pleaded meanings are capable of being understood as an expression of opinion. If they are, it is then for the jury to decide whether in the circumstances they were an expression of opinion.[146] The jury must look at the publication as a whole in order to determine whether the writer or speaker conveyed the defamatory statement as an expression of opinion or as a statement of fact.[147]

[132] In this case the plaintiffs accept that some of the statements in the broadcast and website are capable of being understood as opinions but they say this is not the relevant question. They submit that when the focus is properly placed on the pleaded imputations in the context of the publication as a whole, those imputations are not capable of being understood as expressions of opinion.

[133] I do not accept this submission. Taken as a whole, the broadcast and website story could be understood to convey a dysfunctional Māori Council, within which one faction is making serious allegations against Sir Edward and Ms Hall. Read in that context the defamatory imputations (such as that they are behaving unprofessionally, irresponsibly and undermining the Māori Council's mana) are capable of being understood as expressions of opinion by those making the

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146 *Haines* above n 142 at [90].
147 At [91] to [95].

allegations. Whether, in the circumstances of the publication, they are expressions of opinion or statements of fact is a jury matter.

Publication facts

[134] The pleading does not currently particularise publication facts on which the opinions are said to be based and which are true or not materially different from the truth. Counsel for the defendants says it is all those statements in the broadcast and website story which are not set out in Schedule II. If that is the case then the publication facts relied upon are as follows:

> The New Zealand 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. …
>
> 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.
>
> Manu Paul sent an email to Donna Hall last Friday advising that her firm, Woodward Law, was being dismissed as its TPPA counsel.
>
> Neither [party] are disclosing much about the fallout. …
>
> 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 New Zealand Law Society be prepared and filed.
>
> …
>
> [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:
>
> …

> "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. …
>
> 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:
>
> …
>
> [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, Donna Hall 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.

[135] If the pleading is amended to simply incorporate these statements it will remain defective. Many of the above statements are expressed as allegations.

[136] The defendants must plead the publication facts on which this defamatory imputation is based. It need only prove those statements of fact which are relevant, and which provide the foundation for the opinion.[148] In relation to pleaded tier one meanings, the publication facts relied on for the opinion which gives rise to the defamatory allegation cannot be the fact that someone else has said something (for example, Mr Paul has said that "Woodward Law wasn't listening to our directives"). The defence must be established "by reference to underlying or primary facts."[149] For example, the defendants may wish to rely on the defence of honest opinion for the pleaded imputation that Ms Hall was acting unprofessionally. To do so it could

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148 Todd above n 18 at [16.8.02(1)].
149 See *Simunovich (CA)* above n 141 at [122].

rely on the fact that Woodward Law had not listened to the Māori Council's directives but, if they did so, this fact would need to be proven as true or not materially different from the truth.

[137] In the case of tier two meanings, the sting is likely to be that the plaintiff did something that created the reasonable grounds to believe the conduct specified.[150] For example, the sting of the pleaded meaning, that there were reasonable grounds to believe Sir Edward had acted unlawfully and unprofessionally, is Sir Edward did something so as to create reasonable grounds on which to believe that he acted unlawfully and unprofessionally. The pleaded facts must relate to what Sir Edward did to create the reasonable belief and this must be true or not materially different from the truth.

[138] The defendants say this is a case where the underlying allegations do not need to be proven. They say the 'fact' pleaded is not the underlying allegations in the minutes document but the fact there was a dispute at the highest echelons of the Māori Council. They submit this distinguishes the particulars from those pleaded in *Simunovich*. I accept the fact there was a dispute at the highest echelons of the Māori Council is potentially a relevant publication fact. It will be relevant if the defamatory opinion was based on this. As stated in *Simunovich* the honest opinion defence "comes into play at the point where the plaintiff has proved the publications are capable of bearing the defamatory imputations that it pleads."[151]

[139] In short the pleading is defective and requires amendment. The plaintiffs submit the pleading, even if amended, is incapable of alleging a tenable defence of honest opinion. That is because it relies on actions said to have been taken by the Māori Council, when those actions came from a purported minute of the Executive. It is therefore submitted the defendants cannot prove the truth of the Māori Council having taken these various actions, because the Māori Council did none of these things.

[140] The defendants respond that this is an overly legalistic distinction in an honest opinion defence. They submit the distinction between the Executive and the

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150 See, for example, *Simunovich (CA)* above n 141 at [81].
151 *Simunovich (CA)* above n 141 at [122].

Māori Council is insufficiently material to detract from the central thrust of the news item. In my view, whether the publication fact (for example, that the Māori Council has dismissed Woodward Law) is not materially different from the truth (the Executive, or a purported meeting of the Executive, dismissed Woodward Law) is a matter better determined at trial.

Genuine opinion

[141] The pleaded defamatory imputations relate to the reporting of comments of other people. In a number of instances the statements are attributed to the Māori Council. To succeed in a defence of honest opinion the defendants must prove they had no reasonable cause to believe those statements were not the genuine opinion of the Māori Council.

[142] The plaintiffs submit the defendants cannot do this for two reasons. The first is that the defendants misattributed statements of the Executive to the Māori Council. As they are not the same entity, and the minutes document does not, on its face, purport to be minutes of the Māori Council, the plaintiffs say it is impossible for the defendants to prove they had no reasonable cause to believe the statements were not the genuine opinion of the Māori Council. I do not accept this submission. As already stated it is not clear there is a material distinction to be made between the actions of the Executive purportedly on behalf of the Māori Council, and actions of the Māori Council. This is a jury question.

[143] Secondly the plaintiffs submit the defendants had reasonable cause to believe the minutes document on which they relied was not truly a minute of the Executive. Ms Hall had informed Mr Gardiner that the statements were not truly from the Executive but were personal statements of some disgruntled members. Ms Hall had also set out the reasons for her view. Once again I consider it is a jury question whether it is material that the members of the Executive, who took the action or made the allegations reported by the defendants, may have been acting without authority.

[144] The plaintiffs also contend that the defendants must prove the truth of enough supporting facts for the comment to be honest in the sense of being an opinion that

an honest person could hold on the facts. However this is not an element of the defence in New Zealand.[152] The requirement is that the opinion be genuine. The test is the "honesty of the opinion, not its reasonableness."[153] An insufficient factual basis for an opinion might be relied on to challenge whether the opinion was honestly held, but this is a jury question.

Conclusion

[145] The honest opinion pleading requires significant amendment. At this stage I am not able to say that it is incapable of being amended to set out a tenable defence of honest opinion. I therefore decline to strike out the defence. The defendants are directed to file an amended pleading within 30 days of this judgment or such further period of time as the Court may direct.

Result

[146] The application to strike out the defence of neutral reportage and qualified privilege, and the defence of honest opinion, is dismissed. If the defendants still wish to rely on the defence of honest opinion, they are directed to file an amended pleading within 30 days of this judgment or such further period of time as the Court may direct.

[147] Costs would ordinarily follow the event. However the plaintiffs have had a measure of success on the honest opinion pleading, the neutral reportage and qualified privilege defence is new, and whether the defences will succeed will be decided at trial. It may be that this is an appropriate case to reserve costs. If, however, an order for costs is sought at this juncture, leave is reserved for each side to file a brief memorandum setting out their position on costs. Any such memorandum should be filed within 30 days of this judgment or such further time as the Court may direct.

Mallon J

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[152] Todd above n 18 at [16.8.02(1)] says "[i]t is normally sufficient that the commentator merely gives some indication of the facts on which he or she is commentating."

[153] *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at 733 at [24].