

**EXTENDING COMMON LAW QUALIFIED PRIVILEGE TO THE MEDIA:
A COMPARISON OF THE ENGLISH AND AUSTRALIAN APPROACHES**

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ABSTRACT

[87] This article compares the recent expansion by Australian and English law of situations where the common law defence of qualified privilege can apply to defamatory material in the media: *Lange v Australian Broadcasting Corporation* (Australian High Court) and *Reynolds v Times Newspapers Ltd* (House of Lords). By exploring applications of the latter decision by the lower English courts, the paper concludes that what significantly distinguishes it from the Australian decision is that it has application outside of political discourse. This, the article argues, is the correct approach, due to the difficulty of delimiting the 'political' in a theoretically neutral way. The article also notes the House of Lords' ready appreciation of the commercial imperatives of news, and concludes by asking whether we are better served by a shift towards a public interest defence.

When the House of Lords changed the face of English libel law in late 1999, there were inevitable comparisons with an equally influential decision of the Australian High Court just two years earlier.² [88] What connects the two judgments extends beyond the similarities in the facts giving rise to them, striking though these are. In both cases the highest court of the land was giving judgment in a libel action brought by the former prime minister of a smaller, neighbouring, English speaking country. In both cases proceedings were against one of the host jurisdictions' most prominent organs of media. And in both cases the plaintiff stood accused of abuse of their political office as regards events in their home country. In the case of Australia, David Lange of New Zealand had sued the Australian Broadcasting Corporation, in particular for accusing him of trading political patronage for campaign contributions. In London David Reynolds, former Taoiseach (prime minister) of Ireland had sued the *Sunday Times* for accusing him of lying to the Irish Dáil (parliament).

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In both cases, the media defendants claimed special protection because of the political nature of what they had to say. Both invoked a right to freedom of political speech. In both countries courts had recently held that a special defence applied in libel actions relating to political expression.³ And in both cases, the highest court changed the law laid down in those decisions. In doing so, both the High Court of Australia and the House of Lords gave what the media had sought for decades. They significantly extended the application of the defence of qualified privilege to stories of public importance appearing in the mass media.

The common law defence of qualified privilege prior to *Lange* and *Reynolds*

The defence of qualified privilege⁴ is the major exception to the basic common law rule that defamatory statements of fact, however much they may be of public concern, can only be excused if the publisher can establish their truth. The classic justification for the defence is the 'public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect'.⁵ Put simply, it protects defamatory statements published in certain circumstances, even if those statements are false, provided the defendant was not actuated by malice.⁶ The onus of proving the occasion of qualified privilege rests with the defence and that of rebutting the defence with malice rests with the plaintiff.

Although it has long been recognised that common law qualified privilege needs flexibility to deal with 'unexpected combinations of circumstances' created by 'new arrangements of business, even new habits of life',⁷ until recently the defence was applied to a fairly set repertory of circumstances, almost all of which involved

² *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 (House of Lords) and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (Australian High Court).

³ In Australia this was the High Court in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v WA Newspapers* (1994) 182 CLR 211. In the case of England, this was the Court of Appeal in the proceedings brought by David Reynolds prior to the matter reaching the House of Lords: [1998] 3 WLR 862.

⁴ Note that this has been replaced by the statutory defence of 'qualified protection' in Queensland and Tasmania: *Defamation Act 1889* (Qld) s 16; *Defamation Act 1957* (Tas) s 16.

⁵ *Horrocks v Lowe* [1975] AC 135, 149.

⁶ Or lack of 'good faith' as regards the statutory defence of qualified protection in Queensland and Tasmania: *Defamation Act 1889* (Qld) ss 16 and 17; *Defamation Act 1957* (Tas) ss 16 and 19.

⁷ *London Association for Protection of Trade v Greenlands* [1916] 2 AC 15, 22-3 (Lord Buckmaster LC). See also *Howe v Lees* (1910) 11 CLR 361, 369.

publication to just a handful of recipients.⁸ As for the mass media, the defence has historically proved harder to apply. Generally, the necessary reciprocity of duty and interest must be established between the publisher and all publishees.⁹ The interest of the latter in receiving the [89] information had to be ‘apart from its mere quality as news’.¹⁰ Consequently its application to the media has normally been restricted to rebuttal of public attack on the media organ,¹¹ situations where the privilege is ancillary to that of others responding to media allegations,¹² information to electors about the fitness for office of candidates in the elector’s constituency¹³ (provided the publication does not extend beyond the electorate),¹⁴ or where there is an urgent imperative to warn of public danger, such as a suspected terrorist or contaminated food or drugs.¹⁵

Lange v Australian Broadcasting Corporation (1997)

It was just in the last decade that the jurisdictions of England and Australia began to substantially diverge. What led to Australia’s break from the traditional position was that in 1992 the Australian High Court distilled from the country’s Constitution, and particularly its concept of representative and responsible government,¹⁶ an implicit freedom of political communication.¹⁷ Two years later, this concept was extended to defamation law, with the creation of a new constitutional defence applying to political speech.¹⁸

⁸ Classic qualified privilege occasions have involved the giving of employment references (eg *Spring v Guardian Assurance* [1993] 2 All ER 273, 289–90), complaints re alleged misconduct of employees (eg *Toogood v Spyring* (1834) 1 CM&R 181; 149 ER 1044), complaints to professional bodies (eg *Royal Aquarium & Summer & Winter Garden Society v Parkinson* [1892] 1 QB 431, 443) or the police (eg *Finn v Hunter* (1886) 12 VLR 656, 660).

⁹ See, eg, *Chapman v Lord Ellesmere* [1932] 2 KB 431, 456, 469. For exceptions where this rule does not apply, see, eg, *Browne v Croome* (1817) 2 Stark 297; 171 ER 652.

¹⁰ *Howe v Lees* (1910) 11 CLR 361, 398 (Higgins J).

¹¹ Eg *Stephens v WA Newspapers* (1994) 182 CLR 211, 243.

¹² *Loveday v Sun Newspapers* (1938) 59 CLR 503.

¹³ *Duncombe v Daniell* (1837) 8 C&P 222; 173 ER 470. NB, however, *Defamation Act 1952* (UK) s 10, which provides that a defamatory statement published by or on behalf of a candidate at elections does not attract qualified privilege on the ground that it relates to an issue in the election. In *Reynolds* the House of Lords hint that this section might not survive scrutiny under the *Human Rights Act 1998*: *Reynolds*, 1019G (Lord Nicholls).

¹⁴ *Lang v Willis* (1934) 52 CLR 637.

¹⁵ *Blackshaw v Lord* (1984) QB 1, 25 (Stephenson LJ).

¹⁶ Arising particularly from ss 7 and 24 of the *Australian Constitution*.

¹⁷ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

After another three years, David Lange's libel action remoulded defamation law once again. The High Court in *Lange v ABC*¹⁹ swept the constitutional defence aside, but in doing so the judges reiterated the implied freedom of political communication, which is an 'indispensable incident'²⁰ to the system of government enshrined in the Constitution. It exists, in their minds, to enable 'the people to exercise a free and informed choice as electors'.²¹ The law of defamation had unduly burdened that freedom by providing no appropriate defence for the honest publication of untrue government or political information to a general audience.

The solution adopted in *Lange* was to extend the common law defence of qualified privilege. This was achieved through a declaration that each Australian has an interest in disseminating and receiving information on government and political matters affecting the population.²²

Reynolds v Times Newspapers Ltd (1999)

When, just two years later the House of Lords handed down its judgment in *Reynolds v Times Newspapers*,²³ commentators greeted it as *Lange*'s English cousin. Since no malice had been found on the *Sunday Times*' part, the newspaper had claimed qualified privilege. The trial judge and the [90] Court of Appeal, as might be expected in applying the orthodox test of reciprocal duties and interests between newspaper and readers, held that there was no qualified privilege.²⁴ However, the newspaper claimed protection by means of a new category of occasion when privilege is derived simply from the political nature of the subject-matter. They argued that provided such material is published in good faith and without malice, liability could arise only if the publisher knew the statement to be untrue, or was reckless in that regard.

When the House of Lords in *Reynolds* significantly extended qualified privilege to media reports, commentators wrote of 'political qualified privilege'²⁵ and 'freedom of

¹⁸ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v WA Newspapers* (1994) 182 CLR 211.

¹⁹ (1997) 189 CLR 520 (Australian HC).

²⁰ *Lange*, 559.

²¹ *Ibid*, 560.

²² *Ibid*, 571.

²³ [1999] 3 WLR 1010 (House of Lords, judgment delivered 28 October 1999)

²⁴ The Court of Appeal is reported at [1998] 3 WLR 862.

²⁵ Paul Mitchell, 'Political Qualified Privilege', (2000) *King's College Law Journal* 11(1) 114–19.

political expression in the United Kingdom'.²⁶ The emphasis on the political is surprising, at least in hindsight. Also puzzling is that such commentary continued for many months, even though the application of *Reynolds* in the lower courts was already showing how non-political the extended defence could be.

GKR Karate (UK) Ltd v Porch

When Popplewell J delivered his judgment in *GKR Karate (UK) Ltd v Porch*,²⁷ less than three months after *Reynolds*, he began by citing several cases postulating the traditional argument that qualified privilege will only apply in very limited circumstances to newspapers. He was in no doubt, however, that *Reynolds* had fundamentally changed the position. He was considering a case where a local paper, distributed free to some 158,000 homes and offices in parts of Leeds, had carried allegations against a karate school that had been going door to door in those areas, offering parents karate lessons for their children. The paper claimed that the school, which was not registered with the sport's governing body, either disappeared with the parents' money, or gave 'dodgy' lessons, with poorly trained instructors and possibly inadequate insurance.

When Popplewell J agreed to try the issue of qualified privilege as a preliminary issue, he had no hesitation in applying *Reynolds* to the situation, even though the allegations would rarely be deemed political in nature. In so doing, Ian Loveland²⁸ accused him of misconstruing *Reynolds* and suggested that the decision should be overruled for failing to distinguish 'political' from 'public interest' information.²⁹ Loveland claimed that although *Reynolds* rejected 'political information' as a generic category receiving special protection, the House of Lords had nevertheless limited the defence to political information 'which the public has a right to know'.³⁰

²⁶ Ian Loveland, 'A New Legal Landscape? Libel Law and Freedom of Political Expression in the United Kingdom' [2000] *European Human Rights Law Review* Issue 5, 476–92.

²⁷ Unreported, English High Court, Popplewell J, 17 Jan 2000, <<http://www.bailii.org/ew/cases/EWHC/QB/2000/180.html>> at 23 January 2002 (copy on file with author).

²⁸ Professor of Law, City University, London.

²⁹ Ian Loveland, 'Two Wrongs (Almost) Make a Right' (7 July 2000) vol 150 no 6943 *New Law Journal* 1020, 1020.

³⁰ *Ibid.*

James Gilbert Ltd v Mirror Group Newspapers Ltd

Three months before Loveland's comments were published, Eady J gave judgment in *James Gilbert Ltd v Mirror Group Newspapers Ltd*.³¹ This libel action had been brought by manufacturers of sporting goods, including the balls used in the latest Rugby World Cup, against the *Sunday Mirror*, a national tabloid, after the paper ran a series of three articles accusing the Claimant of using an Indian supplier that employed child slave labour. The action concerned only the third article, which criticised the company for reneging on a promise to investigate the supplier and, should the allegation be substantiated, to terminate its [91] contract. In fact the company had sent a team to India to investigate some six days prior to publication. The Claimants applied for summary disposal on the basis that there was no realistic prospect of defence.³² They failed, Eady J holding that on the basis of *Reynolds*, qualified privilege could apply. Eady J was in no doubt that it is a matter of 'legitimate public interest' if a UK business is using a supplier that exploits labour, particularly child labour, within some foreign jurisdiction.³³

Grobbelaar v News Group Newspapers Ltd

Sport is also the substance of a third reported application of *Reynolds*. *Grobbelaar v News Group Newspapers Ltd & Anor*³⁴ concerned allegations in the *Sun*, Britain's biggest selling newspaper, that Bruce Grobbelaar, the goalkeeper of England's soccer team, had been paid to fix matches. The trial judge held that the paper was not entitled to rely on a qualified privilege defence, so the issue of justification was left to the jury, which awarded Grobbelaar £85,000. The newspaper's appeal will remain most famous for its apparently unprecedented success in having this verdict overturned as perverse. However the appeal also dealt with the paper's claim for qualified privilege. In this regard it was unsuccessful, but not because of the subject matter of the defamatory articles. The Court of Appeal was in no doubt that they were of 'very substantial public concern':

³¹ [2000] EMLR 680. (Judgment was 17 April 2000).

³² *Defamation Act 1996* (UK) s 8.

³³ *James Gilbert* [2000] EMLR 680, 700.

³⁴ [2001] 2 All ER 437. (Judgment was 18 January 2001).

It is imperative that football is not tainted by corruption and that matches are competitively played rather than their outcome determined or influenced by corrupt payments in the interests of foreign gambling syndicates.³⁵

That *Reynolds* can be applied to non-political libels, whereas *Lange* cannot, should not surprise anyone understanding the routes by which the two cases were decided. In the case of *Lange*, the extension of qualified privilege was mandated entirely by the constitutional protection afforded political discussion. The House of Lords, however, rejected the idea of a generic category of qualified privilege for political information. In his leading judgment, Lord Nicholls of Birkenhead was of the view that favouring political over non-political information lacked 'a coherent rationale'.³⁶ Instead, Lord Nicholls sought elasticity in the common law so as to enable the court to give appropriate weight, in contemporary conditions, to the importance of freedom of expression by the media on all matters of public concern.

Lord Nicholls declared as his starting point freedom of expression. He also had in mind the upcoming implementation of the *Human Rights Act*, which requires the Court in relevant cases to have particular regard to the importance of the right to freedom of expression.³⁷ The common law, he noted, is to be developed and applied in a manner consistent with art 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the court must take into account relevant decisions of the European Court of Human Rights.³⁸ As a result, any curtailment of freedom of expression must be convincingly established by one of the countervailing considerations enumerated by art 10 (which include reputation), and the means employed must be proportionate to the end sought to be achieved. From this premise, Lord Nicholls saw the crux of the appeal as lying in identifying the restrictions that are fairly and reasonably necessary for the protection of reputation.

Reynolds' application outside the sphere of political discussion makes its potential impact on English libel law far greater than that of *Lange* on Australian. The allegations that gave rise to *James Gilbert*, *Grobbelaar* and *GKR Karate* are stock-in-

³⁵ Ibid 446a (Simon Brown LJ).

³⁶ *Reynolds*, 1025G. See also 1042A (Lord Cooke of Thorndon).

³⁷ *Human Rights Act 1998* (UK) s 12.

³⁸ *Human Rights Act 1998* (UK) ss 2, 6.

trade for journalists, typical of stories of business misconduct and, [92] in the case of *GKR Karate*, consumer journalism, that occupy the news daily.

It is hard to predict how broadly the term 'matter of public concern'³⁹ will come to be defined for the purposes of *Reynolds*. The most radical position would be for it to become as open a concept as that of 'public interest' in the common law defence of fair comment. While this defence only applies to comments on matters of public interest, the latter is understood to include 'anything which may fairly be said to invite comment',⁴⁰ even an innkeeper's conduct towards a traveller,⁴¹ or a tradesman's handbill.⁴² If the media hope for such an outcome in the short term, they are surely over-optimistic. Even so, they might view the first few applications of *Reynolds*, described above, as a hopeful beginning.

It must be noted that this paper focuses on the application of the *common law* defence of qualified privilege. Statutory modifications should not be overlooked, and to some extent these narrow the gap between the countries as regards media reports of matters of public interest that fall outside those receiving specific qualified privilege protection (fair and accurate reports of courts, tribunals, official reports and so on).⁴³

In Queensland and Tasmania the common law defence has been replaced by the somewhat broader statutory defence of qualified protection, which can apply to media reports on subjects of public concern outside of politics and government.⁴⁴ The same applies to the statutory defence of qualified privilege provided by s 22 of the *Defamation Act 1974* in New South Wales. This extended the common law defence in a way broadly similar to *Reynolds*, but because of the rigorous requirements of its reasonableness test (as routinely interpreted) s 22 is considered by many practitioners to be of little assistance to journalists.⁴⁵ Similarly, as far as I am aware, in only one case where *Lange* has been applied in its four-year history has a defence of qualified

³⁹ *Reynolds*, 1027C (Lord Nicholls).

⁴⁰ *Campbell v Spottiswoode* (1863) 3 B & S 781.

⁴¹ *Payne v Sheffield* (1882) 2 EDC (S Africa) 166.

⁴² *Paris v Levy* (1860) 9 CB(NS) 342.

⁴³ *Defamation Act 1996* (UK) s 15 and sch 1. In Australia note, eg *Defamation Act 1974* (NSW) ss 24–26, and equivalents in other jurisdictions.

⁴⁴ *Defamation Act 1889* (Qld) s 16 and *Defamation Act 1957* (Tas) s 16.

⁴⁵ 'Practitioners say s 22 may as well not exist': Henric Nicholas QC, speaking in Sydney, 3 May 2001.

privilege been upheld as a result.⁴⁶ It already seems that British journalists have more cause to celebrate in *Reynolds* than their Australian counterparts about *Lange*.

Among such enthusiasm, *GKR Karate* deserves a cautionary aside. While Popplewell J clearly felt he was only able to uphold a defence of qualified privilege because of *Reynolds*, he was also greatly influenced by the limited circulation of the *Leeds Weekly News*, which had a readership of just 400,000 in an area where the karate school was operating. Given the historic development of qualified privilege, this was bound to weigh heavily in the Justice's mind. Presumably, if the karate school had been operating nationally, the national media should have been granted the same protection. Even so, this consideration may constrain consumer journalism and is unfortunate when media globalisation is diminishing the influence of parochial publications.

Privileging the 'Political'

Lange's privileging of political speech over non-political, by affording the defence of qualified privilege to the first but not the second, may be an accident of Australia's constitutional position, but the [93] approach is favoured by some.⁴⁷ Ian Loveland, urging the reversal of *GKR Karate* for failing to distinguish 'political' from 'public interest' information, argued that the rationale for special protection of political speech is that those people who govern us exercise such power over our lives that it is in our interest to have as much 'true' information about them as possible, even at the cost of the occasional false defamation being published.⁴⁸ The audience interest in the sale of 'dodgy' goods and services as in *GKR Karate* is, he argued, 'not remotely comparable to that in knowing whether politicians are dishonest or corrupt' and insufficiently important to justify the risk of untrue publications.⁴⁹

⁴⁶ The exceptional case was *Brander v Ryan*, (unreported, Supreme Court of South Australia, Wicks J, 12 Jan 2000), <<http://www.austlii.edu.au/au/cases/sa/SASC/2000/2.html>> at 24 January 2002 (copy on file with author) where an imputation that Michael Brander, chairman of the political party Australian National Action, did not hold his political beliefs sincerely, was held to be defamatory but protected by qualified privilege on the basis of *Lange*.

⁴⁷ For the general need to extend special protection to political expression, see eg in the US Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960) and Robert Bork 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1.

⁴⁸ Ian Loveland, 'Libel Shopping in the Wrong Mall?' (26 May 2000) vol 150, no 6937 *New Law Journal* 759.

This trivialisation of the journalism in *GKR Karate* smacks of condescension. The *Leeds Weekly News* was a local 'freebie' warning low-income families in working-class Leeds about allegedly ill-trained and dubiously insured karate teachers. Such stories do not stir excitement on the world stage. They might not be considered in the same league as claims of organised crime among friends of former Russian President Boris Yeltsin, which Loveland said undoubtedly merit protection as a political story, since the alleged criminal activities 'struck at the very core of the Russian state'. But what value judgments are involved in ranking these issues? Which is likely to be of greater relevance to readers of the *Leeds Weekly News*?

Clearly the 'non-political' can have the most dire consequences for our lives, often far more than the 'small change of political controversy'.⁵⁰ But this is not the only reason to be uncomfortable with privileging political expression.

Lange extends the defence of qualified privilege so as to protect the political debate needed for realisation of the system of responsible and representative government envisaged by the Constitution. Michael Chesterman has insightfully argued that where the parameters of that debate are drawn depends on what model of democracy the constitution is thought to have in mind.⁵¹ A participatory vision of democracy envisages a right, perhaps a duty, on the citizen to actively partake in governance, while an institutional, elite or protective democracy, which seems to be envisaged in *Lange*, creates an executive distinct from the electorate.⁵² The latter model requires only that sufficient information be disseminated to ensure that informed decisions can be reached in choosing who should govern. If, on the other hand, the agenda of government rests with a participatory citizenry, the range of information that needs to circulate among that population is likely to be considerably broader.

The difficulty is not only in deciding what form of democracy we are seeking to promote, and thus determining the parameters of the 'political', it is in the concept of

⁴⁹ Ibid.

⁵⁰ The latter quote comes from the Court of Appeal in *Reynolds* [1998] 3 WLR 862, 910F. In the House of Lords it was also recognised, eg by Lord Cooke (1042A) that people other than politicians exercise great power and influence.

⁵¹ Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000) chs 2 and 3, especially 27–31.

⁵² It is the latter that seems to be envisaged by *Lange*. Cf *Levy v Victoria* (1997) 146 ALR 248.

‘political’ in the first place.⁵³ In arguing that publication of political information should be privileged regardless of the status and source of the material and the circumstances of the publication, the Defence in *Reynolds* claimed that otherwise the court would need to assess the public interest value of a publication, taking these matters into account. Such an approach, claimed the newspaper, would not only have an unpredictable outcome, it would put the judge in a position which in a free society ought to be occupied by the editor. Such paternalism, they said, would effectively give the court an undesirable and invidious role as a censor or licensing body.

[94] The impression is thus given that determining what information it is in the public interest to disseminate is highly subjective, while distinguishing the political from the non-political is a virtuously neutral exercise. It is easy to imagine proponents of this approach asking why it is so disagreeably subjective to have the judiciary distinguish allegations of government corruption (‘political’) from ‘dodgy’ services, like karate lessons in Leeds (‘non-political’).

The problem with this question is that it raises several others, one being why dishonest government is not characterised as a dodgy service. Speech cannot be classified as political, and therefore as a necessary and proper component of public discourse, in a theoretically neutral way. Politics lies at the heart of the public realm where, in the words of Hanna Pitkin, ‘people determine what they will collectively do, settle how they will live together, and decide their future, to whatever extent that is within human power’.⁵⁴ First, however, we must decide what we are as a society and what matters to us collectively. The exercise of distinguishing political from non-political information is in effect the process of determining what is relevant and what irrelevant to that process. As Robert Post has observed, speech can be deemed irrelevant for national self-definition only in the name of a particular, substantive vision of national identity. He adds: ‘If this is done with the authority of the law, possible options for democratic development will be foreclosed’.⁵⁵

⁵³ This point is also made by Michael Chesterman: Chesterman, above n 51, chs 2 and 3, especially 44–63.

⁵⁴ Hannah Pitkin, ‘Justice: On Relating Private and Public’ (1981) 9 *Political Theory* 327, 343.

⁵⁵ Robert Post, ‘The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine v Falwell*’ (1990) 103 *Harvard Law Review* 601, 670.

Privileging 'Matters of Public Concern'

Just as the political/non-political divide is itself political, so is the public/private dichotomy involved in *Reynolds'* distinction between what constitutes matters of public concern and what might be termed 'private gossip'. Take the late 19th century press reports of Boston dinner parties which, Post claims, virtually created the American common law on privacy.⁵⁶ Public fascination with the doings of the rich, he suggests, may have helped to alter the public vision of America and promoted measures to redistribute wealth, so that in retrospect condemnation of such 'trivia' 'has come to seem an unattractive example of self-serving class prejudice'.⁵⁷

The value of distinguishing 'public interest' from 'private gossip' becomes particularly suspect once public discourse is understood as serving more than just the political endeavour whereby society's identity and ethics are shaped. Freedom of expression can be extolled not just for promoting that political process, but also for self-realisation. We are interested not only in our qualities and values as a society, but also in the more private process whereby we define what distinguishes us as individuals within that community. For the construction of our individuality we turn to role models, and for role models we increasingly rely on public figures, something acknowledged by Lord Cooke in *Reynolds*.⁵⁸ In a culture that is so fragmented that we are strangers to our neighbours, perhaps even our families, it is little wonder that we find fascination in the privacy of public figures, about whom we may know more than those with whom we have daily contact. In our culture of celebrity, information on private human functioning is the only means available to many to make some sense of the human condition and thus tackle those issues of self-identification rather more profound than the routine machinations of government.

If, for a moment, we are credited with the instinct to seek out what truly matters to us, we might be less disdainful of 'tittle-tattle', defy the decial of 'prurience', and resist the familiar refrain in defamation [95] law that the public interest is not always what

⁵⁶ *Ibid*, 671. Post suggests the tort of invasion of privacy arose in large part from the writings of Samuel Warren, who was enraged at his private entertainments in Boston.

⁵⁷ *Ibid*.

⁵⁸ *Reynolds*, 1042A.

interests the public.⁵⁹ Undoubtedly a central issue remains the extent to which it is justifiable to compromise the privacy, and therefore comfort, of the individual to serve a collective good. Even so, we might ponder as to how future generations will consider today's gossip sheets, and whether they will be as sympathetic as we are to those 19th century reports of Boston opulence.

Focussing again on the role of public discourse in framing societal identity and values, the doctrinal impasse created by *Lange* is clear. The rationale behind the High Court's decision was to facilitate political discussion and thus further the constitutional goal of democratic self-governance. Even if we reject the participatory model of democracy presented above, it is surely necessary that the people control the agenda of government. To return to Post:

[The people] have the power to determine the content of public issues simply by the direction of their interests. This means that every issue that can potentially agitate the public is also potentially relevant to democratic self-governance, and hence potentially of public concern. The normative conception of public concern, insofar as it is used to exclude speech from public discourse, is thus incompatible with the very democratic self-governance it seeks to facilitate.⁶⁰

As the American judiciary has observed:

To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.⁶¹

Before extolling *Reynolds* for not being restricted to political speech, two factors must be remembered. First, the House of Lords did not avoid the political/non-political dichotomy out of concern for promoting wide-ranging and vibrant public discourse. Rather, they were concerned about politicians' reputations. Secondly, and obviously, *Reynolds* employs just as much judicial prescription in determining what is in the public interest. Even so, this exercise has more candour and by putting less reliance

⁵⁹ For instance in Australia the public were held not to have the necessary interest in the private life of a public figure for the purposes of the *Defamation Act 1974* (NSW) s 22 (see below): *Chappell v TCN Channel Nine* (1988) 14 NSWLR 153, 170–1.

⁶⁰ Post, above n 55, 670.

on the construct of the 'political', Lord Nicholls at least achieves some of the elasticity of doctrine he so eagerly sought.

Lange's Reasonableness Test v Reynolds's Circumstantial Criteria

The foregoing paragraphs compare how *Lange* and *Reynolds* determine the type of information the public has an interest in receiving for the purposes of applying the common law defence of qualified privilege. This is only one element of the tests devised by the House of Lords and the Australian High Court to decide when the media can make use of the defence.

In *Lange* it was held that in the case of political matter communicated to the world at large, the unwarranted damage to reputation that can be inflicted by untrue factual statements is so great that a requirement of honesty of purpose and lack of malice in the publisher is insufficient protection for reputation.⁶² This being so, there was added for publications to a wide audience a requirement of [96] reasonableness that goes beyond mere honesty.

In *Reynolds*, the majority in the House of Lords was similarly of the view that the protection of reputation required more than just the requirement that there be no malice on the part of the publisher of defamatory statements of fact. Malice, Lord Nicholls pointed out, is notoriously difficult to prove, particularly given the British media's ability to avoid disclosing sources.⁶³ The Court of Appeal had added an extra requirement: a 'circumstantial test', which asks:

Were the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice?⁶⁴

The House of Lords rejected this as a separate test, considering that these are factors to be taken into account in determining whether the duty-interest test is satisfied,

⁶¹ *Consolidated Edison Co v Public Service Commission*, 447 US 530, 538 (1980), quoting *Police Dept v Mosley*, 408 US 92, 96 (1972).

⁶² The relevance of 'malice' has declined as regards political defamations in Australia, since *Lange* states that the motive of causing political damage to plaintiffs or their political parties cannot be regarded as improper.

⁶³ *Contempt of Court Act* 1981 (UK) s 10.

which Lord Nicholls formulated as the test as to whether the public was entitled to know the information. They would instead use the common law solution: the court shall have regard to all the circumstances when deciding whether publications be privileged because of their value to the public. That value depends upon quality as well as subject matter. The burden should be on publishers to show they had been reasonable, since they will best know the facts leading up to publication.

Lord Nicholls sought elasticity, with each case being scrutinised individually. This accords with the European Court's preference, and he thought that with the enunciation of some guidelines by the court, any practical problems of unpredictability should be manageable. While this intended flexibility receives greater emphasis in *Reynolds*, it is also apparent in *Lange*. Thus in both cases lists of factors that might be taken into account are given, but each says that what considerations are relevant will depend on particular circumstances. Subsequent cases applying *Reynolds*, in particular, are adopting the pattern of working methodically through the list, using it as a fairly rigid template for judicial consideration.⁶⁵ Even so, in interpreting and comparing the cases it is important to bear in mind the lists' intended flexibility and not to read too much into wording, inclusions and omissions.

Lange lists four points that the Defendant must generally demonstrate for the defence of qualified privilege to apply to the media.⁶⁶ They are itemised below, together with their counterparts in Lord Nicholls' list of ten, which he says are illustrative only.⁶⁷

Lange Point 1: The Defendant should have reasonable grounds for believing the imputation to be true

Michael Chesterman⁶⁸ suggests that the only points enumerated by Lord Nicholls that bear on *Lange* Point 1 are Points (3), (4) and (5) of *Reynolds*:

⁶⁴ [1998] 3 WLR 862, 899.

⁶⁵ Eady J in *James Gilbert* assiduously worked through Lord Nicholls' ten points, fearing that failure to do so might be regarded as failure to separately address each one. The Court of Appeal did likewise in *Grobbelaar*.

⁶⁶ *Lange*, 574.

⁶⁷ *Reynolds*, 1027C.

⁶⁸ Chesterman, above n 51, 104.

- (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
- (4) The steps taken to verify the information.
- (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect.⁶⁹

[97] On a literal interpretation of (4), which refers to the steps taken by the journalist and not the evidence unearthed thereby, this point equates to *Lange* Point 2 (see below). No doubt Lord Nicholls also had in mind the quality of evidence discovered to corroborate the source, referred to in (3). That being so, there is no justification for presenting (3) as a separate consideration. Obviously an unreliable source requires greater corroboration, but just as the Police are not criticised for routinely relying on sources within the criminal underworld, so journalists should not be penalised, even if they act on the most dubious of tip-offs. What matters is the quality of the evidence as a whole possessed by Defendants at the point of publication.

Point (5) alludes to an issue already dealt with by statute, which extends qualified privilege to fair and accurate reports of the outcomes of official enquiries and the like.⁷⁰ It can be subsumed with (3) and (4), to the extent that the latter relates to evidence uncovered by the journalist, into a single concern relating to whether the allegations are sufficiently substantiated. Whether there is any substantial difference between the cumulative effect of Lord Nicholls' three points and the first in *Lange*, and whether Michael Chesterman's observation stands that the former requires significantly less of the Defendant than the latter, depends on how much flexibility is read into *Lange*.⁷¹ While *Reynolds* emphasises 'elasticity' more, it is too early to compare their applications.

Lange Point 2: The Defendant should take proper steps, so far as they are reasonably open, to verify accuracy of the material

As already indicated, there is no meaningful distinction between *Lange* Point 2 and Lord Nicholls' Point (4). This acts as a penalty for negligent or indolent journalism,

⁶⁹ *Reynolds*, 1027D.

⁷⁰ *Defamation Act 1996* (UK) s 15 and Sch 1.

just as the American test under *New York Times Co v Sullivan* penalises recklessness as to truth.⁷² Lord Nicholls' approval of the following from the New Zealand judge Tipping J is telling:

It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power and capacity to cause harm and distress are considerable if that power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. It may be asked whether the public interest in freedom of expression is so great that the accountability which society requires of others, should not also to this extent be required of the news media.⁷³

Also interesting is Lord Nicholls' dismissal of the *Sunday Times*' argument that it is enough to rely on the ethics of professional journalism. His Lordship retorted that in the UK 'the overall handling of these matters by the national press, with its own commercial interests to serve, does not always command general confidence'.⁷⁴

Thus in *Lange* and *Reynolds* the courts seek a disciplinary role as regulators of journalistic conduct, as well as that of facilitators in the diffusion of information of public concern.

Lange Point 3: The Defendant should not believe the imputation to be untrue

There is no equivalent to *Lange* point 3 in Lord Nicholls' list of points, but this is a matter likely to be raised in determining whether the defence of qualified privilege should be defeated by malice, and is also [98] likely to be considered in the court's role in policing standards of journalism. For instance, Popplewell J concludes his judgment in *GKR Karate* with a finding that the journalist involved was 'honest, sensible and responsible', not indifferent to accuracy or truth, and based her article on what she believed was reliable evidence. This seems to have weighed heavily with the judge, who, despite making numerous criticisms of the journalist (mostly concerning

⁷¹ Chesterman, above n 51, 104.

⁷² *New York Times Co v Sullivan* (1964) 376 US 254. In the US public figures cannot recover damages for a defamatory falsehood unless they prove, with convincing clarity, that the statement was made with knowledge of its falsity or with reckless disregard as to its truth.

⁷³ *Lange v Atkinson* [1998] 3 NZLR 424, 477, quoted at *Reynolds*, 1025A (Lord Nicholls).

⁷⁴ *Reynolds*, 1024E (Lord Nicholls).

the way she wrote the story), found in her paper's favour, essentially because she had conducted sufficient investigations.

Lange Point 4: The Defendant should seek a response from the person defamed and publish any response, unless this is impracticable or unnecessary

Lange point 4 correlates with Lord Nicholls' points (7) and (8):

- (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
- (8) Whether the article contained the gist of the plaintiff's side of the story.⁷⁵

Chesterman suggests that his Lordship is being more lenient to the Defendant in this regard, since he specifically rejects any general principle that a defendant should always 'report the other side', but simply gives it as a factor to be taken into account.⁷⁶ It should be recalled, however, that *Lange* excuses journalists from reporting the plaintiff's comments if this is 'impracticable or unnecessary', and also that on the facts in *Reynolds*, the *Sunday Times* lost the protection of qualified privilege mainly because they did not report David Reynolds' version of events. It is difficult at this stage to determine whether *Lange* will be interpreted as setting a more stringent requirement in this regard.

There are no equivalents in the *Lange* reasonableness test to Lord Nicholls' remaining five factors:

- (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
- (2) The nature of the information, and the extent to which the subject-matter is a matter of public concern.
- ...
- (6) The urgency of the matter. News is often a perishable commodity.
- ...
- (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

⁷⁵ *Reynolds*, 1027D.

⁷⁶ Chesterman, above n 51, 104.

- (10) The circumstances of the publication, including the timing.⁷⁷

Before conclusions are drawn from the omission of these points from *Lange*'s list of four considerations, it should be recalled that the Australian High Court did not suggest that its list is exclusive.

Lord Nicholls' points (1) and (2) — seriousness and public concern

If Lord Nicholls' 10 points are to be used as a template for considering the application of qualified privilege to the media (as seems to be the case, judging by the cases so far reported), they need some honing. I have already suggested that points (4) and (6) could be combined. Point (2) is clearly understood as less concerned with the nature of the information (is it political?) than the extent to which the subject matter is of public concern (is it important for the public to know?) and could be thus simplified. In so doing, difficulties become apparent in (2)'s relationship with (1). Clearly the more that [99] information is of public concern, the more justified is publication, even if supporting evidence is scant. But Lord Nicholls also argues that the more serious the charge, the more the public is misinformed and the individual harmed if the allegation is not true. Thus a higher standard of evidence is required.⁷⁸ The difficulty for the journalist is that more often than not, these two considerations pull in opposite directions. Generally, the more serious the allegation, the more it is an issue of public concern, simply by virtue of its seriousness. Conversely, with the trivial allegation, its very triviality challenges the need to disseminate.

Lord Nicholls' point (6) — urgency

Lord Nicholls' point (6), which relates to urgency of publication, deserves further comment. Alongside whether the defamatory material is of sufficient public interest, surely this is the crux of the matter. No doubt it will be just as relevant in applying *Lange*. Sometimes the urgency of the situation is self-evident. The epitome is the newspaper that warns of defective food containers that if used could cause lethal

⁷⁷ *Reynolds*, 1027D.

⁷⁸ This is not an altogether new concept. While the civil law standard of proof (ie, balance of probabilities) generally applies to the tort of defamation as regards the defence of justification, it is established that the more serious the allegation the more cogent must be the evidence which is required to prove it on the balance of probabilities: eg *Three Rivers District Council and Others v Bank of England* (No 3) [2001] 2 All ER 513 (HL).

poisoning.⁷⁹ Qualified privilege should not be withheld because of insufficient time to make extensive pre-publication enquiries.

Often, however, the case for urgency is less clear. Consider the paper with evidence of criminality, as in *Grobbelaar*.⁸⁰ While there is always an argument for exposing wrongdoers sooner rather than later, often protection of reputation from unwarranted damage, as well as the course of justice, would be best served if the paper handed the evidence to the relevant authorities and remained silent until after any court proceedings. Even so, the paper will typically break the story as an exclusive. It will then hand over the evidence to the authorities and report again when the subject is arrested and charged. Any subsequent trial might also get daily coverage, and certainly its outcome will be heavily reported, particularly in the event of a conviction. One legal transgression can fill a lot of column inches on a great many days.

The argument that a paper with information of criminal conduct should notify the authorities and remain silent was quickly dismissed in *Grobbelaar*, on the basis that investigative journalism can be of considerable public benefit, but can only flourish with the incentive of an exclusive story. The suggestion, therefore, is that a necessary price of investigative journalism is the hastily published newspaper exclusive.

This is unpersuasive. Even if restricted to retrospective court reporting, the press could still be 'a bloodhound as well as a watchdog',⁸¹ reaping reward by claiming credit for the successful prosecution. But judges understand that news is commercial produce for sale, manifested by Lord Nicholls' choice of words when he observed 'news is often a perishable commodity'.⁸² They know that crime not only sells newspapers but also generates plenty of journalists' copy, and to compete to maintain sales, papers need not just exclusives, but an abundant supply of marketable information. The judgments in *Lange* and *Reynolds* compromise reputation not just to enable dissemination of material of public concern, but also to maintain an industry.

⁷⁹ Such circumstances arose in Canada in 1983, and a defence of qualified privilege was allowed: *Camporese v Partoon* (1983) 150 DLR (3d) 208.

⁸⁰ In that case Simon Brown LJ was of the view that there was no urgency of publication: *Grobbelaar*, 446J.

⁸¹ *Reynolds*, 1027H (Lord Nicholls).

Conclusion

In their form, there is only one clear and meaningful distinction between the criteria established by [100] the House of Lords and those of the Australian High Court as to when the common law defence of qualified privilege will be extended to media reporting of defamatory statements of fact. That factor is the privilege *Lange* gives to political speech. On the other hand, sub-textually *Reynolds* hints at greater flexibility in its 'circumstantial considerations' than does *Lange* in its reasonableness test, and also more leniency towards the media. Certainly the indications to date are that *Reynolds* will be of greater use to the British media than *Lange* to the Australian.

Lange's privileging of the political arises from its constitutional roots. I have argued that the defining of the political is itself political, and that *Lange* creates a doctrinal impasse whereby the promotion of self-governance might ultimately restrict self-governance. Even so, both *Reynolds* and *Lange* represent shifts away from the sovereignty of truth, where the essence of the law was 'you can say whatever you can prove'. While the media rejoice in the thaw of defamation reform, should we ponder whether we are better served by a rule that essentially states 'you can say whatever judges think is worth talking about'?

Of course this does not represent the full situation. Justification remains as the media's last resort in England and some Australian jurisdictions. Elsewhere it has been degraded by statute.⁸³ The danger is that the more a society protects speech it considers important, the easier it can justify neglecting the 'unimportant'. This could be speech from any of the margins of dissension; not just the political radical, but also the gossip, even the pornographer.

Reynolds will no doubt be welcomed by the media, introducing as it does a public interest defence, and also, as has been argued above, acting as an indication that judges appreciate and take heed of news as a commercial commodity. While this may

⁸² *Ibid*, 1027D.

⁸³ In the Australian Capital Territory, Queensland and Tasmania the common law defence of justification has been replaced with statutory defences that also require that the Defence prove that the publication of the matter was for the public benefit: *Defamation Act 1901* (ACT) s 6, *Defamation Act 1889* (Qld) s 15, *Defamation Act 1957* (Tas) s 15. In New South Wales, the imputation complained of must not only be true, but must relate either to a matter of public interest or be published under qualified privilege: *Defamation Act 1974* (NSW) s 15(2).

suit the media, a healthier route for defamation law is towards a fault-based tort, more akin to malicious falsehood, where the central issues will be recklessness, falsity and damage, rather than subject matter.⁸⁴ Both *Lange* and *Reynolds*, which seek to police journalistic standards, are steps in that direction, and it is telling how the cases examined above that apply *Reynolds* are preoccupied not with the nature of the allegations made, but the research and writing of the journalists communicating them. It may be that both *Reynolds* and *Lange* will yet prove seminal moments in the changing paradigm by which interests of speech and reputation are balanced.

⁸⁴ Geoffrey Robertson, 'Tiptoeing Towards Free Speech', *The Guardian* (29 October 1999).