

DEFAMATION TESTS:

Common law and statute      At stake is reputation (of a person) vs. freedom of speech (of another person)

**Plaintiff must prove... (but also incl dft. views)**

**Advice that could be given before dft. decides to publish...**

- (1) Change the words – “It seems he thinks” “the facts say”
- (2) Show evidence that led to a particular conclusion
- (3) Get the other side of the story to set yourself up for a QP defence

**1. What was the meaning? (chosen by the ptf.)**

- a. How does the publication appear to the ‘mind of an ordinary, reasonable, fair-minded reader?’  
*Charleston*
  - i. A person who reads it once
  - ii. Has ordinary intelligence/ general knowledge
  - iii. Can read between the lines but is not avid for scandal
  - iv. Not scrutinising the words to find an allegation
- b. Under the single meaning rule... *Charleston*
  - i. The Court will not divide the audience – they are assumed as the ‘ordinary...’ to understand the publication in the same way and take the same meaning *Charleston*
  - ii. Publication must be taken as a whole, irrelevant if when read in isolation a defamatory meaning is created *Charleston*
- c. Ask, what is the ‘**sting of the words?**’ – *matter of argument, often more than one meaning that can be taken, what do the words say about the ptf’s. character? (dishonest, irresponsible, lacking integrity, unlawful, improper behaviour (vague), callous.) (sting is (x) this is def because – sim etc.)*

**2. How was the meaning obtained?**

- a. Natural or ordinary meaning *Lewis*      *Chris is stupid*
  - i. Do not need extra facts to understand → Explicit, defamatory on its face  
Inference *Lewis*      *Chris went home with his secretary*
  - ii. Implicit, ‘reading between the lines,’ layperson, no special knowledge required
  - iii. Popular/ false innuendo
- b. (True or Legal) Innuendo (*exception to the single meaning rule*) *Lewis*
  - i. Where **extrinsic facts known** to the reader change their ordinary meaning (not simply because they are interpreting the info differently than others)
  - ii. Particular group have additional knowledge – they will see publication as defamatory whereas the general public will not

→ Pastor went to 15A Maple Street

....

- c. REFER TO... Section 37: Particulars of definitive meaning
  - i. Must cite **exact words of defamation** and say **what they mean**, if defamatory meaning is evident no particulars needed BUT
  - ii. If meaning is not evident (inference or innuendo) – set this out, explain meaning and why it is understood this way (extra facts) – who the group are, and why they have this extra meaning

## SECTION 37

- (1) Ptf. must give particulars specifying every alleged defamatory/ untrue statement (*copy of what was said as small changes can alter the meaning*)
- (2) Where ptf. alleges the matter is defamatory in *natural or ordinary meaning* – ptf. must give particulars of every meaning the ptf. alleges the publication bears (unless it is self-evident)
- (3) Defamatory but not in its natural or ordinary meaning, ptf. must give particulars specifying...
  - a. Person or class of persons who whom the defamatory meaning is alleged to be known
  - b. The other facts and circumstances that support ptf's. allegations

### 3. Was that meaning actually defamatory? (take the ptf's. claimed meaning and ask...)

- a. Whether the words tend to lower the ptf. in the estimation of right thinking members of society generally? *Sim*
  - i. Right thinking – ordinary decent people?
- b. Would the words expose the ptf. to hatred, ridicule or contempt? *Parmiter*
- c. Would the words tend to cause others to shun and avoid the ptf? *Youssoupoff*
  - i. *Think about what is defamatory in the context of the time (e.g. mentally ill, gay etc. what is the context the words are being said in?)*
  - ii. *You must argue that being called (x) is a bad thing/ what is attached to the words is bad and therefore (a, b or c)*
  - iii. *Judge decides whether it is capable of bearing a defamatory meaning and the Jury decides whether it does bear that said meaning*

### 4. Spectrum of allegations *Lewis ->* (impt to make this clear from the outset)

1 Guilty            2 Reasonable cause to suspect    3 Reasonable cause to inquire

- a. Bane & Antidote?? *Charleston*
  - i. Sting can be removed if in the same publication an 'antidote' removes the meaning
  - ii. Only if the ordinary, fair-minded reader takes the B&A together (*The threshold is high e.g. Lady Hadlee, lesbian? 'to set the record straight' – not enough or; bane on page 1, antidote on page 17 – bane is only defeated if it states 'see page 17.'*)

### 5. Identification

- a. Explicitly named? *Morgan Easily satisfied OR...*
- b. Where the ptf. is not named, ask whether people acquainted with the ptf. would reasonably assume/ believed the words were about/ connected to the plaintiff *Morgan*
  - i. Must be 'of and concerning' the ptf. *Hulton & Morgan*
  - ii. Readers/ viewers do not have to believed the sting (Goddard LJ; 'if words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue') *Morgan*
  - iii. Minor inconsistencies/ wrong facts may not matter – general impressions are more impt. *Morgan*
  - iv. Identification can be by innuendo *Morgan*

c. Identification from a class of peoples

Generally, no right to sue if a member of a class unless reasonable people would believe the statement about the group reflected on the plaintiff as an individual BUT...

- i. **Whether it was a group or not can be irrelevant** as long as the *Morgan* test is satisfied 'would reasonable persons acquainted with the ptf. think the publication reflects on the ptf. as a member of that group?' → 'Of and concerning the ptf' *Hulton, Morgan & Knupffer*

→ **Basically the ptf. must be singled out in words/ circumstances** *Knupffer*

ii. **What is the size of the group?**

- Courts tend to draw the line at around a dozen (<12)
- How inclusive was the language?
- Smaller groups, more likely to succeed as you will be more likely to say the statement applies to each member (especially if specific allegation) *Knupffer*

iii. **Who is the plaintiff??**

- Are they a leader of the group? Govt. dept. accused of fraud – reflects the key-decision makers i.e. the Minister or Chief Executive

iv. **Nature of the allegation?**

- Generalisations are hard to prove, but specific allegations are easier

d. Who cannot be defamed?

- i. Local authorities – they are local representative; the public is allowed to have opinions/ criticise them *Derbyshire County Council v Times Newspapers* BUT, the criticism could reflect on an individual directly – e.g. the Mayor (also applies to Ministries/ government)
- ii. Corporations – under Section 6 they have to prove financial loss, or likely financial loss
- iii. The dead – friends and family cannot sue to protect deceased's reputation, but they can if it attacks *their own* reputation

**SECTION 6**                      **SPECIFIC RULES FOR CORPORATIONS**

Proceedings will fail unless body corporates can allege and prove that the publication has caused...

- (a) Pecuniary loss
- (b) Is likely to cause pecuniary loss

**6. Publication**

*If you tell someone to their face you are not liable. The statement must reach a wider audience.*

a. Initial Publication

- i. Must be publication to a third party *Pullman*
- ii. To publish it is to communicate it to someone
- iii. They need not be the author of the defamation
- iv. Ask, was the defamatory material put out of your control? Did you have it directed in such a manner that it **might possibly** be opened by others? *Pullman*
- v. Exception: Putting "Private and Confidential" on an envelope?

**b. Subsequent Publications**

- i. Liable for further publication that is **reasonably foreseeable (reasonably anticipated that a 3<sup>rd</sup> party will see it *Weld-Blundell*)** (If you leave something lying around where it is likely to be seen you are liable for publication, if you tell one person and they tell (x) amount of other people you are responsible for the extra publication) - **this does not require intention**
- ii. *Pullman* – **might possibly** be opened by others
- iii. Each republication gives rise to liability (**repetition rule**)

**c.** You need not be the author of the material published

**d. Who is liable for the publication?**

- i. All involved in the publication: source, reporter, subeditor, editor, newspaper owner, publisher, printer, distributor UNLESS they are exempt by s 21
- ii. You would sue: person who directly made the statement, party with the most money or the person who blame for doing it in the first place

**Defendant can argue...**

→ cannot argue on negligence *Weld-Blundell*

→ Cannot defend the alleged defamation on account of 'lack of intent'; intention is irrelevant to defamation liability *Hulton* – **BUT...**

→ **Innocent dissemination** or *Safe Harbour provisions of Harmful Digital Communication Act.*

**SECTION 21                      Innocent Dissemination**

If a person, solely in the capacity of employee or agent, of a processor or a distributor has published defamatory material, they can prove...

- (a) They did not know the material contained was defamatory and;
- (b) The person did not know the matter was of character likely to be of a defamatory nature and;
- (c) The person's lack of knowledge was not due to negligence

*Satisfy all. E.g. booksellers, libraries, printers, newspapers, deliverers etc.*

*Note: Harmful Digital Communication Act*

- New defence for ISPs for material they are hosting

DEFENCES	
True Facts	TRUTH
Some true fact and opinion	HONEST OPINION
False facts and not opinion	PRIVILEGE

**TRUTH:**

Templeton stance CA, NZ 1984 – Because the allegations were severable and specific, Jones only sued on the anti-Semitic allegations – this means the dft. could not argue any of the other allegations that Jones did not sue for. NOW Section 8 – allows dfts. to prove the truth of the article “as a whole.” *Politics of hatred.* Perhaps if the allegations are still genuinely severable the defence may still fail.

## 1. Truth (justification) SECTION 8

- a. Burden of proof is on the dft. (balance of probabilities) to prove the sting (alleged by ptf.)
  - i. *They do not need to prove that the publication was literally true, minor inconsistencies do not matter as long as they're not materially different from the truth. Prove the STING*
  - ii. *Ptf alleges the meaning, the dft. cannot create their own lesser sting – BUT could argue on section 8 (3)(a) and (b).*
    - *BCNZ v Cush* – can try to convince a jury on 'ordinary, reasonable and fair minded' meaning, but cannot use evidence;
    - *TVNZ v Haines* – cannot set up lesser meanings from those pleaded by the ptf;
    - *Templeton* – dft. can deny the meaning, but cannot prove the truth of something the ptf. does not complain (this could dampen the jury's opinion and affects the level of allegation)

### Picking and choosing:

1. **Section 8(2)** allows facts to be proven, even if the ptf. is not suing for them
  - a. Ptf. can no longer 'pick and choose' *Templeton* overruled (narrow meaning)
2. **Section 8(3)(a)** only requires proof (burden of proof on the dft.) that the imputation pleaded was true/ not materially different from the truth – the sting *NOTE: can prove either (a) or (b)*
3. **Section 8(3)(b)** protects truth of the publication as a whole *(s2 allows facts to be proved that help this even if not sued upon)*
  - a. Is the article true as a whole/ not materially different from the truth? (allegations must be closely related)
  - b. Find an umbrella term that includes all the meanings
    - i. dft. can prove a common sting (exception to the general rule that the dft. cannot create their own meaning and prove the truth of that) –
    - ii. Can succeed even if one of the allegations cannot be proven (as long as the sting on the whole is true)
    - iii. If you can prove the "worst" allegation on the list, it is likely the others will be automatically included
  - c. Exception?!
    - i. Umbrella truth cannot be proven if the allegations are truly distinct or severable (look at the nature of the allegations) → are the other allegations not as bad as (x), if so you can't say the statement as a whole was true without establishing the truth of (x) as well.

### **SECTION 8**

- (1) Truth is a defence
- (2) Dft. can allege and prove any facts contained in the whole of the publication
- (3) (a) dft. can prove the imputations were true or not materially different from the truth  
(b) proceedings based on all/ any of the matter contained, dft. can prove that the publication taken as a whole was in substance true/ not materially different from the truth

### Difficulties with truth:

- Witness recollection may be hard to substantiate (elderly, overseas, dead etc)
- Confidential sources
- Juries – inherent dislike of the media?
- Alleging truth is risky, if you fail the damages could be bigger

Note: where there is no info, you cannot rely on this defence because without further info, there's nothing to sustain it.

## 2. Honest Opinion

- a. Must clearly be an opinion Section 10
- i. It must concern a matter which is in its nature doubtful or is it an ascertainable fact (if it is a clear fact, it is not opinion) - Can it be proven one way or another? **Eyes**
  - ii. An opinion includes a “deduction, inference, conclusion, criticism, remark observation... etc.” from surrounding facts **Clark**

### How would it be reasonably understood

- ✓ Is it a bare assertion? (fact)
- ✓ Is it provable as true or false? (fact)
- ✓ Language used? Subjective or evaluative? Metaphor? (opinion)
- ✓ Context? Letters etc.
- ✓ Bias – usually not provable, can only determine from someone’s subjective point of view – therefore more likely to be ‘in nature doubtful’ e.g. lazy (opinion)

From this ^ decide this >>>>

### Three types of opinion Spectrum of allegations come back in

- (1) Pure opinion “I think Jones is ugly”
- (2) Context-dependent opinion “Jones behaved disgracefully” (*do not assert fact, it must be followed by a series of facts that could make it an opinion*)
- (3) Statement of fact “Jones took a bribe” (*could be opinion if it is a deduction from a series of facts*)
- (X) CLEAR FACT “Nigel Owens killed Richie McCaw”

BE CAREFUL: if someone is alleging someone said something, focus on whether or not the person said it, not whether what they have said it true.

- b. Dft. proves that the opinion is genuine (s10(1) honestly believed)
- i. Can be subjective, does not need to be sound or reasonable, can be obstinate, prejudice, insensitive
  - ii. Not honest if the dft. does not believe it, is there evidence suggesting contrary to their supposed opinion?
  - iii. May be so extreme the court can’t find it to be genuine
  - iv. **Dft. not the author?** S 10(2) they must still believe it was the genuine opinion of the person who wrote it/ had no reason to believe it was not the author’s opinion; cannot purport the opinion to be their own

### Preliminary question:

Is there subject matter **indicated with sufficient clarity** to justify comment being made? Was the comment actually made such as an honest, though prejudiced, man might make?

- c. Every comment should be based on a substratum of true facts, stated or indicated (otherwise it will be treated as an allegation of fact) **Kemsley**
- i. Facts provide a platform that the opinion can sit on
  - ii. Is the subject matter indicated with sufficient clarity to justify the comment being made **Kemsley**
  - iii. Facts could be expressly included OR
  - iv. Facts only need to be “indicated if well-known”

- This does not mean they have to be fully recited/ set out in great detail **Kemsley**
- v. Facts need not be set out if they have been “submitted to the public” (e.g. play, book, restaurant etc.) **Kemsley**
- if the facts on which the opinion is based are common knowledge, the reader will be able to determine if the opinion is justified without those facts being stated **Kemsley**
- vi. Need not prove the truth of the facts – can get some wrong, just cannot be materially different from the truth (s 11)

*Always state whether or not the facts set out would have been a sufficient platform for the opinion to be expressed as one. BUT could be circumstances where the issues is not that there is no factual substratum, but that the accusation was expressed as fact not opinion.*

- d. Public interest is not required (s9 seems like name change of common law fair comment, could PI carry through? Continuing relevance doubted **Shadbolt**)
- e. Malice does not defeat the defence (s10(3) – doesn’t matter if they were acting with malice as long as the opinion is genuine (**Horrocks** malice)
- f. No special rules about the ptf’s. motive (s 12)

#### **HONEST OPINION DEFENCE SECTIONS:**

Section 9 – ‘fair comment’ → honest opinion a defence

Section 10 – Opinion must be genuine

- (1) Must prove genuine opinion
- (2) The defence will fail where dft. is not the author of the matter
  - a. Where dft. is not the author, but author was an employee or agent they must show...
    - i. Didn’t purport to be dft’s. opinion AND
    - ii. Dft. believed it was the authors genuine opinion
  - b. Where dft. is not the author, and author was not dft’s. employee or agent they must show...
    - i. Did not purport to be the dft. or any employee/ agents opinion
    - ii. There was no reason to believe it was not the author’s genuine opinion

Section 10(3) – malice does not defeat the defence

Section 11 – need not prove the truth of all the facts – can get some wrong, if the opinion is genuine having regard to those facts that are proved to be true or not materially different from the truth

Section 12 – No special rules about the ptf’s. motives

#### Common law:

- Clearly comment, not fact, but based on true fact (in publication or indicated)
- Matter of public interest
- ‘fair’ as such an honest person might hold
- if it attacks ptf’s. motive it must be well-founded, warranted on facts
- defence is defeated if ptf. proves malice

#### Honest Opinion notes:

- Courts do not assess whether they agree with the opinion or not
  - o Designed to allow leeway for freedom of expression
- If the plaintiff attacks honesty, notice must be provided (s 39)

**If there is nothing on the facts this defence cannot be relied upon.**

### 3. Privilege Sections 16-19

(immunity granted as a matter of public policy; where the benefits of a free flow of particular communication, outweighs the damage to reputation)

- Focus of relationships and occasions; possibly protects false statements of fact

#### Absolute Privilege (s 13)

- a. Not defeated by malice - Even if someone publishes to the world that they are wrong and have the intention of hurting someone
  - a. (e.g. *Prebble v TVNZ* – even when the words of the House are inspired by improper motive, the Court cannot bring into Q what they have done

Two main types:

#### (1) Parliamentary Privilege

- a. Was the statement made by an MP in the House or outside
  - i. What is said outside is not protected *Weir*
- b. Repetition rule
  - i. MP says “I stand by what I said” – even though they were benefitting from it/ giving it oxygen, *repetition cannot be sued*
  - ii. “Did not resile” – the extra-Parl. statement must have followed the Parl. publication *Jennings*
  - iii. If they repeat the whole thing they are liable, but if they vaguely say something they are not
  - iv. You cannot bring evidence of what happened in Parl. to prove truth; the dft. can allege the occurrence of events/ saying of certain words in Parl. without any accompanying allegation of impropriety *Prebble*

#### (2) Judicial proceedings (court cases, lawyers etc.)

#### Statutory Qualified Privilege (here first!) >>>>> see handwritten page

- a. Contains protections for reports about particular events and occasions
  - i. Court hearings, Parl. public meetings
  - ii. Only if the story is fair and accurate and made in good faith
- b. Defeated by malice (section 19)???
  - i. s19(2) abolishes malice, but s19(1) replaces it with stat. test *designed to do the same thing*
  - ii. Reflects/ codifies *Horrocks* even though language differs
- c. See conditions below!

#### QUALIFIED PRIVILEGE SECTIONS

##### Section 16 (things protected by QP)

- (1) Subject to prohibited law s 17, and malice s 19 all - Part 1: most fair and accurate reports of absolutely privilege, are protected
- (2) Subject to s17 & 19, the publications specified in Part 2: Mostly fair and accurate reports of various official events and publications

Conditions:

Section 17 – unlawfulness always defeats QP



Section 18 – (only applies to Part 2): must be a matter of public interest in any (any not all) place in which publication occurs, fails if ptf. seeks reasonable right of reply and dft. unreasonably refused

Section 19 – (2) Malice does not defeat QP BUT where the dft. is (1) “predominately motivated by ill will or took improper advantage of the occasion” the defence will fail?

### Qualified Privilege common law

*Not absolute in nature and can be challenged*

- (1) **Was it an occasion of privilege?** *This requires (x) to establish that they had a social, moral or legal duty to provides info to a group of others who had a reciprocal interest/ duty in receiving the info OR that they all had a shared interest. Only need to satisfy one of the below >>>>*

- a. **Duty to communicate information**, believed to be true to a person who had a material interest in receiving the information *Watt*
  - i. do the people have a ‘reciprocal social, moral and legal interest/ duty to convey or receive information???
- b. **Interest** in the speaker to be protected by communicating the info to a person that has a duty to protect the interest *Watt*
  - i. E.g. neighbour’s meth lad, interest in neighbourhood being free from crime, police have a duty to prosecute on account of this crime
- c. **Common interest or duty** in giving and receiving communication in respect of the subject-matter *Watt*

→ Ask was there “a duty recognised by English people of ordinary intelligence and moral principles, but at the same time not a duty enforceable by legal proceedings” *Watt*

→ What would the “great mass of right-minded men” think it was their obligation to do? *Watt*

*This is a flexible test, what does your conscience say?*

### (2) **Have they lost the privilege?**

- a. **Excess of privilege** *Watt*
  - i. Telling people beyond those who have a duty/interest to receive the info (e.g. not in PI to know criminal allegations even if discussed through news media *Watt*)
  - ii. Including irrelevant facts not necessary for the fulfilment of particular duty or protection of interest upon which privilege is found *Horrocks*
- b. **Desire to injure (malice) proven by:** *Horrocks* s 19 codifies this

*Touchstone – whether there is a positive belief in the truth even if irrationally arrived at (if so, doesn’t matter how belief was reached)*

- i. Lack of belief in truth OR
- ii. Recklessly indifferent to the truth (not believing/caring) OR
- iii. Misuse of the occasion for improper purpose

→ Where the dfts. desire to comply with relevant duties/ protect interests plays no significant part in his motives for publishing what he believes to be true → ulterior motive must be the dominant one

**NOTE:** *Lange-style malice (resp. test) only for public/ wide audiences – sitch’s like Watt – Horrocks.*

- c. What is not **malice**? **Horrocks**
  - i. Carelessness, impulsiveness, irrationality, prejudice in arriving at positive belief
  - ii. Simple personal animosity
  - iii. Extreme language, usually not enough by itself
  - iv. Refusal to apologise? Not an indicator of Malice, just shows you believe it to be true – positive belief, no matter how illogical, malice is not available **Lange**
  - v. Failure to check may only be negligent, not reckless
- d. How to prove? (high threshold, due to subjectivity)
  - i. Extrinsic – statements/ conduct of dft. somewhere else
  - ii. Intrinsic – inclusion of hurtful material that is not necessary for the privilege

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**Extension for political comment:** *publication to a wide audience, redefines malice so political discussion can be protected under QP...*

In the UK there is a general public interest defence - media must show that they've earned it by being resp.

**Reynolds:** Irish PM **Content is one of public interest: You must prove that you behaved responsibly.**

- Responsible Journalism – Anything in the public interest (*Reynolds*)
  - o UK - If journalism is responsible, a qualified privilege defence is available
    - Must have behaved/acted resp. in making the statement
    - Journalism responsible? Reputable sources? Check the records? (Nicholls)

*Courts should be slow to conclude that a publication was not in the public interest and therefore the public had no right to know, especially when the information is in the field of political discussion*

Lord Nicholls 10 factors' (to prove responsible behaviour and earn privilege):

1. Seriousness of allegation (more serious, public will be less informed if false)
2. Nature of the info, extent to which the subject matter is of public concern
3. Source of the info
4. Steps taken to verify info
5. Status of the info (subject something already investigated?)
6. Urgency of the matter – news is a perishable commodity
7. Comment sought from ptf?
8. Article contains gist of ptf's. side of the story?
9. Tone of the article
10. Circumstances of the publication? (timing etc.)

*Note: When a source is not disclosed – harder to prove that they were acting responsibly, but should not be fatal (confidential sources)*

**Jameel: 9/11**

- a. Lord Nicholls 10 factors should not be applied as hurdles (lower threshold)
- b. Emphasis on free speech – if overall the journalism was responsible, defence will be given
- c. More serious the allegation the more impt it is, therefore public interest increases
- d. Ask whether it was necessary to include a defamatory statement

**Templeton:**

- Just because (x) is a public figure, does not mean there is an automatic social/moral obligation/duty to publish whatever defamatory info there may be about (y)

**Truth v Holloway:**

- Just because the general topic of a published defamatory statement about an individual may be a matter of public interest, does not mean (x) can claim privilege defence

## Lange:

- Privilege for political comments only: extension of the CL, non-private actions/ qual of elected officials
- Based on the idea that speech directly concerning the functioning of representative govt. is so imp. that the law should not discourage it by allowing politicians to sue for defamation

### First CA (1998) judgment – 5 point criteria for QP (scope):

#### Is it an occasion of privilege? **See written page**

1. Privilege available to statements published generally
  - i. Argument that it should be extended to those who exercise considerable influence in society
2. Statements that directly concern functioning of representative govt. incl. statements about the performance of elected officials
  - i. Public have a particular interest here
3. Proper interest/ occasion of privilege does exist when talking about MPs (current, former, future) actions/ qualities that make them un/suitable to be representatives
4. Has to be a matter of public interest, rather than private concern
5. Width of public interest justifies the extent of the publication

**ALWAYS ADD FOR COMPARISON**  
– One-line reference to alleged misconduct of a grave nature on the part of the Parliamentarian in an article in motoring magazine is not QP.

#### 6<sup>th</sup> point added in the second CA judgment (2000)

6. Must be published on a qualifying occasion >>>>>>>
  - i. Genuine, bona fide political discussion

#### 1. Has the privilege been lost?

- a. "Failure to give such **responsible consideration** to the truth or falsity of the statement as the jury considers should have been given in all the circumstances" – lower threshold than in *Horrocks*
  - i. Other side
  - ii. Biased or unreliable sources?
  - iii. Overhyped story?
- b. Considerations as to how much responsibility the publisher has?
  - i. Seriousness of the allegation
  - ii. How widely was it being published?

*Serious and widespread – reasonable care must be shown, if less so, may only require that you were not careless.*
- c. New malice: *Lange* has redefined s 19 malice (s 19 has been designed to reflect the common law concept of malice, but carelessness is not malice – can point to recklessness?) Defeated by malice.
  1. Objective test about the ethics of gathering/ publishing material
- d. Scope – non private actions and qualities of elected officials
- e. Occasion – subject matter, circumstance and context – genuine political discussion
- f. Burden of proof – dft.
- g. Who decides – Judge
- h. If source not disclosed – ptf. will want source in order to prove malice (source protection may need to be relaxed)

**2<sup>nd</sup> Court of Appeal decision 2000:**

- Did not change the scope – the dft. does not need to show they have behaved responsibly
- Point (3), changes to ‘may’ exist, not ‘does’ exist
- Privilege will be lost if there is ill will or lack of responsible consideration to the allegations as warranted in the circumstances (Section 19)
- Published to a wide audience - the motives of the publishers and whether they had a genuine belief in truth or statement will warrant close scrutiny
- Publisher unable/ unwilling to disclose any responsible basis for asserting genuine belief in truth – jury could be entitled to draw the inference that no such belief existed
- Publisher who is reckless or indifferent to the truth of what is published cannot assert a genuine belief that it was true
- Carelessness not sufficient in itself, but can support assertion by the ptf. of a lack of belief/ recklessness

REYNOLDS	LANGE
Behave responsibly (Nicholls 10 factors’)	Media do not need to show they have behaved responsibly
Dft. proves its conduct is responsible to get privilege	Ptf. proves dft. conduct irresponsible to defeat privilege
Anything in the public interest	Only concern political content You can only get privilege if you are talking about political figures in the name of public interest
“act responsibly”	5 (+6) criteria
	Similar to Reynolds in Q of whether dft, acted with reasonable consideration
	Does not cover people in private sphere

**Why does NZ have a different test to the UK?**

2. NZ judges said *Reynolds* was unclear so journalist would be unwilling to use it as a defence due to its lack of clarity
3. NZ journalism – is it so different that justifies a different set of rules?
  - a. NZ has the Official Info Act? Each NZer has a right to know about the govt. which differs to the UK?
  - b. BORA?
  - c. Different electoral system?
  - d. UK has more of an unethical media? NZ journalists need not prove they are responsible because they generally are

**Section 19:**

- Two different interpretations... one for something **published to the whole world** (if its about politics, malice is about being dishonest and unethical) ... and one **to something published individually** (if its in the public interest... its about whether there was a reciprocal duty/interest)

**Other issues:**

**(1) Public interest QP for statements not about politicians in NZ??**

- e. Might we adopt *Reynolds* rules? Or extend the *Lange* rules? Or first principles – duty/ interest.
- f. Emerging - judges have said that they are prepared to find a QP defence in matters of simply NZ public interest (HC only – usually does not succeed)
- g. *Hagaman* case – public interest speech about govt. or private interest speech about Earl Hagaman?

(2) Is it 'responsible' to simply report an exchange of allegations without verifying their truth?? Neutral reporting? (two politicians making allegations about each other – should you check the sources???) Sometimes just responsible to publish as is?

(3) Consent (you do not need to prove...)

- a. Harm – the law presumes their reputation has been hurt
- b. Falsity – if all elements are satisfied
- c. Fault or intention – strict liability
- d. If you knew you were being recorded for e.g. for TV

(4) Not a serious defamation

- a. Not worth it to have a defamation trial
  - i. Wasn't doing that much harm even though technically a defamation – low level defamation or to very few people

**INJUNCTION THRESHOLD:** Injunction will not be granted unless there is no possibility of a legal defence and it is very clear someone will be defamed (*Auckland Area Health Board*)

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**Suggestions for safer publications:**

- (1) Check the facts. Ask what evidence it is based on (potentially include this evidence)
- (2) Eliminate false comments
- (3) Use "I think/ I feel"
- (4) Lower the levels of allegations
- (5) Remove names (speak more generally about people e.g. ALL TV HOSTS)
- (6) Use humour to make it easier to argue HO