Case Commentaries

Freedom of Speech And Defamation: Developments in The Common Law World

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This comment traces the relationship between freedom of speech and the common law of defamation in India, Australia, South Africa, Canada, the United Kingdom and New Zealand. A central theme is the treatment of the iconic decision of the United States Supreme Court in New York Times v Sullivan. This comment shows that while the use of foreign precedent by judges in common law countries is widespread, the use of such precedent is, in the main, not uncritical. The reaction of common law courts to New York Times *signals that these courts will usually reassess and exercise their own judgment in relation to even the most revered aspects of the American constitutional tradition.*

I INTRODUCTION

Over the last decade, the relationship between freedom of speech and the common law of defamation has preoccupied common law courts around the world; most recently the House of Lords in *Reynolds v Times Newspapers Ltd*[1] and the New Zealand Court of Appeal in *Lange v Atkinson*.[2] In the United States, this issue was dealt with long ago in the Supreme Court's landmark decision in *New York Times v Sullivan*.[3] In this comment, we examine the influence of *New York Times* in India, Australia, South Africa, Canada, the United Kingdom and New Zealand.

In *New York Times*, the United States Supreme Court held that the First Amendment's protection of freedom of speech required a 'federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made

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1 [1999] 4 All ER 609 ('*Reynolds*').

2 Unreported, Court of Appeal of New Zealand, Richardson P, Henry, Keith, Blanchard and Tipping JJ, 21 June 2000.

3 376 US 254 (1964) ('*New York Times*'). *New York Times* arose from a libel action brought against the New York Times by an Alabama official. The complaint related to an advertisement carried by the newspaper that was critical of the actions of Alabama authorities during civil rights protests. After a record verdict against the New York Times was upheld in the Alabama courts, the case was heard by the United States Supreme Court. For an historical account of the case, see Anthony Lewis, *Make No Law* (1991).

with "actual malice" ... or with reckless disregard of whether it was false or not'.[4] The Supreme Court considered that a requirement that a defendant prove the truth of otherwise defamatory statements would sometimes deter speakers (most importantly journalists and publishers) from publishing statements that they thought were true, but which they were not sure they could prove to be true.

The court therefore formulated a rule that protected the publication of *false* defamatory statements, even though it acknowledged that the rule would cause some harm by allowing reputations to be damaged by such statements. In the court's view, it was necessary to tolerate these evils in order to avoid the 'chilling effect'[5] of a requirement to prove truth and thus to protect freedom of speech.

Given the iconic status of *New York Times* within American free speech law and American constitutional law generally,[6] it is perhaps not surprising that it has been an important reference point in the deliberations in other countries of the relationship between free speech and defamation. What is notable, however, is the degree to which courts in the common law world have forged their own paths. Of the cases we examine here, it is striking that, with the possible exception of a decision of the Supreme Court of India, all have modified or entirely rejected the *New York Times* rule.

We examine these decisions in three groups. In Part II, we turn to India, Australia and South Africa; countries where courts have been at least somewhat receptive to the *New York Times* rule. We then turn, in Part III to Canada and the United Kingdom, where courts have been rather more sceptical about the rule before concluding, in Part IV, with a discussion of a recent decision of the New Zealand Court of Appeal. Two themes emerge from these decisions. First, the courts in these countries have been mindful of criticisms of *New York Times* by American scholars. In brief, these critics of *New York Times* argue that the shift in focus from the truth of the allegation to the propriety of the defendant's conduct, and the consequent complexity and expense of litigation under the rule, creates its own 'chilling effect' on political speech.[7] Some foreign modifications of the *New York Times* rule can be seen as technical alterations designed to address these concerns. In the case of New Zealand and the United Kingdom, moreover, this has been accompanied by a concern to adapt the local law to local circumstances, especially to the nature of local media.

4 376 US 254 (1964), 279–80.

5 Ibid 279: 'A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable "self-censorship" ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so ... The rule thus dampens the vigor and limits the variety of public debate.'

6 See Harry Kalven, Jr, 'The New York Times Case: A Note on "The Central Meaning of the First Amendment"' [1964] *Supreme Court Review* 191; Anthony Lewis, '*New York Times v Sullivan* Reconsidered: Time to Return to "The Central Meaning of the First Amendment"' (1983) 83 *Columbia Law Review* 603: 'The decision had from the first the ring of a great occasion in the law, sensed not only in the result but in the bold sweep of the court's opinion'. That is not to deny that the decision has also been much criticised. See, Lewis, ibid 603; Nadine Strossen, 'A Defence of the Aspirations * But not the Achievements * of the US Rules Limiting Defamation Actions By Public Officials or Public Figures' (1986) 15 *Melbourne University Law Review* 419.

7 See Lewis, above n 6; Strossen, above n 7.

More fundamentally, however, the failure in other countries to embrace fully the *New York Times* rule reflects scepticism of the philosophy underlying that decision. The central conclusion in *New York Times* is that some damage to reputation is necessary in order to protect freedom of speech. By contrast, in almost all cases studied here, we see rather more emphasis given to the protection of reputation (and in some cases privacy), and also some concern that too much tolerance of false information might undermine the quality of public debate.

II INDIA, AUSTRALIA AND SOUTH AFRICA: A (COMPARATIVELY) WARM RECEPTION

We begin our study in India, Australia and South Africa where courts have, to varying degrees, been sympathetic to *New York Times*.

India

India is perhaps an exceptional case in this study because there the *New York Times* rule has received a particularly enthusiastic reception. The rule was considered in the 1995 case of *Rajagopal v State of Tamil Nadu*,[8] not as a possible defence to defamation, but in the course of determining exceptions to the right to privacy conferred by the Indian Constitution.[9] Nonetheless, *New York Times* was clearly influential. A two member bench of the Indian Supreme Court carved out a number of exceptions to privacy that have regard to the need for open public discussion. The Indian Supreme Court's judgment shares much of the free speech philosophy that motivated *New York Times*, holding that:

> Our system of government demands — as do the systems of Government of the United States of America and United Kingdom — constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government.[10]

For this reason, although the Indian Supreme Court acknowledged that the protection of freedom of speech under its Constitution is not identical to 'the sweep of the First Amendment to the United States Constitution',[11] it

8 1995 AIR (SC) 264 ('*Rajagopal*').

9 Ibid 276–7. This case arose out of a petition by the publishers of a weekly magazine, who proposed to publish the autobiography of a convicted murderer, to prevent authorities in the Indian state of Tamil Nadu from taking any action with respect to the publication. The Supreme Court found that the constitutional right to privacy (implicit in the right to life and liberty guaranteed by Article 21 of the Indian Constitution) protected personal information from publication without consent of the person concerned, unless that person has thrust himself into controversy or the information is available in public records. The Court held that, although the authorities could not prevent the publication on this basis, the right to author's right to privacy may expose the publishers to subsequent action.

10 Ibid 275.

11 Ibid.

nonetheless adopted an exception to the right to privacy that is remarkably similar to the *New York Times* rule.[12] The Court concluded that the right to privacy did not allow for a defamation action in respect of statements made with respect to the discharge of public duties by public officials, even if the statements are false, unless the official could show that the publication was made 'with reckless disregard for the truth'.[13]

Australia

The response to *New York Times* in the other countries considered here has been more complex. In Australia, the High Court has been relatively enthusiastic about the rule, but has also adopted significant modifications.

Attention to *New York Times* arose in Australia shortly after the implied constitutional freedom of political communication was recognised by the High Court in 1992.[14] The case, *Theophanous v Herald & Weekly Times Ltd*,[15] was an obvious vehicle for consideration of *New York Times* as it concerned a member of the Federal Parliament who took action against a newspaper in response to published criticism regarding the performance of his public duties. Given the fame of the *New York Times* decision, it is not surprising that the defendant publisher argued for the adoption of a similar rule.

The High Court in its 1994 decision in *Theophanous* substantially accepted the defendant's argument,[16] fashioning a new constitutional defence to override the common law of defamation. In doing so, the court owes a clear intellectual debt to *New York Times*. In particular, the Court accepted that defamation law can have a 'chilling effect' on political communication, and also that the existing defences to defamation were inadequate to overcome this effect.[17] However, the constitutional defence adopted by the High Court made three important changes to the *New York Times* rule: it limited the defence so that it was available only to public officials and candidates for public office; it modified the actual malice standard to require that the publication be 'reasonable in the circumstances'; and it reversed the onus of proof.[18]

[12] For the application in the United States of the *New York Times* rule as a defence to a tortious action for breach of privacy, see *Time Inc v Hill*, 385 US 374 (1967).

[13] *Rajagopal* 1995 AIR (SC) 264, 277.

[14] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. See generally George Williams, *Human Rights under the Australian Constitution* (1999) 165–93. After these foundational decisions, the High Court heard only one freedom of political communication case (*Cunliffe v Commonwealth* (1994) 182 CLR 272) before hearing *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*'), and its companion case, *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. Judgment in *Cunliffe* was delivered at the same time as *Theophanous* and *Stephens*.

[15] (1994) 182 CLR 104.

[16] Mason CJ, Toohey and Gaudron JJ, Deane J concurring; Brennan, Dawson and McHugh JJ dissenting.

[17] *Theophanous* (1994) 182 CLR 104, 131 (Mason CJ, Toohey and Gaudron JJ), 182 (Deane J).

[18] Ibid 137. So, under the new rule, the defence was available in respect of comment about a public official or candidate for public office where the *defendant* could establish that: (a) it was unaware of the falsity of the material published; (b) it did not publish the material recklessly, that is, not caring whether the material was true or false; and
(c) the publication was reasonable in the circumstances.

These alterations show the two kinds of divergence from the *New York Times* rule mentioned above. First, the High Court limited the operation of the rule to the political context.[19] This limitation might be expected given that the Australian freedom protects only political communication rather than speech or expression generally, but it is also a response to wide criticism in the United States of the extension of the 'public figure' test beyond the political context. Further, despite some affinity with the philosophy underlying *New York Times*,[20] the High Court showed some discomfort with the transcendent value placed on freedom of speech under the First Amendment. The reversal of the onus of proof and the addition of the reasonableness requirement reflect an assessment that the *New York Times* rule 'sets too little store by the reputation of the person defamed'.[21] It appeared from *Theophanous*, therefore, that reputation is more highly valued in comparison to freedom of expression in Australia than in the United States.

The story of *New York Times'* influence in Australia has since become complicated by the reformulation of the *Theophanous* doctrine in 1997 in *Lange v Australian Broadcasting Corporation*.[22] In Lange, the High Court held that the Constitution did not render rules of the common law invalid as such,[23] but rather that the common law should conform with constitutional requirements such as the implied freedom of political communication.[24] For this reason, the court rejected the idea that there was a *constitutional* defence to a defamation action (as was held in *Theophanous*), and instead extended the common law of qualified privilege to accord with constitutional values

19 Ibid 134 (Mason CJ, Toohey and Gaudron JJ): 'We should indicate our preliminary view that these extensions [of the public figure test under *New York Times*] other than the extension to cover candidates for public office, should not form part of our law.' Although he indicated his support for the conclusion reached by these judges, Deane J's preferred approach, at 185–8, was to abandon any limitation on the availability of the defence to a publisher for statements about 'the official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office', thus responding to the arguments that rule's focus on the defendant's conduct itself created a chilling effect.

20 See Adrienne Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219.

21 *Theophanous* (1994) 182 CLR 104, 134.

22 (1997) 189 CLR 520 ('*Lange*'). See also *McGinty v Western Australia* (1996) 186 CLR 140; George Williams, 'Sounding the Core of Representative Democracy: Implied Rights and Electoral Reform' (1996) 20 *Melbourne University Law Review* 848.

23 *Lange* (1997) 189 CLR 520, 560. See Stone above n 20; Leslie Zines, *The Common Law in Australia: Its Nature and Constitutional Significance* (1999).

24 *Lange* (1997) 189 CLR 520, 566: 'Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives ... The common law and the requirements of the Constitution cannot be at odds. The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law's protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution.'

represented by the freedom of political communication.[25] The court stated that the extended defence could not be relied upon:

> unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.[26]

Despite the differences between the interpretive approaches of *Theophanous* and *Lange*, both decisions respond to *New York Times* in similar ways. The new common law rule laid down in *Lange* clearly shows the influence of *New York Times*, by giving greater protection to the discussion of public affairs than had previously been given by the common law of defamation. Similarly, like the *Theophanous* defence it replaced, it is somewhat more protective of reputation than the *New York Times* rule, preferring a requirement of proof of the reasonableness of the defendant's conduct to an actual malice standard.

South Africa

In South Africa, the Australian rule, as well as *New York Times,* has been influential in the interpretation of South African constitutional guarantees of freedom of expression.[27]

After some conflicting early decisions by single judges in lower courts,[28] an

[25] Ibid 571. In its traditional form, the defence of qualified privilege had not protected publications in newspapers and broadcasts. Under the new approach, however, the Court recognised that 'each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia' and extended the defence of qualified privilege to publications and broadcasts of such material. This extension of the common law defence is clearly inspired by the freedom of political communication. 'Because the Constitution requires "the people" to be able to communicate with each other with respect to matters that could affect their choice in federal elections or constitutional referenda or that could throw light on the performance of ministers of State and the conduct of the executive branch of government, the common law rules concerning privileged communications, as understood before the decision in *Theophanous* . . . failed to meet that requirement.'

[26] Ibid 574.

[27] This is now reflected in s 16 of the 1997 Constitution. Attention to *New York Times* and subsequent developments in other countries is not at all surprising in the South African context. Section 39(1) of the 1997 Constitution states that: 'When interpreting the Bill of Rights, a court, tribunal or forum . . . (b) must consider international law; and (c) may consider foreign law'. See generally Hoyt Webb, 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 205.

[28] *Gardener v Whitaker* 1995 (2) SA 672, 687 (Froneman J) (the common law of defamation 'may be at odds with the Constitution'); *Bogoshi v National Media Ltd* 1996 (3) SA 78 (finding that the guarantee of freedom of expression did not require any modification of the law of defamation because the common law had already struck an appropriate balance between freedom of speech and reputation.); *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588, 613, 617 (rejecting the *New York Times* 'actual malice' test as 'inappropriate and undesirable for our law' and adopting the *Theophanous* test but not the shift in the onus of proof to the defendant); *Buthelezi v South African Broadcasting Commission* 1997 (12) BCLR 1733 (rejecting the placement of the onus of proof on the plaintiff).

authoritative consideration of the relationship between the constitutionally guaranteed freedom of expression and the common law of defamation was provided in 1999 by the South African Supreme Court of Appeal in *National Media Ltd v Bogoshi*.[29] The Supreme Court of Appeal examined the Australian High Court's judgment in *Lange* and the English Court of Appeal's 1998 judgment in *Reynolds* (discussed below) in concluding that appropriate protection of freedom of expression required modification of the common law of defamation.[30]

In *Bogoshi*, the Supreme Court of Appeal modified the common law of defamation in the light of the constitutionally guaranteed freedom of expression, but was not prepared to accept the full *New York Times* test. Closely following the Australian solution, the court held that 'the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time'.[31] Moreover, the Court accepted the placement of the onus of proof on the defendant.[32]

This modification of the *New York Times* rule reflects discomfort with the American philosophy. In particular, rather than celebrating the encouragement of robust debate even to the point of sanctioning the publication of falsehoods, the Supreme Court of Appeal was sceptical of the value of such a debate, stating: 'Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.'[33]

Thus, *New York Times* has been influential in India, Australia and South Africa, albeit that the rule has been modified in some significant respects in Australia and South Africa.

29 1999 (1) BCLR 1 (*Bogoshi*). The plaintiff in this case brought an action in defamation against the publisher, editor, distributor and printer of the *City Press* newspaper. The defendants sought to amend their plea to include a defence of good faith publication in part based the constitutional guarantee of freedom of expression. The Supreme Court of Appeal allowed the application for amendment and in, the course of judgement, gave considerable attention to the *New York Times* issue. (The South African Supreme Court of Appeal is the highest court of appeal in all but constitutional matters. The South Africa Constitutional Court has yet to give authoritative guidance on this issue, although it has alluded to the need to do so: *Gardener v Whitaker* 1996 (4) SA 337, 343–4 (Kentridge AJ); *Du Plessis v De Klerk* 1996 (3) SA 850, 883–5 (Kentridge AJ)).

30 *Bogoshi* 1999 (1) BCLR 1, 38–42. The Supreme Court of Appeal examined the revised common law in light of the guarantee of freedom of expression in the South African Bill of Rights. It held, at 57, that the common law 'achieves a proper balance between the right to protect one's reputation and the freedom of the press, viewing these interests as constitutional values'.

31 Ibid 42. Although its finding was not limited to the political context, the court, at 42–3, gave special emphasis to free expression in that context: 'In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion ... and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information.'

32 Ibid 58–60.

33 Ibid 43.

III CANADA AND THE UNITED KINGDOM: A MORE SCEPTICAL APPROACH

We now turn our attention to Canada and the United Kingdom, where the reaction to the *New York Times* rule has been more sceptical.

Canada

Reluctance to embrace the *New York Times* principle is particularly striking in Canada. Given its cultural and geographical closeness to the United States, and the express protection of 'freedom of expression' found in s 2(b) of the *Canadian Charter of Rights and Freedoms*, it might be thought that Canada is the country most likely to adopt the *New York Times* rule. However, the much-observed difference between Canada and the United States in matters of free speech is evident again in the Canadian reaction to *New York Times*.[34]

The issue came before the Canadian Supreme Court in the 1995 case of *Hill v Church of Scientology*.[35] Like the Indian decision of Rajagopal, Hill presented an atypical context for the consideration of *New York Times*. Rather than an elected official suing a media organisation for statements about his or her public role, the case before the Canadian Supreme Court concerned two lawyers — a prosecutor suing an opposing counsel and his client (the Church of Scientology) for allegations, subsequently proved to be groundless, relating to the plaintiff's conduct during an investigation of the Church of Scientology.

It was not open to the defendants to argue that their allegations were directly protected by s 2(b) of the Canadian Charter because (like the Australian freedom of political communication) the Charter does not, as a general rule, apply to the common law.[36] Instead, they argued that, in light of the freedom of expression provided for by the Charter, the common law should be developed to reach a result similar to that reached on constitutional grounds in *New York Times*.[37] In particular, the defendants here argued that the Charter required either the adoption of the *New York Times* 'actual malice' standard as a rule of common law, or the extension of the law of qualified privilege to afford a defence in the particular circumstances at issue in the case.[38]

[34] See Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (1994).

[35] [1995] 2 SCR 1130 (La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ; L'Heureux-Dube J concurring) ('*Hill*').

[36] *Canadian Charter of Rights and Freedoms* 1982, s 32. The court in *Hill* [1995] 2 SCR 1130, 1159 provides an exception 'in so far as the common law is the basis of some governmental action which ... infringes a guaranteed right or freedom'. No such government action was present in this case. The court rejected the argument that the plaintiff's action, as the action of an officer of the Crown, constituted government action. He brought the action, the court held, in his own capacity in response to the impugning of his, rather than the government's, reputation.

[37] The Supreme Court's view is that the common law ought to be interpreted consistently with Charter values. See *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573, 603.

[38] *Hill* [1995] 2 SCR 1130, 1158–9.

The Canadian Supreme Court declined to adopt the *New York Times* actual malice standard as a rule of the Canadian common law of defamation and, indeed, declined to undertake much revision of the Canadian common law. However, although the Canadian Supreme Court is even more resistant to the *New York Times* and its underlying philosophy than the courts discussed above, it scepticism stems from the same source. First, the Canadian Supreme Court was influenced by the arguments that the *New York Times* rule tended to defeat its own purpose by exacerbating the chilling effect of defamation law.[39] Further, like the South African Supreme Court of Appeal, the Supreme Court of Canada challenged the rationale underlying *New York Times*. For this reason, the Supreme Court did not merely reject aspects of the *New York Times* rule which have proved self-defeating, while accepting its rationale that political discussion needs to be protected from the chilling effect of a truth requirement (as in Australia).[40] Rather, the Supreme Court focussed on the resulting social cost of the deprecation of truth in public discourse to which it is said the rule gives rise,[41] and consequently seemed not to be troubled by any 'chilling effect' that defamation law may have on public debate. Writing for the court, Cory J stated :

> [D]efamatory statements are very tenuously related to the core values which underlie s 2 (b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. *Nor can it ever be said that they lead to healthy participation in the affairs of the community.* Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society.[42]

Thus, rather than expressing confidence in the capacity of a *New York Times* rule to improve discussion of public affairs, the Court was concerned with the adverse effects on participation in public affairs produced by a strong political expression defence deterring 'sensitive and honourable men from seeking public pos-itions of trust and responsibility'.[43] The Canadian Supreme Court concluded from this that the current truth requirement of the law of defamation gave appropriate protection to both reputation and speech.[44] Justice Cory stated:

[39] Ibid 1182–3.

[40] Jamie Cameron, 'The Past, Present, and Future of Expressive Freedom under the Charter' (1997) 35 *Osgoode Hall Law Journal* 1, 39.

[41] *Hill*, above n 38, 1182–5. See *Dun & Bradstreet, Inc v Greenmoss Builders, Inc,* 472 US 749, 767–9 (1985) (White J; Burger CJ concurring): 'The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts.'

[42] *Hill* [1995] 2 SCR 1130, 1174 (emphasis added).

[43] C Gately, *Gatley on Libel and Slander in a Civil Action* (4th ed, 1953) quoted in *Hill* [1995] 2 SCR 1130, 1174.

[44] In the end then, the Canadian Supreme Court took only very limited steps, extending the common law defence to the report of the content of court documents not filed until shortly after the report of their contents: *Hill* [1995] 2 SCR 1130, 1192–3.

> I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish.[45]

Finally, the Canadian Court also shared the concern seen in the Australian and South African courts for the protection of reputation. Thus, at the same time as it rejected the American understanding of the value of robust debate, the court placed a correspondingly higher value on the protection of reputation. Indeed, it considered the protection of reputation to be closely linked to Charter values such as the 'innate worthiness and dignity of the individual'[46] and the right to privacy.[47]

United Kingdom

The first important British case to consider the *New York Times* rule was *Derbyshire County Council v Times Newspapers Ltd*,[48] in which the English Court of Appeal (in 1992),[49] and subsequently the House of Lords (in 1993), held that free speech considerations precluded a local government authority suing at common law for libel in respect of its governmental and administrative functions. The House of Lords' judgment shows that the connection between freedom of speech and democracy, so central to *New York Times*, is also recognised by the English common law. Their Lordships stated:

> It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.[50]

The *New York Times* rule then came before the House of Lords in 1998 in *Reynolds*, when a defamation action was brought by a former Irish Prime Minister against the *Sunday Times* newspaper. Despite the sensitivity to free speech concerns evident in cases such as *Derbyshire*, English courts previously had not adopted a public figure defence in the common law of libel.[51] Although it was not argued that the House of Lords should adopt a *New York Times*-like defence, it was put that the common law should recognise a new

45 Ibid 1187.

46 Ibid 1175: '[T]he good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights.'

47 This was accorded constitutional protection in *R v Dyment* [1988] 2 SCR 417, 427. See *Hill* [1995] 2 SCR 1130, 1179

48 [1992] 1 QB 770 (Court of Appeal); [1993] AC 534 (House of Lords) ('*Derbyshire*'). See Eric Barendt, 'Libel and Freedom of Speech in English Law' [1993] *Public Law* 449.

49 Although the Court of Appeal's decision was principally influenced by the European Convention on Human Rights, *New York Times* was regarded as a persuasive statement of basic free speech principle that accorded with the approach of the European Court of Human Rights: *Derbyshire* [1992] 1 QB 770, 831 (Butler-Sloss LJ), 826 (Ralph Gibson LJ).

50 *Derbyshire* [1993] AC 534, 547.

51 Barendt, above n 48, 455. See also Lord Lester of Herne Hill QC, 'Defaming Politicians and Public Officials' [1995] *Public Law* 1, 5–6; Kevin Williams, '"Only Flattery is Safe": *Political Speech and the Defamation Act* 1996' (1997) 60 *Modern Law Review* 388, 392–3.

'generic privilege' that would protect political discussion.[52] Under the suggested new rule, a libellous statement of fact made in the course of political discussion would not attract liability if published in good faith; a submission clearly influenced by the *New York Times* rule.[53]

However, the 'generic privilege' was rejected by the House of Lords, which also resisted the more limited concessions to free speech made by the Court of Appeal.[54] Instead, the House of Lords preserved the classical test of duty and interest[55] but emphasised that this test could be sensitive to free speech concerns by taking into account matters such as the nature of the publication, including its importance for public discussion.[56]

Once again, the conservative approach to the protection of political speech reflects the kind of concerns seen in other courts discussed above. Like the South African Supreme Court of Appeal and the Supreme Court of Canada, some members of the House of Lords were sceptical of the value of protecting false statements of fact.[57] Indeed, although there was some recognition of the chilling effect of libel action,[58] Lord Hope of Craighead regarded the requirements of the existing law of defamation as an important disciplining factor that appropriately constrained the media.[59] In addition, at other points there is much emphasis on the competing value in the protection of reputation.[60]

52 By 'generic privilege' it was meant a rule that would apply to a pre-determined category of cases. *Reynolds* [1994] 4 All ER 609, 621 (Lord Nicholls), 630 (Lord Steyn). This is opposed to the Court of Appeal's approach of preserving the existing common law rule but recognising that the requirements of qualified privilege should be 'rather more readily held to be satisfied' where the media has published criticism of political figures. This 'circumstantial test' would be applied in determining a claim for qualified privilege, under which a court would consider, among other matters, the nature, status and source of the material published and the circumstances of the publication. *Reynolds v Times Newspapers Ltd* [1998] 3 All ER 961. 'Political discussion', it seems, was meant to refer to discussion of matters relating to the public conduct of those elected to positions of responsibility in government. See *Reynolds* [1999] 4 All ER 609, 621, 630.

53 See *Reynolds* [1999] 4 All ER 609, 621 (Lord Nicholls).

54 The Court of Appeal had formulated a new 'circumstantial test'. See above n 52. In the House of Lords, this test was explicitly rejected by Lords Nicholls, Steyn, Hope and Hobhouse, the latter two expressing agreement with Lord Nicholls: ibid 625–6, 639, 654–5, 658–9. Their Lordships' concern was that the circumstances nominated by the Court of Appeal as relevant to the availability of the defence of qualified privilege might take on a greater status as elements of a rule that must be satisfied in each case. By contrast, Lord Cooke, who also expressed general agreement with Lord Nicholls, accepted the circumstantial test, but with the proviso that 'the circumstantial test should not be treated as something apart from the [traditional common law] duty-interest test.' Ibid 647.

55 See *Toogood v Spyring* (1834) 1 CM & R 181, 189; 149 ER 1044, 1049–50.

56 *Reynolds* [1999] 4 All ER 609, 625–6 (Lord Nicholls), 633 (Lord Steyn).

57 'There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation.' Ibid 657 (Lord Hobhouse).

58 Ibid 654.

59 The protection of the media 'carries with it certain penalties . . . One of these is the discipline of having to justify each claim to the benefit of qualified privilege should the statements of fact which are made by the media turn out to be defamatory. The description of this discipline as having a "chilling" effect on free speech, as if this in itself shows that something is wrong with it, is too simple. Of course, it does "chill" or inhibit the freedom of the communicator. But there are situations in which this is a necessary protection for the individual.' Ibid.

60 Ibid 622 (Lord Nicholls): 'Reputation is an integral and important part of the dignity of the individual . . . [but] it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely.'

There are two further distinctive features of this case. First, their Lordships were particularly sensitive to the need to adapt the law to suit distinctive conditions prevailing in the United Kingdom. In the words of Lord Steyn, balancing the competing interests in reputation and freedom of speech was a difficult task which could admit of more than one plausible answer:

> This is a branch of law in which common law courts have arrived at sharply divergent solutions ... There are at stake powerful competing arguments of policy. They pull in different directions. It is a hard case in which it is unrealistic to say that there is only one right answer. *And in considering the decisions in other jurisdictions it is right to take into account that cultural differences have played an important role.*[61]

This caution as to the adoption of foreign solutions manifested itself in several ways. One way was the judicial distrust of the media evident in *Reynolds*, a distrust that was not evident in *New York Times*.[62] Lord Nicholls of Birkenhead suggested that 'reliance upon the ethics of professional journalism ... would not generally be thought to provide a sufficient safeguard ... [T]he sad reality is that the overall handling of these matters by the national press, with its own commercial interests to serve, does not always command general con-fidence.'[63] Further, Lords Steyn and Cook rejected more extensive protection for political discussion out of concern to preserve the strong protection English law accords the media from pressure to reveal sources.[64] Finally, this sensitivity to cultural differences even led Lord Cooke of Thorndon to suggest that a different result might be appropriate in New Zealand, even though the Privy Council is that country's ultimate court of appeal. In Lord Cooke's words, 'the possibility of a difference between English and New Zealand common law on the issue has to be accepted, albeit not advocated'.[65]

Secondly, the court's resistance to a generic privilege reflects a strong preference for a test that would allow for 'a balancing exercise in the light of the concrete facts of each case'.[66] Thus it was recognised that a generic privilege, a rule that applied to a nominated category of cases, would by its very nature, limit the capacity of judges in individual cases to respond to the exigencies of that case.[67] This preference for more flexibility was partly based upon a desire

[61] Ibid 630 (emphasis added).
[62] Lewis, above n 3.
[63] *Reynolds* [1999] 4 All ER 609, 623.
[64] Ibid 631 (Lord Steyn), 640 (Lord Cooke). Lord Steyn compared the protection accorded by s 10 of the *Contempt of Court Act* 1981 (UK) and *Goodwin v United Kingdom* (1996) 22 EHRR 123, 143 with a plaintiff's entitlement in the United States to a pre-trial inquiry into sources and editorial decision making as held in *Herbert v Lando*, (1977) 441 US 153.
[65] *Reynolds* [1999] 4 All ER 609, 643.
[66] Ibid 631 (Lord Steyn). Lord Nicholls makes a similar point, at 625–6.
[67] The choice between relatively defined rules that constrain the choice of judges and more flexible approaches has long been at the centre of debate over the shape of free speech law in the United States. In the United States the argument has been that defined rules are an important aspect of free speech protection. See generally Frederick Schauer, 'Categories and the First Amendment: A Play in Three Acts' (1981) 34 *Vanderbilt Law Review* 265. See also Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.

for consistency with the approach of the European Court of Human Right exhibited in cases such as *Lingens v Austria*.[68] However, at other points, it i the flexibility itself that was attractive. Lord Hope of Craighead took the vie that, in these circumstances, flexibility was valuable because the balancing o reputation against freedom of speech 'is particularly sensitive to changin circumstances, whether they be social or political, and to changes in the wa in which information is presented or disseminated'.[69] It was said that generic privilege would bring with it the danger that the privilege would no respond to these changing circumstances, and thus risk 'losing touch with th underlying justification for the creation of the category'.[70]

IV NEW ZEALAND: A SWING TO MORE PROTECTION?

The treatment of *New York Times* in *Reynolds* brings us finally to Nev Zealand. Although the position in that country was settled in June 2000 by th New Zealand Court of Appeal in *Lange v Atkinson*,[71] a complicated series o appeals had preceded that decision.

The case first came before the Court of Appeal on appeal from the 199 decision of Elias J at first instance.[72] In that decision, although her Honou declined to recognise a free standing 'public figure' or 'political figure' rul derived from the *New Zealand Bill of Rights Act* 1990 (NZ) (partly in respons to the well known criticisms of *New York Times*),[73] she reformulated th common law of defamation in response to free speech concerns.[74]

When the matter went to the New Zealand Court of Appeal, the defendant did not seek to reassert *New York Times* as the basis for a separate rule, an challenged only Lange's reliance on the reformulated doctrine of qualifie privilege. However, in the Court of Appeal's 1998 decision,[75] the court's

68 (1986) 8 EHRR 407. See *Reynolds* [1999] 4 All ER 609, 635 (Steyn L).

69 *Reynolds* [1999] 4 All ER 609, 650. Lord Nicholls, at 623, also advocated a flexible approach even though he recognised that it would bring with it 'an element of unpredictability and uncertainty'. At 624, he was confident that this degree of uncertainty could be adequately resolved by a court which has 'the advantage of being impartial, independent of government, and accustomed to deciding disputed issues of fact and whether an occasion is privileged.'

70 Ibid 650. See also Schauer, above n 67.

71 Unreported, Court of Appeal of New Zealand, Richardson P, Henry, Keith, Blanchard and Tipping JJ, 21 June 2000. The case was brought by David Lange, the former Prime Minister of New Zealand, the same plaintiff who featured in the Australian case *Lange* (1997) 189 CLR 520. The action was brought against the author of articles critical of Mr Lange's performance as Prime Minister and against the publisher of the magazine in which they appeared.

72 *Lange v Atkinson* [1997] 2 NZLR 22. Her Honour is now Chief Justice of New Zealand.

73 Ibid 37, 47–8. In part Elias J also appears to have been influenced by certain cases in which New Zealand Courts had declined to recognise a special privilege available to the media. She held, at 44, that these cases bound her not to recognise a special rule that 'would deny the protection of the law of defamation to a section of the community.' In a final passage, at 48, Elias J also appears to place reliance on New Zealand's 'unitary system of law', although the precise relevance of this matter is not made clear.

74 Ibid 46: 'Qualified privilege ... attaches to statements made to the general public about matters of government.'

75 *Lange v Atkinson* [1998] 3 NZLR 424.

general approach to the discussion of the common law extension of the privilege suggested that its underlying philosophy was closer to the vision of freedom of speech seen in other common law countries than the more speech protective United States vision.

Significantly, the New Zealand Court of Appeal moderated its enthusiasm for freedom of speech in a manner similar to other courts. It placed special emphasis on the limitation in s 5 of the *New Zealand Bill of Rights Act* in favour of regulation 'demonstrably justified in a free and democratic society'. Thus, although the New Zealand Court of Appeal in its 1998 decision did not reach precisely the same balancing of interests as other courts studied here, the New Zealand Court seemed to be open to the prospect that competing interests should prevail over freedom of speech.[76] In particular, like other courts, it was especially concerned with the competing interest of reputation which it regarded as related to the human dignity and privacy.[77]

The New Zealand Court of Appeal did, however, take a distinctive position. Unlike the Canadian Supreme Court in *Hill*, the Court of Appeal in its 1998 decision did not accept that existing common law rules provide adequate speech protection, nor did it anticipate the subsequent modest reformulation of the common law by the House of Lords in *Reynolds*. Rather, essentially in agreement with the court below, the Court of Appeal extended the common law of qualified privilege to cases of general publication 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 . . . to meet their public responsibilities'.[78]

In formulating a special rule, the New Zealand approach resembles the Australian and South African approaches but the New Zealand Court went a little further towards speech protection than even those courts. The court rejected the 'reasonableness' requirement by which the Australian High Court increased the protection of reputation, relying instead upon a statutory exception[79] that applies when the defendant's decision to publish was predominantly motivated by ill will towards the plaintiff or otherwise by the possibility of improper advantage.[80]

[76] Ibid 466–7. This view is confirmed by the New Zealand courts' attitude in contempt of court cases when considering the conflict between freedom of expression and a fair jury trial. Although they rejected the Canadian rule directed specifically to the contempt of court issue, New Zealand courts have adopted the relatively deferential standard of review that the Canadian courts generally use to accommodate freedom of expression and other conflicting interests. See *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48, 61; *Gisborne v Solicitor-General* [1995] 3 NZLR 563, 573–4 (rejecting the holding in *Dagenais v Canadian Broadcasting Corporation* (1994) 94 CCC (3d) 289).

[77] Though not mentioned in the *New Zealand Bill of Rights Act*, the right to reputation is recognised in the International Covenant on Civil and Political Rights to which the Bill of Rights purports to give effect. The preamble to the *New Zealand Bill of Rights Act* provides that a purpose of the act is '[t]o affirm New Zealand's commitment to the International Covenant on Civil and Political Rights'. See *Lange v Atkinson* [1998] 3 NZLR 424, 465–6.

[78] Ibid 468.

[79] *Defamation Act* 1992 (NZ), s 19(2).

[80] *Lange v Atkinson* [1998] 3 NZLR 424, 469.

The Court of Appeal's 1998 decision was subsequently appealed to the Privy Council. However, having heard argument, the Privy Council remitted the case for reconsideration by the Court of Appeal in the light of the House of Lords' 1999 decision in *Reynolds*. Showing the concern, discussed above, that local law be adapted to local circumstances, the Privy Council emphasised that the New Zealand Court of Appeal was free to depart from *Reynolds* if it considered that local circumstances required it.[81]

On reconsideration, the Court of Appeal chose to maintain its previous position, despite developments in England. However it clarified a number of matters in its 2000 decision. First, it emphasised that the extended form of qualified privilege, recognised in its earlier decision, is context-dependant. That is, the court held that the determination of whether a publication is privileged depends upon a traditional common law analysis of whether there is a duty to disclose the information, and a concomitant interest in its receipt. Accordingly, not *every* statement made about the suitability of a candidate for public office is necessarily privileged. Although the Court of Appeal rejected the non-exhaustive list of matters that the House of Lords had indicated in *Reynolds* were relevant to the application of the English rule,[82] the Court nonetheless confirmed that the application of the New Zealand rule will depend upon the totality of the circumstances, including 'the identity of the publisher, the context in which the publication occurs, and the likely audience as well as the actual content of the information'.[83] Significantly, the Court of Appeal stressed that it is important to take context into account to ensure appropriate protection of reputation, even though it acknowledged that the consequent difficulty in predicting whether speech would be protected might contribute to a chilling effect.[84]

This qualification went some way to dealing with the Privy Council's suggestion that that the New Zealand rule might be unnecessarily wide.[85]

81 *Lange v Atkinson* [2000] 1 NZLR 257, 263: 'If satisfied that the privilege favoured in the [first New Zealand *Lange* case] is right for New Zealand ... the New Zealand Court of Appeal is entitled to maintain that position.' See generally Rosemary Tobin 'Public Interest and the Defamation of Political Figures: The English Approach' (2000) 8 *Torts Law Journal* 152.

82 It did so in response to two concerns. First, the Court was concerned that this list created unnecessary uncertainty and thus added to the chilling effect of defamation laws. Further, the Court criticised the English rule for blurring the distinction between an occasion of privilege and the misuse of the privilege. In the Court of Appeal's view, the English test imported matters relevant to the determination of misuse (traditionally a matter for the jury) into the determination of whether a privileged occasion existed (traditionally a matter for the judge) and thus undesirably reduced the role of the jury in free speech cases. *Lange v Atkinson* (Unreported, Court of Appeal of New Zealand, Richardson P, Henry, Keith, Blanchard and Tipping JJ, 21 June 2000), paras [24]–[25].

83 Ibid para [13].

84 Although the Court expressed the opinion, at ibid para [22], that very little uncertainty would result from the rule, it held that 'the small level of uncertainty it may cause is a necessary price to pay to guard reputations against false imputations made on occasion which are outside the purpose of the privilege'. The Court thus sets itself well apart from the American free speech tradition which greatly values certainty as a means of protecting speech. See above n 67.

85 *Lange v Atkinson* [2000] 1 NZLR 257, 263.

However, importantly, in its 2000 decision, the Court of Appeal maintained its refusal to adopt the Australian 'reasonableness' requirement. The Court of Appeal pointed to several features of New Zealand society that it claimed justify somewhat more vigorous protection of public discussion. First, despite some emphasis on privacy in its earlier decision,[86] the court now seemed to down-play this value, noting that, unlike the *Human Rights Act* 1998 (UK) (which is still to come into force), the *New Zealand Bill of Rights Act*[87] contains no express mention of a right to privacy, nor does it contain an injunction (as does the UK Act) for courts to have regard to whether a journalistic publication is in the public interest or to relevant privacy codes. Additionally, the Court of Appeal held that 'History and circumstances give New Zealanders special reason for wanting to know what their Government is doing and why',[89] and found that New Zealand media is more trustworthy that its British counterparts.[90]

By marking itself out from the English position, the New Zealand Court seems, then, to have swung the pendulum back towards greater free speech protection. However, any such swing is slight. The Court of Appeal has certainly rejected the conservative approach of the House of Lords (thus also setting itself apart from the Supreme Court of Canada) and has adopted a rule that seems slightly more protective of certain types of speech than the Australian and South African rules. The New Zealand position remains, however, a long way from *New York Times*. Elias J's critique and subsequent rejection of the *New York Times* rule has never been questioned, and the New Zealand Court of Appeal, like most other courts studied here, employs a relatively flexible, contextual common law rule that gives more emphasis to the competing value of reputation than the American rule.

V CONCLUSION

This study of the interaction of the law of defamation and principles of freedom of speech demonstrates that most courts in the common law world are not committed to the particular vision of freedom of speech that characterises the First Amendment to the United States Constitution. With the possible

[86] See above n 77 and accompanying text.

[87] Section 14 provides: '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.' Although an Act of Parliament rather than an entrenched constitutional document, the *New Zealand Bill of Rights Act* has special status through s 6, which empowers the judiciary to interpret an enactment of the New Zealand Parliament so as to prefer 'a meaning that is consistent with the rights and freedoms contained in this Bill of Rights'.

[88] *Human Rights Act* 1998 (UK) s 12(4).

[89] *Lange v Atkinson*, (Unreported, Court of Appeal of New Zealand, Richardson P, Henry, Keith, Blanchard and Tipping JJ, 21 June 2000), para [32] citing a Parliamentary Committee Report *Towards More Open Government* (1980). That report refers to the small size of New Zealand (which requires that the government play a special role as a major developer of large scale projects as an alternative to overseas control) and the dependence of social support systems on central government.

[90] Ibid paras [34]–[35].

exception of the Indian Supreme Court, courts have tempered their commitment to freedom of speech out of deference to other interests such as privacy and the protection of reputation. This suggests, then, that despite increased rights protection in common law countries, the fiercely protective free speech regime that dominates the United States is likely to remain unique to that country.

These decisions also point to two important features of modern judicial practice. First, the extensive discussion of *New York Times* shows that, despite some academic reservations,[91] comparative law is much practiced by judges in common law countries.[92] These cases provide an example of the widespread use of foreign precedent in high appellate courts of the common law world (a phenomenon fuelled perhaps by the ready accessibility of foreign judgments on electronic retrieval services and the Internet).[93] Moreover, they show that the use of foreign precedent is, in the main, not uncritical. This is especially significant given that, following constitutional change in many countries that has brought issues of individual rights to the fore, the United States Constitution[94] has become a particularly pertinent source of comparative analysis.[95] Notably, the courts considered here signalled that they would reassess, and exercise their own judgment in relation to, even this revered aspect of the American constitutional tradition.

91 These reservations date back at least to Montesquieu, *The Spirit of the Laws* (1748): 'the political and civil laws of each nation ... should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another'. But see also Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1.

92 For a comprehensive analysis of the more general phenomenon by which legal systems 'borrow' or adopt features of other legal systems, see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

93 American precedent has been a popular source of reference particularly in the rights context. See, for example, Gerard V La Forest 'The Use of American Precedents in Canadian Courts' (1994) 44 *Maine Law Review* 211; Anthony Lester QC 'The Overseas Trade in the American Bill of Rights' (1988) 88 *Columbia Law Review* 537; Paul E Von Nessen, 'The Use of American Precedent by the High Court of Australia, 1901–1987' (1992) 14 *Adelaide Law Review* 18.

94 For a comprehensive analysis of the influence of the United States Constitution in other countries, see Louis Henkin and Albert J Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (1990).

95 By contrast, the United States Supreme Court is far more reticent about comparative law than its counterparts in the English speaking world. See, for example, *Stanford v Kentucky*, 492 US 361, 369 n 1 (1989), rejecting an argument that the Eighth Amendment's bar on 'cruel and unusual punishments' should be interpreted by reference to penal practices in other 'advanced industrial societies'. See generally Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225.