The Defamation Action in mid 19th Century New Zealand

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> "For the most part any thoughtful consideration of the present state of the law of libel either begins or ends with a combined apology and lament."[1]

I INTRODUCTION

In order to protect innocent defendants from large libel sums the common law has, over the centuries, developed a number of defences that both provide a measure of protection for defendants and help counter the inroads the action has made upon freedom of expression. Today, two of the most important of these are qualified privilege and fair comment.[2] Qualified privilege protects false matters of fact published to a very limited audience,[3] while fair comment protects expressions of opinion widely publicised. The origin of these two defences can be traced to the end of the 18th century, but confusion reigned in English courts throughout the greater part of the 19th century as to their ambit. This culminated in the middle of the 19th century in a public discussion defence that comprised elements of both.[4] Yet, in 1867, the newly constituted Court of Appeal in New Zealand was able to identify the following defences to a defamation action in this country. The Court stated that the law would excuse a libel where:[5]

(i) the defamatory matter was true;
(ii) it consisted of fair comment on undisputed facts relating to matters of public interest;
(iii) it was communicated *bona fide* and without malice by one person to another, such persons having a corresponding interest or duty in respect of the matter communicated; or
(iv) the matter was contained in fair report of proceedings in a Court of Justice; or
(v) the matter was a correct report of parliamentary proceedings; or
(vi) it formed part of a report published in full and directed by law to be made public by some legally constituted official person or body.

It was remarkable that this statement came from a little known court in an English colony. With only a little modification the first three categories correspond to today's

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1 *Blanchard v Claremont Eagle* 63 A 2d 791, 792 (1949) per Kenison J.

2 Now renamed honest opinion in New Zealand; see s 9 Defamation Act 1992. For convenience I have continued to refer to the defence as fair comment.

3 I am excluding from this definition the *Lange* extended form of qualified privilege that arose as a result of *Lange v Atkinson* [1997] 2 NZLR 22 (HC); [1998] 3 NZLR 424 (CA); [2000] 1 NZLR 257 (PC); [2000] 3 NZLR 385 (CA) which does permit the wide publication of false matters of fact about a past present or future politician and also the *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 extended form of privilege that the English Court of Appeal later referred to as sui generis.

4 For a more extended discussion of this see Tobin, "Public Discussion as a Defence to a Nineteenth Century Defamation Action" (2005) 21 NZULR 385.

5 *Cameron v Otago Daily Times and Witness Co Ltd* (1867) 1 NZCA 1, 7.

defences of truth, honest opinion (formerly known as fair comment) and qualified privilege.[6] New Zealand was a Crown colony and its judges followed English law, yet this exposition of the state of the law at the time contains no trace of the public discussion defence. This article considers that development and speculates on the reasons.

II DEVELOPMENT OF THE TWO DEFENCES

The defence of qualified privilege began towards the end of the 18th century with the servant reference cases where Lord Mansfield confirmed that when a mistress was asked for the character of her servant her reply was protected provided it was not made with malice.[7] This culminated in the early 19th century with Parke B's explanation of the defences in *Toogood v Spyring* where he confirmed that the defence was only available to someone who had an interest or duty to communicate the information with the person concerned. Any communication was thus with a very limited audience. Not long afterwards Lord Ellenborough began the fair comment defence when he decided that literary criticism was no libel.[8] It was another forty years or so before *Parmiter v Coupland*[9] extended the fair comment defence to encompass criticism about the public acts of the public man.

The area of law was dynamic, the defences were new, and it was almost inevitable that during their development any boundary between them would be uncertain. This can be seen both in the leading texts of the day[10] and the cases.[11] Terminology, for example, was imprecise and words such as "duty" and "interest" that were pivotal to the qualified privilege defence had their place in the fair comment defence as well. Reference, for example, to the public interest of the fair comment defence became confused with the commonality of interest required in qualified privilege.

This interchangeable use of libel terminology in the two defences, alongside the extension of the fair comment defence from literary productions to comment on the

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6 The other categories identified are now the subject of statutory privilege. See s 16 and Part I cl 6 of the First Schedule of the Defamation Act 1992 in respect of the third category. For the earlier legislation see s 2(b) of the Law of Libel Amendment Act 1910 and s 17(1) and Part I of the First Schedule of the Defamation Act 1954. Section 16 and Part I cl 2 of the First Schedule of the Defamation Act 1992 accord a statutory qualified privilege to the kind of report identified in the fifth. For the earlier legislation see s 2(a) of the Law of Libel Amendment Act 1910 and s 17(1) and Part I of the First Schedule of the Defamation Act 1954.

7 See for example *Edmondson v Stephenson* (1766) Buller's NP 8; *Weatherston v Hawkins* (1786) 1 T R 110; 99 ER 1001; *King v Waring* (1803) 5 ESP 13; 170 ER 721; *Rogers v Clifton* (1803) 3 Bos & Pul 587.

8 *Carr v Hood* (1808) 1 Camp 355; 170 ER 983. See also *Dibdin v Swan* (1793) 1 Esp 28; 170 ER 269 and *Tabart v Tipper* (1808) 1 Camp 349; 170 ER 981.

9 (1840) 6 M & W 105; 151 ER 340. See Parke B at 108, 342 and Alderson B at 109, 342.

10 Starkie, *The Law of Slander, Libel, Scandalum Magnatum, and False Rumours* (1832) 168. It is also noteworthy that the first and even the third edition of Odgers, *A Digest of the Law of Libel and Slander* (1 ed 1881, 3 ed 1896) included "Fair Comment" in Chapter 2. This chapter examined whether words were libelous, while in the fifth edition, Eames & Odgers, *A Digest of the Law of Libel and Slander* (5 ed, 1911) it was accorded a chapter of its own (Ch VIII), after "Justification" and before "Absolute Privilege".

11 See for example *Henwood v Harrison* (1872) LR 7 CP 606 where the term privilege is used in respect of matters of opinion. In *Cox v Feeney* (1863) 4 F & F 13; 176 ER 445, Cockburn CJ uses terminology interchangeably.

public acts of the public man, resulted for a short period of time in the public discussion defence. That defence combined elements of both of the other defences and permitted discussion on matters of public interest providing only that the speaker honestly believed the words he spoke.[12]

One of the best illustrations of the confusion in the early cases is provided by *Cox v Feeney*,[13] where the defamatory material was contained in a letter that formed part of the official report of a public officer, made in pursuance of a public duty, and founded on a public inquiry.[14] Cockburn CJ directed the jury that they must find for the plaintiff unless the communication was privileged.[15] Whether it was privileged depended upon whether the matter was one in of public interest. Once the jury had decided it was a matter of public interest they then had to decide if the material was published with the honest desire to afford the public information that it interested the public to know. Although "privilege" is used twice and the judge refers to the duty of the reporter to bring the information before the public, the greater part of his direction to the jury is more reminiscent of fair comment than qualified privilege. There is, for example, no reference to reciprocity of any duty or interest between the maker of the statement and its recipient. The case suggests a public discussion defence, under which a bona fide statement at a public meeting on a matter of public interest could be privileged.[16] The decision that stood in its way and ultimately led to its demise was that of *Campbell v Spottiswoode*.[17]

In addition fair comment was sometimes seen as a specific category of qualified privilege. Starkie, for example, when examining what we now call classic qualified privilege, considered those instances where communications were "made in the discharge of any duty that the conveniences or exigencies of society call upon them to perform",[18] and did not think it improper to include in this class the authors of those publications whose object was to discuss literary productions of the day.[19] In his opinion they had a most difficult and important public duty to discharge in the detection and exposure of "vicious principles and bad taste."[20] In the same way Erle CJ referred to a case of fair discussion for the promotion of truth as reducible to the same general proposition as that behind the servant reference cases.[21]

To add to the confusion there was also a school of thought that considered words of fair comment were no libel: "Nothing is a libel which is a fair comment on a subject fairly open to public discussion."[22] Even as late as 1907, a note in the Law Quarterly

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12 See for example the explanation in *Hunter v Sharpe* (1866) 4 F & F 983; 176 ER 875.

13 (1863) 4 F & F 13; 176 ER 445.

14 The report would now attract qualified privilege under s 16 of the Defamation Act 1992 (NZ) and the First schedule, Part II.

15 *Cox v Feeney* (1863) 4 F & F 13 at 19; 176 ER 445.at 448.

16 See also *Gathercole v Miall* (1846) 15 M & W 319, 332; 153 ER 872; *Turnbull v Bird* (1861) 2 F & F 508; 175 ER 1163; *Wilson v Reed* (1860) 2 F & F 149, 175 ER 1000; *Hunter v Sharpe* (1866) 4 F & F 983, 176 ER 875.

17 (1863) 3 B & S 769; 122 ER 288.

18 Starkie, *The Law of Slander, Libel, Scandalum Magnatum, and False Rumours* (1832) 162. The most important category was the servant reference cases.

19 Ibid at 168.

20 Ibid.

21 *Hibbs v Wilkinson* (1859) 1 F & F 608, 610; 175 ER 873, 874. See also *Davis v Duncan* (1874) LR 9 CP 396, 398 where "fair discussion" was said to be "within the doctrine of Privilege".

22 Pollock, *The Law of Torts* (1887) 219.

Review[23] drew attention to two rival theories. The first saw fair comment as a branch of the defence of qualified privilege[24] while the second considered words of fair comment as not defamatory at all.[25] However, by the time *Adam v Ward*[26] was decided, qualified privilege covered what was a usually limited communication of false facts published to a small audience, where there was a commonality of interest and duty between the speaker and the audience, while fair comment related to opinion communicated to a wide audience, but wherein the facts upon which the opinion was based were truly stated.[27] This distinction came to be seen as fundamental.[28]

III THE EARLY NEW ZEALAND ACTION

The blurring of the line between the two defences did not occur in what was then the colony of New Zealand. In part this can be explained because the colony only officially came under English rule with the signing of the Treaty of Waitangi in 1840. This was six years after the first canon associated with the qualified privilege defence, Baron Parke's words in *Toogood v Spyring*[29] that recognised the need for a duty to speak in order to attract the privilege, and the same year as *Parmiter v Coupland,*[30] which extended the fair comment defence to encompass criticism of the acts of the public man.[31]

The first judge of the Supreme Court of New Zealand did not take the oath of office or commence duties in Auckland until January 1842,[32] and it was not until 1844 that Henry Chapman became the first resident Supreme Court judge in Wellington.[33] The third and more controversial judge,[34] Sidney Stephen, was only appointed in 1850.[35]

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23 Radcliff, "The Defence of 'Fair Comment' in Actions for Defamation" (1907) 23 LQR 97. See also Rowland, "Fair Comment and Qualified Privilege" (1907) 4 Commonwealth Law Rev 202 and the discussion in *Thomas v Bradbury Agnew & Co Ltd* [1906] 2 KB 627.

24 Radcliff, supra note 23, cited *Henwood v Harrison* (1872) LR 7 CP 606 for this proposition, but *Wason v Walter* (1868) LR 4 QB 73 and *Davis v Duncan* (1874) 9 LR CP 396 are perhaps better examples. Radcliff favoured this approach.

25 Radcliff, supra note 23, cited *Campbell v Spottiswoode* (1863) 3 B & S 769; 122 ER 288 and *Merrivale v Carson* (1887) 20 QBD 275 for this proposition. Odgers, *A Digest of the Law of Libel and Slander* (2 ed, 1887) 33 also confirms this as the prevailing view. See also Spencer Bower, *"A Code of the Law of Actionable Defamation*" (2 ed, 1923) Appendix VIII section 1.

26 *Adam v Ward* [1917] AC 309.

27 See for example *McQuire v Western Morning News* [1903] 2 KB 100.

28 Veeder, "Freedom of Public Discussion" (1910) 23 Harv L Rev 413, 419.

29 (1834) 1 C M & R 181; 149 ER 1044.

30 (1840) 6 M & W 105; 151 ER 340.

31 On appeal the focus was on the public acts of the public man that could attract the defence. Ibid at 108, 342 per Parke B; and at 109, 342 per Alderson B.

32 William Martin, who was New Zealand's first Chief Justice, arrived in Auckland on September 1841 and on 10 January 1842 commenced Supreme Court proceedings. Lennard, *Sir William Martin: The life of the First Chief Justice of New Zealand* (1961) 6. See also: "The Supreme Court and the Court of Appeal: Their First Beginnings" [1938] NZLJ 233; Wood, "Construction and Reform: The establishment of the New Zealand Supreme Court" (1968) 5 VUWLR 1; and Spiller, Finn & Boast, *A New Zealand Legal History* (2 ed, 2001) 204.

33 Spiller, *The Chapman Legal Family* (1992).

34 See Editorial, *Lyttleton Times,* Lyttleton, New Zealand, 21 August 1852, 7 which said rather bitterly: "Judge Stephen has already done more to shake public confidence in his decisions than years of prudence and painstaking will restore." The judge's activities in court in Otago were described as "negligible, save for litigation in which he personally was involved." Cooke (ed) *Portrait of a Profession* (1969) 51.

New Zealand was well served by the majority of those judges who were appointed to the Supreme Court bench. The background of the early judges was English both by their nationality and training. Combined with the fact of British colonisation this gave the proceedings of the Supreme Court of New Zealand "an atmosphere and ethos basically close to that of the courts in London."[36]

Nonetheless English developments in the two defences did not go unnoticed in New Zealand. The New Zealand judges referred to *Toogood v Spyring* and struggled with the concept of duty and interest in the same way as the English courts, particularly where the duty was a moral one.[37] Although fair comment began in England with criticism of artistic works and only progressed to comment upon public figures some fifty years later, it was the latter which unsurprisingly features in the early New Zealand cases.[38] Again, predictably the early judgments followed English precedent. The words had to be fair[39] comment,[40] upon a matter of public interest[41] and based upon facts truly stated.[42] Not surprisingly matters that were considered to be of public interest varied widely, although political matters feature strongly in the decisions.[43]

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35 The Editorial, *Otago News,* Dunedin, New Zealand, 13 July 1850, commented on the appointment and its terms. The *Otago Witness*, Dunedin, New Zealand, 3 May 1851, confirmed that the circuit was twice a year on the first days of June and December or "as soon as possible thereafter".

36 Cooke (ed), supra note 34, 47.

37 See for example *Bird v McLean* (1866) Mac 409.

38 See for example the first two cases heard by Martin CJ discussed in Lennard, *Sir William Martin: The life of the First Chief Justice of New Zealand* (1961) 182 to 184. Also see *Sinclair v Beit* discussed by Lennard at 125 and *Travers v Nation*, the details of which were recounted in *The Colonist,* 20 July 1860. The plaintiff, who was a recently appointed District Court Judge, had previously been a solicitor and conveyancer and a member of the House of Representatives. The defendant was the printer and publisher of the edition of *The Colonist* that had criticised the appointment of the District Court Judges. The report in the paper was found not to be a fair and bona fide comment without malice on the plaintiff in a public capacity.

39 *Eyes v Henderson* (1873) 1 NZ Jur 34, 36; *Mills v Otago Daily Times* (1898) 1 GLR 127, 128 and *Timpany v New Zealand Dairy Produce Exporter Newspaper Company Ltd* [1927] GLR 398, 401.

40 *Eyes v Henderson* (1873) 1 NZ Jur 34; *Macassey v Bell* (1874) 2 NZ Jur 59; *Norton v Bertling* (1910) 29 NZLR 1099 (CA); *Massey v New Zealand Times* (1911) 30 NZLR 929, 949 (CA), affirmed on this point in [1912] NZPCC 503 (PC) and *Gooch v New Zealand Financial Times (No 2)* [1933] NZLR 257.

41 *Eyes v Henderson* (1873) 1 NZ Jur 34; *Swainson & Bevan (Ltd) v Hadfield* (1903) 23 NZLR 43, 44; *Stallworthy v Geddis* (1909) 28 NZLR 366; *Scott v Gudsell* (1884) 3 NZLR 119, 121 & 124; and *Norton v Bertling* (1910) 29 NZLR 1099 (CA).

42 *New Zealand Banking Corporation Ltd v Cutten* (1864) Mac 212, 231; *Eyes v Henderson* (1873) 1 NZ Jur 34; *Sinclair v Hornby* (1886) 5 NZLR 113, 118; *Scott v Gudsell* (1884) 3 NZLR 119, 125; *Lowry v New Zealand Times Co Ltd* (1910) 29 NZLR 570, 572; *Norton v Stringer* (1909) 29 NZLR 249, 270 (CA); *Norton v Bertling* (1910) 29 NZLR 1099, 1119 and *New Zealand Times Co Ltd v Wellington Publishing Co Ltd* (1914) 33 NZLR 907.

43 The conduct and action of the Opposition was held to be one such matter of public interest by the Privy Council in *Massey v New Zealand Times* Co *Ltd* (1912) NZPCC 503, 505 & 508 (PC). The actual nature of the defence is not apparent from a perusal of any of the judgments in the Court of Appeal. It is only Lord Atkinson's judgment in the Privy Council, at 505, that explains the nature of the defendant's argument: "The defendant … pleaded in addition a special plea to the effect that the cartoon was a fair comment made in good faith and without malice upon a matter of public interest".

The first twenty years

Locating the very early cases is not easy. Even when they are found, the detail is often missing. Although there are law reports from 1861 the coverage is not comprehensive, and cases from the first twenty years during which the Supreme Court was sitting are simply not reported. In order to discover what cases were decided in the very early years of the Supreme Court it is necessary to go to the first papers of the colony that recorded scenes from the courtroom in detail. Freedom of speech was not a concept that was high on the political agenda of a young colony seeking to establish itself under British rule at the other end of the world.[44] Conversely reputation was highly valued. The early years of the colony spawned a number of defamation proceedings. The reporting in the more independent newspapers was, to say the least, robust[45] and those who have perused the first newspapers may wonder why more libel actions were not commenced. This can perhaps be explained in part by the failure of the court to sit at the allocated time. Many scheduled sittings did not occur as the boat bringing the judge was delayed or did not sail at all.

As far as I have been able to ascertain, the first two defamation cases in the colony came before Martin CJ in June 1842. Unsurprisingly, both had political overtones. The first was brought by the Sheriff and Clerk of the council, James Coates, against Willoughby Shortland, the colonial secretary. Shortland claimed the extraordinarily high sum of £5000. Although the court records have been lost,[46] the case was reported in the early newspapers but not all of these have survived.[47] The action arose out of a rumour circulated by a Mr Thompson and reported to Governor Hobson by Mr Shortland that Coates was a bad credit risk. Although the jury was locked up for the night they were unable to reach a verdict against Mr Shortland. However, in the action against Mr Thompson they awarded the plaintiff £40. It is unfortunate that no detailed account of the case is available, particularly the instructions of the judge to the jury. As a result it is not possible to determine why the jury failed to reach a verdict as far as Mr Shortland was concerned. It was an obvious case to argue privilege on the basis of *Toogood v Spyring*: the Colonial Secretary would have a duty to report any credit risk affecting the Clerk of the Council to the Governor who would have a corresponding interest in hearing the information. There would be no such duty as far as Mr Thompson was concerned.

The second case involved one of the more colourful characters of early colonial New Zealand, Dr SMD Martin, who had been at constant odds with the Government, and in particular with Mr Swainson, the Attorney General. He was briefly the editor of the *New Zealand Herald and Auckland Gazette,* one of the very early Auckland papers

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44 Many early papers that offered vigorous opposition to the government's land policy had management replaced or were closed down. See the explanation given for the closure of the *New Zealand Herald & Auckland Gazette* in Martin, *New Zealand; in a Series of Letters Containing an Account of the Country* (1845) Letter VIII. See also Scholefield, *Newspapers in New Zealand* (1958) 4

45 Such as the *New Zealand Advertiser and Bay of Islands Gazette* which attracted the wrath of the Government of the time to such an extent that the editor was directed to appear before the Colonial secretary and explain his policies. See Day, *The Making of the New Zealand Press 1840 - 1880* (1990) 13.

46 There is no sign of them in the archives, and an archivist with whom the loss of the records was discussed advised that many of the early Auckland records had been lost in a flood. Others were destroyed by fire. Information provided 15 July 2001.

47 *New Zealand Gazette & Wellington Spectator*, Wellington, 16 August 1842. The report of the cases is taken from an article in the Auckland papers of 20 June 1842. No copies of the Auckland papers survive.

which folded in April 1842[48] after his attack on the irregularities and apparent official corruption in the allocation of land at Auckland. The Government, not surprisingly, took great exception to the articles, and sought to obtain the original manuscript from the printer by threatening him with an action for damages.[49] The printer surrendered it on condition the action was dropped. Dr Martin was dismissed and sued for damages for breach of contract.[50] It appears the defendants raised a counter claim alleging that he had libelled several government officers.[51] Once again this was a chance to consider the defences but the paucity of information about the arguments makes it impossible to draw any conclusions.[52]

Justice Chapman also heard libel actions early in his judicial career.[53] In 1845 his Court Notebooks disclose two libel actions, both set down for the April sitting of the Supreme Court. In *Hutchinson v Beit*[54] the defendant had chartered a ship to convey stock and merchandise from Sydney to Nelson. The libel related to a note concerning certain missing merchandise which was later printed in the *Nelson Examiner.* The defendant argued that there was no libel on the basis that what was printed was true. Once again neither in the Judge's Court Notebooks nor in the newspaper reports of the action is there any record of instructions given to the jury.[55] The second is of more interest, and shows awareness of English developments. The libel concerned a prominent figure in Nelson,[56] the police magistrate and Government Representative of Nelson, and referred to him as a "pettifogging lawyer" and "decidedly the worst character in Nelson". The special jury awarded the plaintiff 40s, and added that they would have given more if they had felt that the character of the plaintiff had been in the slightest injured by the libel. Chapman J refused the application to set aside the verdict. Here the judge's words were more fully reported. *Parmiter v Coupland,*[57] which had extended the fair comment defence to encompass the public man, was cited in the refusal of the application.[58] There is nothing in the report that suggests any confusion with the qualified privilege defence.

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48 Day, supra note 45, 10.

49 Martin, supra note 44, Letter VIII.

50 Lennard, *Sir William Martin: The life of the First Chief Justice of New Zealand* (1961) 39.

51 Martin, supra note 44, Letter VIII.

52 According to Dr Martin's account in his letters home he was ultimately awarded one year's salary for breach of contract.

53 A perusal of his Court Notebooks discloses not only the cases discussed in the local papers of the time, but others such as *Guyton v Nickson* heard on Monday 16 September 1844 before a special jury (Civil Trials Court Notebook No 4) and *Cridlund v Smith* 10 September 1845 (Civil Trials Court Notebook No 6) which was a libel trial where damages of one farthing were awarded. His points to the jury in a defamation action were noted in Civil Trials Court Notebook No 5.

54 Reference to the case can be found in *Cases in the Supreme Court of New Zealand 1844 - 1852,* but the full report is in the *Nelson Examiner and New Zealand Chronicle*, Nelson, 12 May 1845 No 162 Vol VI. The case was first set down for hearing on Tuesday October 1844 where a postponement of trial was requested due to the absence of material witnesses.

55 The jury gave a verdict for the plaintiff of £100. On October 4th a rule nisi was granted for a new trial on the grounds of excessive damages and after one hour's deliberation the jury returned a verdict of 1 farthing.

56 *Sinclair v Beit, Cases in the Supreme Court of New Zealand 1844 – 1852,* 22.

57 Parmiter v Coupland (1840) 6 M & W 105; 151 ER 340.

58 *Cases in the Supreme Court of New Zealand 1844 - 1852* 22.

First Reported New Zealand Cases

The first reported New Zealand decision to discuss qualified privilege was *Bird v McLean,*[59] a decision of Richmond and Chapman JJ, where reciprocity of interest and duty was identified as a requirement. What is of more interest is that the Court identified confusion as to the ambit of the defence in England: "The question involved is one of very great difficulty, upon which the most learned lawyers at home are not quite agreed." Indeed, there was, they observed, "scarcely any question upon which the judges of the Courts at Westminster ha[d] been so divided in opinion of late years as that which [wa]s now under notice."[60] At trial Justice Chapman ruled against the defence of privilege. Counsel for the defendant sought a new trial, partly on the basis that the occasion was privileged. Baron Parke's words in *Toogood v Spyring* were seen as the guiding principle to be applied whether judges were disposed to extend the privilege or were inclined to limit it.[61] Directly after citing the learned Baron's words the judges acknowledged the difficulty in determining the nature and extent of the duty justifying the communication and the nature of the interest and its connection with the occasion. They accepted that no difficulty arose in respect of the "relationship" cases or those where the communication was clearly made with a view to protecting the defendant's own interests, although difficulties might arise where the communication was, as here, made by a volunteer. Their Honours derived the following principle, which clearly identified the need for a moral duty[62] on the speaker's part and an interest on the recipient's part, to explain when a communication made by a volunteer is privileged:[63]

> "where a stranger, and therefore a volunteer, *fairly believes that he is bound morally* to make a communication which he believes to be true, to some person *having an interest in knowing it* he will be protected"

Duty and interest were two tests of bona fides. In the present case both parties were closely connected with the subject matter of the communication,[64] and the presumption of privilege was supported by the fact that the spoken words themselves bore the character of a reason for the refusal to accede to the volunteer's request.[65]

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59 (1866) Mac 409. The words spoken by the manager of the Bank of New Zealand to a friend of the plaintiff suggested the plaintiff was insolvent. For other reported cases on qualified privilege before 1883 (when the New Zealand Law Reports began publication) see *Cameron v Otago Daily Times and Witness Co Ltd* (1867) 1 NZCA 1 (newspaper report of the meeting of the Education Board not privileged); *Mckellar v Brown* (1871) Mac 905 (where the defendant intended to communicate the words to the plaintiff and used an intermediary as agent to do so); *Bird v National Bank of New Zealand* (1876) 2 NZ Jur (NS) 96 (where a bank letter was sent to a customer explaining why a cheque was dishonoured); and *Hodges v Glass* (1879) OB & F 66 .

60 *Bird v McLean* (1866) Mac 409, 413.

61 Chapman J stated that the rule expressed by these words was cited "without exception": ibid.

62 As the case involved a moral duty there was no need to refer to a legal or social duty.

63 *Bird v McLean* (1866) Mac 409, 416 (emphasis added). The defendant was the manager of a bank who had sued the plaintiff on a bill of exchange and obtained judgment. The volunteer, a friend of the plaintiff, asked the defendant to withdraw the execution and remove the bailiff. The evidence showed that the bill sued upon had been accepted by the plaintiff for the accommodation of the volunteer.

64 Ibid at 417.The occasion thus constituted a reasonable occasion for unreserved conversation.

65 Ibid.

Cameron v Otago Daily Times

It was *Cameron v Otago Daily Times and Witness Co Ltd*[66] that clarified the common law defences then present in New Zealand. This was an early New Zealand attempt to protect a fair and accurate report of a public meeting. The defamatory words were contained in a memorial of complaint reflecting on the conduct and capacity of the plaintiff as a schoolmaster and presented at a meeting of the Education Board of Otago. The meeting was required by law to be open to the public. A report of the meeting was published in the newspaper. The defendants pleaded the publication was privileged on the basis that the alleged libel was a matter of interest to the public, published without malice and solely to afford true, useful and authentic information to the public. The case was argued at the zenith of the public discussion defence in England, and it is clear from the way the defendant framed its argument that this development had not gone unnoticed in New Zealand. Chapman J, in the Supreme Court, was attracted to the defence.[67] In a carefully reasoned decision relying heavily on *Cox v Feeney,*[68] which he felt able to distinguish from two other English cases, *Davidson v Duncan*[69] and *Popham v Pickburn*,[70] that were at odds with it, he decided the communication was privileged.

He was overturned on appeal where the Acting Chief Justice, who delivered the decision of the Court, took a more careful approach. There is no doubt that matters of English precedent weighed heavily upon His Honour, and that he was anxious about the width of the proposition advanced by the defence and the weight of authority that *Cox v Feeney* should be accorded. First, he noted that attempts had been made to extend privilege to reports of proceedings at public meetings whether voluntarily called or directed by law to be held publicly but, as he observed, no case at that time had done so, although *Cox v Feeney* on the facts did come close. Second, his Honour was troubled by the authority of both *Davidson v Duncan* and *Popham v Pickburn*. These two cases pointed against the principle proposed. *Davison v Duncan* was particularly on point as it concerned an accurate report of a public meeting of the West Hartlepool Improvement Commission reported in the local newspaper. In that case both the Chief Justice, Lord Campbell, and Justice Coleridge considered that the principle which rendered fair accounts of court proceedings privileged could not be extended to cover a fair report of a meeting held for a public purpose. This was the closest analogy to the privilege confirmed by *Cox v Feeney,* and sought by the defendant. The judge accepted that the rationale for the privilege afforded reports of court proceedings lay in the "great" interest that the public had in knowing what occurred in courts of justice and the "infinitesimally small" inconveniences that could arise from such publication in comparison with the benefits publication achieved.[71] However, he considered that it was difficult to extend that rationale to proceedings at a public meeting, exercising no judicial function, and not being restrained in its proceedings by rules of precedent.

His Honour accepted that *Popham v Pickburn* left open the issue of whether the report of a public meeting published according to the relevant Act would attract privilege, but this did not avail the defendant as there was no statutory requirement of

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66 (1867) 1 NZCA 1. The case came on upon a writ of error from the judgment of the Supreme Court overruling a demurrer. Unfortunately the case was not heard by a full Court. Richmond J had not arrived and Chapman J heard only part of the argument and consequently refrained from taking part in the judgment. This left Johnston, Acting CJ, Gresson and Moore JJ.

67 See *Cameron v Otago Daily Times and Witness Co Ltd* (1867) Mac 602 Chapman J.

68 (1863) 4 F & F 14; 176 ER 445.

69 7 E & B 229; 119 ER 1233.

70 (1862) 7 H & N 891; 158 ER 730.

71 *Cameron v Otago Daily Times and Witness Co Ltd* (1867) 1 NZCA 1, 8.

publication in the present case: it was the meeting that was required to be open to the public, nothing more. As in *Popham v Pickburn* the statements were not opinion, but were statements of fact, and the judge referred with approval to Baron Wildes' observation that "to charge a man incorrectly with a disgraceful act is very different from commenting on a fact relating to him truly stated."[72] Having decided that these two cases clearly pointed away from the width of the proposition advanced by the defendant this left the judge with Chief Justice Cockburn's words in *Cox v Feeney*.

There is no doubt the case presented the court with a real difficulty, and the decision was one the court approached "with no little embarrassment," especially in light of the respect due to the "position, reputation, ability, and eloquence of the Lord Chief-Justice." This was a new court in an English colony. How was it to reconcile *Cox v Feeney* with other decisions of the English courts at variance with it, and which it appeared had not been cited to the judge in the case, while at the same time paying due deference to the Lord Chief Justice's position? The colonial judge chose to adopt a diplomatic approach, and queried the accuracy of the actual reporting. In deciding not to follow *Cox v Feeney* he was very careful to say that the language used by judges summing up to juries and the reports of Nisi Prius decisions could not be expected always to be as pointed and precise in respect of law as the language and reports of decision of Courts sitting in Banco, after solemn argument.[73]

Quite apart from this, had it had to do so, the New Zealand Court considered that *Cameron* could be distinguished from *Cox v Feeney* on three grounds, although of these the second and third were, in the opinion of the judge, the more important.[74] First, the libel was found in an official report of a public officer made in pursuance of a statutory duty, rather than a voluntary memorial of inhabitants of the district. The second drew a parallel between the report of the inquiry at the centre of *Cox v Feeney* with that of a judicial proceeding, while acknowledging that this was not the foundation of the judge's ruling. No such parallel could be drawn in the instant case. The third ground identified the real issue in *Cox v Feeney* as the fairness of the comment because the plaintiff had admitted the truth of the report. In *Cameron* matters of fact were in the publication and these were taken as untrue.[75]

That the Acting Chief Justice did not regard *Cameron* as a case of qualified privilege where the duty or interest was absent is clear. He simply was not happy with the width of the proposition advanced, and could see real difficulty with its application. Quite apart from that, he saw no authority to support the proposition. Nor did he think that it could it be reconciled with the two decisions he considered most on point. The plaintiff was entitled to judgment.[76] The New Zealand Court thus rejected the public

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72 *Popham v Pickburn* (1862) 7 H & N 891, 898; 158 ER 730, 733.

73 *Cameron v Otago Daily Times and Witness Co Ltd* (1867) 1 NZCA 1, 11 –12. As an example of this imprecision the judge discusses what the Lord Chief Justice meant (or rather did not mean) when he spoke of the 'duty' of the newspaper to publish information to the public.

74 Ibid at 12. The first ground reflected the fact that the libel was contained in an official report of a public officer made in pursuance of a statutory duty rather than a voluntary memorial of the inhabitants of a district and observations concerning the same.

75 As also in *Popham v Pickburn* (1862) 7 H & N 891; 158 ER 730.

76 As a matter of interest the newspaper was not content to let things rest at that, but instead courted contempt of court. In an impassioned editorial, characteristic of the robust discussion present in the colonial newspapers at the time, the author argued for freedom for the press to report what transpired at public meetings: *Otago Daily Times*, Dunedin, New Zealand, 12 November 1867. The editorial came out after the Court of Appeal had reversed the decision of the Supreme Court, but before judgment had been formally entered, and before final trial of the matter. The plaintiff took exception to the editorial and argued that it was seriously calculated to pervert the course of justice, and prejudice his case: *Cameron v Otago Daily Times and Witness Co Ltd* (1868) Mac

discussion defence and did so without reference to *Campbell v Spottiswoode*, the case that had ended the defence in England.

IV CONCLUSION

By the time the New Zealand legal system was hearing defamation cases in any number the English law had solved some of the problems that initially bedevilled this area of the law. Others were to take longer. *Cameron*, represents a landmark decision in 19th century New Zealand defamation law. It identified fair comment and qualified privilege as separate defences in New Zealand, and the cases that followed confirmed this.[77] I suspect the public discussion defence did not take hold for two reasons. First, because New Zealand was such a young colony and the court system so new, it entered the evolution of libel law at a later stage of its development. The second reason owes much to the judges of the time, and in particular the Acting Chief Justice, who was prepared to circumvent a decision he clearly felt he should follow and apply what seemed to him (and probably the other members of the court) a principle that better protected individual reputation. It was to be another 140 years before a form of public discussion defence was to be part of New Zealand defamation law, signalling the development of a mature democracy where freedom of speech was enshrined in legislation.

645, 648. There had been no final trial of the plaintiff's claim. It is fair to say that the editorial was primarily aimed at achieving reform of the law, preferably legislative reform, but it was not complimentary about the abilities of the Acting Chief Justice: see *Otago Daily Times*, 12 November 1867. Justice Chapman decided that there was a contempt of court, but accepted the defendant's explanation and ordered it to pay the plaintiff's costs.

77 "This contention rests upon a confusion between cases of privileged communication, properly so called, and the right to comment upon matters of public interest": *Sinclair v Hornby* (1886) 5 NZLR 113, 117 per Richmond J. His Honour refers to the words of Blackburn J in *Campbell v Spottiswoode* (1863) 3 B & S 769; 122 ER 288. See also *Stallworthy v Geddis* (1909) 28 NZLR 366 where counsel again confused the issue, but Edwards J referred to Eames & Odgers, *A Digest of the Law of Libel and Slander* (4 ed, 1905) to correct him.