Court of Appeal rules on new public interest defence to defamation

There has long been a tension between the wider benefits of allowing robust discussion on matters of public interest and the right of an individual (or corporate) to not have their reputation unjustly diminished.

Aside from the usual defences of truth and honest opinion (which can be difficult and costly to establish) until the late 1990's there was little available to assist a commentator who, in good faith, defamed someone in the course of commenting on a matter of public interest.

Then, in *Lange v Atkinson*, the Court of Appeal recognised an extension to the defence of qualified privilege which allowed comment on the conduct of elected public officials and those seeking public office to the extent that such conduct related to their fitness for that office.

The *Lange v Atkinson* principle was essentially confined to comment on politicians. It was of no use to somebody who had commented on (for example) the conduct of an executive of a publicly traded corporation or a senior public servant. Indeed, the Court of Appeal expressly declined to recognise a general defence of public interest.

So for the best part of the next 20 years, New Zealand's approach in this area diverged from that of the United Kingdom, where the House of Lords had recognised a public interest defence in the case of *Reynolds v Times Newspapers Limited*.

That has now changed with the New Zealand Court of Appeal's recent decision in *Durie v Gardiner*. The facts concerned a broadcast by Maori TV reporting on the dismissal of the New Zealand Maori Council's legal counsel. The Court ruled that the *Lange v Atkinson*principle has been replaced by a new defence of public interest. The new defence is not confined to comment on politicians but can extend to all matters of significant public concern.

The Court was reluctant to exhaustively define what could be considered a matter of sufficient public concern. However, it was suggested that trial judges may be assisted by the Supreme Court of Canada's decision in *Grant v Torstar Corp* which held that the subject matter should be one inviting public attention or about which the public or a segment of the public has some substantial concern because it effects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.

The Court justified this change in the law by saying that in view of subsequent societal and legal developments since *Lange v Atkinson* was decided, it was time to "strike a new balance". Interestingly, the Court was clearly influenced by the explosion of social media and online bloggers who exist outside of the mainstream media. In doing so, the Court appears to have confirmed that the new defence is in principle available not only to traditional media outlets but to anybody making a public comment. The availability of the public interest defence is subject to a requirement that the communication at issue be "responsible". The factors to be taken into account when considering whether a particular communication is responsible include:

- the seriousness of the allegation – the more serious the allegations the greater the required degree of diligence to verify them;
- the degree of public importance;
- the urgency of the matter – did the public's need to know require the defendant to publish when it did, taking into account that news is often a perishable commodity?

- the reliability of any source;
- whether comment was sought from the defamed party and accurately reported (this is described as a key factor);
- the tone of the publication; and
- the inclusion of defamatory statements which were not necessary to communicate on the matter of public interest.

There will be some ambiguity about where the boundaries of the public interest defence lie until there is a wider body of case law on the issue. Until then, commentators would be prudent to proceed with caution and bear in mind the old saying that what the public finds interesting is not necessarily what is in the public interest.

Durie v Gardiner can be looked upon as a victory for free speech, but it by no means provides free reign for unrestrained comment on public figures. The clear room for argument as to what is in the public interest and whether a particular publication was responsible may mean that defendants will rarely be able to strike out a claim or obtain summary judgement based on this new defence, at least for the foreseeable future.

Therefore, the time and cost that would likely be involved in establishing the public interest defence at trial should still incentivise commentators (both in social and mainstream media) to be cautious before impugning a person's reputation even on matters of public interest.