

Free speech and the speechwriter

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DAVID LANGE, quite without meaning to, played a major part in shaping the law of defamation as it is today. It's hard to tell how he'd be pleased by the result.

Thanks in no small part to a case which carries David's name, the defamation law is in a state of transition. It is moving from a time when you could hardly say anything even slightly critical of people in power or public office without having a writ slapped on you, and into a time when you can say pretty much what you like.

David himself thought that the law as it used to be was too much of a restraint on freedom of speech. He said on the record that there was little hope of parliament reforming a law which benefited parliamentarians more than anybody else; but he would have been happier if the court, when it decided to take him at his word and reform the law on its own account, had used his name and his assets to make its point.

When David began his defamation action against the author and publishers of an article which appeared in North & South in 1995 he thought the law was plain enough. The defendants would have to prove the truth of the allegations made about him in the article. If they could not, they would have to compensate him for the damage it did to his reputation.

In his autobiography, David said that the article, which was written by a political scientist called Joe Atkinson and suggested that he did not work at the job of being prime minister "... seems trivial now, and I should have let it go, but it hurt in a way that better informed and more pointed criticism did not..."

David as prime minister might well have found some way to have a flick at Atkinson and his publishers without taking them to court, but when the article appeared he was a backbencher close to retirement from politics and he did not have a prime ministerial platform. He was not in good health (he had his first heart bypass about the time the article was published) and was easily hurt by assaults on his reputation.

David was also a prisoner of what might be called the downside of the old law of defamation. If damaging material was published about you, and you did not sue, people were likely to believe that its allegations must be true.

He knew before he took the case that the law in other jurisdictions had evolved to allow for discussion of public figures which did not expose the speaker to the risk of having to prove the truth of everything which was said. He was the plaintiff in an Australian case in which the court found that the constitution guaranteed freedom of political communication. But it also found that freedom of speech was matched by responsibility, and had to be exercised in a reasonable way.

The court in New Zealand might well have decided *Lange v Atkinson* along the same lines, but it went much further than that. It allowed what David called a free hit at politicians: you could say what you liked about members of parliament. The truth of what you said was not an issue, and being reasonable didn't come into it.

The case went to the Privy Council, which said that the court in New Zealand had gone too far. The Court of Appeal was obliged to concede that freedom of speech was not absolute. It could be abused. If it wasn't abused, you were free to say what you liked about any member of parliament, past, present or future.

Lange v Atkinson was decided in 2000, and I did not give it much thought until the publication of *Working with David*, Michael Bassett's overheated tale of love, loss and the fourth Labour government. In Bassett's fiction I play the other woman, who for various doubtful motives and by many dubious means, stole David away from his friends, denied Roger Douglas his chance to bring us a flat rate of income tax, and in the end encouraged David to bring down his own government. It is a work which regurgitates many of the legends invented by his opponents in the 1980s to discredit David in his battle against Douglas.

My first instinct when I heard about the book was to ignore it; but it was hard to escape the thought that inaction might give it some credibility to it.

When I asked those with some knowledge of the law if I should sue the publishers of the book, I was surprised to hear *Lange v Atkinson* raised as an obstacle. The judgement in that case applied strictly to members of parliament; I had believed that the older law would apply to me and that the publishers of the book would have to prove the truth of its claims if I took action.

So I asked for advice from counsel with considerable experience in defamation. The results, from my point of view, were mixed.

There has been little movement in the law since *Lange v Atkinson* was decided, although cases overseas suggest that the court here might well be persuaded to extend its principles to cover discussion of people like me who used to work in places like the prime minister's office. On the other hand, there is a New Zealand case in which the court declined to extend *Lange v Atkinson* to local body officers, on the grounds that they were not elected officials. As I was employed in the prime minister's office to give political advice to David, whether Bassett and his cronies happened to like it or not, the same reasoning might well apply to me.

It was also suggested that the court might be reluctant to extend the protection of *Lange v Atkinson* to works like the Bassett book. The court saw freedom of political speech as an important matter of principle, and might not be happy to let its decision licence the prurient speculation about my relationship with David which takes up far too much of the Bassett book.

If the court did decide that *Lange v Atkinson* protected the Bassett book, there was also the matter of the concession the Court of Appeal was obliged to make to the Privy Council: if you have freedom of speech you cannot take what the court called unfair advantage of your opportunity.

In that respect, the Bassett book offers considerable scope for action. It is not simply that much of it is made up, but that its author must have known that it was made up or made no effort to satisfy himself about the truth. It is a vendetta masquerading as a scholarly work.

The decisive difficulty for me is that having the court tell me what the law is would be expensive enough; if the case went to trial before a jury it would cost far more than I could afford, the more so if the court did decide that *Lange v Atkinson* was relevant, which would leave me as plaintiff with the task of proving the author's malice. Unfortunately the law requires rather more than having him get up and open his mouth.

It may be ironic that David's case offers some defence to the publishers of the Bassett book, but in the long run it hardly matters. If the law allows more freedom of speech about political issues because the threat of an action in defamation is less than it used to be, people will take defamation out of the equation and make their own judgements about the value of a work. In the court of public opinion David can stand up for himself.

Lange v Atkinson - setting a precedent

The *Lange v Atkinson* defamation decision ruled that political commentaries should not be subject to the usual rules of defamation because of the public importance of political debate. Former prime minister David Lange had sued Auckland University political scientist Joe Atkinson and Australian Consolidated Press NZ over a 1995 column criticising his Beehive performance. The article alleged that Lange resigned as prime minister because he found the job "too much like hard work" and accused him of trying to rewrite history in recollecting his leadership. He took issue with 16 passages allegedly meaning that he was irresponsible, dishonest, insincere, manipulative and lazy. ACP cited an Australian precedent in claiming a defence of qualified privilege for political expression - a defence which was later upheld at appeal.

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