HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

REX BASHFORD APPELLANT

AND

INFORMATION AUSTRALIA (NEWSLETTERS)
PTY LIMITED RESPONDENT

Bashford v Information Australia (Newsletters) Pty Limited [2004] HCA 5
11 February 2004
S393/2002

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

R S McColl SC with M A Kumar for the appellant (instructed by Eakin McCaffery Cox)

G O'L Reynolds SC with R G McHugh and A T S Dawson for the respondent (instructed by Corrs Chambers Westgarth)

CATCHWORDS

Bashford v Information Australia (Newsletters) Pty Limited

Defamation – Defences – Common law defence of qualified privilege – Matter published conveying imputation defamatory of appellant in subscription publication – Where matter involved report of judicial proceedings – Where no claim for qualified privilege made under *Defamation Act* 1974 (NSW) – Whether qualified privilege available as a defence – Whether matter published on occasion of qualified privilege – Publication for reward – Publication of matter concerning occupational health and safety – Publication to subscribers – Subscribers professionally concerned with matters of occupational health and safety – Whether reciprocity of duty or interest – Whether defamatory matter sufficiently connected to the privileged occasion – Whether absence of availability of defence of fair and accurate report of judicial proceedings precludes availability of defence of qualified privilege.

Defamation Act 1912 (NSW), s 29(1)(d), (e).
Defamation Act 1958 (NSW).
Defamation Act 1974 (NSW), ss 11, 22, 24.

1 GLEESON CJ, HAYNE AND HEYDON JJ. Central to the resolution of the issues in this appeal is the proper application of principles regulating the availability of the common law defence of qualified privilege to a claim for defamation.

2 The appellant sued the respondent in the Supreme Court of New South Wales for defamation. He alleged that the respondent had defamed him in a periodical it published called "Occupational Health and Safety Bulletin". The relevant text of the matter which the respondent published, and which the appellant alleged defamed him, is set out in the reasons of other members of the Court. Those reasons also describe the course of proceedings in the courts below. We need only repeat those matters which are necessary to explain our reasons.

3 A jury found, and it is now not disputed, that the matter which the respondent published conveyed the following imputation, which was defamatory of the appellant: that the appellant had been found by the Federal Court of Australia liable to ACOHS Pty Ltd ("ACOHS") in damages and costs for causing that company harm and loss by publishing a false report concerning it.

4 In fact, a company controlled by the appellant and his wife (R A Bashford Consulting Pty Ltd – "Consulting") had been found by the Federal Court to be liable to ACOHS. The appellant had not been a party to those proceedings and it follows that it was wrong to say that *he*, as distinct from his company, had been found liable.

5 It is necessary to say something about the claim which ACOHS made against Consulting in the Federal Court. It concerned, among other things, the publication of a newsletter called "Infax". On 2 December 1993, Consulting and another company called Risk Management Concepts Pty Ltd published an item entitled "Chemwatch wins copyright case". The Federal Court found (and in its final orders declared) that in publishing this item, or causing it to be published, those companies engaged in conduct which contravened s 52 of the *Trade Practices Act* 1974 (Cth)[1]. The Court ordered Consulting, Risk Management Concepts Pty Ltd, and a third respondent (Mr Bialkower), to pay ACOHS $20,000 damages and to pay part of ACOHS' costs of the proceeding. Thus, the Federal Court found Consulting (but not the appellant personally) liable to ACOHS in damages and costs for causing it harm and loss.

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1 *Acohs Pty Ltd v R A Bashford Consulting Pty Ltd* (1997) 144 ALR 528 at 558.

6 It is important to identify the basis for that finding against Consulting. The "item" published in the "Infax" newsletter falsely asserted that "Chemwatch" (a competitor of ACOHS) had "successfully challenged in court ... for breach of copyright" two companies which used, on a database, material safety data sheets prepared by Chemwatch. The item said that entering the data sheets into the database was an "unlawful act ... in total disregard of copyright legislation". The item implied that ACOHS was one of the two companies concerned. In fact, however, Chemwatch had not succeeded in proceedings of that kind. Publishing, or causing to be published, the assertion, that entering material safety data sheets into a database had been judicially determined to breach copyright, was held by the Federal Court to be misleading or deceptive conduct contravening s 52 of the *Trade Practices Act*. (The Federal Court also reached a number of other conclusions about copyright in material safety data sheets and about licences to use that copyright material. The validity of those conclusions could not be and was not examined in this litigation.)

The issues in this Court

7 In this Court the appellant made three, related, contentions. First, it was submitted that the primary judge and the Court of Appeal erred in finding[2] that the matter of which the appellant complained was published on an occasion of qualified privilege. Secondly, it was submitted that if the matter was published on an occasion of qualified privilege, that part of the matter which defamed the appellant was not sufficiently connected to the occasion to attract the defence. (The primary judge held[3] that it was; the Court of Appeal divided on the point, holding by majority (Sheller and Hodgson JJA, Rolfe AJA dissenting) that the primary judge was not shown to have erred in this respect[4].) Thirdly, it was submitted that the matter which defamed the appellant was an inaccurate report of court proceedings and that, because the report was inaccurate, the defence of qualified privilege could not be engaged.

8 Before dealing with these arguments in the order stated it is necessary to refer to Pt 3 of the *Defamation Act* 1974 (NSW) which deals with defences in

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2 *Bashford v Information Australia (Newsletters) Pty Ltd* [2000] NSWSC 665 at [24] per Davies AJ and, on appeal, [2001] NSWCA 470 at [1] per Sheller JA, [32] per Hodgson JA, [54] per Rolfe AJA.

3 [2000] NSWSC 665 at [24].

4 [2001] NSWCA 470 at [2]-[4] per Sheller JA, [32]-[44] per Hodgson JA; cf [55]-[57] per Rolfe AJA.

civil proceedings for defamation[5]. Division 2 provides[6], among other things, that it is a defence to any imputation complained of that it is published under qualified privilege. Division 2 identifies[7] both when an imputation is published under qualified privilege and what is an occasion of qualified privilege. The application of the provisions of Div 2 of Pt 3 of the Act was not in issue in the appeals to the Court of Appeal or this Court. On appeal, the respondent did not rely on the statutory defence of qualified privilege. Rather, consonant with s 11 of the Act (that the provision of a defence by Pt 3 "does not of itself vitiate, diminish or abrogate any defence" available apart from the Act), the respondent contended that the primary judge had correctly concluded that the common law defence of qualified privilege was available to it.

An occasion of qualified privilege?

9 The principles to be applied in determining whether the occasion of publication of matter about which complaint is made was an occasion of qualified privilege are well known. The authorities that state those principles are equally well known[8]. Frequent reference is made to the statement of Parke B in *Toogood v Spyring*[9]:

> "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare

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5 s 10.

6 By s 15(2)(b).

7 In s 14.

8 *Toogood v Spyring* (1834) 1 Cr M & R 181 [149 ER 1044]; *Adam v Ward* [1917] AC 309.

9 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050].

> of society; and the law has not restricted the right to make them within any narrow limits."

Reciprocity of duty or interest is essential[10].

10 These principles are stated at a very high level of abstraction and generality. "The difficulty lies in applying the law to the circumstances of the particular case under consideration"[11]. Concepts which are expressed as "public or private duty, whether legal or moral"[12] and "the common convenience and welfare of society"[13] are evidently difficult of application. When it is recognised, as it must be, that "the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact"[14], it is clear that in order to apply the principles, a court must "make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication"[15].

11 The primary judge's reasons did not identify the particular circumstances of the case which made the occasion of publication one of qualified privilege. His Honour did cite the well-known statements of Lord Atkinson in *Adam v Ward*[16] and noted[17] that the subjects and issues dealt with in the matter which the respondent had published were of interest to persons operating in the field of occupational health and safety. It may be that argument at trial was understood as focused more upon other issues, such as malice, than it was upon whether the occasion was one of qualified privilege.

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10 *Adam v Ward* [1917] AC 309 at 334.

11 *Macintosh v Dun* (1908) 6 CLR 303 at 305 per Lord Macnaghten; [1908] AC 390 at 398.

12 *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 per Parke B [149 ER 1044 at 1050].

13 *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 per Parke B [149 ER 1044 at 1050].

14 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 22 per Lord Buckmaster LC.

15 *Guise v Kouvelis* (1947) 74 CLR 102 at 116 per Dixon J.

16 [1917] AC 309 at 334.

17 [2000] NSWSC 665 at [22].

12 In the Court of Appeal, however, a deal of attention was directed to identifying the circumstances which made the occasion of publication a privileged occasion. Five features of the circumstances of publication were noted by Hodgson JA who, in this respect, stated the reasons of the Court. First, occupational health and safety was identified as a matter of importance for the common convenience and welfare of society[18]. Secondly, the communication of matters relevant to that issue to persons responsible for occupational health and safety was said to promote that common convenience and welfare[19]. Thirdly, it was noted that the respondent's publication was a subscription periodical distributed to persons responsible for occupational health and safety, and not to a wider audience[20]. Fourthly, it was said that having accepted subscriptions, the respondent was morally and legally obliged to publish for its subscribers matters of significance on the topic[21]. Finally, it was said that the Federal Court's decision on the claim made by ACOHS for damages for contravention of s 52 was a matter of significance on the topic of occupational health and safety[22].

13 The appellant submitted both in this Court and in the Court of Appeal that there was not the necessary reciprocity of duty or interest to make the occasion of publication privileged. It was emphasised that the respondent was a publisher for profit. The appellant submitted that any duty or interest which the respondent had was created by itself; the respondent and its subscribers had no interest in common, so it was said, save that provided by the subscription contracts they had made.

The significance of a profit motive

14 Reference must be made, and was made in argument in this Court, to the advice of the Privy Council in *Macintosh v Dun*[23] and the decision of this Court in *Howe & McColough v Lees*[24]. But attention cannot be, and was not, confined

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18 [2001] NSWCA 470 at [32].

19 [2001] NSWCA 470 at [32].

20 [2001] NSWCA 470 at [33].

21 [2001] NSWCA 470 at [32].

22 [2001] NSWCA 470 at [32].

23 (1908) 6 CLR 303; [1908] AC 390.

24 (1910) 11 CLR 361.

to those two decisions. Both must be set in the general fabric of the law relating to qualified privilege.

15 Each concerned mercantile references. *Macintosh* concerned a reference given by a trade protection society, or mercantile agency, to one of its subscribers about the commercial "standing, responsibility, [*et cetera*]" of a trader for the purpose "of aiding [the subscriber] to determine the propriety of giving credit" to the trader[25]. It was ultimately held that the reference was not made on an occasion of qualified privilege. In giving the advice of the Privy Council, Lord Macnaghten emphasised that the information upon which a mercantile agency would base its reference about a trader's standing would include confidential information. His Lordship referred[26] to the possibility that such information would be extorted from the trader, or would come from gossip, discharged servants or disloyal employees. Accordingly, although it would be convenient for a subscriber, who was also a trader, to know what Lord Macnaghten described[27] as "all the secrets of his neighbour's position, his 'standing', his 'responsibility', and whatever else may be comprehended under the expression '*et cetera*'", the good of society did not require that disclosure of such information for profit be privileged.

16 The fact that the mercantile agency was in the business of providing the information was evidently an important consideration leading to denial of the claim to privilege. It would be wrong, however, to isolate that element of profit and conclude that it will, in every case and without more, deny the availability of a defence of qualified privilege. In *Macintosh*, further elements were identified: the disclosure of confidential information would be sought, and it would likely be sought by means condemned as at least inappropriate, if not unlawful. While these further considerations were seen as *following* from the existence of the profit motive, they were considerations critical to the conclusion that the occasion was not privileged.

17 In *Howe & McColough* the members of an association of stock salesmen had contracted with each other to supply information about the default of any purchaser of stock. Failure to fulfil that obligation to supply information rendered a member of the association liable to forfeit a sum of money. There was, therefore, at least that commercial spur to the performance of the obligation

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25 (1908) 6 CLR 303 at 304; [1908] AC 390 at 398.

26 (1908) 6 CLR 303 at 307; [1908] AC 390 at 400.

27 (1908) 6 CLR 303 at 307; [1908] AC 390 at 401.

as well as the self-interest in avoiding future defaults. This Court held that each member of the association had an interest in making and receiving communications of information about default. It was held, therefore, that the publication occurred on a privileged occasion, there being the necessary reciprocity of duty or interest. The Court distinguished *Macintosh*. O'Connor J said[28] that the Privy Council's decision in *Macintosh* was to be understood as authority for no more than the proposition that "an individual, or an association or corporation, that makes a business of collecting information about traders' credit and selling it for reward to other traders has no privilege to communicate defamatory matter in the information". *Macintosh* does stand for that proposition, but does it, as the appellant contended here, stand for some wider proposition?

18 In both *Macintosh* and *Howe & McColough*, the maker and the recipient of the communication which was held to have defamed the plaintiff made or received the communication pursuant to contractual obligations which each had voluntarily assumed. In both cases, the maker and the recipient of the communication were in business and the communication related to a business transaction. In both cases, the maker and the recipient had a business reason (that is, a profit motive) for making or receiving the communication. Yet in *Howe & McColough* it was held that there was mutual duty or interest, whereas in *Macintosh* it was held that there was not.

19 The Full Court of New South Wales had held in *Macintosh*[29] that reciprocity of duty or interest was established. Pring J, who gave the reasons of the Full Court, said that *because* there was a contract to supply the information, the mercantile agency was under a legal duty to supply to the subscriber making the inquiry whatever information the agency had. He rejected the proposition that, because the mercantile agency was paid for its information, there could be no privilege. He described this argument as amounting to saying "that the higher the duty the less the protection"[30]. On appeal to this Court this analysis was substantially affirmed[31].

20 It is important to recognise that, in rejecting the analysis made in the Full Court of New South Wales and this Court, the Privy Council did not endorse the

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28 (1910) 11 CLR 361 at 373.

29 *Macintosh v Dun* (1905) 5 SR (NSW) 708.

30 (1905) 5 SR (NSW) 708 at 718.

31 *Dun v Macintosh*; *Macintosh v Dun* (1906) 3 CLR 1134.

proposition urged in the Full Court that payment for information *necessarily* denies that the occasion of its communication is privileged. Nor did the Privy Council hold that the voluntary assumption of obligations (whether by contract or otherwise) is *necessarily* inconsistent with the existence of mutual duty or interest. What distinguished *Macintosh* from *Howe & McColough* was the nature of the information conveyed and the manner of its collection. In *Macintosh*, information which included private or confidential material gathered from and about third parties was being conveyed; in *Howe & McColough*, information about a transaction to which the maker of the statement was a party was passed on. In *Macintosh*, the fear was that inappropriate methods would be used to assemble the information; in *Howe & McColough*, the person who made the communication already possessed the relevant knowledge.

21 In his reasons in the present case Hodgson JA said[32] he accepted "that one cannot create a licence to oneself to defame other persons by undertaking a contractual obligation to supply information". Divorced from its context, that proposition might be misunderstood. *Macintosh* does not establish that proposition and, expressed as it was, it might be understood as misstating the place of qualified privilege in the law of defamation.

22 Qualified privilege gives no licence to defame. It denies the inference of malice that ordinarily follows from showing that false and injurious words have been published. If the occasion is privileged the further question which arises is whether the defendant "has fairly and properly conducted himself in the exercise of it"[33]. In a trial of all issues in a defamation action by judge and jury, the question whether the occasion is privileged is a question of law for the judge; the question whether the occasion was used for the purpose of the privilege is a question of fact for the jury[34]. That is, it is for the jury in such a trial to decide the issue of malice. If the judge rules that the occasion is privileged, "the burden of shewing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason, is thrown upon the plaintiff"[35]. But if the occasion is held to have been privileged, the question of malice will ordinarily remain to be answered. If that is so, it cannot be said that the defendant had some licence to defame.

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32 [2001] NSWCA 470 at [32].

33 *Guise v Kouvelis* (1947) 74 CLR 102 at 117 per Dixon J quoting *Dickson v Earl of Wilton* (1859) 1 F & F 419 at 426 per Lord Campbell CJ [175 ER 790 at 793].

34 *Guise v Kouvelis* (1947) 74 CLR 102 at 117 per Dixon J.

35 *Clark v Molyneux* (1877) 3 QBD 237 at 247 per Brett LJ.

23 Was there, in this case, that reciprocity of duty or interest between maker and recipient of the matter of which complaint was made which would make the occasion of its communication privileged? What legal, social, or moral duties or interests were engaged between the respondent as publisher and those subscribers to whom it published its Bulletin?

24 The respondent described its Bulletin, on the masthead of the publication and in the advertising material it distributed, as a "plain English guide to workplace health and safety". The subscribers to the Bulletin were persons responsible for health and safety in the workplace, not any wider audience. By accepting subscriptions, the respondent undertook to publish a periodical of the kind it described – a guide to workplace health and safety. The subject of the guide was rightly identified in the Court of Appeal as important to society as a whole. The dissemination of information about that subject to those responsible for it was rightly held by the primary judge and the three judges in the Court of Appeal as advancing the common convenience and welfare of society. The matter of which complaint was made concerned the use which persons other than the copyright owner might make of material safety data sheets containing safety information about hazardous materials.

25 The facts that the respondent voluntarily embarked on its publishing venture and charged subscribers for its Bulletin required no different answer. There will be cases where an occasion is privileged but where both maker and recipient of the matter complained of have voluntarily undertaken the reciprocal duties which make the occasion privileged. *Howe & McColough* was such a case. Sometimes, as again was the case in *Howe & McColough*, there may be a contract between the maker and the recipient. Unlike *Macintosh*, however, no adverse consequence followed in this case from the publisher having a motive to profit from the publication. The material which the respondent sought to publish was not, as Lord Macnaghten described the subject of the respondents' business in *Macintosh*, "the characters of other people"[36]. Rather, the material concerned how to keep people safe from workplace injury.

26 What set the respondent's Bulletin apart from some other paid publications was the narrow focus of both its subject matter and its readership. Because its subscribers were *only* those responsible for occupational health and safety matters, and because it dealt *only* with those matters, there was that reciprocity of duty or interest between maker and recipient which attracted qualified privilege. The circumstances of publication were, therefore, very different from those in

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36 (1908) 6 CLR 303 at 306; [1908] AC 390 at 400.

which the general news media deal with matters of political or other interest. The premise for the development of the common law that was made in *Lange v Australian Broadcasting Corporation*[37] was that only in exceptional cases had the common law recognised a duty to publish or interest in publishing defamatory matter to the general public[38]. To hold that the occasion of publication of the matter complained of in this matter was privileged does not challenge that premise. In the present matter there was no publication to the general public. The occasion of the publication of the matter of which the appellant complained was rightly held in the courts below to be a privileged occasion.

Connection with a privileged occasion

27 As noted earlier, the Court of Appeal divided in opinion about the second of the issues argued in this Court: whether the matter which defamed the appellant was sufficiently connected to the privileged occasion to attract the defence. The majority of the Court of Appeal was right to conclude that it was. Whether other statements, in other subscription journals, would attract such a defence is a matter to be decided as and when the occasion arises, according to the facts of the particular case.

28 The article published in the respondent's Bulletin was entitled "MSDS copyright case dismissed". (Material safety data sheets are often called "MSDS".) The first paragraph of the article read: "Material safety data sheets should not be too restricted by copyright – they should as much as possible be available to enforce OH&S, according to a Federal Court ruling in the past fortnight." The article then contained extensive quotations from the Federal Court's reasons for decision in the ACOHS case as well as commentary on what had been decided. The article said that ACOHS had sued the publishers of the Infax newsletter "which had printed a report claiming ACOHS was one of two companies Bialkower successfully prosecuted for MSDS copyright infringement". It went on to say that the publishers "had engaged in false and misleading conduct by publishing an incorrect report".

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37 (1997) 189 CLR 520 at 570.

38 *Duncombe v Daniell* (1837) 8 Car & P 222 [173 ER 470]; *Adam v Ward* [1917] AC 309; *Chapman v Ellesmere (Lord)* [1932] 2 KB 431; *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632; *Lang v Willis* (1934) 52 CLR 637; *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 261.

29 The matter of which the appellant complained had as its subject the use that persons other than the copyright owner might make of material safety data sheets. That subject was evidently connected to occupational health and safety. The particular parts of the matter published by the respondent which defamed the appellant related to that subject. The defamatory matter related to the subject because it, like the rest of the matter published, concerned the use that others might make of material safety data sheets. It said that to assert that there had been "successful[] prosecut[ion] for MSDS copyright infringement" had been held to be "false and misleading conduct". That the article wrongly identified the appellant as having published this assertion did not alter or reduce the connection between the privileged occasion and the defamatory matter.

30 Communication of the statement, that to assert successful prosecution for MSDS copyright infringement had been held to be false and misleading conduct, fulfilled the reciprocal duties or interests of the parties in the communication of information about occupational health and safety.

An inaccurate report of court proceedings

31 The appellant submitted that a defence of qualified privilege was not available because the defamation was contained in what purported to be, but was not, a fair and accurate report of court proceedings. It was said that the "doctrinal basis for the defence of fair and accurate report of court proceedings is such that it axiomatically eclipses any particular relationship" which might found a defence of qualified privilege.

32 This, the third of the issues argued in this Court, can be dealt with shortly. The defences of qualified privilege and fair and accurate report have developed separately and differently[39]. That separate development may have occurred only in the nineteenth century[40], but it was inevitable. Each form of defence assumes the making of a defamatory statement. The focus of the defence of fair and accurate report, however, is necessarily directed to the quality of a *report* of what has taken place elsewhere. By contrast, because qualified privilege extends to all manner of communications between persons, its focus is upon what duty or interest joined the parties, and how the defamatory material related to the privileged occasion.

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39 *Curry v Walter* (1796) 1 B & P 525 [126 ER 1046]; *R v Wright* (1799) 8 TR 293 [101 ER 1396].

40 *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 215 per Dawson, McHugh and Gummow JJ.

33 Because the two defences *are* so different, and are directed to radically different problems, one is not to be understood as superior to the other. Each has its proper work to do. When, as here, it is thought that the two may intersect in some way, it is important not to begin from some assumption that only one can be engaged. Yet that was the premise for this aspect of the appellant's argument: that unless the respondent's report of the court proceedings brought by ACOHS was fair and accurate, the respondent could have no defence of qualified privilege. The premise should be rejected.

34 It is right to say that because the report was inaccurate (in describing the individual rather than his company as publisher) the respondent could not rely on a defence of fair and accurate report of court proceedings. But it by no means follows that no other defence was available. Contrary to the appellant's submissions, what was called "the internal coherence of the law of defamation" does not require that conclusion. The separate development of the defence of qualified privilege and the defence of fair and accurate report reveals that to be so, and nothing in the *Defamation Act* denies it. As noted earlier, s 11 of that Act says that the provision of a defence by Pt 3 of the Act "does not of itself vitiate, diminish or abrogate any defence or exclusion of liability available apart from this Act".

35 The defence of qualified privilege was available. The absence of a defence of fair and accurate report of judicial proceedings required no different conclusion. The appeal should be dismissed with costs.

36 McHUGH J. "When *New York Times Co v Sullivan* was decided, Alexander Meiklejohn, the philosopher of free speech, said it was 'an occasion for dancing in the streets.'" So wrote Anthony Lewis, the legal columnist for the *New York Times*, in his book *Make No Law: The Sullivan Case and the First Amendment*[41]. Australia has no First Amendment to celebrate. But, as it appears to me, the majority decision in this case goes beyond any decision that could be rendered under the First Amendment. It may not cause any dancing in the streets, but it is likely to be celebrated in the offices of the publishers of subscription magazines dealing exclusively with subjects of public interest and it will almost certainly be celebrated beyond that newly privileged group of publishers.

37 The majority decision holds that an occasion of qualified privilege arises when matter is voluntarily published to subscribers concerning a subject of public interest, if the subscribers have a business or professional responsibility for that subject. If they have that responsibility, the occasion is privileged even where, as here, the subject matter is described at a high level of abstraction – "occupational health and safety" or a "guide to workplace health and safety". It is possible to imagine more abstract statements of a subject of public interest, but there is certainly nothing concrete in the description of the subject matter in this case. Thus, the majority decision appears to protect the extensive publication of defamatory statements, true or false, that can be related to a widely defined subject of public interest when they are published to persons who have some responsibility for matters falling within the subject of interest.

38 At least inferentially, the majority decision also holds that the occasion is privileged even though the defamatory matter is not itself part of the subject of public interest and no part of that subject contains defamatory matter. Necessarily involved in the majority decision, given the facts of the case, is the holding that qualified privilege protects defamatory matter even though it is merely explanatory of, or related or incidental to, the subject of public interest and would not be published on an occasion of qualified privilege if published by itself. Indeed, the judgment of the Court of Appeal, which the majority decision affirms, expressly held that it was sufficient that the defamatory matter was explanatory of the subject of public interest. Nor did it matter, in the Court of Appeal's view, that the defamatory matter would not be published on an occasion of qualified privilege if published by itself. The majority decision also appears to treat the publication of the subscription magazine itself, and not the publication of the article that gave rise to the defamation, as the occasion of qualified privilege.

39 So the present case will inevitably stand as authority for the proposition that a paid-for communication such as a safety bulletin containing defamatory

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41 (1991) at 200.

matter relating to occupational health and safety matters sent to subscribers responsible for occupational health and safety matters is published on an occasion of qualified privilege. The result is that principles applied by common law judges for 200 years, principles that were carefully crafted to balance the competing demands of protection of reputation and freedom of speech, have been outflanked, if indeed their substance has not been repudiated. Certainly, the decision blunts the application of those principles.

40 The consequences of the majority decision may be far reaching. At the least, it must mean that trade and professional journals sent to paid subscribers are published on an occasion of qualified privilege and that defamatory imputations concerning any person that can be related to that trade or profession are protected communications. A medical journal that falsely stated that a person had died because of a particular doctor's negligent diagnosis would therefore be a protected communication. So would a legal journal that falsely reported the professional misconduct of a practitioner or judge or the incompetence of a journalist writing on legal matters. Except in those cases where the plaintiff can prove malice, the defendant will escape liability without the necessity to prove truth or fair comment.

41 The majority decision asserts that finding qualified privilege in this case is no licence to defame. But it is certainly a licence for the stupid and careless, as well as the ignorant, to defame. Ignorance, carelessness and stupidity are not evidence of malice, and their presence does not destroy an occasion of qualified privilege. Once the occasion is privileged, the protection will not be defeated because the publisher was ignorant, careless or stupid.

42 Moreover, it is difficult to see how the effect of the decision can be confined to trade and professional journals. Any subscription magazine concerning general health and consumer matters would seem to fall within the ambit of the decision, at all events if the subscribers are mainly persons who have responsibilities in respect of health and consumer matters. Specialist publications concerning companies sent to investors, credit officers and other persons responsible for financial matters are also arguably within the ambit of the decision. And it may well be that the publication of a trade union or trade association journal to members of organisations responsible for advancing and protecting the interests of those members is published on an occasion of qualified privilege. Indeed, there are numerous instances of subscription journals dealing with matters of public importance or interest. The potential scope of this decision's application in those cases is very great, particularly where persons responsible for matters pertaining to that subject matter are the chief recipients of the journals.

The issues

43 The appeal, which is brought from an order of the Court of Appeal of New South Wales, gives rise to two questions of public importance and one subsidiary question in the law of defamation. First, if the law of qualified privilege would otherwise protect defamatory matter, is the privilege lost if that matter is contained in a report of court proceedings that is unfair? Second, if the privilege is not lost, does the common law recognise the relationship between the publisher of an occupational health and safety bulletin and subscribers who are responsible for occupational health and safety matters as one that makes the publication of the bulletin to the subscribers an occasion of qualified privilege? If the bulletin was published on an occasion of qualified privilege, a subsidiary question arises as to whether the defamatory matter was so irrelevant to the occasion of privilege that the privilege does not protect it.

Statement of the case

44 Mr Rex Bashford sued Information Australia (Newsletters) Pty Ltd ("Information Australia") for damages for defamation in the Supreme Court of New South Wales. His claim arose out of an article published by Information Australia in its *Occupational Health and Safety Bulletin*, dated 28 May 1997. Subscribers to the bulletin – who total about 900 – pay an annual subscription of $395. Its readers comprise persons with responsibility for occupational health and safety within their companies, agencies and government departments.

45 The article on which Mr Bashford sued arose out of a judgment given by Merkel J[42] in an action in the Federal Court of Australia in respect of misleading statements in a newsletter called *Infax*. The main thrust of the article, however, concerned a cross-claim in that action brought by Mr Bernie Bialkower, one of the defendants, against ACOHS Pty Ltd ("ACOHS"). Mr Bialkower alleged that ACOHS had breached his copyright in certain safety data sheets. He had sought an injunction against further infringement of that copyright, but Merkel J dismissed the cross-claim. His Honour found that no breach of copyright had occurred and he declared that in any event he would have refused relief on discretionary grounds that included the public interest in not impeding the disclosure of data sheets concerned with industrial safety.

46 In its action, ACOHS had sought relief against R A Bashford Consulting Pty Ltd ("Bashford Consulting"), Mr Bialkower and Risk Management Concepts Pty Ltd ("Risk Management") in respect of misleading statements published in the *Infax* newsletter. The newsletter was published by Risk Management under a business venture between it and Bashford Consulting. Merkel J found both

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42 *ACOHS Pty Ltd v R A Bashford Consulting Pty Ltd* (1997) 144 ALR 528.

companies and Mr Bialkower liable for the harm caused by the misleading statements. His Honour awarded damages of $20,000 to ACOHS, but declared that Bashford Consulting and Risk Management were entitled to an indemnity of 75% of the damages and costs from Mr Bialkower. Bashford Consulting was found liable, not expressly as a publisher but as a principal of a business in the course of which Risk Management published the newsletter. It was the report of these findings of Merkel J that gave rise to Mr Bashford's claim for defamation. He was not a party to the action or cross-claim and was not mentioned by Merkel J in his judgment. However, the article in the bulletin concluded:

> "In respect of the initial claim, Justice Merkel found the publishers of Infax newsletter, RA Bashford and Risk Management Concepts, had engaged in false and misleading conduct by publishing an incorrect report – there had been no such copyright case – and that Bialkower was the source of the information and authorised its publication.
>
> He ruled publication of the 'seriously misleading statements caused harm to ACOHS's repute and goodwill and that harm is likely to have led to some loss of business or custom'.
>
> He awarded ACOHS $20,000 damages and ordered Bialkower, RA Bashford and Risk Management Concepts to pay their legal costs."

47 In accordance with the law of New South Wales, a jury had to determine what, if any, imputations concerning Mr Bashford were contained in the bulletin article and whether they were defamatory. But the validity of the defences to the publication and the assessment of damages had to be determined by a judge without a jury. In an earlier hearing, a jury determined that the bulletin contained the defamatory imputation that "[Mr Bashford] by publishing a false report concerning ACOHS Pty Limited had been found by the Federal Court of Australia liable to ACOHS Pty Limited in damages and costs for causing it harm and loss".

48 Subsequently, the case came before Davies AJ to determine the defences and to assess the damages. Information Australia relied on four defences – the "no harm" defence under s 13 of the *Defamation Act* 1974 (NSW), the defence of truth under s 15 of the *Defamation Act*, the defence of contextual truth under s 16 of the *Defamation Act* and the common law defence of qualified privilege. It did not rely on the defence of statutory qualified privilege given by s 22 of the *Defamation Act* – apparently because it believed that it could not establish that its conduct was reasonable, as required by that section.

49 Davies AJ found that the bulletin article contained two erroneous statements concerning Mr Bashford. First, it used the name "R A Bashford", not "R A Bashford Consulting Pty Ltd", and thereby referred to him personally. Second, it suggested that Mr Bashford was a publisher of the *Infax* newsletter

when neither he nor his company was the publisher. As a result, his Honour rejected the defences of truth and contextual truth. His Honour also rejected the "no harm" defence sought to be relied upon by Information Australia. However, he upheld the defence of common law qualified privilege.

50 His Honour held that the principal part of the article, dealing with the cross-claim, was published on a privileged occasion because Mr Bialkower's cross-claim raised a matter of general interest to persons operating in the field of occupational health and safety. His Honour said that the part of the article concerning misleading and deceptive conduct – which gave rise to the defamation – was not of interest to persons operating in the occupational health and safety field. He found that, if published on its own, it would not have been the subject of qualified privilege. But his Honour said that that part of the article was not irrelevant to the matters involved in the cross-claim. Consequently, the defamatory matter was also published on a privileged occasion. He also rejected Mr Bashford's argument that qualified privilege could not attach to a report of legal proceedings if the report was not fair and accurate. His Honour found that there was no evidence of malice or improper purpose on the part of Information Australia that defeated the privilege. He entered judgment for Information Australia but, in case his findings on liability should be reversed on appeal, he assessed the damages at $25,000.

51 The Court of Appeal of New South Wales by majority (Hodgson JA with Sheller JA agreeing, Rolfe AJA dissenting) dismissed an appeal brought by Mr Bashford. All three judges agreed the article was published on an occasion of qualified privilege in so far as it dealt with the determination of the cross-claim. But Rolfe AJA held that the publication of the defamatory matter was not relevant to the occasion.

Qualified privilege

52 It is convenient to determine whether any part of the article was published on an occasion of qualified privilege before discussing whether the defence of qualified privilege can ever protect the publication of an unfair report of court proceedings. Mr Bashford contends that, for the purposes of the doctrine of qualified privilege, Information Australia had no relevant duty to publish the article and no relevant interest in publishing it. He accepts that the bulletin subscribers had an interest in the judgment of Merkel J so far as it related to Mr Bialkower's cross-claim, but he submits that this is insufficient to establish a privileged occasion. He contends that the duty must be a duty to publish the matter complained of, not the journal in which it appears. He claims that in the Court of Appeal Hodgson JA erred in saying that it was sufficient that there was a duty, moral and legal, to include matters of this type in the newsletter. Mr Bashford claims that the statement is contrary to principle and to the decided cases – which speak in terms of the duty to make the communication in question.

53 At common law, a defamatory statement receives qualified protection when it is made in discharge of a duty or the furtherance or protection of an interest of the maker of the statement or some person with whom the publisher has a direct business, professional or social connection, and the recipient of the statement has a corresponding duty to receive or interest in receiving it[43]. Lord Campbell CJ stated the principle in *Harrison v Bush*[44] as follows:

> "A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable."

54 The common law describes the occasion on which such a communication is made as an occasion of qualified privilege[45]. The protection is lost – hence the name qualified privilege – if the occasion was used for a purpose or a motive foreign to the duty or interest that gave rise to the occasion[46]. In determining whether the occasion was privileged, the court examines all the circumstances of the case. They include the nature of the defamatory communication, the status or position of the publisher, the number of recipients and the nature of any interest they had in receiving it, and the time, place and manner of, and reason for, the publication. After considering these matters, the court makes a judgment as to whether the publisher had a duty or interest that justified making the publication and whether the recipients, or some of them, had a duty to receive or interest in receiving it. Evaluating these questions of duty and interest usually involves questions of public policy. In *Toogood v Spyring*[47], Parke B said that "[i]f fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of

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43 *Toogood v Spyring* (1834) 1 Cr M & R 181 [149 ER 1044]; *Adam v Ward* [1917] AC 309; *Watt v Longsdon* [1930] 1 KB 130; *Mowlds v Fergusson* (1940) 64 CLR 206; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

44 (1855) 5 E & B 344 at 348 [119 ER 509 at 512].

45 In *Adam v Ward* [1917] AC 309 at 334, Lord Atkinson said that a privileged occasion arises "where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it." Lord Atkinson said that "[t]his reciprocity is essential."

46 *Adam v Ward* [1917] AC 309 at 334; *Mowlds v Fergusson* (1940) 64 CLR 206 at 210-211, 214-215; *Roberts v Bass* (2002) 212 CLR 1 at 26 [62].

47 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1050].

society". Griffith CJ cited this passage with approval in *Howe & McColough v Lees*[48]. There, Griffith CJ explained[49] that the reference to the welfare of society did not mean that the person who made the communication was under an obligation to publish and was justified in publishing it to the public at large. Rather, according to his Honour, the phrase means that the interests of society in general require that a communication made under the particular circumstances to the particular person should be protected.

55 It is of the first importance to understand that references to concepts such as "the common convenience and welfare of society" and similar phrases record a result and explain why the communication and the relevant duty or interest gave rise to an occasion of qualified privilege. Such concepts are not the determinants of whether the occasion is privileged. They must be distinguished from the question whether society would recognise a duty or interest in the publisher making, and the recipient receiving, the communication in question. As Jordan CJ pointed out in *Andreyevich v Kosovich*[50], it is necessary to "show by evidence that both *the givers and the receivers of the defamatory information had a special and reciprocal interest in its subject matter*, of such a kind that it was desirable as a matter of public policy, in the general interests of the whole community of New South Wales, that it should be made with impunity, notwithstanding that it was defamatory of a third party." (emphasis added) It is only when the defendant has a duty to publish or an interest in publishing the particular communication and the recipient has a corresponding duty or interest that the occasion is privileged. It is only when this reciprocity of duty and interest is present that the common law regards publication of the communication as being for the common convenience and welfare of society.

56 With great respect, it was the Court of Appeal's failure to appreciate that the concept of the common convenience and welfare of society describes a result reached on the ground of reciprocity of duty and interest that erroneously led it to find that the bulletin was published on a privileged occasion. The Court of Appeal began with the premise that it was for the common convenience and welfare of society to publish material concerning occupational health and safety matters. Commencing with that premise, the Court of Appeal naturally concluded that the publication was made on a privileged occasion because of the responsibilities of the recipients and the contractual obligation of Information Australia to furnish them with information on safety matters.

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48 (1910) 11 CLR 361 at 368.

49 (1910) 11 CLR 361 at 368-369.

50 (1947) 47 SR (NSW) 357 at 363.

57 After concluding that it is for the common convenience and welfare of society to publish matter concerning occupational health and safety matters, the Court of Appeal held that Information Australia had a duty to publish this class of matter and that the recipients had an interest in receiving this class of matter. Thus, the Court of Appeal held that Information Australia had a duty to publish matter, described at a high level of abstraction, without regard to the subject matter of the particular defamation or, for that matter, whether the matter was defamatory or non-defamatory. The Court of Appeal then held that, because the defamatory matter sued upon was incidental to, or explanatory of, matter falling within this abstract description, the occasion of publication was privileged.

58 With respect, this analysis of the issues turns the law of qualified privilege on its head. A plea that defamatory matter was published on an occasion of qualified privilege is a plea of confession and avoidance. It accepts that the communication is defamatory, that the defamatory matter may be false and that its publication has caused or may cause harm to the plaintiff. It confesses the publication of defamatory matter, but contends that the publication is immune from liability because the public interest requires that the duty and interest of the publisher and recipient should be preferred to the protection of the plaintiff's reputation. The court cannot determine these issues of duty and interest without characterising the subject matter of the defamation. It cannot judge whether the particular duty and interest are so necessary for the proper functioning of society that the occasion should be privileged – despite the harm that the communication may cause – unless it knows what is the nature of the defamatory communication that allegedly gives rise to the duty and interest. A defendant who claims that the occasion was privileged must show that "both the givers and the receivers of the defamatory information had a special and reciprocal interest in its subject matter"[51] such that public policy requires that the defendant be immune from liability for the publication.

59 Commencing with the premise that it is for the common convenience and welfare of society to publish matter concerning occupational health and safety also led the Court of Appeal into two further errors that are related to each other. First, it caused the Court to fail to define precisely and concretely what the interest of each recipient was. Second, it caused the Court to equate the issue of relevance with the connection between the defamatory matter and the report of Mr Bialkower's cross-claim, instead of the connection between the defamatory matter and the occasion of qualified privilege.

60 Although it is convenient for text book writers and sometimes judges to classify occasions of qualified privilege into broad categories such as replies to attacks and interests arising out of employment, the practical working of the

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51 *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357 at 363.

doctrine of qualified privilege requires that the occasion be defined concretely and precisely. That ordinarily requires the interest of the recipient to be defined first, and to be defined concretely and precisely, although sometimes it is necessary first to define the duty in that way. Unless the interest is so defined, the issues of duty, occasion, relevance and malice cannot be determined – at all events correctly.

61 Thus, it is insufficient to describe the interest of an employer as an interest in obtaining information about the character of a potential employee. It is necessary not only to know the name of the employee but also what position that person will occupy and often what he or she will be doing. Until these things are known, it is not possible to know whether the publisher had a reciprocal duty to answer a request for information concerning the employee and whether the defamatory answer given is relevant to the request that together with the answer constitutes the occasion. Similarly, where the defendant asserts that he or she had an interest in answering an attack, it is necessary to know what the attack was and how and to whom it was made. Only when that is known can the court determine whether the defendant's defamatory response was relevant to the occasion, went beyond what was necessary to protect the defendant's interests or was used for a purpose foreign to the occasion.

62 By regarding the interest of the bulletin's recipients as simply an interest in receiving information concerning occupational health and safety matters, the Court of Appeal appears to have concluded that Information Australia's contractual promise to publish the bulletin to each subscriber constituted the required reciprocal duty. If the Court of Appeal had attempted to define the interest of each recipient more concretely and precisely, it would have seen that each recipient had no interest that created a reciprocal duty in Information Australia to publish the defamatory matter concerning Mr Bashford.

63 The correct approach in determining the issue of qualified privilege is radically different from the approach of the Court of Appeal. In determining the question of privilege, the court must consider all the circumstances and ask whether *this* publisher had a duty to publish or an interest in publishing *this* defamatory communication to *this* recipient. It does not ask whether the communication is for the common convenience and welfare of society. It does not, for example, ask whether it is for the common convenience and welfare of society to report that an employee has a criminal conviction. Instead, it asks whether this publisher had a duty to inform this recipient that the latter's employee had been convicted of a particular offence and whether this recipient had an interest in receiving this information. That will depend on all the circumstances of the case. Depending on those circumstances, for example, there may be no corresponding duty and interest where the conviction occurred many

years ago or where it could not possibly affect the employment. As an Irish court has pointed out[52]:

> "It is not enough to have an interest or a duty in making *a* communication, the interest or duty must be shown to exist in making *the* communication complained of." (original emphasis)

64 The correct approach to determining whether the occasion is privileged is contained in a passage in *Baird v Wallace-James*[53] that members of this Court have cited[54] with approval. In *Baird*, Earl Loreburn said[55]:

> "In considering the question whether the occasion was an occasion of privilege the Court *will regard the alleged libel*, and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty; and the consideration of these things may involve the consideration of questions of public policy". (emphasis added)

Statements made in answer to attacks or requests for information

65 In determining whether the communication was made to discharge a duty or to protect or further an interest, the common law has drawn a distinction between statements replying to a request for information or responding to an attack and statements that are volunteered by the publisher. Where the defamatory communication responds to an attack on its publisher or some person connected with him or her, the common law has adopted a liberal approach to the question of duty or interest. Not only has it usually held[56] that the publisher had a duty to respond or an interest in responding but, as a consequence, it has taken a very liberal view of what constitutes an "interest" in those who receive the response. In *Mowlds v Fergusson*[57], Dixon J said:

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52 *Lynam v Gowing* (1880) 6 LR Ir 259 at 268-269.

53 (1916) 85 LJ PC 193.

54 *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632 at 646-647; *Mowlds v Fergusson* (1940) 64 CLR 206 at 214.

55 (1916) 85 LJ PC 193 at 198.

56 *Laughton v The Bishop of Sodor and Man* (1872) LR 4 PC 495; *Adam v Ward* [1917] AC 309; *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503.

57 (1940) 64 CLR 206 at 214-215.

> "Where the defamatory matter is published in self-defence or in defence or protection of an interest or by way of vindication against an imputation or attack, the conception of a corresponding duty or interest in the recipient must be very widely interpreted."

66 So, in *Adam v Ward*[58], the House of Lords held that the publication of a letter in the British and Colonial Press was made on an occasion of qualified privilege when it was sent by the Army Council to protect an army officer who had been falsely attacked in Parliament. Lord Atkinson said[59] that the publication was not too wide because "every subject of the Crown ... has, and must have, an interest in the British Army". Similarly, in *Loveday v Sun Newspapers Ltd*[60], this Court held that, where the plaintiff had chosen the public press for the purpose of publicising a complaint, he could not complain if the defendant used the public press to reply to the plaintiff's criticism. Starke J said[61]:

> "A man who attacks another in or through a newspaper cannot complain if that other repels or refutes the attack for the purpose of vindicating himself. He has appealed to the public and provoked or invited a reply. A person attacked has both a right and an interest in repelling or refuting the attack, and the appeal to the public gives it a corresponding interest in the reply. Occasions of this kind are privileged and communications made in pursuance of a right or duty incident to them are privileged by the occasion."

67 Dixon J said[62]:

> "If the criticism had been addressed to the public at large and the communication had not been confined to specific individuals, the privilege would cover a publication of the answer in the newspapers or in any other manner that would reach the public generally. A privilege would be of no value if the means of exercising it were not also protected. If the party attacked is given a privilege to reply through the public press, the

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58 [1917] AC 309.

59 [1917] AC 309 at 343.

60 (1938) 59 CLR 503.

61 (1938) 59 CLR 503 at 515.

62 (1938) 59 CLR 503 at 519.

> publisher of a newspaper who allows the use of his columns for the purpose must also enjoy an attendant privilege."

68 Similarly, the common law has taken a liberal view in respect of the existence of a duty to answer requests for information about the plaintiff. Rarely will the duty be one enforceable by mandamus or other legal action. It is sufficient that the duty is social or moral[63]. Admittedly, common law judges of great experience "have all felt great difficulty in defining what kind of social or moral duty ... will afford a justification"[64]. In *Stuart v Bell*, however, Lindley LJ said[65]:

> "I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings".

69 A common case of a moral or social duty in this context is the duty to answer a request by a potential employer for information concerning the character, capacity or honesty of an employee[66]. When such a request is made, the common law recognises a duty in the recipient of the request to answer the enquiry and to state fully and honestly all that he or she believes that he or she knows about the employee that is relevant to the enquiry. The answer cannot be used as a licence to defame the employee. It must be fairly and reasonably relevant to the enquiry. If the employer is asked whether the employee is fit to be employed as a gardener, it is unlikely that the occasion of privilege would extend to details about the employee's convictions for negligent driving.

70 Similar to the case of information concerning an employee is an answer to a request for information by a person who intends to deal with a businessperson. If the request is made to someone who has information about the business dealings of a businessperson, the common law recognises a duty to give a full,

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63 *Watt v Longsdon* [1930] 1 KB 130 at 152.

64 *Whiteley v Adams* (1863) 15 CB (NS) 392 at 418 [143 ER 838 at 848].

65 [1891] 2 QB 341 at 350.

66 *Hodgson v Scarlett* (1818) 1 B & Ald 232 at 239-240 [106 ER 86 at 88]; *Mead v Hughes* (1891) 7 TLR 291.

honest and relevant answer concerning that person[67]. In *Waller v Loch*, Brett LJ said[68]:

> "If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered, and if answered bona fide and without malice, the answer is a privileged communication."

71 But not every relevant answer to a request for information concerning the character, reputation or credit-worthiness of another is published on an occasion of qualified privilege[69]. The occasion will not be privileged unless the person making the enquiry has a legitimate interest in obtaining the information[70]. Interest for this purpose – and the law of qualified privilege generally – means more than an interest in the information "as a matter of gossip or curiosity"[71]. The interest must be a social, moral or economic interest that is sufficiently tangible for the public interest to require its protection[72]. The interest of the recipient, said Evatt J in *Telegraph Newspaper Co Ltd v Bedford*[73], must be "a real and direct personal, trade, business or social concern." The occasion will not be privileged simply because the defendant believes that the recipient had a relevant interest in receiving or duty to receive the communication[74].

72 Although answers to enquiries about the character, reputation and credit-worthiness of former employees and businesspersons represent the most common instances of the common law recognising a duty to give information, the

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67 *Bromage v Prosser* (1825) 4 B & C 247 [107 ER 1051]; *Storey v Challands* (1837) 8 C & P 234 [173 ER 475]; *Robshaw v Smith* (1878) 38 LT 423; *Waller v Loch* (1881) 7 QBD 619 at 621; *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 42.

68 (1881) 7 QBD 619 at 622.

69 *Force v Warren* (1864) 15 CB (NS) 806 at 808 [143 ER 1002 at 1003].

70 *Greenlands Ltd v Wilmshurst and the London Association for Protection of Trade* [1913] 3 KB 507 at 541.

71 *Howe & McColough v Lees* (1910) 11 CLR 361 at 398.

72 cf *Howe & McColough v Lees* (1910) 11 CLR 361 at 377.

73 (1934) 50 CLR 632 at 662.

74 *Hebditch v MacIlwaine* [1894] 2 QB 54 at 59.

categories of duty are not closed. The law will recognise a duty whenever "the great mass of right-minded men in the position of the defendant would have considered it their duty, under the circumstances, [to make the communications]"[75]. Thus, where a person suspects someone of committing a crime, being dishonest or engaging in misconduct, the common law recognises a duty in that person to give information concerning what he or she knows about the matter to a person who has requested the information and has a legitimate interest in acquiring it[76].

73 Different considerations apply when the defendant volunteers defamatory information. Ordinarily the occasion for making a volunteered statement will be privileged only where there is a pressing need to protect the interests of the defendant or a third party or where the defendant has a duty to make the statement to the recipient. The common law has generally perceived no advantage to society in giving qualified privilege to volunteered statements in the absence of a pre-existing reciprocity of interest between the defendant and the recipient[77]. It has taken the view that the reputation of the defamed should be preferred over the freedom to publish volunteered but defamatory statements that may or may not be true. In most cases, a defendant who publishes a defamatory statement that neither protects his or her interests nor answers a request for information will have to rely on some other defence, such as truth or fair comment. Thus, in *Guise v Kouvelis*[78], a majority of this Court held that the occasion was not privileged when a club committeeman, who was watching a game of cards, immediately informed about 50 or 60 members and non-members in the room that one of the players had cheated when he claimed that there had been a misdeal. The majority rejected the defendant's claim that he had a moral or social duty to say what he did or that he was protecting his own interests or the common interests of himself and other members of club. Latham CJ said[79] that it

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75 *Stuart v Bell* [1891] 2 QB 341 at 350.

76 *Cockayne v Hodgkisson* (1833) 5 C & P 543 [172 ER 1091]; *Kine v Sewell* (1838) 3 M & W 297 [150 ER 1157]; *Beatson v Skene* (1860) 5 H & N 838 [157 ER 1415].

77 *Wyatt v Gore* (1816) Holt NP 299 [171 ER 250]; *Brooks v Blanshard* (1833) 1 C & M 779 [149 ER 613]; *Wenman v Ash* (1853) 13 CB 836 [138 ER 1432]; *Dickeson v Hilliard* (1874) LR 9 Exch 79; *Thomas v Moore* [1918] 1 KB 555; *Guise v Kouvelis* (1947) 74 CLR 102; *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357.

78 (1947) 74 CLR 102 (Latham CJ, Starke, McTiernan and Williams JJ, Dixon J dissenting).

79 (1947) 74 CLR 102 at 111.

could "hardly be contended that the defendant was under a duty to shout out to the room that the plaintiff was a crook even if he believed that he was." Starke J said[80] that the committeeman clearly "had no legal duty to make any such statement and no reasonable right-minded man in the circumstances and in the position of the [defendant] ought, in my judgment, to have made it." Dixon J, who dissented, thought that the defendant did have a social duty to expose immediately the cheating that he believed had occurred. His Honour said[81]:

> "The test of privilege that is in point is the defendant's interest or social duty in impugning then and there the plaintiff's play on the footing of what he had witnessed and on the other side the plaintiff's interest therein, which can hardly be doubted. The question and the interest of the bystanders is by no means immaterial, because it affects the extent of the protection, the extent of publication protected. But that is not the essential basis of the privilege, it is rather incidental."

74 Nevertheless, an occasion may be privileged when the defendant has volunteered a statement instead of answering a request or has made the statement to protect the defendant's or a third party's interests. As Jessel MR pointed out in *Waller v Loch*[82], "[i]t is not necessary in all cases that the information should be given in answer to an inquiry." In all cases, however, the fact that the defendant has volunteered the statement is an important – often decisive – factor in determining whether the occasion was privileged. In *Macintosh v Dun*, Lord Macnaghten said[83]:

> "Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be 'recognized by English people of ordinary intelligence and moral principle'[84], (to borrow again the language of Lindley LJ), it cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance."

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80 (1947) 74 CLR 102 at 114.

81 (1947) 74 CLR 102 at 122.

82 (1881) 7 QBD 619 at 621.

83 (1908) 6 CLR 303 at 305-306; [1908] AC 390 at 399.

84 *Stuart v Bell* [1891] 2 QB 341 at 350.

75 In cases where imminent injury to the person or loss or damage to property is concerned, the common law has given a wide protection to defamatory communications initiated by a defendant where they are necessary to protect the immediate interests of a person – usually the recipient[85]. In *Davies v Snead*, Blackburn J said[86]:

> "[W]here a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he bona fide and without malice does tell them it is a privileged communication."

76 So in *Stuart v Bell*[87], the Court of Appeal held that the occasion was privileged where the defendant, after receiving information from a chief constable, informed the plaintiff's master that the plaintiff was suspected of stealing a watch. Similarly, a former employer may ordinarily inform a potential employer of the misconduct of a former employee even though the potential employer has made no request for a reference[88]. And an employer who has dismissed the plaintiff for dishonesty acts on an occasion of qualified privilege when the employer informs the person who gave the reference that led to the plaintiff's employment of the dishonesty[89]. So does a relative who warns a woman about the bad character of the man that she proposes to marry[90]. So too does a solicitor who warns a client about the potential harm to the client's interests even though the solicitor has not been consulted on the particular matter[91]. In a case like that the previous relationship between the solicitor and the client may be sufficient to constitute an interest in the client and a social or moral duty in the solicitor that enables the solicitor to volunteer the defamatory communication. Similarly, in *Mowlds v Fergusson*[92], this Court held that a former relationship between the defendant, a police officer, and a former Commissioner of Police constituted a sufficient interest in all the circumstances

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85 *Coxhead v Richards* (1846) 2 CB 569 at 596 [135 ER 1069 at 1080].

86 (1870) LR 5 QB 608 at 611.

87 [1891] 2 QB 341.

88 *Rogers v Clifton* (1803) 3 Bos & P 587 at 592, 595 [127 ER 317 at 320, 321]; *Pattison v Jones* (1828) 8 B & C 578 [108 ER 1157].

89 *Dixon v Parsons* (1858) 1 F & F 24 [175 ER 609]; *Fryer v Kinnersley* (1863) 15 CB (NS) 422 [143 ER 849].

90 *Todd v Hawkins* (1837) 8 C & P 88 [173 ER 411].

91 *Baker v Carrick* [1894] 1 QB 838 at 841.

92 (1940) 64 CLR 206.

of the case to create a duty in the defendant to show a copy of a report to the former Commissioner.

77 But where neither life is in immediate danger nor harm to the person or injury to property imminent, the fact that the defendant has volunteered defamatory matter is likely to be decisive against a finding of qualified privilege. Thus, the customer of a shopkeeper in answer to a request by a potential customer is entitled to give his or her opinion as to the quality of the shopkeeper's goods, and when he or she does so, the reply will be published on an occasion of qualified privilege. But the case is different where the customer voluntarily defames the character or reputation of the shopkeeper to potential customers[93]. The point is well illustrated by the famous case of *Toogood v Spyring*[94].

78 In *Toogood*, the defendant required his landlord to effect repairs on the tenanted property; the landlord's agent sent out two workmen to do the work, one of whom was the plaintiff. Later the defendant complained to the plaintiff in the presence of one Taylor that the plaintiff had misconducted himself in doing the work. Still later the defendant repeated the charge to Taylor in the absence of the plaintiff and later again to the landlord's agent. The Court of Exchequer held that the statements were made on occasions of qualified privilege, except for the statement made to Taylor in the absence of the plaintiff. The Court held that both the plaintiff and the agent had such an interest in being informed of the charge against the plaintiff that the defendant was entitled to protect his interests by telling them of his concerns. Taylor, however, had no interest in the matter that could justify the defendant telling him of the plaintiff's misconduct.

79 One class of case where the defendant is entitled to volunteer defamatory information to a third party is where a confidential relationship exists between the defendant and the third party and the defendant has a duty to protect the interests of that person[95]. In the absence of a confidential relationship between the parties, however, the common law has narrowly construed the situations that entitle a person to volunteer defamatory information concerning another. In

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93 *Picton v Jackman* (1830) 4 C & P 257 [172 ER 695]; *Storey v Challands* (1837) 8 C & P 234 [173 ER 475].

94 (1834) 1 Cr M & R 181 [149 ER 1044].

95 *Wright v Woodgate* (1835) 2 Cr M & R 573 [150 ER 244]; *Todd v Hawkins* (1837) 8 C & P 88 [173 ER 411]; *Wilson v Robinson* (1845) 7 QB 68 [115 ER 413]; *Scarll v Dixon* (1864) 4 F & F 250 [176 ER 552]; *Stace v Griffith* (1869) LR 2 PC 420; *Henwood v Harrison* (1872) LR 7 CP 606; *Adams v Coleridge* (1884) 1 TLR 84; *Baker v Carrick* [1894] 1 QB 838 at 841.

Macintosh v Dun[96], the Judicial Committee of the Privy Council held that qualified privilege did not attach to communications by a trade protection business to subscribers concerning the commercial standing of persons in New South Wales and elsewhere. Lord Macnaghten, giving the reasons of the Committee, said[97]:

> "No doubt there was a specific request. In response to that request the communication was made. That much is clear. But it is equally clear that the defendants set themselves in motion and formulated and invited the request in answer to which the information complained of was produced. The defendants, in fact, hold themselves out as collectors of information about other people which they are ready to sell to their customers."

80 The Judicial Committee went on to hold that the defendants did not supply the information to subscribers from a sense of duty but as a matter of business and self-interest. Having made that finding, the Judicial Committee said[98]:

> "Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from a *bona fide* sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people?"

The Judicial Committee answered the question in the negative. It said[99]:

> "There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employees. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law."

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96 (1908) 6 CLR 303; [1908] AC 390.

97 (1908) 6 CLR 303 at 306; [1908] AC 390 at 399-400.

98 (1908) 6 CLR 303 at 306; [1908] AC 390 at 400.

99 (1908) 6 CLR 303 at 306-307; [1908] AC 390 at 400.

81 *Macintosh* does not hold that qualified privilege cannot attach to a communication made for profit. It is true that the Judicial Committee used the business nature of the communication to negate the conclusion that the defendants acted from a sense of duty. But it went on to determine whether, despite the lack of duty, the business interest of the defendants was sufficient to make the occasion of publication one of qualified privilege. The real basis of the decision was that the welfare of society was not furthered by giving qualified privilege to defamatory communications, whether true or untrue, made by a publisher who was a volunteer, who was not discharging any moral duty and whose sources might be unreliable or malicious, simply because of the business interest of the publisher. That the communication was made for profit is relevant in determining whether the occasion was actuated by a social or moral duty and *at common law*[100] was once likely to be decisive in determining whether the occasion was privileged. Nowadays, however, it is probably better in most cases to regard the issue of profit motive as neither advancing nor impairing a claim for qualified privilege. That is to say, its presence does not ordinarily indicate that the defendant was not discharging a duty or protecting an interest that the common law will recognise.

82 Nor does *Macintosh* hold that qualified privilege cannot extend to statements concerning the credit of traders when the statements are made by or on behalf of a trade protection association. This Court held to the contrary in *Howe & McColough v Lees*[101]. In *Howe*, the defendants were members of a stock salesmen association in Bendigo. In accordance with the rules of the association, they reported to the secretary of the association that the plaintiff had failed to pay for stock bought at the Bendigo sales yards. In turn, the secretary informed other members of the association that the plaintiff had defaulted. The Court held that the defendants' report was made on an occasion of qualified privilege. Griffith CJ said[102]:

> "Having regard to the nature of the business conducted by the members of the Bendigo association, I think that they were all mutually interested in knowing whether probable bidders at the auction sales were persons to whom the short credit allowed might be safely given. The fact that a man had purchased at one sale was, in my opinion, sufficient foundation for regarding him as a probable bidder at another. A communication with regard to his failure to meet his engagements was consequently relevant to

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100 The position is different in New South Wales when the case falls within s 22 of the *Defamation Act* 1974 (NSW).

101 (1910) 11 CLR 361.

102 (1910) 11 CLR 361 at 370.

> the question of his solvency. There was, therefore, in my opinion, a community of interest."

His Honour went on to say[103]:

> "The communication now in question was in substance made in answer to a standing inquiry understood to be made on every Saturday by every member of the association to every other member in pursuance of the rules, the effect of which was: Has any purchaser from you at the last sale made default?"

83 As the judgment of Griffith CJ shows, the occasion was privileged because each member had a direct financial interest in knowing whether he or she could safely extend credit to a purchaser at the sales yards. Furthermore, by the rules of the association, each was taken to have made a standing request to other selling agents for information concerning the credit of probable purchasers at the sales. There was, therefore, a request for credit information by a person who had a direct interest in acquiring that information and the information given was based on the defendants' own dealings with the plaintiff. The decision of the Court is analogous to a long line of cases holding that qualified privilege attaches to answers to requests for information concerning the credit or character of another, when the request is made by those who are likely to deal with that person[104]. The only material difference between *Howe* and those cases was that in *Howe* the requests were made by, and the answers given to, more than one person. However, a real possibility existed that any of the recipients might have dealings with the defaulter. Because that was so, each of them had a direct interest in knowing of the credit standing of the defaulter.

84 A clear example of the distinction that the common law draws between a statement made in response to an attack on the publisher of the statement and a volunteered statement made to protect others is seen in *Penton v Calwell*[105]. In *Penton*, the defendant claimed qualified privilege in respect of an editorial responding to an attack upon the defendant and fellow employees *and upon Australian newspapers generally*. Dixon J rejected the claim in so far as the defendant sought qualified privilege in respect of the defence of Australian newspapers generally. His Honour said[106]:

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103 (1910) 11 CLR 361 at 370-371.

104 See, for example, *Smith v Thomas* (1835) 2 Bing (NC) 372 [132 ER 146]; *Storey v Challands* (1837) 8 C & P 234 [173 ER 475]; *Robshaw v Smith* (1878) 38 LT 423; *Waller v Loch* (1881) 7 QBD 619.

105 (1945) 70 CLR 219.

106 (1945) 70 CLR 219 at 231-232.

> "No case has yet gone as far as deciding that attacks upon an institution, such as the press, the theatre, or the Bar, or a section of the community create a privileged occasion in each person belonging to or concerned in the institution or the section of the community so that he is enabled in the exercise of a qualified privilege attaching to him personally to publish defamatory matter by way of defence or counter-attack."

85 The Full Court upheld this part of his Honour's judgment[107]. *Penton* is another authority, therefore, for the proposition that the occasion is privileged when the defendant responds to the plaintiff's attack on the defendant's interests by attacking the plaintiff. But it is also an authority for the proposition that the occasion does not extend to attacking the plaintiff because of what that person has said about an unrelated third party. *A fortiori*, the occasion is not privileged if, in the course of responding to the plaintiff's attack, the defendant volunteers an attack on a third party.

The Court of Appeal's reasons

86 In my opinion, the learned judges of the Court of Appeal failed to invoke or apply these principles in the present case in determining the issue of qualified privilege. Hodgson JA gave the leading judgment. Both Sheller JA and Rolfe AJA agreed with his Honour's judgment on this issue. Hodgson JA said that occupational health and safety is a matter important for the common convenience and welfare of society and that communications on matters relevant to that issue to persons responsible for occupational health and safety promote that common convenience and welfare. The article was in a newsletter distributed to persons responsible for occupational health and safety who paid a substantial subscription for the newsletter and not to any wider audience, as is the case with a newspaper of general distribution.

87 Relying on *Howe*[108], Hodgson JA said that the existence of a lawful agreement with regard to a matter that the parties have a common interest in gives rise to a duty to provide the information. In this case, Information Australia had entered into an agreement with its subscribers to provide an occupational health and safety newsletter. The subscribers would have expected that, in return for their $395, Information Australia would include stories about matters of importance in the area of occupational health and safety.

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107 (1945) 70 CLR 219 at 245-246, 248, 251, 255.

108 (1910) 11 CLR 361 at 370 per Griffith CJ, Barton J agreeing.

88 Hodgson JA said that the cross-claim was a matter of significant importance to those in the industry and it was part of Information Australia's duty to communicate information about it to its readers. His Honour said that "having accepted subscriptions for a newsletter on such matters, [Information Australia] was morally and legally obliged to publish for subscribers matters of significance on that topic, and the decision on the cross-claim in this case fell within that description." His Honour said that he was satisfied that the publication was made on an occasion of qualified privilege.

The circumstances did not give rise to an occasion of qualified privilege

89 The material circumstances in the present case were as follows:

(1) The defamatory communication imputed that Mr Bashford had published a report concerning ACOHS that contained seriously misleading statements and that the Federal Court of Australia had held him liable to pay damages and costs to ACOHS for the harm and loss that it had suffered.

(2) The defamatory imputation was published as an addendum to a story that the Federal Court had rejected a claim for an injunction by a Mr Bialkower to restrain breach of the copyright he claimed in certain safety data sheets.

(3) The Federal Court had held that Mr Bialkower had no copyright in the sheets.

(4) In rejecting the claim, the Federal Court said that in any event it would have refused to give Mr Bialkower relief because of the public interest in not impeding the disclosure of data sheets concerned with industrial safety.

(5) The Federal Court had made no finding against Mr Bashford.

(6) The article was published as an item of information to about 900 paying subscribers to a bulletin that specialised in reporting occupational health and safety matters.

(7) Most – perhaps all – of the subscribers to the bulletin had responsibilities in respect of occupational health and safety matters.

(8) The subscribers were not shown to have any imminent dealings with Mr Bashford.

90 Upon these facts, it is impossible to hold that the defamatory matter was published on a privileged occasion. Earlier in these reasons, I pointed out that

the major premise of the Court of Appeal's reasoning and its consequential analysis were erroneous. And when the above circumstances are evaluated, they lead inevitably to the conclusion that the defamatory communication was not published on an occasion of qualified privilege.

91 The fact that the publication was made to paid subscribers neither advances nor impairs the claim of qualified privilege. However, Information Australia had no legal duty to publish the article or any part of it to its subscribers. It was a matter for its discretion whether it did so. It could select what items it published. Unlike the defendants in *Howe*, Information Australia had no contractual obligation to publish *this* communication, even if the communication was defined to mean the entire article. And, unlike the recipients of the communication in *Howe*, the recipients of the bulletin had no direct interest in being informed that Mr Bashford had engaged in false and misleading conduct by publishing seriously misleading statements that had caused harm to the repute and goodwill of ACOHS. No evidence was led that the recipients, or any of them, had any imminent or even potential dealings with Mr Bashford that made it imperative that they be told of his misconduct. Because that is so, it is impossible to hold that Information Australia had any legal, moral or social duty to publish this communication containing defamatory material to the recipients. And as I have indicated, the recipients did not have "a real and direct personal, trade, business or social concern"[109] in information concerning Mr Bashford or, for that matter, Mr Bialkower.

92 Nor did Information Australia make the communication in answer to a request for information concerning Mr Bashford or such people as the subscribers were likely to deal with in the future. Nor did it make the communication to protect its own interests. If Information Australia had responded to a public attack by Mr Bialkower by relevantly attacking him in its bulletin, the occasion of the reply would have been privileged. But that occasion of privilege would not have extended to defaming Mr Bashford. However, there is not, and cannot be, any suggestion that in publishing the article Information Australia was seeking to protect its own interests by responding to attacks on those interests.

93 Thus, for the purpose of the law of qualified privilege, Information Australia was a volunteer. It was in no different position to an ordinary citizen who informed the safety officers of a number of companies that Mr Bashford had published a false and misleading report that caused damage to ACOHS. A claim for qualified privilege by such a citizen would be hopeless. Information Australia's position is in fact worse than the claim of the hypothetical citizen: it has published the defamation to at least 900 persons. The extent of a publication

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109 *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632 at 662.

is always a relevant matter in determining whether the occasion was privileged[110].

94 Finally, if it otherwise mattered in this case, not only did Information Australia have no duty to publish this defamatory communication and its recipients have no interest, properly defined, in receiving it, but the communication is a false report of court proceedings. Contrary to the argument of Mr Bashford, there is no general rule that an occasion cannot be privileged if the communication contains an unfair report of court proceedings. If the occasion is otherwise privileged because of reciprocity of duty and interest, the fact that the communication contains an unfair report of court proceedings will not destroy the occasion of privilege. Thus, the occasion is still privileged even though an employer, when asked about the character of a former employee by a potential employer, honestly but mistakenly reports the result of a court case concerning the employee. But when a question arises as to whether a defendant had *a duty to volunteer* information about a court case – as in this case – the fact that the information constitutes an unfair report of the court proceedings is a decisive reason for rejecting the claim. At common law, the publishing of a report of court proceedings was an occasion of qualified privilege. However, it was a condition of the privilege that the publication was a fair report[111].

95 The application of the settled principles of the law concerning qualified privilege requires the rejection of Information Australia's claim that the defamation was published on an occasion of qualified privilege. I have not read all the reported cases on common law qualified privilege decided by the English and Australian courts, but I have read many – probably most – of them. I can think of only two English cases that remotely support the bold claim of qualified privilege for this defamation. In *Chapman v Ellesmere (Lord)*[112], the English Court of Appeal held that the occasion was privileged when the defendants published the disqualification of a horse trainer in the Racing Calendar, the recognised organ of the Jockey Club, which was circulated to persons interested in horse racing. It is hard to see what "interest" in the proper sense the readers of the Racing Calendar had in the trainer's disqualification. Central to upholding the claim of privilege, however, was the fact that the plaintiff was bound by a rule of the Rules of Racing of the Jockey Club that authorised disqualifications to be published in the Racing Calendar. The decision may therefore be supported on the ground that the trainer had consented to the publication. Significantly, the Court of Appeal rejected a claim of qualified privilege for the publication of the disqualification in the *Times* newspaper.

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110 *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632.

111 *Wason v Walter* (1868) LR 4 QB 73.

112 [1932] 2 KB 431.

96 In *Allbutt v General Council of Medical Education and Registration*[113], the English Court of Appeal held that a privileged occasion arose when the General Council of Medical Education and Registration found a medical practitioner guilty of professional misconduct and published the decision in the minutes of the council, a book that was open for public inspection. Again it is not easy to see what direct interest each member of the public had in the publication. However, the General Council was a statutory body that had held an inquiry under its statute and, as Lopes LJ pointed out[114], the public had an interest in knowing which medical practitioners were qualified. Moreover, Lopes LJ said[115] that it was "most material to bear in mind that it is admitted that the report is truthful, accurate, and honest, published bona fide, without malice, not an ex parte report, but a report of facts which have been finally ascertained and adjudicated upon." The case may therefore be regarded as one concerning a fair report of quasi-judicial proceedings. But whether or not these two cases were correctly decided, neither case supports the claim of privilege in the present case. The material facts of each of them are far removed from this case.

97 In the Court of Appeal and in this Court, Information Australia principally relied on the decision of this Court in *Howe*[116] to support its claim of privilege. But for the reasons that I have already given, that case does not assist Information Australia's claim for privilege.

98 Two other cases arguably might give support for Information Australia's claim that the occasion was privileged. In *Camporese v Parton*[117], the Supreme Court of British Columbia held that the occasion was privileged when a newspaper asserted that the plaintiff was selling imported canning lids that he knew were defective. The article asserted that using the lids could cause death because they would lead to the formation of a deadly toxin in the cans. The claim of privilege was upheld although the trial judge held that the report was careless and reckless, the plaintiff had invited the defendant to test the lids and the information in the reporter's hands required further in-depth investigation. The trial judge held that the public's interest in learning that the lids were defective was sufficient to create a reciprocity of interest between each reader of the article and the defendant. With great respect to the learned judge, the

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113 (1889) 23 QBD 400.

114 (1889) 23 QBD 400 at 409.

115 (1889) 23 QBD 400 at 408.

116 (1910) 11 CLR 361.

117 (1983) 150 DLR (3d) 208.

decision is plainly erroneous. It offended the long-established rule that, where the subject matter of the article is not itself a matter of public interest or published in answer to a public attack on a person, a general newspaper cannot create an occasion of qualified privilege by publishing matter to inform or protect the defendant or some other person[118].

99 The second case is *Bowin Designs Pty Ltd v Australian Consumers Association*[119]. In *Bowin*, Lindgren J held that an occasion of qualified privilege existed for the publication of an issue of *Choice* magazine that imputed that the applicants had irresponsibly and recklessly distributed dangerous gas heaters. The issue of *Choice* was sent to more than 140,000 subscribers. Lindgren J said[120]:

> "In my view, because the use of gas heaters is so widespread and undiscriminating, members of the public generally had an interest in being warned of the defect and of the fire danger present in the use of the heaters. That interest was personal and private to each member of the public, although shared by all. The warning could be given effectively only by notification to the general public. In such a case the rationale underlying the qualified privilege defence is satisfied."

100 I think that his Honour erred in upholding this claim of privilege. No incident concerning the heaters had been reported during the previous 22 months[121]. Moreover, only 3,400 of the heaters that contained the problem had been manufactured and the evidence suggested that only a small number of them were defective. It seems highly unlikely that more than a few thousand of the 140,000 subscribers to *Choice* had purchased the heaters – indeed it would not be surprising if no more than a few hundred subscribers were directly interested in the matter. It is impossible to see how the great bulk of *Choice* readers had the requisite "real and direct personal, trade, business or social concern" with the applicants and their heaters. In these circumstances, his Honour's decision is surprising and almost certainly incorrect. But even if his Honour was correct in holding that the readers of *Choice* had a sufficiently direct

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118 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 261.

119 Unreported, Federal Court of Australia, 6 December 1996. A truncated report of the case appears at (1996) A Def R [52,078], however none of the passages I refer to appear in that report.

120 *Bowin Designs Pty Ltd v Australian Consumers Association* unreported, Federal Court of Australia, 6 December 1996 at 126-127.

121 *Bowin Designs Pty Ltd v Australian Consumers Association* unreported, Federal Court of Australia, 6 December 1996 at 9.

interest in the subject matter of the article to create a social duty in the defendant to inform them of the defects that it believed existed in the heaters, the decision is far removed from the facts of this case.

101 It would be astonishing if the common law principles of qualified privilege required the present claim to be upheld. It would mean that any defamatory statement by this defendant concerning any person, no matter how serious or how false, would be the subject of qualified privilege if it was relevant to or explained any topic falling under the rubric of occupational health and safety. An article that falsely imputed that an employer was criminally liable for the work-related death of an employee would therefore be published on an occasion of qualified privilege. Unless the employer could prove malice on the part of the defendant, the employer would be without remedy. (Indeed, this very issue of the bulletin contains a story not far removed from this hypothetical.)

102 Nor is this a case where the Court should intervene to change the settled principles of the common law. In *R v Governor of Brockhill Prison, Ex parte Evans (No 2)*[122], in a passage with which I entirely agree, Lord Hobhouse of Woodborough said:

> "The common law develops as circumstances change and the balance of legal, social and economic needs changes. New concepts come into play; new statutes influence the non-statutory law. The strength of the common law is its ability to develop and evolve. All this carries with it the inevitable need to recognise that decisions may change. What was previously thought to be the law is open to challenge and review; if the challenge is successful, a new statement of the law will take the place of the old statement."

103 In New South Wales, the *Defamation Act* has a statutory form of qualified privilege. So have the Code States of Queensland[123], Tasmania[124] and Western Australia[125]. Under these legislative regimes, reciprocity of duty and interest is not a condition of the statutory defences. Some forms of these statutory defences make it necessary, however, to prove that the recipients had an interest in receiving the communication. Moreover, most of these statutory defences stipulate various conditions – for example, reasonableness – that must be fulfilled before they apply. In the present case, despite lack of reciprocity of duty and

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122 [2001] 2 AC 19 at 48.

123 *Defamation Act* 1889 (Q), s 16.

124 *Defamation Act* 1957 (Tas), s 16.

125 *Criminal Code* (WA), s 357.

interest, s 22(1)(c) of the *Defamation Act* arguably gave Information Australia a defence if it could show that its conduct was reasonable. Significantly, it did not rely on this defence.

104 It is, however, one thing to overrule previous decisions and another thing to repudiate fundamental principles of the common law. Reciprocity of duty and interest is fundamental to the common law doctrine of qualified privilege. It would be a far-reaching step, bordering on legislation, to eradicate it from the common law. Moreover, if reciprocity of duty and interest were banished from common law doctrine, some substitute would have to be found to maintain that balance between freedom of speech and protection of reputation that the common law has long sought to maintain. That balance could only be achieved by imposing conditions such as those found in the legislative regimes to which I have referred. Such conditions could only be successfully formulated after widespread consultation with a variety of interested parties. Courts do not have the facilities or the right to engage in such consultations. Imposing such conditions is, therefore, a legislative rather than a judicial function.

105 In *C (A Minor) v Director of Public Prosecutions*[126], Lord Lowry referred to five matters that he said judges should take into account before interfering with fundamental doctrine:

> "(1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty."

106 In my opinion, the claim that this defamatory communication was published on an occasion of qualified privilege must be rejected. It is therefore unnecessary to determine the issue whether the defamatory matter was relevant to the occasion of privilege.

Order

107 The appeal should be allowed. The order of the Court of Appeal should be set aside. In its place should be substituted an order that the appeal to that Court be allowed and judgment entered for the plaintiff in the sum of $25,000. Information Australia should pay the costs of this appeal and the proceedings in the Supreme Court, including the Court of Appeal.

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126 [1996] AC 1 at 28.

108 GUMMOW J. The respondent, Information Australia (Newsletters) Pty Limited ("Information Australia"), is a publisher of books, directories and newsletters. Among its publications is a subscription newsletter entitled *Occupational Health and Safety Bulletin* ("OHS Bulletin"). In an issue of the OHS Bulletin dated 28 May 1997, the respondent published an article entitled "MSDS [material safety data sheets] copyright case dismissed". The points of defamation law in New South Wales with which this appeal is concerned arise in the following circumstances.

The Federal Court proceeding

109 The article concerned the decision of the Federal Court (Merkel J) in *ACOHS Pty Ltd v RA Bashford Consulting Pty Ltd*, which was delivered on 9 May 1997[127]. On 9 December 1993, ACOHS Pty Ltd ("ACOHS") had instituted a proceeding in the Federal Court against RA Bashford Consulting Pty Ltd ("RABC") and Risk Management Concepts Pty Ltd ("RMC"), two companies involved in the publication of a newsletter entitled *Infax*. ACOHS claimed that both companies had contravened s 52 of the *Trade Practices Act* 1974 (Cth) ("the TPA") by publishing an article in which it was claimed that ACOHS had been found guilty of copyright infringement in relation to the use of material safety data sheets produced by Chemwatch, a business owned and operated by Mr Bernie Bialkower. In fact, no such court proceeding had been instituted and at no stage had ACOHS been found guilty of copyright infringement in relation to Chemwatch's material safety data sheets. ACOHS also sought relief against Mr Bialkower, who was alleged to have been the source of the misleading statements and to have authorised their publication.

110 In response, Mr Bialkower cross-claimed against ACOHS alleging that the company had infringed Mr Bialkower's copyright in works, being several safety data sheets, by transcribing the data sheets into its database. He also sought an injunction against further infringement of that copyright.

111 Merkel J found each of the defendants, RABC, RMC and Mr Bialkower, liable for harm caused by the misleading statements contained in the *Infax* newsletter and awarded ACOHS $20,000 in damages. However, his Honour dismissed Mr Bialkower's cross-claim, holding that no infringement of copyright had been established and that, in any event, relief would have been refused on discretionary grounds. Those discretionary grounds were said to include the public interest in ensuring that the disclosure of safety data sheets for safety-related purposes was not unduly impeded.

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127 (1997) 144 ALR 528.

112 In discussing Merkel J's decision, the OHS Bulletin article dealt principally with Mr Bialkower's cross-claim. In this vein, the article commenced as follows:

> "Material safety data sheets should not be too restricted by copyright – they should as much as possible be available to enforce OH&S, according to a Federal Court ruling in the past fortnight."

However, the article concluded by referring in the last seven paragraphs to the claim by ACOHS of contravention of s 52 of the TPA, in respect of which the cross-claim by Mr Bialkower had been instituted:

> "[32] The breach of copyright allegations were made by Mr Bialkower in response to an action initiated by ACOHS in 1993.
>
> [33] ACOHS sued the publishers of a newsletter called Infax which had printed a report claiming ACOHS was one of two companies Bialkower successfully prosecuted for MSDS copyright infringement.
>
> [34] ACOHS also sued Bernie Bialkower as he had provided the information for the report.
>
> [35] Mr Bialkower then made the counter-claim, accusing ACOHS of copyright infringement.
>
> [36] In respect of the initial claim, Justice Merkel found the publishers of Infax newsletter, RA Bashford and Risk Management Concepts, had engaged in false and misleading conduct by publishing an incorrect report – there had been no such copyright case – and that Bialkower was the source of the information and authorised its publication.
>
> [37] He ruled publication of the 'seriously misleading statements caused harm to ACOHS's repute and goodwill and that harm is likely to have led to some loss of business or custom'.
>
> [38] He awarded ACOHS $20,000 damages and ordered Bialkower, RA Bashford and Risk Management Concepts to pay their legal costs." (paragraph numbers inserted)

113 It will be noted from pars [36] and [38] of the article that Merkel J had found "RA Bashford" guilty of engaging in false and misleading conduct and had ordered "RA Bashford" to pay ACOHS' legal costs. In fact, as noted earlier in these reasons, his Honour had made his findings in respect of RABC, which was a party to the Federal Court proceeding.

The Supreme Court action

114 The appellant, Mr Rex Anthony Bashford, was, at all material times, a director of RABC. On 30 September 1997, Mr Bashford instituted an action in the Supreme Court of New South Wales against Information Australia for damages allegedly suffered as a result of defamatory imputations contained in an article in the 28 May 1997 issue of the OHS Bulletin.

115 In order to understand the course of the Supreme Court proceedings, and the issues that arise in this appeal, it is at this point convenient to outline the legal foundation of the procedural and substantive law governing defamation law in New South Wales. Prior to 1958, and notwithstanding the *Defamation Act* 1912 (NSW), the law relating to defamation "remained basically a body of law established by judicial decision"[128]. In that year, the *Defamation Act* 1958 (NSW) ("the 1958 Act") was enacted. That Act endeavoured "largely to codify the substantive law and to supersede the common law"[129]. However, in the present case, the *Defamation Act* 1974 (NSW) ("the 1974 Act") governs proceedings. Section 4(1) of the 1974 Act repealed the 1958 Act and s 4(2) revived the common law as it related to defamation. In addition, s 11 expressly provided that[130]:

> "The provision of a defence by this Part [entitled 'Defence in civil proceedings'] does not of itself vitiate, diminish or abrogate *any defence or exclusion of liability* available apart from this Act."[131] (emphasis added)

Section 11 of the 1974 Act may be contrasted with what had been provided by s 3(2) of the 1958 Act, namely:

> "*Except where this Act deals with, and makes a different provision for*, any protection or privilege existing by law immediately before the commencement of this Act, nothing in this Act is to be construed to affect any such protection or privilege." (emphasis added)

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128 New South Wales, *Report of the Law Reform Commission on Defamation*, LRC 11, (1971) at 88.

129 New South Wales, *Report of the Law Reform Commission on Defamation*, LRC 11, (1971) at 88. See *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 204, 206.

130 cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 569.

131 The exceptions to s 11, contained in ss 15(1) and 29(2) of the 1974 Act, have no relevance in the present case.

116 Special provision is made in s 7A of the 1974 Act as to the method of trial in actions such as the present. The effect is that the "staunch safeguard of democratic liberty"[132] secured in England by Fox's *Libel Act* 1792 (UK)[133] has been withdrawn by the New South Wales legislature. Section 7A(1) provides that, where proceedings for defamation are tried before a jury, the court, rather than the jury, is to determine whether the matter complained of is reasonably capable of carrying the imputation pleaded by the plaintiff and, if so, whether the imputation is reasonably capable of bearing a defamatory meaning[134]. If the court determines that the matter complained of is reasonably capable of carrying the imputation pleaded by the plaintiff and the imputation is reasonably capable of bearing a defamatory meaning, the jury is to determine whether the matter complained of carries the imputation, and, if so, whether the imputation is defamatory (s 7A(3)). However, if the jury reaches the conclusion that the matter complained of was published by the defendant and carries an imputation that is defamatory of the plaintiff, then it is for the court to determine whether any defence raised by the defendant has been established and to determine the amount of damages (if any) that should be awarded to the plaintiff (s 7A(4)).

117 Three imputations were pleaded in Mr Bashford's statement of claim:

> "(a) that [the appellant] was guilty of false and misleading conduct as a publisher of a report concerning [ACOHS] in the newsletter 'Infax', thereby causing [ACOHS] serious harm and loss;
>
> (b) that [the appellant], by publishing a false report concerning [ACOHS], had been found by the Federal Court of Australia liable to [ACOHS] in damages and costs for causing it harm and loss;
>
> (c) that [the appellant] was equally culpable with Mr Bialkower and [RMC] for causing serious harm and loss to [ACOHS] by the publication of a false report".

118 At trial, the jury found that imputation (b) was conveyed and was defamatory of the appellant. Imputations (a) and (c) were found not to have been

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132 Fleming, *The Law of Torts*, 9th ed (1998) at 589.

133 32 Geo III c 60.

134 Section 86(1) of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act") requires that proceedings on a common law claim in which there are issues of fact on a claim in respect of defamation are to be tried with a jury, unless the court makes an order to the contrary pursuant to s 86(2) of that Act. Pursuant to s 7A(5) of the 1974 Act, s 86 of the Supreme Court Act applies subject to the provisions of s 7A.

conveyed. Thereafter, in proceedings before Davies AJ pursuant to s 7A(4) of the 1974 Act, the respondent pleaded common law qualified privilege arising out of a reciprocal duty or interest and the defences available pursuant to ss 13 (Unlikelihood of harm), 15 (Truth generally) and 16 (Truth: contextual imputations) of the 1974 Act. Davies AJ rejected the statutory defences relied upon by the respondent. However, his Honour upheld the respondent's defence of common law qualified privilege[135]. The appellant's proceedings were therefore dismissed.

119 An appeal by the appellant to the New South Wales Court of Appeal was dismissed by majority (Sheller and Hodgson JJA; Rolfe AJA dissenting)[136].

The appeal to this Court

120 During argument before this Court, two primary questions arose for consideration: first, whether the Court of Appeal erred in rejecting the appellant's submission that the common law defence of qualified privilege arising out of a reciprocal duty or interest is unavailable in circumstances where the impugned publication is properly characterised as an inaccurate report of judicial proceedings; and, second, whether the Court of Appeal erred in concluding that the necessary criteria for the existence of common law qualified privilege arising out of a reciprocal duty or interest had been met in the present case. It is convenient to deal with these questions in the order in which they were argued before the Court.

Multiple defences to a single defamatory imputation?

121 At the heart of the appellant's submissions on this issue was the assertion that the common law defence of fair and accurate report of court proceedings "axiomatically eclipses" any particular relationship which might otherwise found a duty or interest sufficient to give rise to common law qualified privilege. The appellant contends that an imputation which would, but for its inaccuracy, attract the common law defence of fair and accurate report of court proceedings cannot attract the defence of common law qualified privilege arising out of a reciprocal duty or interest.

122 In response to this submission, Hodgson JA, in a passage with which I agree, noted[137]:

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135 *Bashford v Information Australia* [2000] NSWSC 665 at [31].

136 *Bashford v Information Australia (Newsletters) Pty Ltd* [2001] NSWCA 470.

137 [2001] NSWCA 470 at [45].

> "[T]he requirement that a report of court proceedings be accurate in order that it have the protection of qualified privilege is a requirement that applies to one particular category of qualified privilege, namely that applicable to reports of court proceedings made to the public in general. It is not an additional requirement imposed over and above the other requirements for the reciprocal duty and interest category of qualified privilege."

123 What we now call the common law of defamation (with its division between libel and slander[138]) has not developed in a structured and ordered way; it is, as Gatley has noted, "firmly rooted in its historical origins, and [has not been] open to the development and rationalisation that is acceptable elsewhere in the common law"[139]. Pleas of publication on privileged occasions were a comparatively late development[140].

124 The appellant's submissions appear to be founded on an assumption that the law of defamation has evolved through reference to a coherent legal policy which implicitly rejects the availability of two or more defences of privilege to a single defamatory imputation. Such an assumption in turn requires acceptance of the proposition that the plurality of common law defences of privilege available in respect of a defamatory imputation exist within a framework which requires each defence to be developed with constant reference to each other defence. Neither that somewhat paradoxical proposition, nor the assumption upon which it is founded, should be accepted.

125 In the present context, it is important to remember that, at common law, the term "qualified privilege" enjoys no legal force of itself but is merely descriptive of those factual circumstances (many in number) which the law deems privileged to a qualified extent. Moreover, it is significant that the unifying criterion by reference to which the categories of qualified privilege have been formulated is not any element of commonality between the circumstances in which defamatory imputations are communicated but rather the effect,

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138 Section 8 of the 1974 Act states:

> "Slander is actionable without special damage in the same way and to the same extent as libel is actionable without special damage."

139 *Gatley on Libel and Slander*, 9th ed (1998) at [1.11]. See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149-150.

140 Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries", (1925) 41 *Law Quarterly Review* 13 at 28-30.

historically, which the presence of malice has had on the availability of the respective defences.

126 Therefore, it is unsurprising that categories of qualified privilege may differ in the considerations which found them. To take a relevant example, while the substantial accuracy of a report of judicial proceedings is deemed necessary in order efficiently to place the general public in the same position as those in attendance upon the relevant proceedings[141], it is well established that the inaccuracy of an imputation is no bar to the availability of qualified privilege arising out of a reciprocal duty or interest[142]. This is because the particular relationship between the defendant and the person in receipt of the communication, and the advantages which the law deems are to be had from free communication within such a relationship, enjoy a significance over and above the accuracy of the defamatory imputation in question.

127 It follows that the circumstance that the publication of a fair and accurate report of judicial proceedings and the publication of a defamatory imputation pursuant to a relevant reciprocal duty or interest both fall under the umbrella of "qualified privilege" does not mean that the defences may not be available in respect of the one imputation. Once that proposition is accepted, it follows that it is open for a defendant to rely on the existence of a relevant reciprocal duty or interest in order to ground a defence of qualified privilege in circumstances where the defamatory imputation could not properly be characterised as a fair and accurate report of judicial proceedings[143].

128 In reaching the above conclusions, it has not been necessary to consider the accuracy or otherwise of the decision of the Full Court of the Supreme Court of New South Wales in *Thom v Associated Newspapers Ltd*[144], upon which the appellant relies. In that case, the Court upheld a jury direction to the effect that, if a publication relied upon as a fair report pursuant to s 14 of the 1958 Act was unfair, it could not, on the evidence before the court, be privileged under the statutory equivalent of qualified privilege contained within s 17 of that Act[145].

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141 *Macdougall v Knight* (1889) 14 App Cas 194 at 200; *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255 at 257-258; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 525-526 [2], 540 [42], 587-588 [153].

142 *Toogood v Spyring* (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1049-1050].

143 *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 557 [94].

144 (1964) 64 SR (NSW) 376; cf *Allen v John Fairfax & Sons Ltd* [1971] 1 NSWLR 773 at 777-778.

145 (1964) 64 SR (NSW) 376 at 384, 386.

Several points may be made in distinguishing *Thom* from the present case. First, the jury direction was given in the terms outlined above where there was no evidence to support a defence of qualified privilege under s 17 of the 1958 Act[146]. Indeed, "when asked, counsel for the appellant was unable to inform the court of any such evidence that conceivably could be available"[147]. Secondly, it is important to recognise that *Thom* related to the availability of multiple defences under the 1958 Act. As noted earlier in these reasons, that Act sought in large part to codify the common law[148]. In this case, however, the 1974 Act governs proceedings and, as noted above, that Act revives the common law and expressly provides that the provision of a statutory defence does not, of itself, vitiate the availability of the equivalent defence at common law (s 11). It follows that the introduction of the statutory defence of fair protected report pursuant to s 24 of the 1974 Act can have no bearing on the availability, under the common law, of individual categories of qualified privilege in the manner discussed above.

129 The appellant's submissions on this issue should be rejected.

Common law qualified privilege – a reciprocal duty or interest?

130 The appellant contends that if, contrary to the submissions considered above, a defence of common law qualified privilege arising out of a reciprocal duty or interest is available in respect of an inaccurate report of judicial proceedings, the Court of Appeal erred in holding that it was available in the present case. The appellant further submits that, even if the principal part of the article was published on a privileged occasion, the privilege did not extend to that part of the article containing the defamatory imputation.

131 In considering whether or not the respondent was able to assert a defence of qualified privilege arising out of a reciprocal duty or interest, the primary judge divided the OHS Bulletin article into two parts. In respect of the principal part of the article, which dealt with Mr Bialkower's cross-claim, his Honour was satisfied that it[149]:

> "was published on a privileged occasion, because Mr Bialkower's cross-claim raised issues which were of general interest to persons operating in

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146 (1964) 64 SR (NSW) 376 at 384.

147 (1964) 64 SR (NSW) 376 at 384.

148 New South Wales, *Report of the Law Reform Commission on Defamation*, LRC 11, (1971) at 88. See *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 204, 206.

149 [2000] NSWSC 665 at [22].

> the field of occupational health and safety. It concerned the copyright in information in a Chemwatch [material safety data sheet] which related to occupational health and safety matters … Merkel J, without deciding the question of copyright, discussed the circumstances in which an implied licence for the use of material would arise. His Honour also discussed discretionary issues and held that, even if he had found that there was an infringement of Mr Bialkower's copyright, he would have refused relief on discretionary grounds … These matters were obviously of interest to persons in the occupational health and safety field and the publication of a report of the case, at least insofar as it dealt with those issues, occurred on an occasion of qualified privilege."

132 In respect of the remaining section of the article (pars [32]-[38]), which dealt with ACOHS' original claim of contravention of s 52 of the TPA, Davies AJ noted that it "was not a matter of interest to persons in the occupational health and safety field, apart from the fact that the persons involved were persons who worked in that field"[150]. Nevertheless, his Honour concluded that this part of the article was also made on a privileged occasion. This was said to be because[151]:

> "the judgment of Merkel J was of an interest to persons operating in the occupational health and safety field. Although the report concerning the s 52 claim would not alone have been the subject of qualified privilege, for there was no duty to report on it and there was no particular interest in the subscribers to the [OHS Bulletin] to receive information about it, nevertheless, the report was not irrelevant to the occasion."

In reaching this conclusion, his Honour did not appear to view himself as departing from the statement of three members of this Court in *Bellino v Australian Broadcasting Corporation* that[152]:

> "at common law, privilege only attaches to those defamatory imputations that are relevant to the privileged occasion. Where a potentially privileged communication consists partly of matters relevant to the privilege and partly of matters that are not relevant, qualified privilege only attaches to that part which is relevant to the occasion."

133 The Court of Appeal unanimously upheld the primary judge's finding that the principal part of the article was published on a privileged occasion. The

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150 [2000] NSWSC 665 at [23].

151 [2000] NSWSC 665 at [24].

152 (1996) 185 CLR 183 at 228 per Dawson, McHugh and Gummow JJ.

critical passage is contained in the reasons of Hodgson JA, with whom Sheller JA and Rolfe AJA agreed on this point[153]:

> "I am satisfied myself that this was an occasion of qualified privilege. Occupational health and safety is a matter important for the common convenience and welfare of society, and communications on matters relevant to that issue to persons responsible for occupational health and safety do promote that common convenience and welfare. The respondent, having accepted subscriptions for a newsletter on such matters, was morally and legally obliged to publish for subscribers matters of significance on that topic, and the decision on the cross-claim in this case fell within that description. It is in my opinion irrelevant that failure to publish this particular report would not of itself have been an actionable breach of contract: it is in my opinion sufficient that there was a duty, moral and legal, to include matters of this type in the newsletter. I accept of course that one cannot create a licence to oneself to defame other persons by undertaking a contractual obligation to supply information[154], but the existence of a contract of the type that existed here does in my opinion support the existence of a duty of communication where there is truly a public interest in the communication being made[155]."

134 However, the Court of Appeal differed as to whether that part of the article which contained the defamatory imputation was also the subject of qualified privilege. Hodgson JA, with whom Sheller JA agreed, upheld Davies AJ's decision that pars [32]-[38] of the article were relevant to the subject-matter of the privileged occasion[156]. Rolfe AJA dissented on this point[157].

135 It is clear that both the primary judge and the Court of Appeal proceeded on the assumption that it was first necessary to establish that the principal part of the article was published on an occasion of qualified privilege and only then to consider whether the defamatory imputation, although not contained within the principal part of the article, nevertheless, was relevant to it. In my view, such an approach requires caution. The defence of qualified privilege is a plea in confession and, as such, is predicated upon the existence of a defamatory imputation to which the privilege attaches. To speak of qualified privilege

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153 [2001] NSWCA 470 at [32].

154 *Macintosh v Dun* (1908) 6 CLR 303; [1908] AC 390.

155 *Howe & McColough v Lees* (1910) 11 CLR 361.

156 [2001] NSWCA 470 at [4], [44].

157 [2001] NSWCA 470 at [55].

attaching to a non-defamatory statement is to ignore this fundamental characteristic. It follows that questions of relevance, in the sense in which that term was used by the judges below, will ordinarily only arise where two or more defamatory imputations are published on a single privileged occasion[158]. In such circumstances, it will be necessary to determine whether each imputation falls within the umbrella of the applicable privilege or whether one of the imputations is not relevant and, therefore, not covered by the defence. In the present case, only one defamatory imputation has been found to have been conveyed. It is therefore necessary to consider whether *that imputation* was made on an occasion giving rise to a defence of qualified privilege arising out of a reciprocal duty or interest.

136 In *Roberts v Bass*, Gaudron, McHugh and Gummow JJ described the defence of qualified privilege arising out of a reciprocal duty or interest in the following terms[159]:

> "The common law protects a defamatory statement made on an occasion where one person has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it[160]. Communications made on such occasions are privileged because their making promotes the welfare of society[161]. But the privilege is qualified – hence the name qualified privilege – by the condition that the occasion must not be used for some purpose or motive foreign to the duty or interest that protects the making of the statement."

137 That statement of principle is consistent with the proposition put in 1869 in the third edition of *Starkie on Slander and Libel*[162] that the "duty" spoken of cannot be confined to legal duties which may be enforced by curial remedy, "but must include moral and social duties of imperfect obligation". Starkie had used the expression "communications ... made in the discharge of any legal, or even moral duty" in the second edition, published in 1830[163], four years before Parke B

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158 *Adam v Ward* [1917] AC 309 at 318, 321, 329, 340.

159 (2002) 212 CLR 1 at 26 [62].

160 *Adam v Ward* [1917] AC 309 at 334 per Lord Atkinson.

161 *Toogood v Spyring* (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1050] per Parke B.

162 Folkard (ed) at 526.

163 *Starkie on Slander and Libel*, 2nd ed (1830) at cxlii.

in *Toogood v Spyring*[164] spoke of the "publication of statements ... made ... in the discharge of some public or private duty, whether legal or moral". Parke B continued:

> "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society".

Of that passage, Griffith CJ explained in *Howe & McColough v Lees*[165]:

> "The reference to society does not mean that the person who makes the communication is under any obligation to publish, and is justified in publishing, it to the public at large, but that the interests of society in general require that a communication made under such circumstances to the particular person should be protected. The term 'moral duty' is not used in a sense implying that a man who failed to make the communication under the circumstances would necessarily be regarded by his fellows as open to censure, but in the sense implying that it was made on an occasion on which a man who desired to do his duty to his neighbour would reasonably believe that he ought to make it. It is obviously impossible to lay down *a priori* an exhaustive list of such occasions. The rule being founded upon the general welfare of society, new occasions for its application will necessarily arise with continually changing conditions."

138 The English Court of Appeal in a recent decision[166] may have extended the scope of the defence. Simon Brown LJ, who delivered the leading judgment in *Kearns v General Council of the Bar*, said[167]:

> "To my mind an altogether more helpful categorisation is to be found by distinguishing between, on the one hand, cases where the communicator and the communicatee are in an existing and established relationship (irrespective of whether within that relationship the communications between them relate to reciprocal interests or reciprocal duties or a mixture of both) and, on the other hand, cases where no such relationship has been established and the communication is between strangers (or at any rate is volunteered otherwise than by reference to their relationship)."

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164 (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1049-1050].

165 (1910) 11 CLR 361 at 368-369.

166 *Kearns v General Council of the Bar* [2003] 1 WLR 1357; [2003] 2 All ER 534.

167 [2003] 1 WLR 1357 at 1369; [2003] 2 All ER 534 at 547.

For the purposes of this appeal, it is unnecessary to decide whether that reasoning should be accepted.

139 In determining the existence of privilege in the present case, the words of Dixon J in *Guise v Kouvelis* deserve mention[168]:

> "[T]he very width of the principles governing qualified privilege for defamation makes it more necessary, in deciding how they apply, to make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication."

140 Hence the caution by Jordan CJ in *Andreyevich v Kosovich*[169] that in order for the defendants in that case to succeed in the defence of qualified privilege:

> "it was necessary that they should show by evidence that both the givers and the receivers of the defamatory information had a special and reciprocal interest in its subject matter, of such a kind that it was desirable as a matter of public policy, in the general interests of the whole community of New South Wales, that it should be made with impunity, notwithstanding that it was defamatory of a third party".

141 One consequence of the matters which Dixon J and Jordan CJ emphasised is that, as has long been recognised[170], different minds, whilst informed of the legal principles, nevertheless may differ as to the outcomes in particular cases. *Guise v Kouvelis*[171] is an example, the majority of the Court differing from Dixon J as to the result. Another is that the outcome in this case cannot be guided by apprehension of what conceivably could be the outcome of other litigation where other considerations and evidence might be put forward in respect of other claims of occasions protected by qualified privilege[172].

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168 (1947) 74 CLR 102 at 116. See *Baird v Wallace-James* (1916) 85 LJ PC 193 at 198; *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 23.

169 (1947) 47 SR (NSW) 357 at 363.

170 See, eg, *Mellor v Parker* (1902) 2 SR (NSW) 156 at 162.

171 (1947) 74 CLR 102.

172 cf *Phelps v Western Mining Corp Ltd* (1978) 20 ALR 183 at 189; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 620 [71].

142 The defamatory imputation complained of by the appellant was conveyed on an occasion of qualified privilege, and protected, in the sense explained by Griffith CJ in *Howe & McColough*[173], for the common convenience and welfare of society. Information Australia presented the OHS Bulletin as the "Plain English Guide to Workplace Health and Safety" written by an "expert editorial team". On its face, the OHS Bulletin was designed to assist those responsible for occupational health and safety in complying with relevant laws and regulations. The Commonwealth and each State and Territory has enacted such legislation[174]. One example is the *Occupational Health and Safety Act* 2000 (NSW) ("the NSW Act"). Section 3 of that Act identifies the objects of the Act as follows[175]:

> "(a) to secure and promote the health, safety and welfare of people at work,
>
> (b) to protect people at a place of work against risks to health or safety arising out of the activities of persons at work,
>
> (c) to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs,
>
> (d) to provide for consultation and co-operation between employers and employees in achieving the objects of this Act,
>
> (e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled,
>
> (f) to develop and promote community awareness of occupational health and safety issues,

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173 (1910) 11 CLR 361 at 368.

174 *Occupational Health and Safety (Commonwealth Employment) Act* 1991 (Cth); *Occupational Safety and Health Act* 1984 (WA); *Occupational Health and Safety Act* 1985 (Vic); *Occupational Health, Safety and Welfare Act* 1986 (SA); *Workplace Health and Safety Act* 1995 (Tas); *Workplace Health and Safety Act* 1995 (Q); *Occupational Health and Safety Act* 2000 (NSW); *Work Health Act* 1986 (NT); *Occupational Health and Safety Act* 1989 (ACT).

175 See also *Occupational Health and Safety (Commonwealth Employment) Act* 1991 (Cth), s 3; *Occupational Safety and Health Act* 1984 (WA), s 5; *Occupational Health and Safety Act* 1985 (Vic), s 6; *Occupational Health, Safety and Welfare Act* 1986 (SA), s 3; *Workplace Health and Safety Act* 1995 (Q), s 7; *Occupational Health and Safety Act* 1989 (ACT), s 3.

(g) to provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices,

(h) to protect people (whether or not at a place of work) against risks to health and safety arising from the use of plant that affects public safety."

The NSW Act, together with its Commonwealth, State and Territory counterparts, demonstrate a legislative recognition of the importance of improving health and safety in the workplace. The provision of information by corporations such as the respondent with respect to statutory and judicial developments in the field of occupational health and safety assists in the achievement of the legislative objectives set out above.

143 Moreover, it is significant that the OHS Bulletin was marketed directly by Information Australia to specific occupational health and safety professionals. Those professionals could, and did, subscribe to the OHS Bulletin for an annual fee of $395. Indeed, at the time of the publication of the relevant issue, the OHS Bulletin was available only by subscription. As a result, Information Australia was contractually obliged to provide those subscribers with information in printed form relevant to matters of occupational health and safety. Although the existence of such an obligation is not generally determinative, it is relevant when considering whether or not Information Australia possessed the requisite duty to publish, or interest in publishing, the impugned article[176].

144 Lastly, the subject-matter of the defamatory imputation itself is significant. As noted earlier in these reasons, the impugned article discussed Federal Court litigation that had a direct bearing upon the enforceability of copyright in material safety data sheets and which could be expected to be of significant interest to those responsible for health and safety in the workplace. As Merkel J noted at the commencement of the decision discussed in the article, "[t]he present matter involves a copyright dispute in relation to material safety data sheets (MSDSs) which contain safety information about hazardous substances and other chemicals used in workplaces throughout Australia"[177]. Importantly, ACOHS' s 52 claim against RABC, RMC and Mr Bialkower was an essential element of that dispute. As Merkel J again noted, Mr Bialkower's contention that ACOHS' use of the relevant material safety data sheets constituted an infringement of copyright was "part of his defence [to the s 52 claim] and also by way of cross-claim"[178]. To seek, as the appellant does, to

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176 *Howe & McColough v Lees* (1910) 11 CLR 361 at 394.

177 (1997) 144 ALR 528 at 530.

178 (1997) 144 ALR 528 at 532.

portray Merkel J's analysis of the enforcement of Mr Bialkower's copyright in the data sheets as wholly isolated from the s 52 claim made by ACOHS is to ignore the course of the litigation before the Federal Court.

145 In such circumstances, and given the general interest of the community reflected in the consistent legislative recognition of the importance of furthering occupational health and safety in Australia[179], Information Australia possessed a duty, in the sense of the authorities, to provide subscribers with the information contained in the impugned article. That the duty owed by Information Australia may be characterised as one of imperfect obligation does not nullify its existence in the present case[180].

146 The appellant submits that the decision of the Judicial Committee in *Macintosh v Dun*[181] stands in the way of the conclusion reached above. In that case, the Board held that the provision of information for profit by a trade protection society to one of its subscribers did not give rise to qualified privilege arising out of a reciprocal duty or interest[182]. In so doing, their Lordships reversed the decision of this Court in *Dun v Macintosh*[183]. However, the "real question" before the Judicial Committee was expressed by Lord Macnaghten as follows[184]:

> "Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from a *bona fide* sense of duty, should be extended to communications made from motives of self-interest *by persons who trade for profit in the characters of other people*?" (emphasis added)

147 The phrase emphasised in the passage just quoted is sufficient to demonstrate the significant factual differences between *Macintosh* and the case

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179 cf *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 61-63 [22]-[28], 83 [91].

180 *Harrison v Bush* (1855) 5 El & Bl 344 at 349 [119 ER 509 at 512]; cf 36 *Corpus Juris* (1924) at 1244 [210].

181 (1908) 6 CLR 303; [1908] AC 390.

182 (1908) 6 CLR 303 at 306; [1908] AC 390 at 400; cf *Foley v Hall* (1891) 12 NSWR 175 at 178.

183 (1906) 3 CLR 1134.

184 (1908) 6 CLR 303 at 306; [1908] AC 390 at 400.

presently before this Court. As noted earlier in these reasons, Information Australia provided information to subscribers that was designed to facilitate the furtherance of occupational health and safety consistently with legislative objectives to that effect. Although the "good of society in general" may, as the Privy Council decided in *Macintosh*[185], detrimentally be affected by the publication of hitherto confidential information regarding the commercial standing and financial position of a corporation, it is quite another thing to reach the same conclusion in respect of the information contained in the impugned article of the OHS Bulletin.

148 The remaining element of the defence of qualified privilege arising out of a reciprocal duty or interest may be dealt with shortly. On the evidence before the primary judge, it is clear that the recipients of the defamatory imputation contained in the relevant article possessed a corresponding interest in the subject-matter to which the imputation related. In *Howe & McColough*, Higgins J noted[186]:

> "[T]he word 'interest', as used in the cases, is not used in any technical sense. It is used in the broadest popular sense, as when we say that a man is 'interested' in knowing a fact – not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its mere quality as news."

In the same case, Higgins J justified the existence of a requisite interest on the part of the recipients of the defamatory communication in the following way[187]:

> "When information is given to these men as to the solvency of a buyer, it is not given to them as idle gossip; it is for solid business uses."

149 The subscribers to the OHS Bulletin were, in large part, individuals and corporations responsible for occupational health and safety in their respective workplaces. The information contained in the OHS Bulletin with respect to occupational health and safety was sought by those subscribers in order to assist them in complying with their statutory obligations. Such an interest cannot be regarded as "unsubstantial" or "remote"[188]. Moreover, the impugned article clearly dealt with a matter to which the interest of the subscribers related, being the refusal of injunctive relief with respect to copyright in material safety data

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185 (1908) 6 CLR 303 at 307; [1908] AC 390 at 401.

186 (1910) 11 CLR 361 at 398.

187 (1910) 11 CLR 361 at 393.

188 *Howe & McColough v Lees* (1910) 11 CLR 361 at 398.

sheets, one result of which could be the increased publication of those data sheets within the workplace. As noted earlier in these reasons, that issue encompassed the claim of contravention of s 52 of the TPA concerning which the defamatory imputation was made. It follows that the defamatory imputation was made upon an occasion of qualified privilege.

Result

150 The appeal should be dismissed with costs.

151 KIRBY J. At first glance this appeal[189] might appear to involve something of a storm in a teacup. A trade journal, reporting a published decision of a judge of the Federal Court of Australia, inaccurately referred to a finding in that decision. Incorrectly, it ascribed the judge's decision that a party had engaged in conduct which contravened s 52 of the *Trade Practices Act* 1974 (Cth) to the appellant personally, Mr R A Bashford, rather than to the consulting company that bore his name, R A Bashford Consulting Pty Ltd.

152 In cross-examination, the appellant agreed that, in the eyes of the marketplace, he and the company were "effectively one [and] the same"[190]. The primary judge in the trial of defamation proceedings in the Supreme Court of New South Wales (Davies AJ) found that the company was "a private company established by Mr Bashford and his wife and all Mr Bashford's consulting activities were carried out in the name of his company"[191]. On the face of things, so much fuss about the failure of the publisher to add "three little words" ("Consulting Pty Ltd") to its report about the judgment might seem a trifle precious.

153 Nevertheless, it is clear that a factual inaccuracy occurred; that the publisher rebuffed a demand from the appellant to publish a correction and apology[192]; and that a jury, performing their limited function in the trial[193], determined that the matter complained of carried an imputation that was defamatory of the appellant. As found by the jury, this was "that the Plaintiff … had been found by the Federal Court of Australia liable to ACOHS Pty Ltd in damages and costs for causing it harm and loss".

154 In this appeal, these facts represent the starting point from which this Court was asked to proceed. Although the primary judge dismissed the appellant's claim on a footing later contested in the Court of Appeal, he prudently proceeded to calculate the damages to which the appellant was entitled, if the filed defences were rejected on appeal. He fixed such damages at $25,000. That

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189 From a judgment of the New South Wales Court of Appeal: *Bashford v Information Australia (Newsletters) Pty Ltd* [2001] NSWCA 470.

190 *Bashford v Information Australia* [2000] NSWSC 665 at [8] per Davies AJ.

191 *Bashford* [2000] NSWSC 665 at [8].

192 Reasons of Callinan J at [215], [217].

193 Pursuant to the *Defamation Act* 1974 (NSW), ss 7A(3) and (4).

sum is not contested[194]. This is not a large sum as defamation verdicts go[195]; but it is not derisory.

155 In a perfect world, defamation proceedings would be available for the redress of wrongs to reputation, large and small, including those which, considering all things, might not seem terribly important except to the person defamed and perhaps that person's family and close friends. But this appeal, like others[196], illustrates the pitfalls that face litigants who enter the lists in this country to repair their hurt feelings and to seek redress for wrongs to their reputation by invoking the law of defamation. Within the Court of Appeal[197] (and now in this Court[198]) differing opinions are expressed concerning the availability of the defences invoked by the publisher. At least in this case, no party invoked the Constitution to complicate the ambit of those defences[199].

The facts and applicable legislation

156 *The background materials*: The matter complained of is set out, or described, in other reasons[200]. Also detailed there are the background facts concerning the original proceedings before Merkel J in the Federal Court of Australia[201]; the actual orders made by that judge against R A Bashford

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194 *Bashford* [2000] NSWSC 665 at [44].

195 *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 598 [173].

196 eg *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183; *Roberts v Bass* (2002) 212 CLR 1.

197 Where, upon some issues, members of the Court divided, with Sheller JA and Hodgson JA in the majority; Rolfe AJA dissenting.

198 Contrast the opinion and conclusions in this Court of Gleeson CJ, Hayne and Heydon JJ ("joint reasons") and Gummow J with those of McHugh J and Callinan J.

199 cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568; *Roberts v Bass* (2002) 212 CLR 1 at 9 [3], 26-28 [64]-[68], 60-64 [163]-[176], 101-103 [285]-[288].

200 Joint reasons at [2]-[6]; reasons of McHugh J at [44]-[47]; reasons of Gummow J at [112]-[113]; reasons of Callinan J at [209]-[216].

201 Reasons of McHugh J at [45]-[46]; reasons of Gummow J at [109]-[113]; reasons of Callinan J at [209]-[211].

Consulting Pty Ltd[202] and the course that the appellant's claim in defamation took at trial[203].

157 Those reasons also describe the differences of opinion that emerged in the New South Wales Court of Appeal between the majority[204] (Hodgson JA, with whom Sheller JA agreed) and the dissenting judge (Rolfe AJA).

158 Other reasons also contain reference to most of the provisions of the *Defamation Act* 1974 (NSW) ("the Act") applicable to the proceedings, to which it will be necessary to refer. These include the unique provision governing the trial of defamation actions in New South Wales, delineating the respective roles of the jury and of the judge, and the structure and key provisions of that Act concerning the applicable law[205]. The saving provisions of s 11 of that Act are also set out, or described, there[206]. Although there are provisions elsewhere that bear some similarities to s 11[207], a full appreciation of the purpose of s 11 can probably only be had by a recollection of the controversies that attended the attempt in 1958 to codify the law of defamation in New South Wales[208]. That venture was ultimately abandoned, with the complete repeal of that Act, the enactment of the present Act[209] and a revival, with respect to matters published after the commencement of the latter Act, of the "common law and the enacted

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202 Reasons of Callinan J at [209].

203 Reasons of McHugh J at [47]-[50]; reasons of Gummow J at [114]-[118]; reasons of Callinan J at [217]-[218].

204 Reasons of McHugh J at [51]; reasons of Callinan J at [219]-[225].

205 The Act, ss 7A, 13, 15, 16: see joint reasons at [8]; reasons of Gummow J at [115]-[116], [118], [128]; reasons of Callinan J at [229]. See also *John Fairfax Publications Pty Ltd v Rivkin* (2003) 77 ALJR 1657 at 1671 [86]; 201 ALR 77 at 96.

206 Set out in joint reasons at [8]; reasons of Gummow J at [115], [128]; reasons of Callinan J at [229].

207 See eg *Wrongs Act* 1936 (SA), s 7(1), proviso (c) set out in *Chakravarti* (1998) 193 CLR 519 at 584 [147] and *Defamation Act* 1992 (NZ), s 16(3) considered in *Pauanui Publishing Ltd v Montgomerie* unreported, Court of Appeal of New Zealand, 21 October 1997.

208 *Defamation Act* 1958 (NSW). See reasons of Gummow J at [115], [128].

209 The Act, s 4(1).

law" that had preceded it, subject of course to modification by the Act's provisions[210].

159 *Statutory protected reports*: I need repeat none of the foregoing material (nor conclusions of the Court of Appeal not now disputed[211]). However, it is relevant to add to the statutory references, mention of those provisions of the present Act that afford protections to court proceedings and reports about them.

160 Such provisions are contained in Pt 3 of the Act ("Defence in civil proceedings"). That Part has various divisions. These include "Truth" (Div 2); "Absolute privilege" (Div 3); "Qualified privilege" (Div 4); "Protected reports etc" (Div 5); "Court notices, official notices etc" (Div 6); "Comment" (Div 7); and "Offer of amends" (Div 8). Within Div 3, dealing with absolute privilege, are contained 36 sections (omitting one repealed) that extend absolute privilege to the publication of proceedings before a very wide range of specified bodies, extending far beyond the traditional categories of that privilege at common law.

161 The defence of qualified privilege (Div 4) includes a statutory defence[212] that arises in respect of matter published to any person where "the recipient has an interest or apparent interest in having information on some subject, [and] the matter is published to the recipient in the course of giving to the recipient information on that subject". However, it is a condition of the application of statutory qualified privilege that "the conduct of the publisher in publishing that matter is reasonable in the circumstances"[213]. In this Court, the publisher did not seek to bring itself within that defence. Presumably, this was because of perceived difficulties in establishing compliance with the condition of reasonable conduct in the circumstances.

162 The particular provisions of the Act governing "protected reports" are contained in s 24. By that section, "[t]here is a defence for the publication of a fair protected report"[214]. "Protected report" is defined to mean "a report of proceedings specified in clause 2 of Schedule 2 as proceedings for the purposes

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210 The Act, s 4(2). See also *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 at 424-425 [112].

211 eg that the matter complained of was not true in substance and that the defence of contextual truth was unavailable. See reasons of Callinan J at [225].

212 The Act, s 22(1).

213 The Act, s 22(1)(c).

214 The Act, s 24(2).

of this definition"[215]. Within that clause it is provided that "[t]he following proceedings are specified for the purposes of the definition of 'protected report' in section 24(1)". The fifth paragraph in the ensuing list states "proceedings in public of a court". By cl 1 of Sched 2 "'court' means a court of any country". Although appearing in a State Act that definition, in the context, would be wide enough to include proceedings in the Federal Court of Australia. Other provisions in cl 2 of Sched 2 replicate a large number of proceedings before the wide variety of specified tribunals and other bodies, established by State legislation, as earlier mentioned in Div 3 ("Absolute privilege").

163 *Requirement that reports be fair*: To attract the statutory protection, the only adjective used in s 24(2) of the Act is "fair". In this respect, the Act has adopted a terminology slightly different from that traditionally applicable to such a defence at common law[216]. In the *Defamation Act* 1912 (NSW), for example, it was provided, relevantly, that no civil action was maintainable in respect of a publication in good faith for the information of the public "in any newspaper" of "a fair *and accurate* report of the public proceedings of any court of justice, whether such proceedings are preliminary or interlocutory or final, unless, in the case of proceedings which are not final, the publication has been prohibited by the court"[217]. Provision was also made in the 1912 Act for a defence for publication of "a copy or an abstract of any judgment, or of the entries relative to any judgment, which are recorded in any books kept in the office of any court of justice"[218].

164 The exceptions in the 1912 Act, in respect of fair and accurate reports of specified proceedings, were collected under the divisional heading "Qualified privilege". That arrangement gives some indication of the way in which the categories of fair and accurate reports were generally regarded in Australia in the

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215 The Act, s 24(1).

216 The language used by statutes varies between jurisdictions, making attention to the language of each statute imperative. Thus, under the *Wrongs Act* 1958 (Vic), s 4 it is provided that "[n]o action … shall be maintainable against any person for publishing a faithful and accurate report of proceedings in any court of justice, or other legally constituted court". The *Defamation Act* 1992 (NZ) refers to "fair and accurate" reports. In some States of the United States the statute requires that the report be "fair, accurate and impartial": *Lubin v Kunin* 17 P 3d 422 (2001) (Nevada).

217 *Defamation Act* 1912 (NSW), s 29(1)(d) (emphasis added); there was a proviso that matter of a defamatory nature ruled to be inadmissible by the court shall not be deemed to be part of the public proceedings of such court.

218 *Defamation Act* 1912 (NSW), s 29(1)(e).

first half of the last century. Provided such reports were fair and accurate and otherwise complied with the conditions of the 1912 Act, they attracted a defence of privilege. But it was not an absolute privilege. It was "qualified". Amongst the qualifications attaching was the requirement that the report must be "fair and accurate". Under the present Act, this formula has been replaced by the simple requirement that the report must be "fair". However, there is no relevant distinction. An inaccurate report, at least in respect of the identification of a party to a judgment of a court that has found a person in breach of the law, could not be "fair".

The issues

165 *Arranging the issues logically*: Despite the order of the grounds of appeal filed in this Court[219], I agree with Callinan J that it is logical to deal first with the threshold point raised by the appellant's third ground. According to that ground, where a case falls to be considered under the statutory defence of protection for a fair report of court proceedings (or a common law defence of a fair and accurate report of such proceedings) that category applies to state the relevant defence to the exclusion of any separate and different category of qualified privilege attaching to the making and receiving of statements published between persons with a corresponding duty or interest to make and receive them.

166 The reason why this ground comes first is obvious. The matter complained of here was inaccurate. It was not fair to the appellant. It would not therefore attract either the statutory "protected report" defence or any residual common law defence for such a report. If, therefore, the *only* applicable defence of qualified privilege in the circumstances was the one requiring the accuracy of reportage of court proceedings and their outcomes (to the exclusion of any other general defence of qualified privilege), the publisher would fail in the defence. The subordinate issues would not then arise.

167 *The consequential issues*: For these reasons, the issues for decision in this Court, in logical order, are:

(1) Whether, when the matter complained of involved reportage (relevantly) of judicial proceedings, the only applicable defence to protect such report is one concerned with the "fairness" (or "fairness and accuracy") of the report. Or whether, even if these requirements are unfulfilled, it remains open to the publisher to invoke a more general defence of qualified privilege in respect of an inaccurate report of such proceedings. (The scope of the protected report issue);

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219 Set out in reasons of Callinan J at [226].

(2) If the answer to (1) is that qualified privilege may protect an inaccurate report of such proceedings, whether the occasion of the publication in question in these proceedings was one attracting qualified privilege at common law, it being conceded that no claim was available for qualified privilege under the Act. (The scope of the qualified privilege issue); and

(3) If the matter complained of was published on an occasion of qualified privilege, whether the part of that publication found to have been defamatory of the appellant was within such privilege, in the sense that it was sufficiently connected to the privileged occasion to attract qualified privilege so as to give rise to the defence. (The relevance to the privileged occasion issue).

The scope of the protected report

168 *A "strange" outcome*: In the Court of Appeal, Rolfe AJA expressed the opinion that, where a person has communicated material on a subject on which the recipient had an interest in receiving that material, but has done so in the form of a report of court proceedings, there is no reason why "any such report should not be, conformably with established principles, accurate"[220]. He suggested that the contrary conclusion seemed "somewhat strange, particularly against the background of reciprocal rights and duties to receive and furnish information"[221]. Without finally deciding the point, Callinan J has expressed a similar inclination on the footing that the application of differing defences (with differing requirements as to accuracy) in respect of communications comprising reports of court proceedings appears "anomalous and productive of an incoherence in the law"[222].

169 At first I shared this opinion. It is not without certain judicial support[223]. The appellant suggests that this Court should uphold the point substantially upon

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220 *Bashford* [2001] NSWCA 470 at [59].

221 *Bashford* [2001] NSWCA 470 at [59].

222 Reasons of Callinan J at [230].

223 See eg *John Fairfax Ltd & Sons v Hook* (1983) 47 ALR 477 at 488, 494-495; *Bainton v John Fairfax & Sons Ltd* (1991) Aust Torts Reports ¶81-143; *Hodgson v Canadian Newspapers Co* (1998) 39 OR (3d) 235; *Grassi v WIC Radio Ltd* [2000] 5 WWR 119; *Pauanui Publishing Ltd v Montgomerie* unreported, Court of Appeal of New Zealand, 21 October 1997 upholding a decision of Anderson J at first instance concerned with the defences available under the *Defamation Act* 1992 (NZ), s 16(1) (fair and accurate report) and s 16(3) (qualified privilege). In the Court of Appeal a concession was made and accepted by the Court.

the basis of the policy of the law that the public, and individual recipients of information about judicial proceedings, are entitled to have reports of that kind which are fair and accurate, such that this basal requirement may not be overridden by invoking other defences, applicable to other, different, communications having different characteristics and requirements.

170 *Court reports "stand apart"*: In support of this approach, the appellant strongly relied on Lord Uthwatt's reasons for the Privy Council in *Perera (M G) v Peiris*[224]:

> "Reports of judicial and parliamentary proceedings and, it may be, of some bodies which are neither judicial nor parliamentary in character, stand *in a class apart* by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings. As regards reports of proceedings of other bodies, the status of those bodies taken alone is not conclusive and it is necessary to consider the subject-matter dealt with in the particular report with which the court is concerned. If it appears that it is to the public interest that the particular report should be published privilege will attach."

171 The notion that there is something special about judicial (and parliamentary and some other) proceedings, so that they "stand apart", is a recurring one in the case law[225]. This notion lends support to the submission that, subject to any valid statutory provisions to the contrary, where the communication is in the form of a report (relevantly) of judicial proceedings, it is a universal prerequisite of any defence based on such a report that it must be fair (including accurate)[226].

172 The point presented by the appellant on this first issue is not the subject of an authoritative decision of this Court. It must therefore be resolved by reference to the usual considerations that inform decisions on such issues. Where a statute speaks and is constitutionally valid, a court must give it effect. A court has no authority to adhere to pre-existing law in the face of contrary provisions in

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224 [1949] AC 1 at 21 (emphasis added).

225 cf *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 246-247; *Chakravarti* (1998) 193 CLR 519 at 556 [89]; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

226 cf *Taylor-Wright v CHBC-TV* (1999) BCSC 214; *MD Mineralsearch Inc v East Kootenay Newspapers Ltd* (2000) BCSC 9036.

legislation[227]. But if a statute does not resolve the matter, the court must do so in a principled way, drawing upon any analogous authority and any applicable legal principle and legal policy[228].

173 *A universal statutory requirement?* Turning to the statute, it must be said that it is not entirely clear. It is true that s 11 of the present Act states (with emphasis added) that "[t]he provision of a defence by this Part [such as the defence of protected report of court proceedings] does not *of itself* vitiate, diminish or abrogate any defence or exclusion of liability available apart from this Act". However, it remains necessary, where some other, general common law defence is postulated on the basis of s 11 of the Act, to reconcile the highly particular provision for "protected reports" in s 24 of the Act with the revived and continuing common law defence of "fair and accurate report" and the qualified privilege relied on by the publisher as applicable alongside s 24.

174 It is open to ask, as the appellant did, what room is left for the defence of publication of a fair protected report when, by s 24 and Sched 2 of the present Act, Parliament had gone to so much trouble to enact detailed and particular provisions on that very subject. If the defence for reports (relevantly) of proceedings in a court were to be at large, with no universal requirement for "fairness" (or accuracy), the operation of the postulate for the publication of reports of judicial proceedings enacted in s 24(2) of the Act would, to that extent, be undermined, or certainly qualified.

175 In effect, this argument amounts to a kind of *expressio unius* contention[229]. Because, in the present Act, Parliament has specifically addressed the subject of reports of certain proceedings (including proceedings in public of a court[230]) the proposition is that pre-existing and general provisions of the common law (including the common law defence of qualified privilege invoked by the publisher) are overridden by the high particularity of the enacted provision for "protected reports". As the argument proceeds, although the provision of s 24 of the Act does not "of itself" have the effect to "vitiate, diminish or abrogate" other common law defences relevant to protected reports, when such defences are placed alongside the particularity of s 24, they cannot survive. They evaporate

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227 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 542-543 [143]-[144]; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 641 [158].

228 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

229 *Expressio unius est exclusio alterius*, ie that the express mention of one outcome implicitly excludes all others.

230 The Act, s 24(2) and Sched 2, cl 2(5) and cl 1, definition of "court".

because of the strong and clear indication of the legislative purpose that to have a defence in such a case all such reports must be fair and, if they are not, they are unprotected.

176 Supporting this notion, the appellant relied not only upon the textual particularity of the Act but also the "strangeness" of the contrary proposition that "fairness" (and accuracy) could be treated as inessential by the simple device of side-stepping the defence of "protected report" and resorting to the common law defence of "qualified privilege" in respect of the self-same report. For the appellant, this was not a result consistent with the language and scheme of the Act dealing with "protected reports".

177 *Need for accuracy of court reports*: Support for the appellant's submission exists in the policy of the law, reflected in s 24 of the Act, insisting on a special status (relevantly) for court reports, on the footing that judicial proceedings can often give rise to highly defamatory and damaging statements which, if reported, should only be protected so long as such reports are accurate[231]. If such a universal rule were established, it would have the merit of promoting particular care in the reporting of judicial proceedings. It would establish a discrete category where accuracy was essential in a class of communication which, of its very nature, is of great public importance. In so far as the common law has not previously expressed such a discrete rule, the appellant invited this Court to do so in fulfilment of its function of stating the common law of Australia in ways that are not merely historical but also conceptual, principled and rational[232].

178 *The Act allows multiple defences*: Whilst these arguments have force, they should not be accepted. The starting point is the Act; because if it establishes an exclusive regime for protected reports of judicial proceedings, this Court will be unconcerned with common law rules. The history, language and structure of the Act tell against treating s 24 as an entire regulation of the law of defamation in respect of reports of the proceedings specified there. The present Act had, as a major objective, the abolition of the codification that had been adopted in the 1958 Act[233]. Its object was to revive the common law of defamation, modified, in part only, by particular statutory provisions. That

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231 cf *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 780-781; *John Fairfax & Sons Ltd v Hook* (1983) 47 ALR 477 at 488.

232 cf *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 534; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 570 [129], 600-603 [226]-[234].

233 The Act, ss 4(1), 4(2).

object was not left to inference. It was spelt out in s 11. The fact that that section refers to "any defence or exclusion of liability" makes it clear that the purpose of the Act was to revive all of the many defences and protections that had previously existed by the common law. In this sense, the present Act is confined to the regulation of essential, or "core", matters upon which Parliament made its will unmistakable. Beyond such matters, the common law had been left to apply and develop.

179 There is a further reason why s 11 should not be given a narrow interpretation. Not only is it somewhat peculiar in its terms (a reflection of its history). It is also a provision that tends to uphold freedom of expression, an important civil right[234]. It is true that the enjoyment of one's honour and reputation, the defence of which is mentioned as an exception to freedom of expression, also constitutes an important civil right, recognised as such by the common law and by international human rights law[235]. The object of the Act is to assist in procuring a proper balance between these rights which are in competition. But, as its heading indicates, the particular purpose of s 11 is to provide for common law defences. It is therefore aimed at securing a balance that ensures the enlargement of common law defences so as to enhance the zone of free expression. Where a statute is ambiguous, it is permissible to resolve its ambiguity by preferring the construction that advances the apparent object of Parliament in a way that promotes the attainment of fundamental civil rights[236].

180 This conclusion is further reinforced by the structure of the Act. Part 3 of the Act contains several defences. There is no hint in the Act that such defences represent closed categories, obliging a party sued to elect amongst them. On the contrary, the language of the defences suggests that, in particular cases, two or more of them may apply concurrently. Taking only the first two defences mentioned as examples, it may frequently be the case that a publisher will wish to defend an action for defamation on the basis that "the person defamed was not likely to suffer harm" (s 13) but also on the basis that "the imputation is a matter of substantial truth, and … either relates to a matter of public interest or is published under qualified privilege" (s 15). Just as plaintiffs are entitled to (and commonly do) express their claims in terms of alternative causes of action

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234 International Covenant on Civil and Political Rights ("ICCPR"), Art 19.1, 19.2.

235 ICCPR, Art 17.1, 17.2. See also Art 19.3(a); cf *Gutnick* (2002) 210 CLR 575 at 626-627 [115]-[117].

236 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; cf *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 59-61 [101]-[110]; 192 ALR 561 at 587-590; *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 138 [184]-[186]; 202 ALR 233 at 278-279.

arising at common law or under a statute, so defendants are ordinarily entitled to invoke each and every applicable defence provided by law (whether by statute or the common law).

181 It follows that, whilst the high particularity of the Act's treatment of "protected reports" in s 24 at first glance suggests to a legal mind an exclusive treatment of the subject matter of that section, with the consequence that such reports must *always* be shown to have been "fair", a closer analysis of the Act denies that proposition. The several defences supplement any common law defences that are revived. They overlap one another. A publisher is entitled to invoke so many of them as are applicable. This also conforms to ordinary pleading practice. Accordingly, notwithstanding an inability to attract the statutory defence of "protected report", if a publisher can establish that some other defence (such as qualified privilege) applies to the occasion of the publication, it may have the protection of that defence. Neither in its express terms, nor by necessary implication, does the Act forbid this construction.

182 *The common law allows multiple defences*: When one leaves the language of the Act, and considers the first issue solely in terms of the common law defences of qualified privilege and "fair and accurate report"[237], the position is even clearer.

183 From their respective origins at common law (and in the manner of the development of that body of law), the defences grew out of different needs, occasioning different judicial holdings. They supplemented, and did not contradict, one another[238]. Obviously, where the more particular defence (absolute privilege or fair and accurate report) applied, it was commonly unnecessary to decide fine points arising from the possible application of a more general defence of qualified privilege. But if, because the requirements of the specific defence were not met, it became essential to invoke the general common

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237 According to Spencer Bower, *The Law of Actionable Defamation*, 2nd ed (1923) at 122, the first modern case involving this defence with respect to a report of judicial proceedings was *Curry v Walter* (1796) 1 Bos & Pul 525 [126 ER 1046]. For a case of criminal defamation see *R v Wright* (1799) 8 TR 293 [101 ER 1396]; cf *Hoare v Silverlock* (1850) 9 CB 20 at 24-25 [137 ER 798 at 799-800]; *Davison v Duncan* (1857) 7 El & Bl 229 [119 ER 1233].

238 cf *Smith v Harris* (1995) A Def R [52,055]. This position appears to be accepted in some jurisdictions in the United States; cf *Lubin v Kunin* 17 P 3d 422 (2001); *Riley v Zuber* Tex App LEXIS 507 (2001) at 20-24. However, United States decisions are often affected by constitutional doctrines: *Chapadeau v Utica Observer-Dispatch Inc* 341 NE 2d 569 (1975).

law of qualified privilege, there was no reason of legal principle why it should be unavailable[239].

184 Nothing in the repeated judicial statements concerning the importance to the public of accurate reporting of judicial (and parliamentary and other) proceedings is undermined by the invocation of common law qualified privilege, where it applies. The social objects of each defence are different; but are equally important. The specific one treats the public interest as conclusively established by proof that a report of certain proceedings is fair (and accurate). The other upholds the public interest "where one person has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it"[240]. Each defence, in its different way, "promotes the welfare of society"[241]. Legal history rejects any suggestion that a publisher must make an irrevocable election between such defences. The welfare of society does not oblige that such an election should now be imposed by this Court.

185 *Conclusion: privilege available*: The first issue must therefore be determined against the appellant. Neither as a matter of statutory construction, nor as one of legal authority, principle or policy, can it be said that the defence of fair and accurate report "eclipses" any relationship otherwise giving rise to a defence of qualified privilege.

The scope of the qualified privilege

186 On the second issue (accepting that qualified privilege attaches) there was unanimity of opinion in the Supreme Court. A majority of this Court takes the same view, as do I.

187 The test for determining whether a particular publication was made on an occasion of, and germane to a subject matter attracting, qualified privilege at common law is whether there was the requisite reciprocal duty or interest between the publisher of the matter complained of and its recipients[242]. In this case, such reciprocity was present. In the reasons of Gleeson CJ, Hayne and

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239 cf Boutrous, "Why an Expanded Common-Law Privilege Should Also Protect the Media", (1997) 15 *Communications Lawyer* 8 at 10.

240 *Roberts v Bass* (2002) 212 CLR 1 at 26 [62]; see also at 58-59 [160]; cf *Toogood v Spyring* (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1049-1050]; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 237-243, 260-264; and Tobin and Sexton, *Australian Defamation Law and Practice* at [14,001].

241 *Roberts v Bass* (2002) 212 CLR 1 at 26 [62].

242 *Roberts v Bass* (2002) 212 CLR 1 at 26 [62].

Heydon JJ ("the joint reasons"), by reference to the analysis of Hodgson JA in the Court of Appeal[243], it is concluded that the necessary indications are present to attract qualified privilege[244]. I agree. However, I wish to add an observation about one feature of the case that has attracted the attention of other members of this Court.

188 Early in the last century, in *Macintosh v Dun*[245], reversing a decision of this Court, the Privy Council deployed language that suggested that the provision of information for fee or profit would deprive a publisher of any qualified privilege to which the occasion of the publication was otherwise entitled[246]. The passages are set out in the joint reasons[247].

189 Since that time there have been many developments that make such a suggestion highly doubtful as a proposition of law. True, in particular circumstances, the receipt of a fee might indicate that a publisher was trading in salacious or malicious gossip, sold for entertainment. But more commonly it would indicate the serious purpose of the publication and the assumption of contractually enforceable obligations and expectations of accuracy and fairness. The growth of credit and other reporting bodies that provide business information about individuals (sometimes based on court reports) is a case in point. Whatever might have been the position a hundred years ago, I do not consider that the Privy Council's dictum in *Macintosh*[248], stated so broadly, represents the common law of Australia today.

190 This Court is no longer bound by decisions of the Privy Council. *Macintosh* should now be treated as overruled in this respect. The payment of a fee, as such, does not deprive an occasion of a publication of any privilege otherwise attaching to it[249]. I feel no obligation to persist with dubious efforts to

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243 *Bashford* [2001] NSWCA 470 at [32]-[33].

244 Joint reasons at [12]. See also reasons of Gummow J at [130]-[135]; cf reasons of McHugh J at [52]-[64]; reasons of Callinan J at [230]-[241].

245 (1908) 6 CLR 303; [1908] AC 390.

246 (1908) 6 CLR 303 at 306-307; [1908] AC 390 at 400.

247 Joint reasons at [14]-[16]. See also reasons of Gummow J at [146]-[147].

248 (1908) 6 CLR 303 at 306; [1908] AC 390 at 400.

249 Reasons of Callinan J at [232].

distinguish *Macintosh*[250], or to await its correction by statute[251]. In particular circumstances, of which the present is an instance, the payment of a fee to the publisher for the information provided may actually reinforce the necessary element of reciprocity. If there is salaciousness or malice in a publication purchased for fee, any qualified privilege otherwise attaching may be lost for such reasons. The salaciousness or malice may snap the connection with the propounded subject matter. They may contradict the propounded interest and duty. But qualified privilege will not be lost for the payment of the fee as such.

The relevance to the privileged occasion

191 *The test of relevance*: The foregoing conclusions bring me to the last point, which was the one upon which, in the Court of Appeal, Rolfe AJA[252] reached his dissenting conclusion. Accepting that the occasion was privileged, was the defamatory imputation (being the mistaken reference to the appellant personally) germane to the occasion? Or did it amount to "[t]he introduction of … extraneous matter"[253] so as to "afford evidence of malice which will take away protection on the subject to which privilege attaches"[254] or otherwise take that part of the publication outside the protection of the privilege?

192 Simply because, in a general sense, the publication of matter defamatory of an individual is included in a context of discussion of a subject of public interest on which there is the requisite reciprocity of interest and duty, does not assure the imputation of protection. Were it so, a great many grievous wrongs to the reputation of individuals would be privileged against redress simply because of a tenuous, remote or contrived connection between the defamatory imputation and the context. The introduction into a privileged communication of extraneous defamatory imputations will not necessarily cloak them with the privilege. The problem remains one of drawing a line between the protected and the unprotected.

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250 As in joint reasons at [25].

251 Australian Law Reform Commission, *Unfair Publication: Defamation and privacy*, Report No 11, (1979) ("ALRC 11"), Draft Bill, cl 15(4) ("The defence under this section does not fail by reason of the fact that the matter was published for fee or reward").

252 *Bashford* [2001] NSWCA 470 at [58]-[59].

253 *Adam v Ward* [1917] AC 309 at 318.

254 *Adam v Ward* [1917] AC 309 at 318.

193 Various judicial formulae have been propounded to mark out the boundaries of the protection given by the relevant privilege. In *Bellino v Australian Broadcasting Corporation*[255], the joint reasons suggested that the test was whether "those defamatory imputations … are relevant to the privileged occasion". In that case Brennan CJ was, if anything, more stringent. He did not consider that it was sufficient to decide whether the impugned imputations were "unconnected with and irrelevant to the main statement", as Lord Dunedin had proposed in *Adam v Ward*[256]. In Brennan CJ's view, it was necessary, in order to attract the protection, that "the publication of the defamatory matter makes a contribution to the discussion of the subject of public interest"[257]. A still further criterion of connection, apparently derived from Canadian formulations[258], was that applied by Sheller JA[259] and Hodgson JA[260] in the Court of Appeal. This asked whether the defamatory imputations were sufficiently "germane and reasonably appropriate" to the publication on the matter of public interest that otherwise attracted the privilege.

194 All of these formulae are attempts to define the boundaries of a discussion that is truly within the scope of the matter of public interest, so as to exclude the introduction of extraneous, irrelevant or marginal and gratuitous imputations that unacceptably do harm to the reputation and honour of an individual. Scientific precision is impossible by the use of such formulae. In every case, a judgment is evoked[261]. In some instances the titillating character of an irrelevant defamatory imputation in an otherwise justifiable context will be plain. But in other cases, the issue will be more debatable, as Callinan J has correctly recognised[262].

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255 (1996) 185 CLR 183 at 228.

256 [1917] AC 309 at 327.

257 *Bellino* (1996) 185 CLR 183 at 204 (footnote omitted).

258 Brown, *The Law of Defamation in Canada*, 2nd ed (1994), vol 1 at 879-880, fn 1604.

259 *Bashford* [2001] NSWCA 470 at [2].

260 *Bashford* [2001] NSWCA 470 at [44].

261 cf *Truth (NZ) Ltd v Holloway* [1960] NZLR 69 at 80-81.

262 Reasons of Callinan J at [237].

195 Care must be observed in taking too literally the test propounded by Brennan CJ in *Bellino*[263]. Because, as Callinan J notes[264], a defamatory imputation, as such, will commonly make little contribution to a discussion of public interest if included in a mistaken report of court proceedings, too rigid an application of that criterion would be self-fulfilling. Every error that involved a defamatory imputation would be cast beyond the pale. This would effectively introduce into the defence of qualified privilege a strict or even absolute requirement of accuracy in reports of proceedings that has been a feature of the common law defence of protected reports but not, as such, of qualified privilege. This, in turn, could endanger free discussion on subject matters of public interest that qualified privilege protects for the welfare of society.

196 Does this mean, as the appellant argued, that to allow the defence of qualified privilege would fundamentally frustrate the policy inherent in the defence of fair protected reports[265]? I think not. In order to secure the alternative defence of qualified privilege, it remains in each case for the publisher to demonstrate that the defamatory imputations are "relevant to the privileged occasion"[266]. It must be left to the common sense of judges (and, where they still decide such matters, juries) to evaluate in the particular case whether the defamatory imputation is "relevant" or "germane" to the occasion or not. It can be left to such decision-makers to navigate the course between the Scylla of extraneous affront and the Charybdis of unrealistic demands that all communications on matters of public interest be fastidiously checked so as to remove the slightest inaccuracies before publication. Whilst the principal disqualifying element for the defence of protected report has conventionally been a want of fairness (and accuracy), the disqualifying element in the case of the defence of qualified privilege has conventionally been different: the existence of malice and the lack of bona fides on the part of the publisher. These considerations are not present here.

197 *Application of the test*: When the test of relevance to the privileged occasion is applied to the circumstances of this case, I agree, for the reasons given by Gummow J[267], that it is impossible to treat the report of Merkel J's

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263 (1996) 185 CLR 183 at 204.

264 Reasons of Callinan J at [231], [237].

265 cf *Sattin v Nationwide News Pty Ltd* (1996) 39 NSWLR 32 at 38 per Levine J; *Wade v State of Victoria* [1999] 1 VR 121 at 137-143; *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 at 156.

266 *Bellino* (1996) 185 CLR 183 at 228.

267 Reasons of Gummow J at [132]-[135].

analysis of the enforcement of the copyright claim over the data sheets as irrelevant to the subject matter enlivened by the claim made under s 52 of the *Trade Practices Act*. By common consent, the latter viewed as a whole was sufficiently relevant to a discussion of the subject matter, occupational health and safety, as to constitute communication on a clear matter of public interest.

198 The publication of the false and defamatory imputation concerning the appellant was hurtful. But, as such, the subject was not irrelevant to the occasion of the publication. Still less was it gratuitous and lacking in relevant connection with the subject matter. That subject matter had arisen out of the same litigation in the Federal Court. It was historically and legally connected. It was agreed for the appellant that malice or want of good faith could not be proved. Thus, whilst neither the statutory defence of protected report nor the common law defence of fair and accurate report was available to, or indeed pleaded by, the publisher, the defence of qualified privilege was available. It was not lost because of the mistaken reference to the appellant in the place of his company.

199 *Response to the minority*: With respect, there are several flaws in the reasoning of the minority on the issues of qualified privilege. First, they effectively demand that the publication always be perfectly accurate, without factual errors. This is most evident in the reasons of Callinan J, which state that "the making of any wrong statement cannot possibly be for the common, indeed any good, or in the public, or indeed any narrower interest"[268]. Such an approach would introduce a strict truth requirement that has not hitherto been part of the common law of qualified privilege. In my view, this Court should not now introduce that requirement, given the purpose and function of that defence. An important attribute of qualified privilege is that the defence is available where the defence of truth (however expressed) may be unavailable.

200 Secondly, the minority appear to overlook the large expansion and variety of publications in Australian society today, including on specialised subject matters of importance and benefit to society. Occupational health and safety is only one such subject matter. The common law of qualified privilege must adapt to such changes and also to the technologies that make them possible. This is a reason for reading some of the old cases with critical scrutiny. The exchange and expression of views upon such subject matters may attract the defence of qualified privilege given the reciprocity of interest and duty that such publications commonly involve for their particular audiences. To withdraw the defence, or to hold that it is lost because of a factual error, would seriously burden such publications and thus community discussion upon specialised subject matters that conduce greatly to the convenience and welfare of society.

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268 Reasons of Callinan J at [231].

The position of such publications is separate and different from the case of the general or mass media.

201 Thirdly, the minority overstate the significance of this decision and the limited circumstances to which it responds. In particular, McHugh J's reference to "dancing in the streets"[269], quickly qualified (as if recognising the hyperbole), seems, with all respect, to overestimate not only the implications of the majority reasoning in this case, but also the subject matters over which Australians display their emotions publicly.

202 Although the basic principles of qualified privilege are well settled, I do not suggest that they are always easy to apply. Opinions will differ concerning their application in a particular case, as they have differed here. However, the decision of this Court rejects an absolute requirement of factual accuracy that would alter existing law, cripple the defence of qualified privilege, impose a chilling effect on legitimate communications and undermine the distinct advantages that modern technology brings to specialised publications.

203 The majority are therefore correct, in my view, to resist the errors into which the minority would lead the law. If there will be "dancing in the streets" (which I doubt), it is because a serious legal error inimical to free expression has been avoided.

The legal defects illustrated by the appeal

204 In a more logical system of defamation law (such as that followed in most countries of the civil law tradition) the solution to the present case, in the absence of a voluntary acknowledgment of mistake as the appellant sought, would have been a court-ordered publication, with adequate prominence, identifying the publisher's error and correcting it with a statement of the true facts as found[270]. That remedy, which acknowledges that the recipients of any publication normally have an interest, beyond those of the parties, in receiving correct information, was proposed more than twenty years ago by the Australian Law Reform Commission[271]. The Commission referred to the "inadequacies of present remedies, the limitations of awards of damages and the unfortunate consequences of the 'damages or nothing' approach"[272] that mark present defamation law. It commented that "[t]he correction order should at once provide a genuine plaintiff

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269 Reasons of McHugh J at [36].

270 ALRC 11 at 142-143 [258]-[259], 151-152 [277].

271 ALRC 11 at 151-152 [277].

272 ALRC 11 at 151 [277].

with a more effective remedy and reduce the burden of damages, with their consequences for the diminution of freedom of speech"[273]. The proposal was not enacted.

205 The present appeal illustrates once again the defects of the current law[274]. The appellant had a genuine grievance which the publisher declined to correct. As it was found, the appellant suffered damage to his reputation. The case was not a big one; but it was important to the appellant. Once again, the law of Australia has failed to afford appropriate redress to an understandable grievance. Instead, it has ensnared the parties in complex proceedings of uncertain statutory and common law and peculiar procedures involving great delays and much cost and anxiety to them both.

206 Eventually, the parties were yoked together in a Herculean struggle where the burden of accumulated costs quite possibly overtook the importance of the dispute that initially lay between them. The outcome is not a proud moment for the law. It affords another reminder of the need for law reform. As many judges and law reform bodies have recognised, the path to such reform lies in the direction of changed procedures, including enforceable rights of correction and reply.

Orders

207 I agree that the appeal should be dismissed with costs.

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273 ALRC 11 at 151-152 [277].

274 cf *Chakravarti* (1998) 193 CLR 519 at 561-562 [106]; *Roberts v Bass* (2002) 212 CLR 1 at 49-50 [126].

208 CALLINAN J. This appeal, in defamation proceedings, raises important questions of principle in relation to qualified privilege: in particular, whether the occasion with which the Court was concerned was one of qualified privilege; and, if it could be so designated, whether the matter published was either not relevant, or of such limited relevance to the publication of the matter actually attracting the privilege (if any) that the matter published should be regarded as falling outside the privilege. I should say at the outset that McHugh J has dealt very fully with the first of the questions, and has reached a conclusion on it with which I agree.

The facts

209 ACOHS Pty Ltd ("A") brought an action in the Federal Court against R A Bashford Consulting Pty Ltd ("Consulting"), Risk Management Concepts Pty Ltd ("Risk") and Mr Bialkower. The last made a cross-claim against A. The action was heard by Merkel J who found in favour of A. Relevantly his Honour made orders as follows:

> "1. The Court declares that:-
>
> (a) in publishing or causing to be published an item entitled 'Chemwatch Wins Copyright Case' on 2 December, 1993 [Consulting] and [Risk] engaged in conduct in trade and commerce which contravened s 52 of the Trade Practices Act 1974 (Cth);
>
> (b) [Mr Bialkower] was a person involved in the said contravention within the meaning of s 75B of the said Act.
>
> 2. [Consulting, Risk and Mr Bialkower] pay damages in the sum of $20,000.00 to [A].
>
> 3. The Application of [A] be [otherwise] dismissed.
>
> 4. The Cross-Claim of [Mr Bialkower] be dismissed.
>
> 5. (a) The Court declares that [Consulting] and [Risk] are entitled to contribution from [Mr Bialkower] in an amount equal to 75 per centum of the damages and costs ordered to be paid by them.
>
> (b) [Mr Bialkower] indemnify [Consulting] and [Risk] in an amount equal to 75 per centum of the damages and costs ordered to be paid by them.
>
> 6. The Cross-Claim of [Consulting] and [Risk] against [Mr Bialkower] be otherwise dismissed.

7. [Consulting, Risk and Mr Bialkower] pay one-third of [A's] taxed costs of and incidental to the proceeding.

8. [Mr Bialkower] pay two-thirds of [A's] taxed costs of and incidental to the proceeding.

9. [Mr Bialkower] pay to [Consulting] and [Risk] one-third of their taxed costs of and incidental to the proceeding."

210 The appellant gave evidence during the trial. His name assumed no prominence in the reasons for judgment.

211 The proceedings before Merkel J arose out of the publication of a newsletter, relating among other things to the handling of chemicals. The appellant was not alleged to have been personally involved in the publication and therefore not himself to have been, to use the language of s 75B(1)(c) of the *Trade Practices Act* 1974 (Cth), "in any way, directly or indirectly, knowingly concerned in, or party to" the misleading or deceptive conduct constituted by it[275]. The precise role of Consulting, of which the appellant was a shareholder and director, in the publication by no means emerges with any clarity from the reasons of Merkel J. Nonetheless, the orders made by his Honour were made in unmistakable terms and clearly identified the legal personalities against whom the orders were made and were to operate.

212 The respondent is also a publisher. It publishes a periodical occupational health and safety bulletin ("the bulletin") fortnightly to subscribers who pay an annual fee of $395. On 28 May 1997, almost three weeks after Merkel J delivered his judgment, the respondent published a bulletin in which the matter complained of appeared under a headline "MSDS copyright case dismissed". The article commenced with the following:

> "Material safety data sheets should not be too restricted by copyright – they should as much as possible be available to enforce OH&S, according to a Federal Court ruling in the past fortnight.
>
> The Court has dismissed a claim by a chemical information database company which alleges its main competitor, Victorian-based ACOHS Pty Ltd, breached copyright by transcribing 43 material safety data sheets (MSDS) into its database.

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275 Neither the parties nor his Honour referred to s 65A of the *Trade Practices Act* which was inserted in 1984 to afford protection to prescribed information providers against suits under s 52 and other sections.

> Bernie Bialkower, proprietor of Chemwatch, claimed the MSDS – the primary vehicle for providing chemical safety information to the workplace – were original literary works authored by himself and his employees.
>
> He sought an injunction preventing ACOHS from further infringing his copyright and an order requiring ACOHS to surrender copies of the 43 MSDS.
>
> ACOHS, which received the MSDS from manufacturers before entering them into its Infosafe database, denied infringing Bialkower's copyright.
>
> Justice Merkel of the Federal Court in Melbourne, dismissed Bialkower's claim, saying he had not adequately shown he owned copyright of the 43 MSDS."

213 There then followed some direct quotations from the judgment of Merkel J and commentary upon them. Included in the commentary was this:

> "The breach of copyright allegations were made by Mr Bialkower in response to an action initiated by ACOHS in 1993.
>
> ACOHS sued the publishers of a newsletter called Infax which had printed a report claiming ACOHS was one of two companies Bialkower successfully prosecuted for MSDS copyright infringement.
>
> ACOHS also sued Bernie Bialkower as he had provided the information for the report.
>
> Mr Bialkower then made the counter-claim, accusing ACOHS of copyright infringement.
>
> In respect of the initial claim, Justice Merkel found the publishers of Infax newsletter, RA Bashford and Risk Management Concepts, had engaged in false and misleading conduct by publishing an incorrect report – there had been no such copyright case – and that Bialkower was the source of the information and authorised its publication.
>
> He ruled publication of the 'seriously misleading statements caused harm to ACOHS's repute and goodwill and that harm is likely to have led to some loss of business or custom'.
>
> He awarded ACOHS $20,000 damages and ordered Bialkower, RA Bashford and Risk Management Concepts to pay their legal costs."

214 Before she wrote the article its author, a journalist, telephoned the appellant to ask him to comment on the decision. The appellant declined, but

warned the journalist that she should be very careful about what she wrote because of the complexities of the case.

215 Following the publication of the bulletin the appellant's solicitors protested on his behalf, and sought an apology from the respondent. The letter was admitted into evidence. It stated several matters of fact:

> "In the newsletter you stated, inter alia:
>
> > 'RA Bashford and Risk Management Concepts had engaged in false and misleading conduct by publishing and [sic] incorrect report ...' and ... 'ordered Bialkower, RA Bashford and Risk Management Concepts to pay their legal costs.'
>
> The Court made no such finding. RA Bashford was not a party to the proceedings at all. The Respondent involved was RA Bashford Consulting Pty Ltd ('Consulting'). Consulting is not mentioned in the judgment at all except in the introduction and in the formal orders.
>
> There is no mention of our client being involved in the commission of any false or misleading conduct. Consulting's only involvement was after the event and aimed at mitigating the effects of an erroneous article in the 'In Fax' Newsletter.
>
> Notwithstanding that our client is a director and shareholder of Consulting (one of the actual Respondents) you also failed to identify that Consulting was provided with a 75% indemnity by the other Respondent with respect to damages and the costs of the case.
>
> Our client is a non practising barrister who specialises in the workers' compensation and occupational health and safety areas. The publication of your newsletter is directed to our client's specialty of work and his client's. The recognition of our client's name as a person with expertise and a reputation in the field of occupational health and safety is critical to his profitability. Additionally, our client is authoring a CD Rom which deals specifically with workers' compensation and occupational health and safety issues Australia-wide. Your newsletter has been forwarded to many of the corporations which would be potential customers for the services of our client.
>
> ...
>
> The newsletter is also defamatory of our client and he has been seriously hurt and embarrassed by its publication.
>
> Our client has instructed that he has already pointed out to you the errors in your newsletter and has provided to you his telephone number so that

you could attempt reparation, but we are instructed, you have not had the courtesy to return our client's telephone calls.

We invite you to publish at the earliest possible date an apology to our client in the following terms:

> 'On 28 May 1997 the Information Australian Newsletters published an article in its Occupational Health and Safety Bulletin which referred to Mr RA Bashford. The Information Australia Newsletters unequivocally recognises that the statements it made referring to Mr RA Bashford were false and without foundation.
>
> The Information Australia (Newsletters) unreservedly apologises to Mr Bashford for any hurt and embarrassment that the publication of the statements may have caused to him.'

Notwithstanding that you may publish an apology in the form requested, our client reserves his rights to claim damages and costs by reason of the publication. We put you on notice that your failure or refusal to publish the requested form of apology to our client, will be relied upon as conduct aggravating the damages suffered by our client because of the offending publication."

216 To the facts stated in the letter should be added these which were found by Davies AJ at first instance:

> "It seems that [the appellant's] relief at the result of the Federal Court proceedings was shattered when he read the article in the Occupational Health and Safety Bulletin, which not only named him personally, but described him as one of the publishers. [The appellant] apparently felt that all his efforts to distance himself from the Infax newsletter, efforts which he considered to have achieved success in the Federal Court proceedings, were destroyed by the article in the Occupational Health and Safety Bulletin."

The trial

217 No apology was published. The appellant sued the respondent in defamation in the Supreme Court of New South Wales. By way of defence the respondent denied that it had defamed the appellant. One of the imputations pleaded was found by a jury to have been conveyed and to be defamatory of the appellant:

> "that the Plaintiff, by publishing a false report concerning ACOHS Pty Ltd, had been found by the Federal Court of Australia liable to ACOHS Pty Ltd in damages and costs for causing it harm and loss".

218 It then fell for a judge of the Supreme Court (Davies AJ) to decide, in accordance with s 7A of the *Defamation Act* 1974 (NSW) ("the Act"), whether any of the other defences of the respondent were made out, and the damages for which the respondent was liable. Those defences in summary were: that the appellant was not likely to suffer harm pursuant to s 13 of the Act; of truth pursuant to s 15 of the Act; of contextual truth pursuant to s 16 of the Act; and of qualified privilege at common law. His Honour rejected three of the defences. The first was clearly unarguable. The second failed because in his opinion the imputation was not true in substance, and the third, because the contextual imputations pleaded by the respondent were not made by the article in the bulletin, and furthermore, did not differ in substance from the appellant's imputation. His Honour did however uphold the defence of qualified privilege for the reasons that the article raised issues of general interest to persons operating in the field of occupational health and safety, that the imputation was within the privilege to which that interest gave rise, and that malice was not established. His Honour, conscious of the possibility of an appeal, said that he would have assessed damages if the defences had failed, in the sum of $25,000.

The appeal to the Court of Appeal of New South Wales

219 The appellant appealed to the Court of Appeal of New South Wales (Sheller and Hodgson JJA and Rolfe AJA). By majority (Rolfe AJA dissenting) that Court found that the inaccurate report of the decision on the original claim was protected because it was relevant to the occasion of qualified privilege. Their Honours also rejected the appellant's argument that a defence of qualified privilege can never attach to an inaccurate report of court proceedings of which this was said to be an example.

220 Hodgson JA (with whom Sheller JA and Rolfe AJA agreed on this point) held that the report of the decision on the cross-claim in the Federal Court proceedings was published on an occasion of qualified privilege. This was so because occupational health and safety were matters important for the common convenience and welfare of society, and communications relevant to them to persons responsible for occupational health and safety promoted those ends. As the respondent had accepted subscriptions for a newsletter dealing with occupational health and safety it was morally and legally obliged to publish to subscribers matters of significance on that topic within which the decision on the cross-claim fell.

221 Hodgson JA also held that unless malice were established, matter communicated on the privileged occasion enjoyed the privilege unless it was "truly unconnected with the subject matter of the occasion." His Honour further held that it was "germane and reasonably appropriate to the occasion to give readers the context of the proceedings in which the decision relevant to occupational health and safety was made" and that "the part of the publication complained about really [did] no more than ... indicate the nature of the

proceedings and the result of the proceedings, so that the part of the judgment relevant to occupational health and safety [was] put in a context." In addition to agreeing with the decision and reasons of Hodgson JA, Sheller JA said that the matter complained of was "connected and sufficiently connected with the subject matter of the privileged occasion" and "relevant to the occasion" because the paragraphs complained of explained the context in which the copyright claim had been made as a response to an action brought against the claimant in the Federal Court proceedings. In dissenting, Rolfe AJA would have applied *Bellino v Australian Broadcasting Corporation*[276] to hold that the imputation found by the jury was not relevant to the privileged occasion: therefore the inaccurate attribution of the publisher was "truly unconnected with the subject matter of the occasion". It "intruded material into the article, which was not only wrong, but irrelevant to its essential thrust."

222 As to the appellant's argument that there could be no defence of qualified privilege for an inaccurate report of court proceedings, Hodgson JA said that the necessity for accuracy to sustain a defence of fair report of court proceedings was not an additional requirement superimposed over and above the defence of qualified privilege based upon a reciprocity of duty and interest.

223 Rolfe AJA would have upheld the appellant's submission in this respect. In his Honour's opinion, the requirement is that for qualified privilege to apply to reports of court proceedings, the reports must be accurate. His Honour thought a contrary conclusion to be "somewhat strange, particularly against the background of reciprocal rights and duties to receive and furnish information."

224 Having regard to the decision he had reached on the appellant's appeal, Hodgson JA did not need to deal with the Notice of Contention. He did, however, express two further opinions: first, that Davies AJ had not been in error in not finding that the appellant's imputation was true in substance. In his Honour's opinion:

> "the indirectness of the involvement of the appellant's company in the publication, coupled with the reference to the appellant rather than his company, are sufficient in my opinion to prevent the imputation being true in substance."

225 Secondly, the respondent's defence of contextual truth could not succeed because, whether or not the contextual imputations were conveyed, they were considerably weaker than the appellant's imputation, and could not satisfy the condition for which s 16(2)(c) of the Act provides, that the appellant's imputation not further injure the appellant's reputation.

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276 (1996) 185 CLR 183.

The appeal to this Court

226 The appellant's appeal to this Court is brought on three grounds:

> "(a) The Court of Appeal erred in finding that the Respondent was 'morally and legally obliged' and thereby had a duty to publish the matter complained of to the recipients and, thereby, finding that it was published on an occasion of qualified privilege at common law.
>
> (b) Hodgson JA (with whom Sheller JA agreed) erred in determining that that part of the matter complained of which defamed the [appellant] was relevant to the occasion of qualified privilege which he had found and in doing so misapplied the decision of this Court in *Bellino v Australian Broadcasting Corporation*[277].
>
> (c) Hodgson JA (and Sheller JA) erred in determining that the defence of qualified privilege can ever extend to protect an inaccurate report of court proceedings."

227 In dealing with the appeal I proceed upon the basis that the article was factually wrong as found by the primary judge, and in my opinion correctly so, in referring to the appellant personally, and not to Consulting by its correct corporate name, and in describing the appellant personally as the, or a publisher of the newsletter the subject of the proceedings in the Federal Court.

228 The first question is whether a defence of qualified privilege is available in respect of the publication of an inaccurate or unfair report of judicial proceedings.

229 That a publication in New South Wales is of a report of court proceedings may not mean that its publisher is confined to the defence of a fair and accurate report of judicial proceedings if other defences are available at common law. Regard has to be had to s 11 of the Act which is in this form:

> "**Common law defence etc**
>
> The provision of a defence by this Part does not of itself vitiate, diminish or abrogate any defence or exclusion of liability available apart from this Act."

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277 (1996) 185 CLR 183.

230 For present purposes I will proceed upon the basis that a report of judicial proceedings may attract qualified privilege. It is another question however whether the fact that the publication does purport to be a report of judicial proceedings, would be irrelevant to a claim of qualified privilege in respect of it. It is unfortunate enough for the persons defamed that absolute privilege attaches to judicial, as well as parliamentary proceedings to deny them an effective remedy in defamation in respect of harsh and false things that may be uttered about them in court and Parliament. Any extension of such a licence, to defame, obviously needs to be carefully scrutinized. I must say that it does seem anomalous and productive of an incoherence in the law[278], that a report of judicial proceedings, however damaging to a person, may be protected as a fair and accurate report of judicial proceedings if, and only if it is fair and accurate[279], yet if it is inaccurate, or unfair, it might still attract qualified privilege. As will appear I do not have to resolve in this case the tension to which that anomaly gives rise or indeed, even to decide this first question, whether a separate defence of qualified privilege at common law can coexist with the statutory or common law defences of "fair report". But it is a matter which may need attention at some stage. There are two reasons why I do not have to do so. One is that, on the assumption that the relevant occasion was one of qualified privilege, all of the necessary elements of the defence of it are not present. The second reason is that, as McHugh J demonstrates in his judgment, the publication the true subject of these proceedings was not made on an occasion of qualified privilege. It is to the first of these matters that I will now turn.

231 Expressions which have the ring of slogans and metaphors have been repeatedly used in discussions of qualified privilege. It is important to examine those expressions to reduce them, as far as may be, to concrete terms. The starting point is that a defence of qualified privilege operates to excuse the publication of inaccurate or untrue and defamatory matter. But from the earliest times and subsequently according to various formulations, the protection which the law affords has always depended upon a number of matters: that the statement has been made in the discharge of some public or private duty, whether legal or moral, or in the conduct of the maker's own affairs and in which he or she has a real interest[280]. The formulation that qualified privilege will extend to a

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278 See *Sullivan v Moody* (2001) 207 CLR 562 at 580-581 [54] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ. See also *Montgomerie v Pauanui Publishing Ltd* unreported, New Zealand High Court, 3 March 1997, and on appeal, *Pauanui Publishing Ltd v Montgomerie* unreported, New Zealand Court of Appeal, 21 October 1997.

279 See *John Fairfax & Sons Ltd v Hook* (1983) 47 ALR 477 at 488, 495.

280 cf *Toogood v Spyring* (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1049-1050]. See also *Howe & McColough v Lees* (1910) 11 CLR 361 at 368 per Griffith CJ.

communication "fairly warranted by any reasonable occasion or exigency, and honestly made", such communication being "protected for the common convenience and welfare of society" was propounded in *Toogood v Spyring*[281] and later affirmed in *Stuart v Bell*[282]. Griffith CJ cited the formulation with approval in *Howe & McColough v Lees*[283]. The phrase "common convenience and welfare of society" rolls readily off the tongue as if it had a fixed meaning that no one could possibly dispute. The desirability of the advancement of the common convenience and welfare of society may readily be accepted. There are bound to be cases however in which what will advance the common convenience and the welfare of society are contestable concepts. Other expressions, such as "the general interest of society"[284] and "community of interest"[285] similarly involve the making of value judgments. It is because the making of any wrong statement cannot possibly be for the common, indeed any good, or in the public, or indeed any narrower interest, that the defence, once the occasion has been shown to be one of qualified privilege, focuses upon the subject matter of the communication, rather than upon the actual communication itself, the inaccuracy of which is the reason why there must be some other basis for its justification if its maker is to be protected against suit.

232 The authorities speak of public and private duties, legal or moral. In truth there are few matters of any kind which in ordinary affairs divorced from business or official functions, one person is under a legal duty to communicate to another or others. Almost all of the cases on qualified privilege are ones in which the publisher of the statement seeks to rely upon the existence of a moral duty, and necessarily so, because a legal duty is non-existent. And it is because of the premium which the law places on freedom of speech that the concept of a moral duty has been generously regarded, and allowed to be extended to large commercial publishers, that is to say publishers avid for profit. That is not to say of course that the intrusion of commerce should in any way be a disqualifying factor. The reality is that much which is informative and is in the interest of society to learn, would not be communicated at all if it could not be communicated for profit.

233 A further requirement for a defence of qualified privilege is an absence of malice. That is not a matter which need detain me here because it is not

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281 (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1049-1050].

282 [1891] 2 QB 341 at 346 per Lindley LJ.

283 (1910) 11 CLR 361 at 368.

284 *Macintosh v Dun* (1908) 6 CLR 303 at 305; [1908] AC 390 at 399.

285 *Howe & McColough v Lees* (1910) 11 CLR 361 at 369 per Griffith CJ.

suggested that the relevant publication was published maliciously: the inaccuracies were not so gross that they could be said to have been made with such a degree of recklessness as could constitute malice.

234 Another requirement for the defence is "community of interest", an expression used by Griffith CJ in *Howe & McColough v Lees*[286], or, as I would prefer, and much other authority holds, "reciprocity of interest and duty". Just as the duty must be a duty to make a communication on, and in respect of a particular subject matter, the interest in receiving the communication must be reciprocal and relate to the particular subject matter.

235 Everything to which I have referred highlights the importance of identifying, and doing so with some degree of precision, the relevant subject matter. It is equally important to make sure that the inaccurate and defamatory matter in respect of which the defence is advanced is not extraneous to that subject matter and is, to adopt the words of each of Sheller and Hodgson JJA respectively in the Court of Appeal in this case which I am content to do, "sufficiently connected" and "germane and reasonably appropriate" to it. A slight, or general, ill-defined connexion will not suffice. As North J said in *Truth (NZ) Ltd v Holloway*[287] in a passage cited with approval by Windeyer J in *Australian Consolidated Press Ltd v Uren*[288]:

> "[T]here is no principle of law, and certainly no case that we know of, which may be invoked in support of the contention that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest."

236 To a similar effect is the passage in the joint judgment of Dawson, McHugh and Gummow JJ in *Bellino v Australian Broadcasting Corporation*[289]:

> "It is true that, at common law, privilege only attaches to those defamatory imputations that are relevant to the privileged occasion. Where a potentially privileged communication consists partly of matters relevant to the privilege and partly of matters that are not relevant, qualified privilege only attaches to that part which is relevant to the occasion. Moreover, the inclusion of the irrelevant part in the

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286 (1910) 11 CLR 361 at 369.

287 [1960] NZLR 69 at 83.

288 (1966) 117 CLR 185 at 209.

289 (1996) 185 CLR 183 at 228.

communication affords evidence of malice and can destroy the privilege attaching to the relevant part."

237 Again, what is or is not relevant or germane is not a matter upon which all minds will always agree. But because the communication of inaccurate matter can hardly be in the true interest of anyone, matters of the most attenuated relevance only to the subject matter, need to be carefully scrutinized and should be rejected as being outside the occasion of qualified privilege.

238 I turn now to the article containing the defamatory matter in which the imputation was made. It appears in a bulletin which on its masthead makes the claim "The Plain English Guide to Workplace Health & Safety". The headings to its various articles give the flavour of the publication. The first article is "Managers to be 'more accountable'". The next is "Dealing with mental abuse at work". The third has the heading "Call for City Link OH&S probe". The fourth article is headed "$350,000 for uninformed worker". The next heading is "Hire cars go smoke free". The sixth is "$6.8 million RSI payout overruled". The next is headed "'Enforced' rest breaks reduce RSI". The eighth has the heading "NT increases OH&S fines". The ninth is "New OH&S regulations for Tas". The tenth has the heading "Emergency management manual". The next is "Tractor safety campaign". The twelfth, with which this appeal is concerned, has the heading "MSDS copyright case dismissed". And the final article is headed "OH&S dates". Were it not for the twelfth article, the readers would be in no doubt that the exclusive concerns of the bulletin were occupational health and safety. He or she would also immediately assume that its readership consisted of people interested in, or directly involved in those disciplines.

239 This view would be confirmed by a statement at the end of the bulletin that it is published fortnightly and that "Special Reports are available at $395 for a [sic] 12 months with a 100% money back guarantee".

240 In my opinion the view of Rolfe AJA in dissent in the Court of Appeal should be preferred to the majority's. Everything which the readers had an interest in knowing and that the respondent had a moral duty to communicate to them consisted of the information about the publication and use of safety data sheets, matters truly of occupational health and safety. The import of the relevant orders of the Federal Court was that these should be, and were readily accessible, and that their republication was not a breach of copyright. The other issue in the proceedings in the Federal Court and the way in which it was resolved, were if at all, of only the most peripheral relevance to the accessibility, use and publication of the safety data sheets. As to those matters, the finding of false and misleading conduct, and its attribution to the appellant, were not germane or sufficiently related. Reference to the latter was not necessary for an understanding of the relevant matter, or in any way to put it in context.

241 I have so far approached this matter on the basis that the occasion was truly one of qualified privilege. It was not in fact, as McHugh J holds, such an occasion. Apart from emphasising that in my view carelessness to the point of recklessness may constitute evidence of malice, I agree with his Honour's reasoning and conclusion.

242 As neither party contended that the trial judge's provisional assessment of damages was inappropriate, I would allow the appeal with costs. The respondent should also pay the appellant's costs of the trial and the appeal to the Court of Appeal. Judgment should be entered for the appellant in the sum of $25,000.