HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE, HEYDON, KIEFEL AND BELL JJ

HARBOUR RADIO PTY LIMITED APPELLANT

AND

KEYSAR TRAD RESPONDENT

Harbour Radio Pty Limited v Trad [2012] HCA 44
5 October 2012
S318/2011

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 22 March 2011, and in lieu thereof order that:*

   (a) *the appeal to that Court be allowed;*

   (b) *the orders of the Common Law Division made on 6 August 2009 be set aside.*

3. *Declare that the defence of qualified privilege at common law with respect to imputations (a), (b), (c), (d), (g) and (j) is made good.*

4. *Remit the matter to the Court of Appeal for consideration of:*

   (a) *the defences of substantial truth with respect to imputations (b), (c), (d) and (g) and contextual truth with respect to imputations (h) and (k);*

   (b) *any questions of remitter to the Common Law Division for assessment of damages if the Court of Appeal holds that a defence of contextual truth does not apply in relation to imputations (h) and (k);*

   (c) *all questions of costs of proceedings in the Common Law Division and the Court of Appeal.*

5. No order as to costs of the appeal or cross-appeal to this Court.

On appeal from the Supreme Court of New South Wales

Representation

R G McHugh SC with G R Rubagotti for the appellant (instructed by Banki Haddock Fiora)

G O'L Reynolds SC with C A Evatt and R K M Rasmussen for the respondent (instructed by Turner Freeman Lawyers) at the hearing on 3 February 2012

G O'L Reynolds SC with R K M Rasmussen for the respondent (instructed by Turner Freeman Lawyers) at the hearing on 5 March 2012

CATCHWORDS

Harbour Radio Pty Limited v Trad

Defamation – Defences – Qualified privilege – Contextual truth – Substantial truth – Reply to criticism – Malice – Where appellant made broadcast in response to statements made by respondent – Whether defence of qualified privilege applicable to statements – Whether broadcast sufficiently connected to criticism by respondent – Whether broadcast made *bona fide* to vindicate reputation of appellant – Whether broadcast actuated by malice – Whether community standard test of "right-thinking" person relevant to substantial or contextual truth defence – Whether audience composed of ordinary decent persons relevant to substantial truth or contextual truth defence.

Words and phrases – "contextual truth", "malice", "qualified privilege", "substantial truth".

Defamation Act 1974 (NSW), ss 3, 7A, 9, 11, 15, 16.

1 GUMMOW, HAYNE AND BELL JJ. The principal issues of defamation law in this appeal from the New South Wales Court of Appeal (Tobias, McColl and Basten JJA)[1] concern the defence at common law of qualified privilege. The proceedings are governed by the *Defamation Act* 1974 (NSW) ("the 1974 Act"), rather than the *Defamation Act* 2005 (NSW)[2]. The effect of s 11 of the 1974 Act was to preserve the common law defence.

2 The objects stated in s 3 of the 1974 Act include the provision of "effective and appropriate remedies for persons whose reputations are harmed by the publication of defamatory matter" (par (a)) and, on the other hand, ensuring "that the law of defamation does not place unreasonable limits on the publication and discussion of matters of public interest and importance" (par (b)). It will be apparent that there may be some tension between these objects.

3 Further, the width of the principles governing the defence of qualified privilege emphasises the need, in deciding whether they apply in a particular case, to scrutinise closely the circumstances of the case, the situation of the parties and the events leading up to and surrounding the defamatory publication in question[3].

4 The sequence of events leading up to this litigation begins in 2005 with major public disturbances in New South Wales at Cronulla Beach. These have become known generally as the "Cronulla Riots" and have been perceived by some as a confrontation between adherents of Islam and persons of European descent who are not Muslims.

The peace rally

5 Approximately one week after the Cronulla Riots, the respondent (Mr Trad) attended and was one of the speakers at a "peace rally" in Hyde Park, in the centre of Sydney. This was held on Sunday 18 December 2005 and was attended by about 5000 people. Representatives of the media were present. In the course of his speech Mr Trad said:

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1 *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183.

2 (2011) 279 ALR 183 at 185 [2].

3 *Guise v Kouvelis* (1947) 74 CLR 102 at 116; [1947] HCA 13; *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 373 [10], 417 [139]; [2004] HCA 5.

> "I never lost my faith in the great people of this nation and if a handful of students can muster so many thousands of true Australians here today, then this is a poke in the eye of those racist rednecks in tabloid journalism".

Later in his speech Mr Trad used words, the effect of which was to place specifically at least part of the blame for the Cronulla Riots on the appellant's commercial radio station, Radio 2GB. He said that there was "a great deal of shame in tabloid journalism" and that "one talk back radio station ... seems to be nothing other than the mouthpiece of the Howard government over the last few years". The crowd responded "2GB", and Mr Trad continued, "[t]his station yes[. I]t is winning the ratings in its small niche in the Sydney market, it is winning the ratings, it is whipping up fears." He added that Muslims in Australia were "suffering as a result of the racist actions of predominantly one radio station". Lengthy extracts from Mr Trad's speech are set out in the reasons of the Court of Appeal[4].

The broadcast

6 In a program that went to air on Radio 2GB at about 10.05am on the next day, Monday 19 December 2005, and which lasted some 11 minutes with at least one commercial break, the radio "host", Mr Jason Morrison, conducted a monologue. This was broken by a short excerpt from a recording of the public rally the day before, and by talk-back calls involving a discussion between him and the callers. The text of the broadcast, being the matter complained of by Mr Trad in his defamation action against the appellant ("2GB"), is set out in the reasons of the Court of Appeal[5].

7 In his amended statement of claim, Mr Trad alleged that the matter complained of conveyed imputations which he identified by reference to numbered paragraphs in the text of what Mr Morrison had said, as follows:

> "[13] Now that's Keysar Trad at a peace rally ... Now I'm sorry about the quality of that [recording of the rally], but as I said Chris [Glasscock] our reporter there had to pull back because *it wasn't safe for him to be standing at the front while all this was going on*.
>
> [14] And it goes on, there is about ten minutes of this bile about how evil and hate filled this radio station is and about how we incite people to

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4 (2011) 279 ALR 183 at 189-190 [14].

5 (2011) 279 ALR 183 at 186-189 [11].

commit acts of violence and racist attitudes. I don't think that I've ever quite done that, *like he did*. In fact I don't think anyone here has ever done anything quite like that. ...

[16] Now, Keysar Trad, *you are a disgraceful individual* and I'm not alone in thinking this, I won't talk to you on the air because you represent no one's views other than your own, so you know, why you call up purporting to be from the Islamic community is beyond me. You are one guy who basically has been marginalized. And I think the more you say the more you represent to me that *you are a dangerous individual* to be out there trying to represent the views because I think *you're responsible about more misinformation about the Islamic community* of the attitudes of Christian Australians *than any other person.*

[17] Now he is *widely perceived as a pest*, that's the way I see him, he is not a peacemaker, so why he was invited to a peace rally is beyond me. ...

[24] ... I mean this guy has a media monitoring company basically watching about any reference about him or for any reference that he believes will be advantageous towards his cause and there he is straight on the phone straight on the fax pumping out letters of complaint, he is one of the most complaining people around the place and he does nothing to try to address the actual issues, he just wants *to sort of hatchet job people who once gave him the privileged position that he thinks he has*." (emphasis added)

The course of the litigation

8 Section 7A of the 1974 Act sets up procedures for the trial of defamation actions which depart radically from the common law system of trial[6]. The common law classified as a question of law the question whether the matter complained of was or was not capable of bearing a defamatory meaning, and as a question of fact for the jury whether the matter was or was not defamatory. The issue whether an occasion was one of qualified privilege was for decision by the judge, that of whether the privilege was forfeited by malice was for the jury[7]. The s 7A structure divides the trial process into three stages.

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6 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 303-305 [31]-[41]; [2007] HCA 28.

7 *Minter v Priest* [1930] AC 558.

9 At the second stage, that pursuant to s 7A(3) of the Act, a jury found that the following eight imputations were conveyed in the 2GB broadcast and were defamatory of the plaintiff, Mr Trad:

> "a. the plaintiff stirred up hatred against a 2GB reporter which caused him to have concerns about his own personal safety;
>
> b. the plaintiff incites people to commit acts of violence;
>
> c. the plaintiff incites people to have racist attitudes;
>
> d. the plaintiff is a dangerous individual;
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> g. the plaintiff is a disgraceful individual;
>
> h. the plaintiff is widely perceived as a pest;
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> j. the plaintiff deliberately gives out misinformation about the Islamic community;
>
> k. the plaintiff attacks those people who once gave him a privileged position."[8]

10 The issues before this Court require close attention to the terms of each of these imputations. The Court of Appeal correctly observed that at least some of the imputations are expressed in terms which are unclear[9]. However, in the amended statement of claim, by way of particulars of each imputation, reference was made to a numbered paragraph in the text of the broadcast, as indicated above[10]. Any challenge to the form of the imputations should have been taken before the s 7A jury trial.

11 Each of these imputations constituted a cause of action, as s 9 of the 1974 Act confirmed. The third and final stage laid down by s 7A(4) required the Supreme Court (McClellan CJ at CL), not a jury, to determine all issues of law and fact relating to any defence raised by 2GB and to determine the amount of any damages to be awarded to Mr Trad. The defences upon which 2GB relied included those of substantial truth and contextual truth respectively under ss 15

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8 (2011) 279 ALR 183 at 185 [2].

9 (2011) 279 ALR 183 at 205-206 [94]-[100].

10 At [7].

and 16 of the 1974 Act[11], and fair comment on a matter of public interest under Pt 3 Div 7 of the Act (ss 29-35).

12 2GB also pleaded that each imputation was published on an occasion of qualified privilege at common law. The occasion was said to be a response by 2GB to the public attack by Mr Trad at the peace rally.

13 McClellan CJ at CL dismissed Mr Trad's case and entered judgment for 2GB. His Honour found that imputations (b), (c), (d) and (g) were substantially

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11 Section 15 stated:

> "(1) Notwithstanding section 11, the truth of any imputation complained of is not a defence as to that imputation except as mentioned in this section.
>
> (2) It is a defence as to any imputation complained of that:
>
> (a) the imputation is a matter of substantial truth, and
>
> (b) the imputation either relates to a matter of public interest or is published under qualified privilege."

Section 16 provided:

> "(1) Where an imputation complained of is made by the publication of any report, article, letter, note, picture, oral utterance or other thing and another imputation is made by the same publication, the latter imputation is, for the purposes of this section, contextual to the imputation complained of.
>
> (2) It is a defence to any imputation complained of that:
>
> (a) the imputation relates to a matter of public interest or is published under qualified privilege,
>
> (b) one or more imputations contextual to the imputation complained of:
>
> (i) relate to a matter of public interest or are published under qualified privilege, and
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> (ii) are matters of substantial truth, and
>
> (c) by reason that those contextual imputations are matters of substantial truth, the imputation complained of does not further injure the reputation of the plaintiff." (emphasis added)

true and had the effect that the publication of imputations (a), (h), (j) and (k) occasioned no further injury to the reputation of Mr Trad. Further, his Honour upheld the defence of qualified privilege in respect of all the imputations and rejected the claim by Mr Trad that the privilege was defeated by malice.

14 With respect to the defence of comment his Honour found that imputations (b), (c), (d) and (g) were expressions of opinion based upon Mr Trad's attack on 2GB at the peace rally. On appeal by Mr Trad, the Court of Appeal held that the primary judge had erred in this respect[12]. There is no ground of appeal in this Court concerning that issue.

15 The Court of Appeal also held that the findings by the primary judge of substantial truth had "proceeded on a false basis" and could not be sustained[13], and 2GB challenges that outcome.

16 With respect to qualified privilege, the Court of Appeal differed in part from the primary judge and held that the defence should not have been upheld as regards imputations (c), (h) and (k). This was said to be because these imputations were not "sufficiently linked" to the occasion of qualified privilege, being the response by 2GB to the public attack by the respondent[14]. The Court of Appeal ordered that the proceedings be remitted to the Common Law Division for the assessment of damages in relation to these three imputations[15].

The appeal to this Court

17 The principal emphasis by 2GB has been upon restoration of the holding of the primary judge in its favour on qualified privilege as to all the imputations. On his part, Mr Trad seeks to expand his success in the Court of Appeal and to achieve rejection of the qualified privilege defence in respect of the remaining imputations (a), (b), (d), (g) and (j), and an order for remitter to the Common Law Division for assessment of damages on all imputations. 2GB also complains of the treatment by the Court of Appeal of its defences of truth and contextual truth.

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12 (2011) 279 ALR 183 at 203-206 [88]-[102].

13 (2011) 279 ALR 183 at 203 [87].

14 (2011) 279 ALR 183 at 209 [111]-[113].

15 (2011) 279 ALR 183 at 210 [125].

18 With respect to qualified privilege, something should be said immediately about the relationship between imputations (b) and (c). The former was that Mr Trad incites people "to commit acts of violence", the latter was that he incites people "to have racist attitudes". The Court of Appeal upheld the defence of qualified privilege with respect to (b) but not to (c). In submissions to this Court the parties submitted that each imputation should share the fate of the other. That is to say, if 2GB succeeded in its submissions both imputations would attract the privilege, and if Mr Trad succeeded neither would do so.

19 As remarked above, the peace rally and the broadcast were *sequelae* to the Cronulla Riots, which attracted considerable public attention. The defence of qualified privilege was pleaded by 2GB on the footing that the broadcast was a response made to the public after Mr Trad had attacked 2GB, in public, at the peace rally the previous day, and so satisfied the requirement for the defence of a reciprocity of duty or interest.

20 There was some attention in submissions to this Court to the nature of this reciprocity in such cases of public replies to public criticism. A starting point is that it is only in exceptional cases that the common law has recognised an interest or duty to publish defamatory matter to the general public[16]. Each side then presented a submission as to what followed as a matter of fundamental principle. Neither submission should be accepted.

Mr Trad's submission

21 The Court of Appeal observed that in the situation here the defamation law "provides a rare example of the law permitting an individual to seek self-redress by conduct that would otherwise be unlawful"[17].

22 Mr Trad was anxious to restrict the permitted scope of the counter-attack by 2GB. To that end, counsel referred to the analogy with self-defence in cases of assault to which reference was made in *Norton v Hoare [No 1]*[18]. This was decided before *Adam v Ward*[19]. Self-defence is not at large and, for example,

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16 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 261; [1994] HCA 45; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570; [1997] HCA 25.

17 (2011) 279 ALR 183 at 207 [108].

18 (1913) 17 CLR 310; [1913] HCA 51.

19 [1917] AC 309.

does not extend to blows struck in revenge[20]. Hence the attraction of the analogy for Mr Trad's case.

23 Counsel for Mr Trad submitted that cases where qualified privilege was claimed for defamatory responses to attacks were not readily accommodated to what had been said by Parke B in *Toogood v Spyring*[21] and to what counsel called "a duty and interest analysis". It may be accepted that the accommodation is not readily made, but it has been made.

24 One asks, what duties or interests were engaged between 2GB as publisher and the listeners to whom the broadcast was made?[22] It should be emphasised that it is here that the necessary reciprocity is to be found, not in any relationship between 2GB and Mr Trad, although it was with this that the broadcast largely was concerned, as a response (or retaliation) to criticism of 2GB by Mr Trad at the peace rally. This consideration will be relevant particularly when considering imputation (k)[23].

25 In *Mowlds v Fergusson*[24], Dixon J explained what should be accepted as the applicable law to a case such as the present in the following terms:

> "Any communication which the defendant might make tending to vindicate his conduct or rehabilitate his reputation would be a subject of privilege provided that the person to whom he made the communication were one proper to receive it. It is commonly said that the recipient must possess an interest or be under a duty which corresponds with the interest of the person making the communication: See, eg, *White v J & F Stone (Lighting and Radio) Ltd*[25], a case with which *Somerville v Hawkins*[26] and

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20 *McClelland v Symons* [1951] VLR 157 at 162-163.

21 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1050].

22 See *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 377 [23] per Gleeson CJ, Hayne and Heydon JJ.

23 At [39].

24 (1940) 64 CLR 206 at 214-215; [1940] HCA 38; cf *Norton v Hoare [No 1]* (1913) 17 CLR 310 at 318 per Barton ACJ.

25 [1939] 2 KB 827 at 834.

26 (1851) 10 CB 583 [138 ER 231].

> *Taylor v Hawkins*[27] should be compared. 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. In *Adam v Ward*[28] the interest of every citizen in the welfare of the army seems to have been considered enough by Lord *Atkinson*, who alone of their Lordships emphasized the necessity of reciprocity[29]."

26 Contrary to the respondent's submission, this reasoning is not at odds with what had been said in this Court, before *Adam v Ward*[30] was decided, in *Norton v Hoare [No 1]*[31] by Barton ACJ[32] and Isaacs, Gavan Duffy and Rich JJ[33]. In *Norton*, Isaacs, Gavan Duffy and Rich JJ referred to various authorities which to them showed[34]:

> "that in defence of property an assault on the person or the property of another may be justified, if necessary for the protection of the defendant's property. And see *Halsbury's Laws of England*[35]. Though couched in somewhat different terms, the rule is substantially based on the same fundamental considerations as that with regard to privileged communications formulated in *Toogood v Spyring*[36], which, as *Parke* B says[37], must be 'fairly warranted by any reasonable occasion or exigency',

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27 (1851) 16 QB 308 [117 ER 897].

28 [1917] AC 309 at 343.

29 [1917] AC 309 at 334.

30 [1917] AC 309.

31 (1913) 17 CLR 310.

32 (1913) 17 CLR 310 at 318.

33 (1913) 17 CLR 310 at 322.

34 (1913) 17 CLR 310 at 322.

35 Volume 9, "Criminal Law and Procedure" at 609 [1231].

36 (1834) 1 Cr M & R 181 [149 ER 1044].

37 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1050].

> and, of course, honestly made, and these facts must, by analogy to *Wright v Ramscot*[38], appear in the plea."

The phrase "honestly made" acknowledges that malice will defeat the privilege. In the same case Barton ACJ said[39]:

> "The defendant is allowed to defend himself in the same field in which the plaintiff has assailed him – if the attack is through the press, then again the press may be used in answer: See *Laughton v Bishop of Sodor and Man*[40]. The aggressor cannot, as Mr *Odgers* puts it[41], 'subsequently come to the Court as plaintiff, to complain that he has had the worst of the fray'. But in such cases the defendant must see to it that his retort, if vigorous, is fair; *that is, that it does not go beyond the occasion*." (emphasis added)

27 The significance for the present case of what was said thereafter by Dixon J in *Mowlds v Fergusson* is that where the occasion is a response, by publication to the general public of defamatory matter, to a public attack upon the defendant by the plaintiff, the consideration of what is relevant to the attack requires particular care. The response must be commensurate with an occasion which is in an exceptional category. Exceptionally, the law has recognised an interest in 2GB to publish defamatory matter to the general public, which has an interest in hearing the response of the talk-back broadcaster to the public criticisms by Mr Trad of 2GB. No doubt vigorous use of language has long been a characteristic of public debate in this country. But in the conduct of public affairs the law, in general, does not encourage persuasion by public vilification and by an abdication of reason. However, by classifying its response as a "counter-attack" 2GB seeks to broaden the scope of its interest in publishing defamatory matter to its audience.

The 2GB submission

28 2GB appeared to pitch its case at the level that "it is legitimate to go on the counter-attack" and in so doing "to impugn the general veracity of the attacker". Certainly, it has been suggested, with reference to what was said by

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38 (1667) 1 Saund 84 [85 ER 93].

39 (1913) 17 CLR 310 at 318.

40 (1872) LR 4 PC 495 at 504.

41 *A Digest of the Law of Libel and Slander*, 5th ed (1911) at 292.

Parke B in *Wright v Woodgate*[42], that, at least initially, the function of qualified privilege was to rebut malice[43]. 2GB sought to develop this view of the privilege so that the significance of a reply in the excessive terms used in the imputations could only be to provide evidence from which malice might be inferred and the privilege thereby defeated; and the plea by Mr Trad of malice had failed.

29 Some recent support for the approach by 2GB may appear from the pugilistic epithets used by the New Zealand Court of Appeal in *Alexander v Clegg*[44] in describing the privilege as one "to hit back" by a "counterpunch" rather than "to keep one hand behind [the defendant's back]". Some further support for this view of the law was said by 2GB to be provided by statements by Latham CJ and Williams J in their joint reasons in *Penton v Calwell*[45]. However, Mr Trad correctly responded that the width of 2GB's proposition would extend the scope of the privilege too far and distort the balance indicated by pars (a) and (b) of s 3 of the 1974 Act.

30 The law respecting qualified privilege developed, by no means systematically, in the years after the ruling by Parke B in *Toogood v Spyring*[46]. This had been in terms reflecting (but without acknowledgment) the writings of Starkie[47]. The subsequent course of decision in England, leading up to *Adam v Ward*[48], has been analysed in Mr Paul Mitchell's work *The Making of the Modern Law of Defamation*[49]. The modern emphasis in the formulation of the defence is upon the existence of the relevant duties and interests rather than immediately upon the state of mind of the defendant.

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42 (1835) 2 Cr M & R 573 at 577 [150 ER 244 at 246].

43 Mitchell, "Duties, Interests, and Motives: Privileged Occasions in Defamation", (1998) 18 *Oxford Journal of Legal Studies* 381 at 392-393.

44 [2004] 3 NZLR 586 at 602 [61]-[63].

45 (1945) 70 CLR 219 at 242-243; [1945] HCA 51.

46 (1834) 1 Cr M & R 181 [149 ER 1044].

47 Starkie, *A Treatise on the Law of Slander and Libel, and incidentally of Malicious Prosecutions*, 2nd ed (1830) vol 1 at 292.

48 [1917] AC 309.

49 (2005) at 145-163.

31 The result is that stated as follows by Cory J, speaking for the Supreme Court of Canada, in *Botiuk v Toronto Free Press Publications Ltd*[50]:

> "[T]he privilege is not absolute. It may be defeated in two ways. The first arises if the dominant motive for publishing is actual or express malice. Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard.
>
> Second, qualified privilege may be defeated if the limits of the duty or interest have been exceeded. In other words, if the information communicated was not reasonably appropriate to the legitimate purposes of the occasion, the qualified privilege will be defeated."

To similar effect is the earlier statement by Jordan CJ in *Mowlds v Fergusson*[51]:

> "If anyone complains that the communication defames him, the burden of proof lies on the complainant to establish either that the defamatory matter was irrelevant to the purposes of the occasion or else that it was made in order to serve some other purpose than the purposes warranted by the occasion."

In *Skalkos v Assaf*[52], the New South Wales Court of Appeal emphasised that the decision of the jury in that case as to the absence of malice did not foreclose the question whether the defamatory imputations were published within the occasion of privilege. Given the distinct role of the jury at common law to determine an issue of malice, to which reference has been made above[53], that result is not surprising.

32 Finally, in *Cush v Dillon*[54], French CJ, Crennan and Kiefel JJ observed:

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50 [1995] 3 SCR 3 at 29 [79]-[80].

51 (1939) 40 SR (NSW) 311 at 318.

52 (2002) Aust Torts Reports ¶81-644 at 68,528 [27], 68,530 [40]-[42].

53 At [8].

54 (2011) 243 CLR 298 at 310 [25]; [2011] HCA 30.

> "The inquiry which precedes that of actual malice is undertaken in order to determine the boundaries of the privilege[55], by reference to the duty or interest which gave rise to it. It may be said to involve an objective assessment. It is not to be confused with an inquiry as to whether a person was actuated by malice in using exaggerated words. As Earl Loreburn observed in *Adam v Ward*[56], a statement which exceeds the occasion may be evidence of malice, but 'the two things are different'."

The foundation of the privilege

33 The statement of principle by Dixon J at first instance in *Penton* looks to the foundation of the privilege and should be accepted. In that case, by way of response to attacks made by the plaintiff under parliamentary privilege upon the press coverage of the escape of Japanese prisoners of war at Cowra, the newspaper, of which the defendant was editor, responded that the plaintiff was "maliciously and corruptly untruthful" and "a dishonest, calculating liar". In the action in the original jurisdiction of this Court the question was whether the form of this libel took it outside the qualified privilege claimed for the occasion, so that the plea should be struck out. This was a question on which the Court divided. What is presently of importance is that Dixon J said[57]:

> "The foundation of the privilege is the necessity of allowing the party attacked free scope to place his case before the body whose judgment the attacking party has sought to affect. In this instance, it is assumed to be the entire public. The purpose is to prevent the charges operating to his prejudice. It may be conceded that to impugn the truth of the charges contained in the attack and even the general veracity of the attacker may be a proper exercise of the privilege, *if it be commensurate with the occasion*. If that is a question submitted to or an argument used before the body to whom the attacker has appealed *and it is done bona fide* for the purpose of vindication, the law will not allow the liability of the party attacked to depend on the truth or otherwise of defamatory statements he so makes by way of defence." (emphasis added)

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55 As observed by Kirby J in *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 435 [193]-[194].

56 [1917] AC 309 at 321.

57 (1945) 70 CLR 219 at 233-234; cf *Watts v Times Newspapers Ltd* [1997] QB 650 at 671.

In this passage it is the phrase "and it is done bona fide" which indicates the distinct role of malice to defeat what otherwise would be a good plea. The phrase "be commensurate with" reflects what was said by Earl Loreburn in *Adam v Ward*[58].

34 Earlier, in *Loveday v Sun Newspapers Ltd*[59] Starke J had said that the privilege is not absolute, and that the answer by the person attacked "must be relevant to the attack and must not be actuated by motives of personal spite or ill will". In *Bashford v Information Australia (Newsletters) Pty Ltd*[60], Gleeson CJ, Hayne and Heydon JJ asked "whether the matter which defamed the appellant was sufficiently connected to the privileged occasion to attract the defence". These notions of what is "commensurate with the occasion", "relevant to the attack", and "sufficiently connected" reflect the idea captured by Parke B in *Toogood v Spyring*[61] in the phrase "fairly warranted by any reasonable occasion or exigency".

35 That the matter complained of is sufficiently connected to the privileged occasion to attract the defence may appear upon any one of several considerations. The matter may be sufficiently connected with the content of the attack, or it may go to the credibility of the attack, or to the credibility of the person making that attack. Questions of degree inevitably will be presented.

Conclusions respecting qualified privilege

36 Mr Trad had attacked 2GB by placing at least part of the blame for the Cronulla Riots upon the "tabloid journalism" practised by one particular talk-back radio station, namely 2GB. It was a relevant and reasonable response by 2GB to direct attention to the credibility of the attacker by imputing hypocrisy to Mr Trad as one who himself incited people to commit acts of violence and to have racist attitudes, and as one who at the peace rally had stirred up hatred against a 2GB reporter, causing him concern about his personal safety (imputations (a), (b) and (c)).

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58 [1917] AC 309 at 321.

59 (1938) 59 CLR 503 at 516; [1938] HCA 28.

60 (2004) 218 CLR 366 at 378 [27].

61 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050].

37 Imputation (j) ranges more widely but is linked to par [16] of the broadcast[62]. In identifying Mr Trad as one who himself deliberately gives out misinformation about the Islamic community, it also seeks to undermine his credibility in complaining at the peace rally of the mistreatment of the community by 2GB. Imputations (d) and (g) are also linked by the pleading to par [16]. This text indicates that the imputations involved more than, as counsel for Mr Trad put it in this Court, 2GB "just having a crack at him". The misinformation was said to be of such a degree of seriousness as to render him a dangerous person, thus further undermining his credibility; further, it was disgraceful for Mr Trad at the peace rally to purport to represent the Islamic community in his attack upon 2GB when he had been marginalised by that community. Imputations (d) and (g) were protected by qualified privilege.

38 Accordingly, the primary judge correctly concluded that 2GB's defence of qualified privilege applied to imputations (a), (b), (c), (d), (g) and (j).

39 Imputation (k) is obscurely expressed. Such coherence as it does have is provided by the portion of the 2GB broadcast set out in par [24][63]. The imputation seems to fix upon the relationship between Mr Trad and the media as the source of the relevant reciprocity of interest. The point then made appears to be that Mr Trad rose to prominence in Islamic community affairs by use of the facilities provided by the media, yet at the peace rally he criticised the media. Imputation (k) exceeded the occasion of the privilege. The Court of Appeal correctly decided that it was not a retort by way of vindication which was fairly warranted by the occasion[64].

40 With respect to imputation (h), the Court of Appeal was correct in deciding that to publish of Mr Trad that he was a pest, without more, was not a relevant response to the attack on 2GB. Counsel for Mr Trad correctly emphasised that the charge of being a pest in no way reflected on Mr Trad's credibility in making the charges against 2GB.

41 The result is that the primary judge should have held that imputations (h) and (k) were not protected; the Court of Appeal was correct with respect to imputations (h) and (k) but erred in rejecting the defence in respect of imputation (c).

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62 Set out at [7].

63 Set out at [7].

64 (2011) 279 ALR 183 at 209 [112].

42 The question thus becomes whether this Court should enter upon the issue of whether the Court of Appeal erred in failing to hold that the privilege of 2GB with respect to imputations (a), (b), (c), (d), (g) and (j) nevertheless was defeated by the malice of 2GB.

Malice

43 With respect to the case presented by Mr Trad on his appeal to the Court of Appeal, that the primary judge had erred in concluding that he had not proved 2GB was actuated by malice in publishing the matter complained of, the Court of Appeal said[65]:

> "The substance of [Mr Trad's] case on malice was that [2GB] and its agent, Mr Morrison, had taken no steps to verify the situation faced by [2GB's] reporter, Mr Glasscock, before attacking [Mr Trad] and had, accordingly done so either knowing that assertion to be false or with reckless indifference to the truth or falsity of his attack.
>
> The difficulty [Mr Trad] faced was that he bore the onus of proof with respect to malice, but was not able to show precisely how Mr Morrison came to form the (incorrect) views which he expressed in the matter complained of as to the situation in which Mr Glasscock found himself at the rally, nor what steps Mr Morrison may have taken to clarify the situation. [Mr Trad] relied solely upon the fact that the videotape of the rally did not support claims of aggression towards Mr Glasscock and that Mr Morrison said that he had viewed the video. Factually, those two statements were true, but they were not sufficient to demonstrate that Mr Morrison knew what he said to be false or made his statements with reckless indifference to the truth or falsity of his attack."

44 Against that holding by the Court of Appeal, Mr Trad seeks an extension of time to file an application for special leave to cross-appeal. 2GB correctly responds that leave ordinarily will be refused if, were leave to file granted, there would be no grant of special leave. The grounds of the proposed cross-appeal deal both with the extension sought of Mr Trad's success on the qualified privilege question, and with malice (ground 2(f)).

45 Mr Trad also seeks an extension of time to file a notice of contention. The proposed notice would raise an issue respecting the truth defences and the issue

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65 (2011) 279 ALR 183 at 209 [115]-[116].

that "the whole of the qualified privilege defence should have been rejected because of malice". Insofar as the issue of malice is concerned, this goes beyond the scope of r 42.08.5 of the High Court Rules 2004, which deals with notices of contention in this Court. These notices may be given only by a respondent who "does not seek a discharge or variation of a part of the judgment actually pronounced or made". But this respondent seeks to do so. The Court of Appeal rejected part, not the whole, of the qualified privilege defence, and ordered remitter for assessment of the damages in relation to three of the eight imputations. The proposed notice of contention would be incompetent insofar as it seeks to deal with the issue of malice and an extension of time to that extent should be refused. (The question of the truth defences will be considered later in these reasons.)

46 The issue respecting malice which Mr Trad wishes to press in this Court is encompassed not by r 42.08.5, but by the proposed cross-appeal in ground 2(f), by which he seeks the setting aside of the Court of Appeal orders so as to achieve a remitter for the assessment of damages on all imputations. One ground on which this outcome is sought is that the Court of Appeal should have found that Mr Trad "had established that the reply by the employee was actuated by malice" (ground 2(f)).

47 Leave to file the notice of cross-appeal out of time should be granted, but with the excision of ground 2(f). There would be insufficient prospects of success in demonstrating error by the Court of Appeal in its conclusions in the passage set out above to warrant a grant of special leave on proposed ground 2(f), and no ground of general importance is involved here.

48 Mr Trad sought to bolster his case for a grant of special leave on the issue of malice by directing attention to the state of mind of Mr Glasscock. He, like Mr Morrison, was an employee of 2GB. It was said that the issue of Mr Glasscock's malice, for which his employer was vicariously liable, had been run at trial. The best passage in support was identified as one in the closing submissions by counsel then appearing for Mr Trad. This falls short of sufficient indication that the focus of the case at trial was on Mr Glasscock rather than Mr Morrison to warrant entry by this Court upon this matter. This particularly is so given the absence of agitation of the point by Mr Trad in the Court of Appeal.

Truth

49 There remains the treatment by the Court of Appeal of the defences of substantial truth (s 15) and contextual truth (s 16).

50 The Court of Appeal held[66] that the primary judge had erred in not asking the question "whether, given the attitudes and views he found [Mr Trad] held, a right-thinking member of the Australian community would consider" that he incites people to commit acts of violence, and to have racist attitudes, is a dangerous individual, and is a disgraceful individual (imputations (b), (c), (d) and (g)).

51 Having found error in principle by the primary judge, the Court of Appeal, however, did not go on to apply what it saw as correct principles so as to produce a definitive result. Hence 2GB seeks remitter to the Court of Appeal for this to take place. For his part, in the Court of Appeal, Mr Trad had (1) challenged, as a matter of law, the invocation of the "right-thinking" person, and (2) disputed the factual findings upon which the primary judge had held that imputations (b), (c), (d) and (g) were substantially true and related to a matter of public interest (s 15).

52 By his proposed notice of contention, Mr Trad seeks to support the reversal by the Court of Appeal of the primary judge's decision on the truth defences but on the ground "that the general community standard test was irrelevant to [the determination] of the truth defences". An extension of time to file a notice of contention limited to that complaint should be granted to Mr Trad.

53 For its part, 2GB submits that the Court of Appeal was correct in its identification of the right-thinking community member test, but erred in holding that the primary judge had not applied it and, on remitter from this Court, itself should apply it.

54 The invocation of "right-thinking" persons as a criterion of the defamatory nature of the matter in question was doubted by Griffith CJ in *Slatyer v The Daily Telegraph Newspaper Co Ltd*[67] if it identified anything other than "a man of fair average intelligence". More recently, in *Radio 2UE Sydney Pty Ltd v Chesterton*[68], French CJ, Gummow, Kiefel and Bell JJ disfavoured any additional requirement of "right-thinking" and preferred, as the referee of the issue of whether a person had been defamed, an audience composed of ordinary decent persons, being reasonable people of ordinary intelligence, experience and education who brought to the question their general knowledge and experience of worldly affairs. Their Honours added that such a criterion "may be seen as a

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66 (2011) 279 ALR 183 at 202 [79], [81], 203 [84], [86].

67 (1908) 6 CLR 1 at 7; [1908] HCA 22.

68 (2009) 238 CLR 460 at 466-467 [4]-[6], 477-478 [39]-[40]; [2009] HCA 16.

benchmark by which some views would be excluded from consideration as unacceptable"[69].

55 A legislative objective of the procedures under s 7A of the 1974 Act was to overcome the complexities said to arise from the common law division of functions between judge and jury[70]. *Chesterton* concerned the alleged inadequacy of jury directions at the second stage, under s 7A(3), when the jury determined whether the matter complained of carried the imputations and, if so, whether they were defamatory. Under s 7A(4) McClellan CJ at CL alone was required to determine all issues of fact and law relating to 2GB's defences.

56 Issues of fact upon which a defence of substantial truth turns may present a ready choice for decision by the judge sitting, as did McClellan CJ at CL, at the s 7A(4) stage. But in other cases the imputation may depend upon more than primary fact finding. Upon that factual substratum an assessment of an evaluative nature may be required by the terms in which the imputation is expressed. Imputation (g) is of that character. In such a case the judge should look to the reaction of an audience composed in the manner as described above by reference to *Chesterton*.

57 This is not how the primary judge proceeded, nor, having found error by the primary judge, did the Court of Appeal proceed in this way in the determination of imputation (g). Moreover, as 2GB submits, the Court of Appeal misconceived the primary judge's approach to imputations (b), (c) and (d). His Honour's consideration of the application of a test based on community standards was confined to the substantial truth of imputation (g).

58 The findings by McClellan CJ at CL respecting the views held by Mr Trad on the topics of women victims of sexual violence, homosexuals, Jews, child martyrs, terrorism, Anglo-Irish Australians and Hindus informed his conclusion of the substantial truth of imputations (b), (c) and (d). His Honour found that the communication of Mr Trad's views demonstrated the substantial truth of the imputation that he incites people to commit acts of violence (imputation (b)) and that he is a dangerous individual (imputation (d)). He found that Mr Trad's encouragement of others to share his views demonstrated the substantial truth of the imputation that Mr Trad incites people to have racist attitudes (imputation (c)).

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69 (2009) 238 CLR 460 at 478 [40].

70 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 303-304 [33].

59 In the Court of Appeal Mr Trad challenged the factual basis of the findings by McClellan CJ at CL (grounds 4 to 9). His appeal respecting the adverse truth findings succeeded on a ground not taken by him, that McClellan CJ at CL had proceeded on "a false basis"[71]. In the absence of a notice of contention by 2GB seeking to uphold the findings on any different basis, the Court of Appeal found it unnecessary to address the parties' submissions as to the factual basis for them[72].

60 2GB has succeeded in its appeal against the setting aside of the primary judge's findings of substantial truth. In the result, it will be necessary for the Court of Appeal to reconsider so much of the appeal by Mr Trad as challenged the holding of the primary judge upon the defences under s 15 and s 16.

61 There was no cross-appeal by 2GB to the Court of Appeal with respect to the rejection by the primary judge of the defence of substantial truth to imputation (h), that Mr Trad is widely perceived as a pest, or imputation (j), that Mr Trad deliberately gives out misinformation about the Islamic community. (His Honour, however, held that, because imputations (b), (c), (d) and (g) were substantially true, the publication of imputations (a), (h), (j) and (k) did not occasion further injury to Mr Trad's reputation[73].) 2GB relies, in its appeal to this Court, on the ground that the Court of Appeal erred in holding that imputation (h) was not protected by qualified privilege. But, as appears above[74], the Court of Appeal was correct in this respect.

Conclusions and orders

62 Upon his summons filed 28 October 2011 Mr Trad should have an extension of time until 14 days hereafter to file (a) a notice of contention limited to the truth defences as indicated in the draft notice and (b) a notice of cross-appeal limited to grounds 2(a)-(e) in the draft notice. There should be a grant *nunc pro tunc* of special leave to cross-appeal upon those grounds 2(a)-(e). But the cross-appeal, which seeks a result that no imputation is protected by qualified privilege, should be dismissed.

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71 (2011) 279 ALR 183 at 203 [87].

72 (2011) 279 ALR 183 at 203 [87].

73 See [13].

74 See [41].

63 The appeal by 2GB should be allowed. The orders of the Court of Appeal made on 22 March 2011 should be set aside. The appeal to that Court should be allowed and the orders made by McClellan CJ at CL on 6 August 2009 set aside. There should be a declaration that the defence of qualified privilege at common law with respect to imputations (a), (b), (c), (d), (g) and (j) is made good. There should be remitted for consideration by the Court of Appeal in the light of the reasons of this Court:

(1) the defences of substantial truth with respect to imputations (b), (c), (d) and (g) and contextual truth with respect to imputations (h) and (k);

(2) any questions of remitter to the Common Law Division for assessment of damages if the Court of Appeal holds that a defence of contextual truth does not apply to imputations (h) and (k);

(3) all questions of costs of proceedings in the Common Law Division and the Court of Appeal.

64 In this Court there should be no costs orders on either the appeal or the cross-appeal. Each side has had some, but limited, success in this Court.

65 HEYDON J. The background facts are set out in other judgments.

Qualified privilege and malice

66 Much of the argument turned upon whether the appellant could successfully raise the defence of qualified privilege. The respondent seeks to defeat that defence by contending that the appellant acted with malice. The appellant submits that so far as the notice of contention raises malice in relation to some imputations, it should be dismissed. The appellant also submits that there should be no grant of special leave to appeal on malice in relation to the remaining imputations.

67 One reason advanced for the appellant's submission is that the respondent "ha[d] lost at every stage of the litigation" on the malice issue. This was not a claim that this Court should not substitute its own view for concurrent findings by the trial judge and the Court of Appeal. No claim of that kind could credibly have been made. The reasoning of the trial judge and the reasoning of the Court of Appeal were not identical or in any sense concurrent. And even if the reasoning had been, that would not in itself have been a bar to success. The respondent submitted that neither the trial judge nor the Court of Appeal had "given due consideration" to malice. Perhaps because of the multiplicity of other issues with which the parties belaboured the trial judge and the Court of Appeal, that was, with respect, a submission that had some force.

68 The malice issue arose as follows. Imputation (a) in par 3 of the respondent's amended statement of claim was: "The [respondent] stirred up hatred against a 2GB reporter [Mr Chris Glasscock] which caused him to have concerns about his own personal safety." The imputation flowed from statements made in a broadcast on the appellant's radio station by Mr Morrison, the appellant's employee. Those statements concerned a "peace rally" which Mr Glasscock reported on, and at which the respondent gave an address. In par 2 of his reply, the respondent pleaded:

> "Further in reply to the defence of qualified privilege … the [respondent] says the [appellant] was actuated by express malice in the publication of the matter complained of.
>
> Particulars
>
> (a) Wrongful failure to make proper enquiries before publication of the imputations in the matter complained of.
>
> (b) False and/or misleading particulars of truth and contextual truth insofar as they apply to [imputation (a) and other imputations]."

Particular (b) of par 2 of the reply refers to pars 6 and 7(a) of the appellant's amended defence. Paragraph 6 of the appellant's amended defence pleaded that

imputation (a) was a matter of substantial truth. And par 7(a) of the amended defence repeated imputation (a), with six other imputations[75]. They were said to be contextual imputations which were substantially true. If imputation (a) is false, the appellant's plea that it was a matter of substantial truth was also false.

69 On 15 May 2009, three days before the trial began, the respondent's solicitors wrote to the appellant's solicitors a letter stating:

> "We refer to the Reply herein and advise that the [respondent] proposes to add to the Particulars of Malice the following paragraph;
>
> 2(c) 'The [appellant] by itself, its servant and agent Jason Morrison spoke and published of and concerning the [respondent] the words set out in annexure "A" of the Amended Statement of Claim including words relating to the intimidation of and misconduct towards Chris Glasscock which said words the [appellant], its servant and agent Jason Morrison either knew to be false or were spoken with reckless indifference to their truth or falsity.'"

70 At the trial, the appellant did not seek to justify imputation (a). The trial judge found it to be false. That finding was inevitable. The respondent denied the imputation in chief. He was not cross-examined to suggest that this testimony was false. The appellant did not call Mr Morrison to support imputation (a). Nor did the appellant call Mr Glasscock, who, according to Mr Morrison's broadcast, spoke to Mr Morrison while covering the peace rally. After contrary submissions, at the very end of this appeal the appellant admitted that Mr Glasscock was one of its employees.

71 An inference is to be drawn that the evidence of Mr Morrison and Mr Glasscock could not have assisted the appellant. An inference is also to be drawn that at least Mr Glasscock, who attended the peace rally, knew at all material times, particularly the time of the broadcast, that imputation (a) was false. The appellant submitted that inferences could not be drawn against it on an issue on which it did not bear the burden of proof. However, an inference adverse to the appellant can be drawn if there exists some evidence against the appellant. That condition is satisfied. The terms of Mr Morrison's broadcast, taken with a key admission by the appellant, contain a considerable amount of material supporting an inference that, if Mr Morrison correctly described what Mr Glasscock said to him, Mr Glasscock knew that what he said to Mr Morrison was false. The appellant's failure to call Mr Glasscock supports that inference.

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75 See above at [7].

72 The appellant also submitted that whether or not it pressed a defence of justification at trial is "wholly irrelevant" to the question of malice at the time of the broadcast. That is not so. The decision to abandon a solemnly pleaded specific defence without satisfactory explanation can be significant. It can be particularly significant where it positively makes so serious an allegation as that the respondent "stirred up hatred against [Mr Glasscock] which caused him to have concerns about his own personal safety"[76]. And it can be particularly significant where the appellant had already admitted to the respondent on 3 May 2006 that imputation (a) was false[77].

73 The respondent submitted that the appellant's statements were malicious because Mr Glasscock knew that it was untrue for Mr Morrison to say that Mr Glasscock feared for his own safety during the respondent's speech at the peace rally.

74 If a defendant knows a statement is untrue at the time of its making, this is "almost invariably conclusive evidence of malice."[78] The relevant statements are those of Mr Morrison about what happened at the peace rally at the time when the respondent was addressing it. Some of the parts of the broadcast which support malice are as follows. Mr Morrison said that during the peace rally Mr Glasscock had called. He continued: "The phone call I got from him was one of fear because half way through this peace rally things turned very hostile and hostile against this radio station but also towards Chris himself." Further, Mr Morrison said: "Chris Glasscock our reporter down there called to say that he had significant concerns about his own personal safety because [the respondent] had turned his little moment of peace into a hate 2GB rally." A little later on Mr Morrison claimed: "it didn't take [the respondent] long at this rally to point the finger again at us. But I gotta say it wasn't just at us, he started to point out our reporter in the crowd [ie Mr Glasscock] … [T]here was [the respondent] pointing out the 2GB reporter and pointing out the microphone in the crowd and highlighting that it's these people, pointing at 2GB, these people stirring up the hatred." Mr Morrison then played a recording, in part, of what the respondent said at the rally. Before he did so, Mr Morrison said: "Now the audio on this is not brilliant because [Mr Glasscock] had to retreat, so we only have, you know, long shot audio recording". When the broadcast of the respondent's speech stopped, Mr Morrison said: "Now I'm sorry about the quality of that, but as I said [Mr Glasscock] our reporter there had to pull back because it wasn't safe for

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76 See *Clerk and Lindsell on Torts*, 20th ed (2010) at 1553 [22-214].

77 See below at [75].

78 *Roberts v Bass* (2002) 212 CLR 1 at 32 [77] per Gaudron, McHugh and Gummow JJ; [2002] HCA 57.

him to be standing at the front while all this was going on." Finally, Mr Morrison addressed the respondent. He said: "don't take it out on a young reporter on his own in a crowd of people that you're whipping up."

75 In significant measure, what Mr Morrison said was untrue. The respondent did not gesture or point at Mr Glasscock. Mr Glasscock did not "retreat" or "pull back". On 3 May 2006, the Chief Operating Officer of the radio station admitted in a letter to the respondent: "It is clear from the footage that the information given to Mr Morrison [by Mr Glasscock] was incorrect at the time of the rally, and that you did not gesture towards our reporter during your speech, nor did he retreat from the stage during your speech." The letter went on: "I have spoken to Mr Morrison about this misinformation, and we have agreed that when he is next on air (during June) he will clarify this error." That was not technically a formal admission. But in substance it served the same function. It had the same reliability.

76 At the trial, counsel for the appellant accepted that Mr Glasscock did not retreat while the respondent was addressing the rally. It is clear that the source of Mr Morrison's information that the respondent gestured or pointed at Mr Glasscock and that Mr Glasscock retreated or pulled back was Mr Glasscock.

77 In considering whether the appellant knew that what it was saying about the respondent gesturing or pointing and Mr Glasscock retreating or pulling back was untrue, the relevant human minds are those of Mr Morrison and Mr Glasscock. If Mr Morrison did not know that what he was saying was untrue, but was correctly describing what Mr Glasscock said to him, there is no doubt that Mr Glasscock did know that what he said to Mr Morrison was untrue.

78 In his closing address to the trial judge, junior counsel for the respondent submitted that the suggestion that Mr Glasscock pulled back "is all nonsense and Mr Glasscock knew it was untrue." He submitted: "Mr Morrison is given these deliberately false statements, knowingly false statements by Mr Glasscock presumably knowing they would be repeated on air, which they were."

79 The trial judge found[79]:

> "The plaintiff pleaded malice on behalf of the defendant, alleging that the defendant failed to make proper enquiries before publication. The plaintiff also pleaded that the defendant had pleaded false and misleading particulars of truth. In addition, the plaintiff alleged that the defendant knew the words in the broadcast 'including words relating to the

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79 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [145]-[146].

> intimidation and misconduct towards Chris Glasscock' were false or that it was recklessly indifferent to the truth or falsity of those words.
>
> As the defendant emphasised in submissions the plaintiff led no evidence in support of these matters. However, there was evidence from the visual recording of the plaintiff's speech that the 2GB reporter remained in position in front of the plaintiff during his speech. There was no gesture made by the plaintiff towards him. Nevertheless, the obvious hostility of the crowd towards 2GB and the prominence of the reporter who was holding a microphone which identified him as from 2GB would undoubtedly have made him feel uncomfortable and vulnerable. In these circumstances Mr Morrison may have legitimately but erroneously come to the conclusion that Mr Glasscock, feeling threatened, had withdrawn from a prominent position. Ultimately there is no evidence from which I could conclude that Mr Morrison as opposed to Mr Glasscock knew that his remarks on air were false. Even if Mr Morrison knew that this allegation which he broadcast was false I am not persuaded that the dominant purpose of the defendant in making the broadcast was improper."

The key reasoning is in the last three sentences. The possibility raised in the third last sentence must be rejected. Mr Morrison stated that Mr Glasscock's phone call "was one of fear". He stated that the respondent "started to point out" Mr Glasscock in the crowd. He stated that Mr Glasscock had "significant concerns about his own personal safety" because of the respondent's behaviour. And Mr Morrison stated that Mr Glasscock had to retreat, and that he had to pull back. This contradicted the possibility that it was Mr Morrison's unassisted idea that Mr Glasscock had retreated or pulled back. When the transcript of the broadcast is read as a whole, the conclusion stated by Mr Morrison that Mr Glasscock had withdrawn does not appear to be based on any personal inference by Mr Morrison from circumstances such as the hostility of the crowd. Its detailed circumstantial character – gesturing, pointing, retreating, pulling back – can only have been based on what Mr Glasscock told Mr Morrison. Mr Morrison passed on what Mr Glasscock told him. Mr Morrison apparently endeavoured to support the verisimilitude of what Mr Glasscock told him by twice attributing the poor quality of the recording of the respondent's speech to Mr Glasscock's retreat from the respondent.

80 The last two sentences in the passage just quoted from the reasons for judgment of the learned trial judge are immaterial. It is sufficient that Mr Glasscock knew the material which he supplied to Mr Morrison was not true. The Court of Appeal criticised these two sentences. But it said that its criticisms did "not undermine the finding of fact, namely, that Mr Morrison, believing that

what he said was true, had not been shown to have acted with malice." Earlier, the Court of Appeal said[80]:

> "The substance of the [respondent's] case on malice was that the [appellant] and its agent, Mr Morrison, had taken no steps to verify the situation faced by the [appellant's] reporter, Mr Glasscock, before attacking the [respondent] and had, accordingly done so either knowing that assertion to be false or with reckless indifference to the truth or falsity of his attack.
>
> The difficulty the [respondent] faced was that he bore the onus of proof with respect to malice, but was not able to show precisely how Mr Morrison came to form the (incorrect) views which he expressed in the matter complained of as to the situation in which Mr Glasscock found himself at the rally, nor what steps Mr Morrison may have taken to clarify the situation. The [respondent] relied solely upon the fact that the videotape of the rally did not support claims of aggression towards Mr Glasscock and that Mr Morrison said that he had viewed the video. Factually, those two statements were true, but they were not sufficient to demonstrate that Mr Morrison knew what he said to be false or made his statements with reckless indifference to the truth or falsity of his attack."

In fact, it was not clear that the video which Mr Morrison viewed had included a recording of the respondent's speech. That qualification aside, the answer to the Court of Appeal's reasoning is that the inquiry is not limited to Mr Morrison's state of mind. It is an inquiry into the corporate state of mind of the appellant, and that mind is the combination of Mr Morrison's and Mr Glasscock's minds. In this Court, the appellant contended that malice on its part resting on Mr Glasscock's state of mind had not been pleaded. That is true, in the sense that the respondent particularised Mr Morrison's malicious state of mind, not Mr Glasscock's. The appellant therefore relies on the principle in *Suttor v Gundowda Pty Ltd*[81] that: "[w]here a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards."

81 The appellant submitted that "the evidence … does not establish … that [Mr Glasscock] was actuated by malice." That submission is incorrect for the reasons given above[82]. Was there any evidence which could have been called at trial which by any possibility could have defeated the respondent's argument on

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80 *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183 at 209 [115]-[116].

81 (1950) 81 CLR 418 at 438; [1950] HCA 35.

82 See above at [73]-[75].

malice? It must be remembered that what the respondent had to establish was the *appellant's* malice. It must also be remembered that if the appellant knew that its statements were untrue when they were made, malice is probably established. Either Mr Glasscock had retreated because of a gesture by the respondent, or he had not. The evidence, particularly the appellant's admission in the letter from the Chief Operating Officer, is that he had not. Once it is accepted that Mr Glasscock had not retreated because of a gesture by the respondent, and that Mr Glasscock had falsely told Mr Morrison that he had, no evidence from Mr Glasscock could have altered the conclusion that Mr Glasscock knew that he had told Mr Morrison something untrue. Mr Glasscock was the only possible source of the "information given to Mr Morrison … at the time of the rally" which the Chief Operating Officer's letter described as "incorrect". It was not possible that Mr Glasscock could have been innocently mistaken.

82 The appellant submitted that the case had never ceased to be the one which was run on the pleadings.

> "All the evidence that was admitted was relevant to the case particularised about [Mr] Morrison's state of mind. The fact that counsel for [the respondent] made a glancing reference to 'the knowledge of Mr Glasscock' … in address, after the evidence was closed, does not turn this into a *Leotta*. The address on behalf of the appellant at AB334.42-48 shows that, consistently with the pleadings, the appellant was proceeding on the basis that 'the relevant state of mind … is that of the person who does the act' of publication alleged, namely, [Mr] Morrison. See also at AB340.20. Evidence of [Mr] Glasscock's state of mind was relevant on the pleadings to the extent that it might support an inference about [Mr] Morrison's state of mind. But [Mr] Glasscock's state of mind was not independently relevant to malice in its own right."[83]

83 These submissions must be rejected.

84 First, the evidence in the form of the admission contained in the Chief Operating Officer's letter of 3 May 2006 cannot have been relevant only to Mr Morrison's state of mind. He was not at the rally. Mr Glasscock was.

85 Secondly, it is not correct to describe the address of counsel for the respondent as containing only a "glancing reference" to Mr Glasscock's knowledge. Counsel said: "We have two employees of 2GB, neither of them giving evidence, with an inference that both of them put their heads together to

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83 The reference to "a *Leotta*" is to *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666; 9 ALR 437.

cook up allegations against the plaintiff to justify all those eight terrible imputations." He continued:

> "This is a reply to a nonexistent attack we say cooked up between Mr Glasscock and Mr Morrison, or as a result of Mr [Glasscock], a 2GB employee, giving Mr Morrison (as said) information which led Mr Morrison, which triggered him off into a diatribe against the plaintiff. Either way Mr Glasscock is an employee of 2GB, must accept some of the responsibility if not the whole of the responsibility for this broadcast by Mr Morrison".

And he said: "All they have done is attack [the respondent's] integrity because of the false allegations that he put Mr Glasscock in fear of his life." This part of counsel's address was interspersed with questions from the trial judge about what he was to do with the fact that either Mr Glasscock or Mr Morrison "got it wrong." The following exchanges are also relevant:

> "HIS HONOUR: Your point is you don't have to prove which one of them was telling untruths, one of them must be.
>
> [COUNSEL FOR THE RESPONDENT]: Well, one or both.
>
> HIS HONOUR: Yes, that's your point.
>
> …
>
> HIS HONOUR: Well, put shortly, your point is that 2GB didn't set out to correct the impression as to what it may or may not have been doing relevant to the Cronulla riots, rather, it set out to attack the plaintiff saying – you say wrongly – that he stirred up the crowd against Mr Glasscock.
>
> [COUNSEL FOR THE RESPONDENT]: That's it in a nutshell, your Honour.
>
> HIS HONOUR: That's the way you put it.
>
> [COUNSEL FOR THE RESPONDENT]: Yes, your Honour.
>
> HIS HONOUR: And whether it, I suppose, expresses the occasion or expressed as malice, you say you win on either count –
>
> [COUNSEL FOR THE RESPONDENT]: Correct.
>
> HIS HONOUR: – on that issue?"

86 Counsel for the appellant addressed the trial judge in reply on the question of malice over 12 pages of the transcript. He did not submit that Mr Glasscock's state of mind was irrelevant to the question of the appellant's malice. He did

advance various arguments for the view that neither Mr Glasscock nor Mr Morrison were actuated by malice. He also denied that Mr Glasscock was "the responsible state of mind, or a part of the responsible state of mind" of the appellant. But he never submitted that an inquiry into that question was not open on the pleadings, or that the respondent was changing his case and should not be permitted to do so after the evidence had closed.

87 The appellant referred to two pieces of transcript in the passage from his submissions to this Court quoted above[84]. The first was:

> "[COUNSEL FOR THE APPELLANT]: Well, he says something, apparently. He conveys some information to Mr Morrison. But the relevant state of mind, your Honour, is that of the person who does the act, because – and this is the crucial point –
>
> HIS HONOUR: That is true, but that mind is informed by Mr Glasscock.
>
> [COUNSEL FOR THE APPELLANT]: The question is one of motive and purpose. That's my – that's the fundamental proposition. It's the motive or purpose of the person who does the publication."

That was a submission – and there were others to that effect during the reply – that Mr Morrison's state of mind was the only state of mind that could be material in law. It was not a submission that on the pleadings Mr Morrison's was the only relevant state of mind. The other passage to which the appellant referred concerns exhibit B, the letter of 3 May 2006 from the Chief Operating Officer to the respondent. The submission was:

> "this was information given to Mr Morrison and so far as the evidence in this document touched upon Mr Morrison's state of mind at all it really exculpates Mr Morrison. That is why I took your Honour to the authority dealing with the question of whose state of mind it is.
>
> So, the proposition is [Mr] Morrison is the actuating relevant mind and there is no suggestion in this that he was acting on anything other than the information that he had such as he understood it. That is exhibit B."

The authority referred to was *Palmer v John Fairfax & Sons Ltd*[85]. Hunt J there said:

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84 See above at [82].

85 (1986) 5 NSWLR 727 at 733.

> "As a corporation, the defendant has no mind of its own, and its state of mind must be found in the mind of those persons who did the act for which it is sought to be made responsible."

The proposition does not support the appellant's case. Mr Morrison's statement was an act for which both Mr Morrison and Mr Glasscock were responsible. However, the present point is simply that counsel was making a submission about the law, not complaining about departure from the pleadings.

88 Finally, the appellant submitted that evidence of Mr Glasscock's state of mind was relevant on the pleadings only to the extent that it might support an inference about Mr Morrison's state of mind. It is difficult to see how it was relevant except as being an ingredient in the appellant's state of mind. It was relevant to the substantive allegation in par 2 of the respondent's reply, even if it was irrelevant as being outside the three particulars given in that paragraph[86]. But no complaint about that kind of irrelevance was made at the trial. Rather, the appellant confronted the problem on its merits.

89 The appellant cited Brennan J's approval in *Stephens v West Australian Newspapers Ltd*[87] of *Egger v Viscount Chelmsford*[88]. But those cases did not involve an inquiry into which two employees caused a single defendant to have a malicious state of mind. They were directed to the state of affairs as between two defendants. The liability of each defendant depended upon that defendant's own state of mind, unaffected by the malice of any other defendant. The appellant's submission treats Mr Morrison as a defendant and Mr Glasscock as a potential defendant. Neither was in fact a defendant. The only defendant was the appellant. The only determinative state of mind was that of the appellant. The issue concerns which human minds that state of mind is to be found in. That precise point was not explicitly considered in any of the few cases cited by the parties. Did Mr Glasscock's knowledge of the falsity of what he said to Mr Morrison and therefore of what Mr Morrison said cause the appellant's state of mind to be malicious?

90 It did. In determining the corporate state of mind of the appellant, it is necessary to take into account the state of mind of the relevant employees – the first employee who broadcast the propositions in question and the second employee who informed the first employee of those propositions. The second employee knew the propositions were incorrect and knew it was likely that the

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86 See above at [68].

87 (1994) 182 CLR 211 at 254-255; [1994] HCA 45.

88 [1965] 1 QB 248.

first employee would use them in broadcasting about the peace rally. In that regard the appellant submitted:

> "Mr Morrison in the broadcast says he had had some conversation of the day with Mr Glasscock. He does not say, 'Mr Glasscock told me to publish this' or anything of the kind, and although Mr Glasscock is a reporter, undoubtedly it is not at all clear that he understood that he was going to be saying something to Mr Morrison, which Mr Morrison would then be publishing in this respect."

Yet it is almost inevitable that when one radio journalist employed to work for a radio station says something newsworthy to another radio journalist who is employed to work for the same station and who is to deliver a broadcast about a strikingly interesting event like the peace rally, what the first says will in fact be broadcast by the latter. The first employee knew that the propositions he was communicating were seriously damaging propositions. Since he was advancing them as part of a counter-attack, it may be inferred that he intended them to be seriously damaging. His broadcast took place on the day following the peace rally. That allowed an interval in which the first employee could have checked the accuracy of what the second employee had told him in the heat of the peace rally, given it cool reflection, and analysed its correctness closely with the second employee with a view to ensuring that there was not some error in perception or transmission. Taking the states of mind of the two employees together with their behaviour in relation to the likely broadcasting of what the second had said to the first, the conduct of the appellant in broadcasting the propositions was malicious. That is because it was at least reckless as to the truth or falsity of the propositions.

91 In short, there are two possibilities. One possibility is that Mr Morrison falsely told his audience that Mr Glasscock had complained that he had been put in fear, and retreated, because the respondent gestured at him: if so, Mr Morrison's state of mind was malicious and the appellant is fixed with it. The other possibility is that Mr Morrison truthfully told his audience that Mr Glasscock had complained that he had been put in fear, and retreated, because the respondent gestured at him: if so, the admission by the Chief Operating Officer proved that what Mr Glasscock said was false, and it must have been false to his knowledge. For the above reasons, that fixed the appellant with malice. Accordingly, leave to file ground 2(f) of the notice of cross-appeal should be granted. The cross-appeal should be allowed on that point. In consequence, the defence of qualified privilege must fail.

Substantial truth and contextual truth issues

92 The trial judge applied a "right-thinking member of the Australian community" test to imputations (b), (c), (d) and (g). He concluded on that basis that those imputations were substantially true. The trial judge also concluded

that they had the effect that the publication of imputations (a), (h), (j) and (k) did not occasion further injury to the respondent's reputation. That is, the "findings that the plaintiff incites acts of violence, incites racial attitudes, is dangerous and perhaps most significantly is a disgraceful individual occasion such injury that the other imputations are incapable of causing further injury."[89]

93 The Court of Appeal considered that the trial judge had not applied the selected test correctly. In its view, the correct question in relation to imputation (b), for example, was "whether, given the attitudes and views properly found to be held by the [respondent], a right-thinking member of the Australian community would consider that the [respondent] incites people to commit acts of violence."[90] The Court of Appeal concluded that the trial judge's test caused his findings of substantial truth to proceed "on a false basis". It said that those findings "cannot be sustained."[91] The Court of Appeal did not itself apply what it thought to be the correct question to the problem.

94 In this Court, the appellant relied on ground 6 of the notice of appeal. It stated:

> "The Court of Appeal erred:
>
> (a) in holding that, notwithstanding that the learned trial judge had identified the correct test as to the substantial truth of imputations (b), (c), (d) and (g) (namely, the views of right-thinking members of the Australian community generally), his Honour failed to apply that test (or to apply it 'in those terms'), such that 'the findings of substantial truth proceeded on a false basis and cannot be sustained';
>
> (b) in failing to make its own findings in respect of the defences of truth and contextual truth."

The third order sought was:

> "In the event that the appeal is allowed only in respect of ground 6, the orders of the Court of Appeal made on 22 March 2011 be set aside and the matter be remitted to the Court of Appeal for determination of the defences of truth and contextual truth."

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89 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [129].

90 *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183 at 202 [79].

91 *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183 at 203 [87], referring to 200 [66].

95 In its written submissions, the appellant put the following submission in support of ground 6:

> "The Court of Appeal agreed that the general community standards test adopted by the trial judge was the correct test. However, despite the absence of any ground of appeal, submissions or even discussion at the hearing on this issue, the Court of Appeal held that the trial judge did not in fact apply that test. This conclusion appears to have been based on the failure of the trial judge, on each occasion he was dealing with a factual matter, to recite the test word for word and then mechanically posit an answer." (footnotes omitted)

The second sentence makes a serious allegation. However, it is not necessary to investigate its merits.

96 In relation to imputation (g) – that the respondent "is a disgraceful individual" – counsel for the respondent more than once challenged the appellant to state what conduct the respondent had been guilty of which made it substantially true to call him "a disgraceful individual". The appellant did not say. The appellant did point to a large number of opinions which the respondent was said to hold and which many people might very strongly disagree with. But that does not ipso facto establish that the respondent is a disgraceful individual. Nor, despite a similar challenge, did the appellant say what particular acts merited the respondent being called someone who incited people to commit acts of violence (imputation (b)), who incited people to have racist attitudes (imputation (c)), or who was dangerous (imputation (d)).

97 The respondent submitted that the Court has power to decline to remit proceedings to the Court of Appeal. The respondent also submitted that in view of the appellant's failure to provide a satisfactory basis on which the Court of Appeal could work, even assuming in the appellant's favour that the Court of Appeal erred in some way, the power to remit ought not to be exercised. Those submissions should be accepted. The respondent pointed out that whatever damages the respondent eventually gets, if any, will have been nibbled down to nothing by the expense of this futile litigation. It is time to bring it to a halt. But at least one more stage cannot be avoided – the assessment of damages.

Orders

98 The appeal should be dismissed with costs. Special leave to appeal should be granted on par 2(f) of the notice of cross-appeal, and the cross-appeal should be allowed on that ground with costs. In lieu of the Court of Appeal's orders, there should be orders that the whole of the respondent's appeal to that Court be upheld with costs, that the proceedings be remitted to the Common Law Division for the assessment of damages in relation to imputations (a), (b), (c), (d), (g), (h),

(j) and (k), and that the order as to the costs of the first trial in the Common Law Division be determined by the judge who assesses the quantum of damages.

99 KIEFEL J. This appeal concerns a broadcast by the appellant's radio station, Radio Station 2GB, on 19 December 2005 during which the host, Jason Morrison, made statements defamatory of the respondent, Keysar Trad. On the day prior to the broadcast, Mr Trad had addressed an event in Hyde Park, Sydney, which was promoted as a "peace rally" and was intended to counter the effects of events known as "the Cronulla riots", which had occurred some days previously. The trial judge in the Supreme Court of New South Wales, McClellan CJ at CL, observed that the riots "were perceived by many people as a confrontation between adherents to the Muslim faith and persons of Caucasian heritage."[92] Mr Trad was one of a number of speakers at the rally and several persons from the media were present, including a reporter from 2GB. During Mr Trad's address he made some attacks upon 2GB. What was said by Mr Morrison on air on 19 December 2005 concerning Mr Trad was a response to that attack. Mr Trad brought an action for defamation against the appellant (which I shall refer to as "2GB"). 2GB defended the action on the basis that the defamatory statements were made on an occasion of qualified privilege and were therefore protected at common law. Such a defence is preserved by the *Defamation Act* 1974 (NSW)[93] ("the 1974 Act"). 2GB also relied upon the defences of substantial and contextual truth which are provided by ss 15 and 16, respectively, of that Act.

The attack and the response

100 A transcript of Mr Trad's speech, which included interjections made by members of the crowd gathered at the rally, was tendered at trial.

101 Although he did not explicitly refer to "the Cronulla riots", Mr Trad alluded to those riots early in his address. He accused "those racist rednecks in tabloid journalism" of mustering "5000 people filled with hatred" for the purposes of the riots. It is evident from the opening and concluding words of his address that Mr Trad considered the federal government and certain segments of the media to be responsible for the riots. He and the crowd identified 2GB as a "mouthpiece" of the government. He accused 2GB of "whipping up fears" and of being "racist criminals", and accused the government of having "fuelled hatred" and of being "racist rednecks" and "evil fearmongers". He further accused 2GB of causing suffering to many Muslims in Australia.

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92 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [6].

93 This Act has been superseded by the *Defamation Act* 2005 (NSW). However, as the broadcast was aired before 1 January 2006, the *Defamation Act* 1974 (NSW) governs these proceedings.

102 In the broadcast aired the following day, Mr Morrison described Mr Trad as a "well known apologist for the Islamic community spewing hatred and bile at anyone who did not agree with [his] philosophies and principles including this radio station". He said that Mr Glasscock, a reporter for 2GB who had been present at the rally, had been concerned for his own safety because Mr Trad had turned the event into a "hate 2GB rally." Mr Morrison repeated the essence of what Mr Trad had said about how 2GB "incite[s] people to commit acts of violence and [have] racist attitudes", in response to which he said, "I don't think that I've ever quite done that, like he did."

103 One section of the broadcast gave rise to a number of the imputations that were found by the jury. Mr Morrison said:

> "Now, Keysar Trad, you are a disgraceful individual and I'm not alone in thinking this, I won't talk to you on the air because you represent no one's views other than your own, so you know, why you call up purporting to be from the Islamic community is beyond me. You are one guy who basically has been marginalized. And I think the more you say the more you represent to me that you are a dangerous individual to be out there trying to represent the views because I think you're responsible about more misinformation about the Islamic community of the attitudes of Christian Australians than any other person.
>
> Now he is widely perceived as a pest, that's the way I see him, he is not a peacemaker, so why he was invited to a peace rally is beyond me."

104 Towards the conclusion of the broadcast, Mr Morrison said of Mr Trad: "he does nothing to try to address the actual issues, he just wants to sort of hatchet job people who once gave him the privileged position that he thinks he has."

The imputations

105 At trial, a jury found that statements made in the broadcast contained the following imputations concerning Mr Trad and were defamatory of him[94]:

> "(a) [Mr Trad] stirred up hatred against a 2GB reporter which caused him to have concerns about his own personal safety;
>
> (b) [Mr Trad] incites people to commit acts of violence;
>
> (c) [Mr Trad] incites people to have racist attitudes;

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94 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [2].

(d) [Mr Trad] is a dangerous individual;

(g) [Mr Trad] is a disgraceful individual;

(h) [Mr Trad] is widely perceived as a pest;

(j) [Mr Trad] deliberately gives out misinformation about the Islamic community;

(k) [Mr Trad] attacks those people who once gave him a privileged position."

Under the 1974 Act, each of the imputations constituted a separate cause of action[95]. Questions as to the applicability of the defences pleaded by 2GB to those imputations fell to be determined by McClellan CJ at CL, pursuant to s 7A(4)(a) of that Act.

The defence of qualified privilege

- *Findings in the Supreme Court*

106 McClellan CJ at CL held that the defence of qualified privilege applied to all of the imputations. His Honour referred to the statement of Starke J in *Loveday v Sun Newspapers Ltd*[96], that 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." His Honour considered that the attack by Mr Trad was a serious one and that 2GB was entitled to defend itself against it[97]. His Honour was satisfied that the broadcast was a response to Mr Trad's attack. Subject to the question of malice, 2GB was entitled to a vigorous response. The response was, in his Honour's view, proportionate to the attack[98].

107 The Court of Appeal of the Supreme Court of New South Wales (Tobias, McColl and Basten JJA) observed that qualified privilege is a rare example of the law permitting an individual to seek self-redress by conduct that would otherwise be unlawful, by making defamatory statements[99]. Their Honours considered the

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95 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 299 [16], 314 [70]; [2007] HCA 28.

96 (1938) 59 CLR 503 at 515; [1938] HCA 28.

97 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [137].

98 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [140]-[141].

99 *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183 at 207 [108].

question in this case to be whether the defamatory matter is relevant to the occasion of qualified privilege[100]. However, their Honours also identified another question as arising: "whether the response exceeded permissible limits."[101]

108 A question which therefore arises on this aspect of the appeal is whether some test of reasonableness of response is to be applied to limit the scope of the privilege in a case of this kind. The law clearly requires that defamatory statements made in response to an attack be relevant to the allegations made in the attack or to the vindication of a defendant's reputation or interests. Statements which seem excessive in their language or content are to be considered in connection with the question of the defendant's malice, in respect of which the plaintiff bears the onus of proof. A consideration of the operation of the privilege and its relationship with the question of malice does not, in my view, provide support for a requirement additional to that of relevance, in order for the privilege to apply.

- *Background to the privilege*

109 An appreciation of the place, historically, of malice in defamation law is necessary to an understanding of the proper operation of qualified privilege. Until the early to mid-19th century, malice was the "foundation" of the action for defamation[102]. A person making a defamatory statement was presumed to be malicious. Such an approach may owe something to the ecclesiastical courts, although a more general explanation may be that, absent an explanation by the defendant, it was assumed that there could be no reason why anyone would defame another, other than malice[103]. In any event, the defence of qualified privilege emerged in the 1760s, in cases involving references given by masters about their servants, and its function was to reverse the burden of proof of malice such that it was borne by the plaintiff[104].

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100 *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183 at 209 [111].

101 *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183 at 207 [108].

102 Mitchell, "Duties, Interests, and Motives: Privileged Occasions in Defamation", (1998) 18 *Oxford Journal of Legal Studies* 381 at 381, quoting *Whiteley v Adams* (1863) 15 CB (NS) 392 at 414 per Erle CJ [143 ER 838 at 846].

103 Mitchell, "Duties, Interests, and Motives: Privileged Occasions in Defamation", (1998) 18 *Oxford Journal of Legal Studies* 381 at 383.

104 Mitchell, "Duties, Interests, and Motives: Privileged Occasions in Defamation", (1998) 18 *Oxford Journal of Legal Studies* 381 at 383-390.

110 The starting point for a consideration of the intended operation of the privilege is therefore the law's assumption that a defamatory statement was made maliciously. This assumption is overcome if the law holds that an *occasion* arose which warranted the making of the defamatory statement. An occasion for the making of such a statement may arise where the maker of the statement has a *duty or an interest*, which the law recognises, in making the statement (questions of reciprocity of interest will be discussed later in these reasons). When such an occasion arises, the statement is protected by a privilege afforded by the law. The duty or interest is regarded as creating the occasion to speak and the occasion prevents the law assuming malice. The privilege is qualified, because it may be lost if actual malice is proved by the plaintiff. This summary of the operation of the defence of qualified privilege is borne out by what was said by Parke B in the following quoted passage from *Toogood v Spyring*[105]:

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

111 It has been pointed out that Parke B did not intend *Toogood v Spyring* to be definitive of the privilege, but rather illustrative[106]. In *Wright v Woodgate*[107], which Parke B heard with Alderson and Gurney BB and Lord Abinger CB the year following *Toogood v Spyring*, Parke B said[108]:

> "The proper meaning of a privileged communication is only this; that the occasion on which the communication was made rebuts the inference

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105 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050].

106 Mitchell, "Duties, Interests, and Motives: Privileged Occasions in Defamation", (1998) 18 *Oxford Journal of Legal Studies* 381 at 392.

107 (1835) 2 Cr M & R 573 [150 ER 244].

108 *Wright v Woodgate* (1835) 2 Cr M & R 573 at 577 [150 ER 244 at 246].

> prima facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact – that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made."

112 In *Cush v Dillon*[109], it was explained that the defence of qualified privilege is based upon notions of public policy, that in some circumstances the freedom to speak may assume more importance than an individual's right to the protection of his or her reputation. Parke B in *Toogood v Spyring* spoke of statements made in circumstances where the privilege arose as being protected "for the common convenience and welfare of society"[110]. Statements such as this should be understood in light of the policy of the law which promotes freedom of speech where the occasion for doing so arises. They provide no support for the application of some further social standard of reasonableness which would limit the scope of the privilege. McHugh J in *Bashford v Information Australia (Newsletters) Pty Ltd*[111] considered that the words in *Toogood v Spyring* did not express a test which may prevent the privilege arising[112]. I respectfully agree.

113 Judgments nowadays sometimes refer to what was said in *Toogood v Spyring* about the basis of the privilege being the "common convenience and welfare of society" by way of conclusion or as confirming the view taken as consistent with those ends. It has been said[113] that in the period following *Toogood v Spyring*, some judges used the notion of "the common convenience and welfare of society" as the basis of the defence, but that this had its detractors, including Lord Esher MR, who (when Brett LJ) initially supported it[114] only to later abandon it[115] in favour of determining whether a duty or interest on the part of the defendant existed. Part of the confusion in this period is attributed to a lack of clear understanding about the relationship between qualified privilege and malice. It may be that that confusion continues today.

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109 (2011) 243 CLR 298 at 305 [12] per French CJ, Crennan and Kiefel JJ; [2011] HCA 30; see also *Aktas v Westpac Banking Corporation* (2010) 241 CLR 79 at 89 [22], 108-109 [89]-[91]; [2010] HCA 25.

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

111 (2004) 218 CLR 366 at 386-387 [55]; [2004] HCA 5.

112 As observed in *Aktas v Westpac Banking Corporation* (2010) 241 CLR 79 at 103-104 [72] per Heydon J; and see 110 [97] per Kiefel J.

113 Mitchell, *The Making of the Modern Law of Defamation*, (2005) at 161-162.

114 *Waller v Loch* (1881) 7 QBD 619 at 622.

115 *Pullman v Hill & Co* [1891] 1 QB 524 at 528.

114 Further, in the course of the development of the defence of qualified privilege, a test of whether "it is right in the interests of society to speak" was applied for a time, but it was applied to mitigate the arbitrary effects of a strict duty/interest test and to avoid questions about the scope of duties or interests[116]. Its limitations became evident when the question was raised whether the privilege could apply when the defendant was mistaken as to whether there was a duty to speak. (It was held that an honest belief in the existence of a duty sufficed[117].) The courts subsequently reverted to the approach suggested in *Toogood v Spyring*[118].

115 It is of interest to observe that some Australian jurisdictions introduced statutory excuses for the publication of defamatory matter where the matter was published "for the public good"[119], but as an alternative defence to that arising where a statement is made in the protection of interests. So far as concerns the common law privilege which is founded upon the existence of a duty or interest to speak, the leading cases such as *Adam v Ward*[120] do not suggest an assessment of the public interest as necessary or appropriate to the scope and operation of the privilege. Rather, they require that a defamatory statement made in response to an attack be relevant to the occasion and to the vindication of the defendant's reputation.

- *Duty or interest to speak in cases of attack*

116 Generally, the law requires that there be a reciprocity of duty and interest as between the maker of a defamatory statement and the recipient of it[121]. It has

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116 Mitchell, "Duties, Interests, and Motives: Privileged Occasions in Defamation", (1998) 18 *Oxford Journal of Legal Studies* 381 at 401.

117 *Waller v Loch* (1881) 7 QBD 619 at 621 per Jessel MR.

118 Mitchell, "Duties, Interests, and Motives: Privileged Occasions in Defamation", (1998) 18 *Oxford Journal of Legal Studies* 381 at 402-404.

119 See: *Defamation Act* 1889 (Q), s 16(1)(c) or, prior to 16 June 1995, *Criminal Code* (Q), s 377(1)(c), a predecessor of which was considered in *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632; [1934] HCA 15; *Defamation Act* 1957 (Tas), s 16(1)(c); and *Criminal Code* (WA), s 357(3), all of which were repealed as part of the adoption of the uniform defamation law.

120 [1917] AC 309 at 320-321.

121 *Adam v Ward* [1917] AC 309 at 334; *Cush v Dillon* (2011) 243 CLR 298 at 305 [11]; *Roberts v Bass* (2002) 212 CLR 1 at 26 [62]; [2002] HCA 57.

been suggested that this requirement may have arisen in line with later developments in the torts of deceit and negligence[122]. In *Norton v Hoare [No 1]*[123], Barton ACJ observed that in cases involving defamatory statements made in response to attacks on a defendant's reputation or interests, there may not be the same community of interest, or corresponding interest, as there is in other cases of privilege[124]. The case confirmed that a defendant nevertheless had a right to respond to attacks.

117 The principal question in *Norton v Hoare [No 1]* was whether the entitlement extends to attacks upon a defendant's property interests, as well as his or her reputation[125]. It was in the context of the defence of property that an analogy was drawn with what may be done by way of self-defence[126]. The usefulness of the analogy may be doubted and does not appear to have been taken up in later cases. It is notable that *Norton v Hoare [No 1]* was decided before *Adam v Ward*, which explained much about the operation of the defence of qualified privilege.

118 *Adam v Ward* involved an attack by the plaintiff, a member of Parliament, in Parliament, upon an Army General. The plaintiff alleged that the General had made deliberately misleading statements concerning one or more officers in a confidential report. An enquiry into the allegation, by the Army Council, vindicated the General and did so, in part, by identifying the plaintiff as one of the officers who had been made the subject of the report and had been called upon to retire from the service. A letter written by the secretary of the Council, containing these facts, was published not only to the General, but also to the press.

119 Lord Atkinson alone in *Adam v Ward* appears to have addressed the question of the interest of the public in the matter published about the plaintiff. His Lordship observed that every person may be taken to have an interest in the British Army, including its discipline and efficiency[127]. In *Mowlds v*

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122 Mitchell, "Duties, Interests, and Motives: Privileged Occasions in Defamation", (1998) 18 *Oxford Journal of Legal Studies* 381 at 405-406.

123 (1913) 17 CLR 310; [1913] HCA 51.

124 *Norton v Hoare [No 1]* (1913) 17 CLR 310 at 318.

125 See *Norton v Hoare [No 1]* (1913) 17 CLR 310 at 318 per Barton ACJ.

126 *Norton v Hoare [No 1]* (1913) 17 CLR 310 at 318 per Barton ACJ, 321-322 per Isaacs, Gavan Duffy and Rich JJ.

127 *Adam v Ward* [1917] AC 309 at 343.

Fergusson[128], Dixon J referred to Lord Atkinson's statement to explain that notions of corresponding duty or interest must be "very widely interpreted" when defamatory matter is published in self-defence, in defence or protection of an interest, or by way of vindication of reputation following an attack[129].

120 It was accepted at an early point in the development of the privilege that a defendant might be entitled to speak using the same medium as the plaintiff, when responding to what had been said by the plaintiff. In *Hibbs (Clerk) v Wilkinson*[130], the editor of the defendant newspaper pointed out to readers that the plaintiff had published in the newspaper extracts of reviews that contained misquotations favouring the plaintiff. Erle CJ, in directing the jury, said that although it was a case of a kind which was "more rare" than the usual case of defamatory statements involving a servant, it was governed by the same principles[131].

121 In *Stephens v West Australian Newspapers Ltd*[132], McHugh J observed that the need for reciprocity might defeat a claim of qualified privilege where the defamatory statement has been made to the general public and that it is only in "exceptional cases" that a person has "an interest or duty to publish defamatory matter to the world at large"[133]. However, his Honour accepted that circumstances may exist where the public's interest is such as to warrant such publication[134]. In such a case there seems no reason to doubt that the same principles relating to the defence of qualified privilege are to be applied, as Erle CJ suggested, and nothing to suggest that they require modification.

122 *Mowlds v Fergusson* did not involve the publication of a defamatory statement at large. Nevertheless, it does provide an example of how this Court has dealt with the requirement of reciprocity. The facts of the case may be stated summarily: in 1934 the respondent (R), a police inspector, made a report on, inter alia, the conduct of A; R was criticised by a Royal Commission concerning

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128 (1940) 64 CLR 206; [1940] HCA 38.

129 *Mowlds v Fergusson* (1940) 64 CLR 206 at 214-215.

130 (1859) 1 F & F 608 [175 ER 873].

131 *Hibbs (Clerk) v Wilkinson* (1859) 1 F & F 608 at 610 [175 ER 873 at 874].

132 (1994) 182 CLR 211 at 261 (footnote omitted); [1994] HCA 45.

133 See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570; [1997] HCA 25.

134 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 261-262.

that report; at the request of the Premier of the State, R produced another report in which he sought to justify his 1934 report and in that process defamed A; R showed the report to C, who had been the Commissioner of Police at the time of the 1934 report, and thereby published the defamation.

123 The Court held that the publication of the statements by R to C were protected by qualified privilege. But it will be observed that this was so notwithstanding that the interests of R and C did not correspond in the usual sense. R was not impelled to make the statement because of some duty towards C or because of an interest C had. He made the statement in the course of seeking to defend himself. Starke J saw R as having a duty or interest to justify himself to his former chief, C, and considered that C had a duty or interest to hear that justification[135]. Dixon J considered that the Premier's request placed R upon his defence. The Commissioner's attack upon him called for a vindication of his reputation and C was a person to whom R might look for vindication, given his knowledge of all the facts[136]. His Honour additionally considered that C had an interest in knowing a consequence of his own former administration[137].

124 Dixon J appears to have doubted that it is necessary that there be reciprocity of interest in every case and to have considered that a defendant's own interests may be sufficient to sustain the defence. In *Mowlds v Fergusson*, in discussing the requirement of reciprocity, his Honour quoted that part of the statement in *Toogood v Spyring*[138] where Parke B spoke of communications "fairly made by a person … in the conduct of his own affairs, in matters where his interest is concerned", which, Dixon J observed, "demands no community, reciprocity or correspondency either of interest or duty."[139] Dixon J repeated these observations in *Guise v Kouvelis*[140], prefacing them with the remark that, "[t]he reduction of matters of privilege to formulas of duty and interest and of corresponding interest or duty has tended to the introduction of dialectical tests in a matter essentially of doctrine and, moreover, a matter covered by many decided cases which do not always respond easily to the formulas."

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135 *Mowlds v Fergusson* (1940) 64 CLR 206 at 211-212.

136 *Mowlds v Fergusson* (1940) 64 CLR 206 at 214-215.

137 *Mowlds v Fergusson* (1940) 64 CLR 206 at 215.

138 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050].

139 *Mowlds v Fergusson* (1940) 64 CLR 206 at 215.

140 (1947) 74 CLR 102 at 125; [1947] HCA 13.

125 In *Loveday v Sun Newspapers Ltd*[141], to which McClellan CJ at CL referred in this case, two statements were published by the defendant newspaper in one article. One was an attack by a body against the Canterbury Municipal Council for refusing the plaintiff relief work, and the other was a statement in reply by the town clerk of the Municipality of Canterbury, which said that the plaintiff had been refused the work because of unsatisfactory conduct on his part. The Court accepted that the Council and the clerk were entitled to reply and that the occasion was privileged. Starke J observed that a person attacked has a right and an interest in repelling or refuting the attack, and that an appeal by the attacker to the public gives the public a corresponding interest in the reply[142].

126 In *Penton v Calwell*[143], Arthur Calwell, a member of Parliament, alleged in Parliament that a newspaper had refused to abide by wartime censorship restrictions in reporting the escape of prisoners of war in New South Wales. The newspaper editor responded in an article, in which it was claimed that Mr Calwell had lied, and called him "maliciously and corruptly untruthful; in other words a dishonest, calculating liar"[144], and invited him to take action against the newspaper in court. The Court held that the statements were privileged, being made in reply to attacks upon the character or conduct of the defendant or in the protection of his interests[145]. In doing so it varied the decision of Dixon J at first instance, on an application to strike out part of the defence.

127 In his judgment, Dixon J did not depart from anything he had earlier said concerning the privilege. His Honour said that "the purpose of the privilege is to enable the defendant on his part freely to submit his answer, whether it be strictly defensive or be by way of counter-attack, to the public to whom the plaintiff has appealed"[146]; and, further, that "[t]he foundation of the privilege is the necessity of allowing the party attacked free scope to place his case before the body whose judgment the attacking party has sought to affect … The purpose is to prevent the charges operating to his prejudice."[147] The point of disagreement between the

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141 (1938) 59 CLR 503.

142 *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 at 515.

143 (1945) 70 CLR 219; [1945] HCA 51.

144 *Penton v Calwell* (1945) 70 CLR 219 at 225-226.

145 *Penton v Calwell* (1945) 70 CLR 219 at 243 per Latham CJ and Williams J, 250 per Starke J.

146 *Penton v Calwell* (1945) 70 CLR 219 at 233.

147 *Penton v Calwell* (1945) 70 CLR 219 at 233-234.

Full Court and Dixon J concerned the effect of the "invitation" to sue upon the operation of the defence.

128 It will be necessary to say something about the approach of Dixon J later in these reasons, when further considering whether any test beyond that of relevance is to be applied in cases of this kind. For present purposes it may be observed that the cases consistently regard an attack by a plaintiff in the public sphere as creating an interest in responding to a like audience, and that the public is regarded as having an interest in hearing that response.

129 In the present case, as the trial judge observed, Mr Trad made a serious attack upon 2GB and one of its commentators. It follows that 2GB had an interest in vindicating its reputation. Mr Trad's attack was made to the public at large – to the persons present at the rally and to other persons through the media outlets there present. 2GB was therefore entitled to respond to the public.

- *The requirement of relevance*

130 It has never been suggested that the defence of qualified privilege is absolute. It is not unbounded and may be lost on proof of actual malice. An attack upon a defendant's reputation does not provide an occasion for defamatory remarks having no connection to the attack or the need for the defendant to vindicate himself or herself. But it is not necessary to confine the scope of the privilege by other considerations, such as whether the response goes too far, is unreasonable or is out of proportion to the attack. Such considerations are essentially subjective and may create uncertainty as to the operation of the defence, which is largely a question of law. Moreover, such considerations may have the effect of blurring the boundary between facts relevant to the privilege and facts relevant to the issue of malice. A test of relevance is necessarily objective and does not confuse matters pertaining to the subjective question of whether a defendant was improperly motivated, and therefore malicious in using the words complained of, with matters from which it may be concluded that the words were spoken on an occasion of qualified privilege. When words are found to have been spoken on an occasion of privilege, the onus of proving malice on the part of the defendant shifts to the plaintiff. If the plaintiff discharges the onus the privilege is defeated. Absent proof of malice, the privilege operates to protect statements which have the required connection to the occasion. The cases decided by this Court in the context of defamatory statements in reply consistently refer only to a test of relevance as a limitation upon the defence of qualified privilege.

131 In the first edition of Gatley's text[148] the distinction mentioned was maintained. It was said that a person whose character has been attacked is entitled to respond and if in doing so he makes defamatory statements about the person who attacked him, "such statements will be privileged, provided they are fairly relevant to the accusations made against him and published *bonâ fide*."[149] Such a person was entitled to appeal to the same audience as his attacker and if, in answering the attack, "he makes relevant defamatory statements about the person who has attacked him, such statements are *primâ facie* privileged."[150]

132 Decisions of this Court appear to have adopted such an approach. In *Loveday v Sun Newspapers Ltd*[151], Starke J said that "[t]he privilege is not absolute: in case a person is attacked the answer must be relevant to the attack and must not be actuated by motives of personal spite or ill will independent of the occasion on which the communication was made". In *Guise v Kouvelis*[152], Dixon J, although in dissent in the result, observed that "unless the words complained of were so foreign to the occasion that they must be held extraneous or irrelevant, the rest is all matter for the jury." "The rest", plainly, is evidence going to malice, which was at that time the province of the jury.

133 Likewise, in *Penton v Calwell* it was held that if the occasion exists, the protection extends to communications relevant to the matter which gives rise to the occasion[153]. Latham CJ and Williams J said that, when a person has been seriously and abusively attacked, "the terms of his reply are not measured in very nice scales, but excess in reply may so exceed a reasonable view of the necessities of the occasion as to provide evidence from which malice may be inferred."[154]

134 In *Penton v Calwell*, Dixon J had held that the form of the defamation took it outside the privilege claimed for the occasion[155]. It is apparent that his

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148 *Law and Practice of Libel and Slander in a Civil Action*, (1924).

149 Gatley, *Law and Practice of Libel and Slander in a Civil Action*, (1924) at 262.

150 Gatley, *Law and Practice of Libel and Slander in a Civil Action*, (1924) at 264.

151 (1938) 59 CLR 503 at 516.

152 (1947) 74 CLR 102 at 118.

153 (1945) 70 CLR 219 at 242 per Latham CJ and Williams J, 250 per Starke J.

154 *Penton v Calwell* (1945) 70 CLR 219 at 243.

155 *Penton v Calwell* (1945) 70 CLR 219 at 234.

Honour considered the newspaper editor's invitation to sue to have this effect, whereas the Full Court considered that it did not prevent the defence arising, there being no inconsistency between the invitation to sue and the operation of the defence[156].

135 In the course of his reasons, Dixon J said that the defendant might, in the exercise of the privilege, impugn the truth of the charges and even the veracity of the attacker "if it be commensurate with the occasion."[157] Of itself this statement is not strong support for an additional test such as proportionality, given in particular his Honour's approach to the operation of the privilege in *Guise v Kouvelis*.

136 Such a test was not at the forefront of the concerns expressed by his Honour in *Penton v Calwell*. His Honour clearly considered that the invitation to sue denied the defence, in large part because it showed that the newspaper editor's response was not directed to the appropriate audience, the public. His Honour said that "the purpose of the privilege is to enable the defendant … freely to submit his answer … to the public to whom the plaintiff has appealed"[158] and "[t]he foundation of the privilege is the necessity of allowing the party attacked free scope to place his case before the body whose judgment the attacking party has sought to affect. In this instance, it is assumed to be the entire public."[159] In any event, the Full Court did not agree with his Honour's view that the challenge or invitation to sue was not for the purpose of self-defence and relevant thereto[160]. Latham CJ, Williams and Starke JJ held that the language used by the defendant in repelling the defamatory accusations fell to be considered in connection with malice[161].

137 More recently, the statement of Dixon J in *Guise v Kouvelis*[162] that, "unless the words complained of were so foreign to the occasion that they must

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156 *Penton v Calwell* (1945) 70 CLR 219 at 245 per Latham CJ and Williams J, 247-248 per Rich J, 250 per Starke J.

157 *Penton v Calwell* (1945) 70 CLR 219 at 234.

158 *Penton v Calwell* (1945) 70 CLR 219 at 233.

159 *Penton v Calwell* (1945) 70 CLR 219 at 233-234.

160 *Penton v Calwell* (1945) 70 CLR 219 at 244-245 per Latham CJ and Williams J, 250 per Starke J. See also at 247-248 per Rich J.

161 *Penton v Calwell* (1945) 70 CLR 219 at 243 per Latham CJ and Williams J, 250 per Starke J.

162 (1947) 74 CLR 102 at 118.

be held extraneous or irrelevant, the rest is all matter for the jury", was approved in *Cush v Dillon*[163]. And in *Bashford*[164], it was held that the court below had been right to conclude that the defamatory matter was sufficiently connected to the occasion of privilege to attract the defence.

138 In *Cush v Dillon*, it was argued that the defamatory statements "went too far" and thus fell outside of the "umbrella of the applicable privilege"[165]. After quoting Parke B's statement in *Toogood v Spyring*[166], French CJ, Crennan and Kiefel JJ explained[167]:

> "*Adam v Ward* confirms that there may be limits to what may be said upon a subject on an occasion of qualified privilege and that those limits are to be tested by the connection of the statement to the subject."

In *Adam v Ward*, Earl Loreburn had observed that "the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion" and that anything "not relevant and pertinent to the discharge of the duty … or the safeguarding of the interest which creates the privilege will not be protected."[168] It may be necessary for the trial judge to consider whether the defendant has published something "beyond what was germane and reasonably appropriate to the occasion".[169] Lord Dunedin spoke of a statement not within the privilege as one which was "quite unconnected with and irrelevant to the main statement"[170]; Lord Atkinson of "foreign and irrelevant matter"[171]; and Lord

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163 (2011) 243 CLR 298 at 310 [26].

164 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 378-379 [27].

165 *Cush v Dillon* (2011) 243 CLR 298 at 307 [17] per French CJ, Crennan and Kiefel JJ (footnote omitted).

166 See at [110].

167 *Cush v Dillon* (2011) 243 CLR 298 at 308 [19].

168 *Adam v Ward* [1917] AC 309 at 320-321.

169 *Adam v Ward* [1917] AC 309 at 321.

170 *Adam v Ward* [1917] AC 309 at 327.

171 *Adam v Ward* [1917] AC 309 at 340.

Shaw of Dunfermline of matter which was "not in any reasonable sense germane"[172].

139 In *Adam v Ward*[173], it was contended that the language to be used on a privileged occasion must be only "such as is reasonably necessary to enable the party making it to protect the interest or discharge the duty upon which the qualified privilege is founded" in order to have the protection of the defence. Lord Atkinson said, emphatically, that "this is not the law"[174] and Lord Finlay LC considered that excessive language went to the issue of malice[175].

140 In *Nevill v Fine Arts and General Insurance Company*[176] Lord Esher MR distinguished an excessive statement, otherwise connected to the privileged occasion, from one which has no connection. His Lordship said:

> "There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it. Instances have been put during the argument of cases where a defendant on an occasion which is privileged as between himself and some other person makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion, in which case, of course, that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion. But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice."

Reference was made to this passage in *Cush v Dillon*[177], where it was then said[178]:

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172 *Adam v Ward* [1917] AC 309 at 348.

173 [1917] AC 309 at 334-335.

174 *Adam v Ward* [1917] AC 309 at 335.

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

176 [1895] 2 QB 156 at 170.

177 (2011) 243 CLR 298 at 309-310 [24].

178 (2011) 243 CLR 298 at 310 [25] (footnotes omitted).

> "The inquiry which precedes that of actual malice is undertaken in order to determine the boundaries of the privilege, by reference to the duty or interest which gave rise to it. It may be said to involve an objective assessment. It is not to be confused with an inquiry as to whether a person was actuated by malice in using exaggerated words. As Earl Loreburn observed in *Adam v Ward*, a statement which exceeds the occasion may be evidence of malice, but 'the two things are different'."

Conclusions regarding relevance and privilege

141 The attacks upon 2GB were serious. They accused it and certain of its hosts of racism and of inciting hatred. 2GB was entitled to address the public in response, to vindicate its reputation and interests. In doing so it was permitted some scope in achieving these objectives, so long as its responses were relevant to the attack and to the vindication of its reputation as affected by the attack.

142 Imputations (a), (b) and (c) call the attention of the public to Mr Trad's own conduct and motives. It does not matter to the defence that Mr Morrison may have been mistaken about whether the reporter in fact feared for his safety. The essential point was that Mr Trad himself appeared to fuel fear and hatred against 2GB, which was the very accusation he had directed against it. The three imputations suggest hypocrisy upon his part and that his true purpose in making the attack on 2GB was to incite racism and violence. These counter-accusations are directly relevant to what Mr Trad had levelled at 2GB and it was entitled to reply in this way. The statements challenged his credibility and cast doubt upon his motives for attacking 2GB.

143 Imputations (a), (b) and (c) also provide the context for imputations (d) and (g), that Mr Trad is "dangerous" and "disgraceful". Imputations (d) and (g) may also be viewed as linked to the statements that Mr Trad does not represent the views of the Muslim community and presents misinformation, particularly about issues concerning that community (imputation (j)). They are likewise responses addressed to the public which suggest that he is not to be trusted in what he says.

144 Imputations (h) and (k) do not, however, have a proper connection to matters of attack upon 2GB, nor are they put forward as challenges to Mr Trad's credibility and therefore as supportive of 2GB's position. A "pest" (imputation (h)) is someone who is annoying and may be so because they interfere in matters which are not of their concern. It may therefore imply some officiousness in the person's conduct. But the attacks upon 2GB were not of this nature, as a comparison with 2GB's other responses shows. No link is evident between this statement and the attacks.

145 It is difficult to infer precisely what the jury understood by imputation (k). The terms of the imputation merely repeat the statement made by Mr Morrison

that Mr Trad attacks those who once gave him a privileged position. This may imply some kind of disloyalty, although it is far from clear who provided him with the position and what the position was. It was suggested in argument that it was the media, which had previously given him a platform from which to express his views. If this is the case, it is not a relevant response to the substance of the attacks upon 2GB nor does it pertain to anything concerning Mr Trad that might cast doubt upon the attack he made.

146 Imputations (h) and (k) are therefore not protected by the privilege. These imputations will therefore necessitate consideration of the defence of truth and in particular that of contextual truth.

Malice

147 Proof of malice requires that it be shown that a defendant was actuated by an improper motive, one foreign to the occasion and therefore destructive of the privilege[179]. In this case Mr Trad pleaded that 2GB had not made proper enquiries and had pleaded false and misleading particulars of truth. These allegations directed attention to the statements made by Mr Morrison, that the 2GB reporter present at the rally, Mr Glasscock, feared for his safety because of the conduct of Mr Trad. McClellan CJ at CL observed that, whilst 2GB did not lead evidence on the issue, the visual recording of Mr Trad's speech showed the 2GB reporter positioned in front of Mr Trad during his speech. His Honour found that the prominence of the reporter's position, his identification as a reporter from 2GB and the obvious hostility of the crowd towards 2GB may well have engendered a feeling of vulnerability in him. In these circumstances, his Honour considered that Mr Morrison may have come to an understandable, though erroneous, view that the reporter had felt it necessary to withdraw from a prominent position. His Honour was unable to conclude that Mr Morrison knew his remarks were wrong or that he was improperly motivated when he made them[180]. Although the Court of Appeal expressed reservations about the terms of his Honour's findings, it did not consider that the essential finding, that Mr Morrison had not been shown to have acted with malice, could be disturbed[181].

148 On this appeal, argument on behalf of Mr Trad was directed to the knowledge of Mr Glasscock as proof of malice. It was argued that Mr Glasscock would have known that the statement that he was concerned for his safety was

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179 *Roberts v Bass* (2002) 212 CLR 1 at 30-31 [75]-[76]; *Cush v Dillon* (2011) 243 CLR 298 at 311 [28].

180 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [146].

181 *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183 at 210 [118].

untrue. I am not satisfied that this argument was squarely raised at trial or on the appeal below. In any event it misunderstands the relevant issue at trial, which was not what Mr Glasscock may have later appreciated about what Mr Morrison had said. If 2GB were to be held vicariously liable, it would be because Mr Morrison was improperly motivated when he made the defamatory statements. The evidence did not permit such a conclusion.

149 I agree with the joint reasons that the respondent should be refused an extension of time to file a notice of contention on the issue of malice. I also agree that leave to file the notice of cross-appeal should exclude ground 2(f).

Truth

150 McClellan CJ at CL considered statements that had previously been made by Mr Trad on a number of topics, including racism, homosexuality, punishments for a wife's adultery and the responsibility some women should bear in the case of rape. This comprised, in part, Mr Trad's reflections upon what had been said by others on those subjects and included some controversial statements made by Sheikh Taj el-Din al-Hilali[182].

151 His Honour found that the defence of substantial truth (s 15) applied to imputations (b), (c), (d) and (g)[183]. 2GB did not seek to justify imputations (a) and (k) as substantially true and, in McClellan CJ at CL's view, failed to prove imputations (h) and (j)[184]. However, his Honour held that the defence of contextual truth (s 16) applied to these four imputations. His Honour held that, because imputations (b), (c), (d) and (g) were substantially true, imputations (a), (h), (j) and (k) did not occasion further injury to Mr Trad's reputation[185].

152 The approach generally adopted by his Honour in applying the defence of substantial truth was to consider whether the views expressed by Mr Trad would be acceptable to "right thinking" members of the Australian community[186]. His Honour's conclusions were expressed to follow upon the application of such a

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182 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [27]-[97].

183 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [129].

184 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [98], [121], [123], [129].

185 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [129].

186 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [20], [34], [45], [47], [51], [74], [82], [97], [104], [112].

test, even though at earlier points in his reasons his Honour had referred to "general community standards" as relevant[187].

153 The question raised by the defence, however, was not what such persons might think of Mr Trad's views. The question was whether he could be said to have incited people to commit acts of violence (imputation (b)); to have incited people to have racist attitudes (imputation (c)); and to be a dangerous (imputation (d)) and disgraceful (imputation (g)) individual, because of the views he had expressed. Only with respect to the more difficult of the imputations respecting the application of the defence, imputation (g), did his Honour conclude as a fact that Mr Trad was a disgraceful person[188]. His Honour's findings with respect to the other imputations did not reach a conclusion of the substantial truth of the defamatory imputations. They were limited to the opinion that right-thinking persons might have of his views.

154 Although applying the test of the views of right-thinking persons, his Honour made mention[189] of the decision of this Court in *Radio 2UE Sydney Pty Ltd v Chesterton*[190], where reference was made to the standards of the general community as applicable. In that case, it was observed that the expression "right-thinking", used in connection with the hypothetical referee of moral or social standards, had been criticised[191]. It was said that the expression should not be understood to involve particular moral or social standards, but to describe a person who shares the standards of ordinary, decent persons in the general community. By this means, views which would be considered unacceptable by such persons would be excluded from the hypothetical referee's consideration[192].

155 It is not apparent that his Honour applied such standards. His Honour's consistent references to "right thinking" persons, in an unqualified way and in the context of moral judgments upon the views expressed by Mr Trad, leads one to doubt that the standards of ordinary persons in the community were applied. Moreover, the proper question posed for the hypothetical referee was not addressed, as has been explained.

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187 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [14], [16]-[17], [20].

188 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [114].

189 *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [16].

190 (2009) 238 CLR 460 at 479 [43]; [2009] HCA 16.

191 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at 477-478 [39].

192 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at 477 [38], 478 [40].

156 The Court of Appeal observed the latter difficulty in much of his Honour's approach[193], with the result that the findings respecting the defence could not be sustained[194]. However, the Court of Appeal did not go further and either conclude the matter for itself or remit the matter for consideration on the correct basis, in the absence of a notice of contention inviting that course to be taken. I agree with the joint reasons that it will be necessary for the Court of Appeal to reconsider so much of Mr Trad's appeal as concerns the defences of substantial truth and contextual truth. It will be necessary for consideration to be given to the defence of substantial truth with respect to each of imputations (b), (c), (d) and (g). Although the defence of qualified privilege applies to these four imputations, their substantial truth will need to be considered in order that a conclusion as to the defence of contextual truth respecting imputations (h) and (k) may be reached. These latter imputations do not have the protection of the privilege.

Conclusion and orders

157 I agree with the orders proposed in the joint reasons, with one qualification. In my view the appellant should have its costs of this appeal and the proceedings below. It succeeded on the main issue, the application of the defence of qualified privilege, and on the issue of malice. Remitter of the issue of substantial truth, for the purpose of a final determination on imputations (h) and (k), was inevitable and does not constitute success on the part of the respondent such as to warrant denying the appellant its costs.

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193 *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183 at 202 [79], [81], 203 [86].

194 *Trad v Harbour Radio Pty Ltd* (2011) 279 ALR 183 at 203 [87].