HIGH COURT OF AUSTRALIA

FRENCH CJ,
HEYDON, CRENNAN, KIEFEL AND BELL JJ

TONY PAPACONSTUNTINOS APPELLANT

AND

PETER HOLMES A COURT RESPONDENT

Papaconstuntinos v Holmes a Court
[2012] HCA 53
5 December 2012
S319/2011

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

T K Tobin QC with R K Weaver for the appellant (instructed by Slater & Gordon Lawyers)

B R McClintock SC with R W Potter and M J Lewis for the respondent (instructed by Baker & McKenzie Solicitors)

CATCHWORDS

Papaconstuntinos v Holmes a Court

Defamation – Defences – Common law defence of qualified privilege – Respondent involved in proposal to invest funds in football club – Appellant was board member of affiliated club – Appellant opposed proposal – Respondent sent letter to appellant's employer conveying imputations defamatory of appellant – Defamatory statements made voluntarily and in protection of personal interests – Whether defence of qualified privilege required respondent to show "pressing need" to protect interests – Whether "pressing need" to be adjudged by reference to test of "reasonable necessity" – Consideration of *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366.

Words and phrases – "community of interest", "fairly warranted by any reasonable occasion or exigency", "pressing need", "qualified privilege", "reasonable necessity".

Defamation Act 2005 (NSW), ss 6(2), 24.

1 FRENCH CJ, CRENNAN, KIEFEL AND BELL JJ. In August 2005, South Sydney District Rugby League Football Club ("the Football Club") was experiencing some financial difficulty. The respondent, Mr Holmes à Court, and Mr Russell Crowe put forward a proposal by which they would contribute $3 million to the Football Club in exchange for a controlling interest in its management. Their proposal required the approval of its members at a general meeting.

2 The appellant, Mr Tony Papaconstuntinos, was at the relevant time a director of the South Sydney Leagues Club, a licensed club associated with the Football Club. He was also employed by the Construction, Forestry, Mining and Energy Union ("the CFMEU"). He was firmly opposed to the proposal regarding the Football Club.

3 An Extraordinary General Meeting of the members of the Football Club was called for 19 March 2006 for the purpose of voting on the proposal. Two days prior to that meeting, the respondent sent a letter which was the subject of the proceedings below. It was addressed to Mr Andrew Ferguson, the State Secretary of the CFMEU. The letter was expressed to be a formal complaint about the appellant, who was referred to as an official of the CFMEU. The evident concern of the respondent was that the appellant had recently contacted members of the Football Club "to repeat misleading information about the proposal which is being put to Members." The respondent said, "I am, frankly, at a loss to understand why Mr Papa has worked so hard to spread misinformation about the proposal." But the respondent then related a series of facts involving the appellant and his son, Mr Jamie Papaconstuntinos. An inference to be drawn from the respondent's doing so was that he considered that those facts provided the reason for the appellant's opposition to the proposal: the proposal would involve a change in the management of the Football Club and the prospect of disclosure of dealings concerning the appellant's son.

4 The focus of the respondent's allegations was the former employment by the Football Club of Mr Jamie Papaconstuntinos as an assistant coach. The respondent said that, having reviewed the accounts of the Football Club, "reconciled [Mr Jamie Papaconstuntinos'] CV and job description with other coaching staff", and interviewed senior members of the management of the Football Club, there was no doubt in his mind that Mr Jamie Papaconstuntinos was paid a salary well in excess of the salary normally paid for a person of his experience and for the position in question. It was said that he was paid a salary of approximately $60,000, when the usual rate was closer to $4,000. The respondent further said that Mr Jamie Papaconstuntinos' employment had been terminated when the Chief Executive Officer of the Football Club became aware of the overpayments. The respondent then raised questions as to whether the

payments were made to Mr Jamie Papaconstuntinos at a premium as "a reward for other activities, or a method of channelling funds to the CFMEU, or indeed to Mr Tony Papa." The respondent said that he was seeking Mr Ferguson's assistance in checking the facts that he had presented and asked that Mr Ferguson contact him that day.

5 As he had said in the letter, the respondent had conducted a due diligence exercise with respect to the operations of the Football Club. This had occurred in about August 2005. The respondent had also been told by the Chief Executive Officer of the Football Club that the salary paid to Mr Jamie Papaconstuntinos was to be met by sponsors of the club. The sponsors were construction companies. The trial judge in the Supreme Court of New South Wales, McCallum J, observed that these companies may have had a motive for keeping the CFMEU happy and found that the facts "were inherently suspicious."[1]

6 In those proceedings, to which the *Defamation Act* 2005 (NSW) ("the 2005 Act") applied, her Honour found[2] that the letter contained three defamatory imputations, namely, that the appellant, a board member of the South Sydney Leagues Club:

(a) "repeated information he knew to be misleading about the [respondent's] proposal to take a controlling interest in the [Football Club]";

(b) "was reasonably suspected by the [respondent] of corruptly arranging for funds meant for the [Football Club] to be channelled to himself"; and

(c) "was reasonably suspected by the [respondent] of corruptly channelling overpayments by the [Football Club] to the CFMEU."

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1 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [66].

2 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [18], [30], [32], [36]. See also in the Court of Appeal: *Holmes a Court v Papaconstuntinos* (2011) Aust Torts Reports ¶82-081 at 64,675 [33].

7 The respondent did not plead the statutory defence of qualified privilege provided by the 2005 Act, which contains a requirement of reasonableness[3]. He relied upon the defence at common law[4].

8 The defence of qualified privilege at common law has been held to require that both the maker and the recipient of a defamatory statement have an interest in what is conveyed[5]. This is often referred to as a reciprocity of interest, although "community of interest" has been considered a more accurate term because it does not suggest as necessary a perfect correspondence of interest[6]. The interest spoken of may also be founded in a duty to speak and to listen to what is conveyed.

9 McCallum J found that Mr Ferguson and Mr Brian Parker, who was the immediate supervisor of the appellant at the CFMEU and became aware of the contents of the letter, had an interest in receiving the information concerning the conduct of the appellant as an officer and employee of the CFMEU[7]. It may be inferred that her Honour considered that the allegations concerning the appellant's conduct in that capacity extended to his putting about misleading information regarding the proposal respecting the Football Club[8].

10 Her Honour also rejected the appellant's concession that the respondent had an interest in conveying the matter complained of by reason of his

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3 *Defamation Act* 2005 (NSW), s 30.

4 Which is unaffected by the *Defamation Act* 2005: see ss 6(2), 24.

5 *Cush v Dillon* (2011) 243 CLR 298 at 305 [11]; [2011] HCA 30; *Adam v Ward* [1917] AC 309 at 318 per Lord Finlay LC, 320-321 per Earl Loreburn, 334 per Lord Atkinson; although, Dixon J in *Mowlds v Fergusson* (1940) 64 CLR 206 at 214-215; [1940] HCA 38, and again in *Guise v Kouvelis* (1947) 74 CLR 102 at 125; [1947] HCA 13, does not appear to have considered that either a community, reciprocity or correspondence of interest was demanded by what Parke B had said in *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050].

6 *Howe & McColough v Lees* (1910) 11 CLR 361 at 369-370 per Griffith CJ; [1910] HCA 67.

7 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [64].

8 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [62].

participation in the proposal to be voted on[9]. However, when regard is had to the reasons which followed, it is evident that her Honour did not deny the existence of some interest on the part of the respondent; rather, her Honour did not consider that such interest as existed was sufficient to give rise to the defence of qualified privilege. Something more was required.

11 Her Honour clearly considered that the respondent was required to further justify his conduct in making the statements. Her Honour said that she found it difficult to accept that the respondent had an interest "that justified his publishing information on that subject to Mr Ferguson at the time that he did."[10] A justification, one infers, might have been present if there had been some "pressing need" for the respondent to protect his interests, because her Honour said that, "I do not think there was a pressing need for Mr Holmes à Court to protect his interests … by volunteering the defamatory information about the events surrounding the employment of Mr Jamie Papaconstuntinos several years earlier"[11]. Her Honour said[12] that she did not accept that the publication of the defamatory statements was warranted in furtherance or protection of the respondent's interests and concluded[13]:

> "Accordingly, adopting the words of Parke B in *Toogood v Spyring*[14] cited in *Bashford*[15] at [54], I do not think the publication of the defamatory statements as to Mr Holmes à Court's concerns about misuse of funds was fairly warranted by any reasonable occasion or exigency. For those reasons, I am not satisfied that the letter was published on an occasion of qualified privilege."

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9 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [62].

10 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [68].

11 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [69].

12 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [71].

13 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [72].

14 (1834) 1 Cr M & R 183 [149 ER 1044].

15 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366; [2004] HCA 5.

12 It is necessary to mention one further matter concerning her Honour's reasons. Because her Honour held that the respondent was not justified in making the statements by reference to some pressing need and an occasion for the privilege therefore did not arise, her Honour did not deal with the question of the relevance of the defamatory statements to the respondent's interests. Her Honour did say that, although in the respondent's mind the allegations may have explained the appellant's opposition to the proposal, this was a "tenuous connection that afforded no basis for volunteering information on the subject to Mr Ferguson."[16] However, her Honour was here speaking of the respondent's purpose in making the statement and the fact that it provided no justification for proffering the information, rather than identifying any lack of connection between the allegations and the respondent's interests. Because of the approach taken by her Honour, no objective assessment was undertaken of the sufficiency of any such connection and the issue of relevance was not raised on the appeal to the Court of Appeal of the Supreme Court of New South Wales and does not fall for consideration by this Court.

13 Putting to one side the requirement of some immediacy of harm to the respondent's interests, a "pressing need", there can be no doubt that the respondent had an interest which would found the privilege. In the Court of Appeal, McColl JA[17] identified the respondent's interest as lying in the proposal respecting the Football Club succeeding and not being thwarted by a person who was possibly motivated by a desire to prevent exposure of his misconduct. Allsop P added[18] that the letter sent by the respondent to Mr Ferguson was clearly sent in order to bring about Mr Ferguson's intervention. His Honour observed that Mr Ferguson had previously said that the affairs of the Football Club were not union business. The letter might have made them so and caused Mr Ferguson to attempt to bring the appellant to heel. An intervention by him even at a point so close to the vote might have been decisive.

14 In reasoning as she did concerning the availability of the privilege, McCallum J applied what had been said by McHugh J in *Bashford v Information Australia (Newsletters) Pty Ltd*[19] concerning defamatory statements which are

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16 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [70].

17 *Holmes a Court v Papaconstuntinos* (2011) Aust Torts Reports ¶82-081 at 64,697 [145].

18 *Holmes a Court v Papaconstuntinos* (2011) Aust Torts Reports ¶82-081 at 64,671 [9].

19 (2004) 218 CLR 366.

volunteered. It may be inferred that her Honour did so because his Honour's views had been followed by the Court of Appeal. McCallum J observed[20] that McHugh J's statement of principle respecting voluntary statements had been cited with approval in decisions of the Court of Appeal in *Goyan v Motyka*[21], *Lindholdt v Hyer*[22] and *Bennette v Cohen*[23]. What was said in those cases was the subject of some comment in the judgments of the Court of Appeal in this matter[24], but it is not necessary for the purposes of this appeal to survey it.

15 In *Bashford v Information Australia*, McHugh J said that different considerations applied in cases involving a volunteered statement and those where defamatory statements were made in response to a request for information. His Honour went on[25]:

> "Ordinarily the occasion for making a volunteered statement will be privileged only where there is a pressing need to protect the interests of the defendant or a third party or where the defendant has a duty to make the statement to the recipient. The common law has generally perceived no advantage to society in giving qualified privilege to volunteered statements in the absence of a pre-existing reciprocity of interest between the defendant and the recipient. It has taken the view that the reputation of the defamed should be preferred over the freedom to publish volunteered but defamatory statements that may or may not be true."

16 McHugh J was in dissent in *Bashford v Information Australia*, as McCallum J observed[26]. As the passage set out above discloses, it was his

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20 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [46].

21 (2008) Aust Torts Reports ¶81-939 at 61,392-61,393 [86].

22 (2008) 251 ALR 514 at 534 [92].

23 (2009) Aust Torts Reports ¶82-002 at 62,820 [21], 62,842-62,844 [145], 62,852 [206].

24 *Holmes a Court v Papaconstuntinos* (2011) Aust Torts Reports ¶82-081 at 64,670 [4] per Allsop P, 64,672 [12] per Giles JA, 64,672 [15]-[18] per Tobias JA, 64,689 [105] per McColl JA.

25 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 393 [73] (footnote omitted).

26 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [46].

Honour's view that, ordinarily, a volunteered statement will be privileged only where there is a "pressing need" to protect an interest or where there is a duty to make the statement. In a later passage his Honour accepted that an occasion might be privileged when the defendant has volunteered a statement, instead of answering a request, but said that the fact that the defendant has volunteered the statement is an important, and often decisive, factor in determining whether the occasion was privileged and the defence available[27]. In his Honour's view, where there is neither immediate danger to life nor imminent harm to person or property, the fact that a defamatory statement has been volunteered is likely to be decisive against a finding of qualified privilege[28].

17 The Court of Appeal (McColl JA; Allsop P, Beazley, Giles and Tobias JJA agreeing) held that the authorities did not support the view expressed by McHugh J, as to the decisiveness to the question whether an occasion of qualified privilege arises, of the fact that a statement for which there is no pressing need is volunteered[29].

18 In her Honour's reasons, McColl JA analysed each of the authorities referred to by McHugh J in connection with the making of voluntary statements[30]. Her Honour also dealt at some length with the decision in *Coxhead v Richards*[31], it having been suggested in argument that certain of the judgments in that case appear to be the source of the requirement that a defamatory statement which is volunteered be given in answer to some pressing need, on the part of the defendant, before the privilege will extend to it.

19 In *Coxhead v Richards*, a ship's mate wrote a letter to the defendant informing him that the ship's captain had been continuously intoxicated on a previous voyage of the ship, putting it and the crew at risk, and was to command

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27 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 394 [74].

28 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 395 [77].

29 *Holmes a Court v Papaconstuntinos* (2011) Aust Torts Reports ¶82-081 at 64,696 [140].

30 *Holmes a Court v Papaconstuntinos* (2011) Aust Torts Reports ¶82-081 at 64,690-64,692 [107]-[115].

31 (1846) 2 CB 569 [135 ER 1069].

the ship for a further voyage[32]. The defendant showed the letter to the owner of the ship, who dismissed the captain. The defendant had no interest in the ship or its crew and had received the information as a friend of the ship's mate, who had sought his advice as to what to do. The Court divided on the question whether the defendant had a duty to communicate the information to the ship owner in these circumstances.

20 Tindal CJ considered that the defendant had such a duty, one which would permit the owner to make his own investigations. Although the ship had not been due to sail before the end of the month, Tindal CJ considered the crew to have been exposed to a hazard and that the publication of the defamatory matter was a means of averting the danger[33]. Erle J also held that the privilege attached and that it was not necessary, to warrant a statement being made, that there be a relationship between its maker and its recipient[34]. In an analogous class of case, his Honour observed, the privilege may be founded upon "the interest of the receiver to know the character of the servant."[35] Cresswell J concluded that in the absence of a relationship with the ship owner, the defendant as a stranger could be under no duty to make the communication[36]. It was Coltman J who expressed his finding against the defendant as based on the voluntariness of the communication, from which he excepted only circumstances of "great urgency and gravity."[37]

21 McColl JA observed that Coltman J's condemnation of voluntary communications was not followed in later cases and that the views of Tindal CJ and Erle J in *Coxhead v Richards* were generally considered to be correct[38]. It is not necessary to repeat the references provided by her Honour. It is sufficient to observe that in the joint judgment in *Bashford v Information Australia* it was

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32 *Coxhead v Richards* (1846) 2 CB 569 at 570-572 [135 ER 1069 at 1070].

33 *Coxhead v Richards* (1846) 2 CB 569 at 598 [135 ER 1069 at 1081].

34 *Coxhead v Richards* (1846) 2 CB 569 at 607-609 [135 ER 1069 at 1084-1085].

35 *Coxhead v Richards* (1846) 2 CB 569 at 609 [135 ER 1069 at 1085].

36 *Coxhead v Richards* (1846) 2 CB 569 at 604 [135 ER 1069 at 1083].

37 *Coxhead v Richards* (1846) 2 CB 569 at 601 [135 ER 1069 at 1082].

38 *Holmes a Court v Papaconstuntinos* (2011) Aust Torts Reports ¶82-081 at 64,694-64,696 [128]-[139].

acknowledged that the voluntary nature of the undertaking of an identifiable duty or interest does not prevent an occasion for the privilege from arising. In the joint judgment it was said[39]:

> "The facts that the respondent voluntarily embarked on its publishing venture and charged subscribers for its Bulletin required no different answer. There will be cases where an occasion is privileged but where both maker and recipient of the matter complained of have voluntarily undertaken the reciprocal duties which make the occasion privileged."

22 *Bashford v Information Australia* concerned an article published in a periodical dealing with occupational health and safety issues to which persons subscribed[40]. The article contained a report of a court proceeding but incorrectly named the plaintiff, a director of one of the parties, as himself a party and as the publisher of an article said to contain misleading information. The principal issue in the proceedings was whether the necessary reciprocity of duty or interest was present, particularly given that the publisher of the periodical both volunteered the information and did so for profit. The majority concluded that there was a reciprocity of duty or interest such as to found the privilege, by reference to the social importance of the nature of the information disseminated in the publication[41], the fact that the information assisted subscribers to comply with their statutory obligations concerning occupational health and safety[42], and the publisher's contractual obligation to provide the information[43].

23 The present case does not involve any question of a duty or interest of the kind dealt with in *Bashford v Information Australia*. What was said by

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39 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 378 [25] per Gleeson CJ, Hayne and Heydon JJ.

40 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 377 [24].

41 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 377-378 [24].

42 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 421 [149].

43 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 377 [24], 419 [143].

McHugh J concerning voluntary statements was said in a different context. This case does not raise questions of whether a stranger can come under a duty to speak, so as to protect defamatory statements made in that process, as occurred in *Coxhead v Richards*. This case has been conducted only upon the basis that the respondent's own interests were sufficient to found the privilege.

24 The appellant concedes that this case is not analogous to, and does not raise the same questions as, *Bashford v Information Australia*. His argument accepts that the respondent had an identifiable interest in making the statements. Indeed, as will be seen, the argument emphasises the fact that the interest is purely personal for the purposes of a supposed distinction the law draws, in connection with qualified privilege, between statements motivated only by self-interest and those made under a duty to speak.

25 Despite the differences attending the decision in *Bashford v Information Australia*, the appellant contended that, in cases concerning personal interests alone, there may be identified in the authorities a requirement that there be a pressing need to protect the defendant's interests, in addition to the requirement that the defendant have some identified interest to protect. In the appellant's submission, the authorities support a principle of "reasonable necessity" which is to be applied in cases where it is sought to protect purely personal interests. The test of reasonable necessity to which the appellant refers is not, however, to be equated with a notion of "reasonableness" which, the appellant pointed out, is a statutory construct rather than a concept recognised by the common law of defamation. Rather, the test is said to operate to require a defendant, relying upon his or her personal interests to found the privilege, to establish that a reasonable person would have thought that publication was necessary to defend those interests.

26 On the appellant's argument, it is in the application of the test of reasonable necessity that a "pressing need" may be seen to be required in cases concerning the protection of self-interest, in order to justify a defamatory statement which is volunteered. Where information is not requested, a number of matters would need to be considered in order to determine whether the statement was reasonably necessary. These would include the degree and imminence of the harm to a defendant's interests and the availability of alternative means to protect them.

27 At a factual level, the appellant suggested that a lack of urgency in publishing the letter to Mr Ferguson was demonstrated by the respondent's alleged failure to return Mr Ferguson's calls following receipt of the letter. However, it may be thought that the respondent's failure to do so, given the success of the proposal at the meeting, reinforces not only the nature of the

interest, but its immediacy at the time the letter was sent. In any event, the present concern is the appellant's submission that a test of necessity, which takes into account degrees of urgency of action, may be deduced as a matter of principle and by reference to the authorities.

28 A test of reasonable necessity was said by the appellant to be evident from a passage from the judgment of Parke B in *Toogood v Spyring*[44] concerning qualified privilege:

> "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."

This passage, which appears at the conclusion of Parke B's discussion as to the circumstances in which qualified privilege may be available[45], is best understood as a statement as to the policy of the law respecting qualified privilege, albeit that it does identify certain qualities which a defamatory communication would have if it were to qualify for the privilege. In his argument the appellant relies, in the first place, upon the phrase "fairly warranted by any reasonable occasion or exigency" as supportive of the test for which he contends.

29 Although what was said by Parke B in *Toogood v Spyring*[46] with respect to the requirements of qualified privilege is often quoted, with approval, it is not a complete statement of the law on the subject. It should not be treated as if it were a statute[47]. It has been pointed out that the formulation in *Toogood v Spyring* was plainly developed with the facts of that case in mind and is not likely to have been intended as definitive[48]. Care must therefore be taken to

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44 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1050].

45 For the preceding discussion, see below at fn 51.

46 Parke B clearly drew upon the description of the privilege provided four years earlier in Starkie, *A Treatise on the Law of Slander and Libel, and Incidentally of Malicious Prosecutions*, 2nd ed (1830) at cxlii, as noted by Gummow J in *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 416 [137]; see also Mitchell, *The Making of the Modern Law of Defamation*, (2005) at 153.

47 See *Aktas v Westpac Banking Corporation* (2010) 241 CLR 79 at 88 [16]-[18]; [2010] HCA 25.

48 Mitchell, *The Making of the Modern Law of Defamation*, (2005) at 155.

avoid reading the words chosen as drawing fixed and certain boundaries around the privilege spoken of.

30 The appellant sought to derive notions of justification from the word "warranted". That justification was said to be provided by any "reasonable occasion or exigency". The appellant relied upon a definition of "exigency" as "urgent want or pressing necessity"[49]. Read as a whole, it was submitted, Parke B was referring to privilege attaching to communications in circumstances that reasonably cause, compel or necessitate action.

31 So far as concerns a requirement of further justification beyond the identification of an interest in or duty to make the defamatory statement, it is as well to bear in mind that before *Toogood v Spyring* the law presumed that defamatory statements were made maliciously. A defendant was required to rebut that presumption and in the process justify the making of the statement[50]. *Toogood v Spyring* changed that. It recognised that the law should treat some communications as privileged. To that end the law would not presume malice when the privilege attached to the communication. This may be seen from the discussion of Parke B which precedes the passage to which the appellant refers[51]. The requirement of justification did not arise where an interest or duty existed such as to found the privilege.

32 For these reasons, it is difficult to conclude that the words "fairly warranted" refer to a requirement that the communication be justified by the defendant. As a matter of language, it is not likely that the qualifying word "fairly" would have been used by Parke B had "warranted" been intended to mean "justified". Further, there is support for the view that the words "fairly

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49 *The Oxford English Dictionary*, 2nd ed (1989), vol 5 at 539.

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

51 "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": *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050].

warranted", in context, refer to the connection between the defamatory statements and the defendant's duty or interest[52]. That is to say, statements may be fairly warranted if they are relevant to the duty sought to be discharged or the interest sought to be protected.

33 In addition to the dictionary definition of "exigency" upon which the appellant relies, the dictionary also sets out meanings of the word which import less urgency, such as something that is "needed" or "required"[53]. It may readily be accepted that there must be a need for a communication before that communication can be said to be made in the discharge of a duty or for the protection of an interest. But it cannot be inferred from what was said in *Toogood v Spyring* that there must be a pressing need.

34 The appellant next focused upon the words "for the common convenience and welfare of society". It was in this connection that the suggested distinction between self-interest and duty was said to assume importance. The argument proceeds, that in cases involving only personal interests the law must recognise a limit beyond the mere protection of that interest. The question the appellant then poses is: when is a defamatory publication in defence of self-interest justified? The answer is said to be provided by the decision in *Norton v Hoare [No 1]*[54] and the requirement of reasonable necessity there referred to. There are a number of difficulties with this aspect of the appellant's argument.

35 In *Toogood v Spyring*, Parke B did not draw a distinction between the fulfilment of a duty and the protection of an interest for the purpose of determining whether a defamatory communication attracted the privilege. The appellant's suggested distinction is drawn from what was said by Lord Macnaghten, giving the advice of the Privy Council, in *Macintosh v Dun*[55].

36 That case involved information provided by a mercantile agency to one of its subscribers about the commercial standing and responsibility of a trader, for the purpose of assisting the subscriber to determine whether to extend the trader credit. Lord Macnaghten raised the question whether the protection which the law gives to communications "made in legitimate self-defence, or from a *bonâ*

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52 *Cush v Dillon* (2011) 243 CLR 298 at 307-308 [18]-[19].

53 *The Oxford English Dictionary*, 2nd ed (1989), vol 5 at 539.

54 (1913) 17 CLR 310; [1913] HCA 51.

55 (1908) 6 CLR 303; [1908] AC 390.

fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people?", and did so by reference to the welfare of society and the interests of the community[56]. It was held that it should not, contrary to the decisions of this Court[57] and the Supreme Court of New South Wales[58]. The decision in *Macintosh v Dun* was distinguished by this Court two years later in *Howe & McColough v Lees*[59], where it was held that members of an association of stock salesmen had an interest in receiving information concerning defaulting purchasers. The facts of that case do not seem materially different from *Macintosh v Dun*. As was observed in *Bashford v Information Australia*[60], in both cases the publisher had a profit motive, but only in *Howe & McColough v Lees* was the privilege held to arise. The difference of outcome, it was suggested, may be explained by the view taken by Lord Macnaghten in *Macintosh v Dun* of the nature and source of the information concerned and the application of public policy considerations arising in connection with its communication[61].

37 The correctness of the resort to public policy in *Macintosh v Dun* need not be considered here. That decision does not stand for any proposition about self-interest effecting some further limitation upon the operation of the privilege. So far as concerns an apparent condemnation of self-interest, born of motives of profit, it was said in *Bashford v Information Australia*[62] that it would be wrong to isolate the element of profit from what was said in *Macintosh v Dun* and then

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56 *Macintosh v Dun* (1908) 6 CLR 303 at 306; [1908] AC 390 at 400.

57 *Dun v Macintosh* (1906) 3 CLR 1134; [1906] HCA 24.

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

59 (1910) 11 CLR 361 at 371 per Griffith CJ (with whom Barton J agreed at 372), 373-374 per O'Connor J, 398-399 per Higgins J.

60 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 376 [18].

61 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 375 [15]-[16], 376 [20]; see also *Howe & McColough v Lees* (1910) 11 CLR 361 at 371.

62 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 375 [16].

conclude that it will in every case deny the defence of qualified privilege. Other elements were present in that case.

38 The modern emphasis in the formulation of the defence of qualified privilege is upon duties and interests rather than the state of mind of the defendant[63], the latter of which would include the defendant's motive. If the defendant has a legitimate interest which the defendant seeks to protect in making the defamatory statement, the occasion for the privilege arises. There is no case which holds that self-interest operates as a disqualification or requires something more, such as some compelling need or urgency, to justify a statement. In *Howe & McColough v Lees*, it was argued that the privilege could not apply because no dealing was proposed or imminent between the plaintiff and any potential sellers and, thus, the sellers lacked the requisite interest in knowing about the plaintiff's credit history. Higgins J rejected this argument. His Honour did not see why this prevented the statement from being "fairly warranted by a reasonable occasion or exigency". It was sufficient that the plaintiff could bid at any future auction[64].

39 The decision in *Norton v Hoare [No 1]*[65] does not provide support for the application of a test of whether it was reasonably necessary to make a defamatory statement at the time the statement was made. Insofar as that decision suggests as necessary some limitation upon defamatory words used in response to an attack, the test it speaks of is not of the same kind as that for which the appellant contends.

40 *Norton v Hoare [No 1]* concerned an application for leave to amend a pleading which raised a defence of qualified privilege, parts of which had been struck out. The plaintiff had published, in a newspaper, an attack upon the defendant and his newspaper and the defendant had responded by publishing in his newspaper the defamatory material complained of. The defendant pleaded that it was published for the purposes, inter alia, of the "reasonable and necessary" defence of himself and his property in the newspaper[66]. The central

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63 *Harbour Radio Pty Ltd v Trad* (2012) 86 ALJR 1256 at 1264-1265 [30] per Gummow, Hayne and Bell JJ; 292 ALR 192 at 201; [2012] HCA 44; see also Mitchell, *The Making of the Modern Law of Defamation*, (2005) at 162.

64 *Howe & McColough v Lees* (1910) 11 CLR 361 at 396.

65 (1913) 17 CLR 310.

66 *Norton v Hoare [No 1]* (1913) 17 CLR 310 at 311-312.

question on the appeal was whether the defence of qualified privilege extended to the protection of property.

41 In a passage upon which the appellant relies, Barton ACJ[67] drew an analogy with the level of physical response which the law allows by way of self-defence, namely, what is reasonably necessary, and said that property may also be reasonably defended against attack. Similarly, in the joint judgment of Isaacs, Gavan Duffy and Rich JJ[68] it was said that an assault on the person or property of another may be justified if necessary for the protection of the defendant's property.

42 The analogy drawn in *Norton v Hoare [No 1]* with self-defence in criminal law is understandable given that that case concerned defamatory statements responsive to an attack, a circumstance remote from the present case. The appropriateness of the analogy and the use of concepts such as proportionality from the criminal law in the context of defamation law generally is another matter[69]. But these matters may be put to one side. The terms of the defence in *Norton v Hoare [No 1]* invited an enquiry as to whether the defendant's response was reasonable and necessary. Later authority such as *Adam v Ward*[70] may not suggest such a test as appropriate to a determination of whether an occasion of privilege arises or as a limitation upon the operation of the privilege. But assuming that such a test is appropriate, it does not arise for application in this case. The appellant's argument does not concern the quality of what the respondent said, that is, whether it was unreasonable because it was excessive, but rather whether there was some urgency or pressing need which required publication of the defamatory statements in protection of the respondent's interests.

43 The remaining authorities upon which the appellant relied do not provide support for a test of pressing need. The appellant relied upon cases and academic writings both prior and subsequent to *Toogood v Spyring* as indicative of a test of reasonable necessity. However, reference to the cases relied upon reveals that

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

68 *Norton v Hoare [No 1]* (1913) 17 CLR 310 at 322. Powers J at 326 agreed with both Barton ACJ and the joint judgment.

69 See *Adam v Ward* [1917] AC 309 at 321, discussed in *Cush v Dillon* (2011) 243 CLR 298 at 310 [25].

70 [1917] AC 309.

the test spoken of also concerns the reasonableness of what was said or how it was published, and not whether it was necessary for the defendant to make a statement at the time the statement was in fact made.

44 The first such case, *Brown v Croome*[71], predated *Toogood v Spyring* and should therefore be approached with caution, for reasons earlier mentioned concerning the law's prior assumptions as to malice[72]. In *Brown v Croome*, Lord Ellenborough said that the question was "whether the defendant was justified in publishing this advertisement to the world, when all the communication which was necessary might have been made in a manner less injurious."[73] The language of justification might be explained by the requirement, which then existed, that the defendant prove that the statement was not made maliciously. In any event, the question raised concerned whether the communication was excessive and that is not the question the appellant raises in the present case.

45 The passage to which the appellant refers in the reasons of Lord Denman CJ in *Tuson v Evans*[74] is closer to a test supported by later authority, which recognises that it is necessary and sufficient that there be a need on the part of the defendant to protect his or her interests. Lord Denman CJ spoke simply of a right to speak of matters relevant to the defendant's business which "a due regard to his own interest makes necessary".

46 What the appellant really seeks to identify, by reference to cases such as *Brown v Croome* and *Norton v Hoare [No 1]*, and despite his submission to the contrary, is a test of the reasonableness of the defendant's conduct as a further qualification of the privilege. This is evident from the reliance placed upon statements in an early text, where it was said that a defamatory statement is privileged when it is necessary to protect one's own interests, but that a person must be compelled to employ the words complained of: "If he could have done

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71 (1817) 2 Stark 297 [171 ER 652].

72 At [31].

73 *Brown v Croome* (1817) 2 Stark 297 at 299 [171 ER 652 at 653].

74 (1840) 12 Ad & E 733 at 736 [113 ER 991 at 993].

all that his duty or interest demanded without libeling or slandering the plaintiff, the words are not privileged."[75]

47 This text was published before *Adam v Ward*, which settled much of the law concerning qualified privilege. Judgments in *Adam v Ward* cast doubt upon such statements. As the appellant himself recognised, Lord Atkinson in particular said, if somewhat emphatically, of an argument that the law generally requires that a statement be reasonably necessary, that "this is not the law."[76] Lord Finlay LC said that excessive language went to the issue of malice[77]. It was pointed out in *Cush v Dillon*[78] that the reasons in *Adam v Ward* may be understood to speak of relevance as a limitation on what is said on an occasion of qualified privilege, and to require that the statement be properly connected to the interest or reputation the defendant seeks to protect or vindicate. It would follow that if a statement were irrelevant, it would be unnecessary.

48 In any event, and to repeat what has been said earlier in these reasons, the appellant's grounds of appeal do not raise questions as to whether a test of reasonableness might apply to the defendant's statement. The suggested requirement of pressing need is not logically supported by such a test. A test of reasonableness, if appropriate to the defence of qualified privilege, would be directed to statements which go too far, whereas an enquiry as to whether there was a pressing need for the defendant to make the defamatory statements would address whether it was necessary to make the statements at the time that they were made.

49 The appellant further submitted that a test of reasonable necessity might furnish a method for determining whether the making of a defamatory statement was for "the common convenience and welfare of society"[79]. It was this enquiry which Lord Macnaghten was said to have been addressing in *Macintosh v Dun*.

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75 Newell and Newell, *The Law of Slander and Libel in Civil and Criminal Cases*, 3rd ed (1914) at 614 §607.

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

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

78 (2011) 243 CLR 298 at 308 [19]-[21] per French CJ, Crennan and Kiefel JJ.

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

However, it is to be observed that in *Bashford v Information Australia*[80] McHugh J himself said that, in determining the question of reciprocal duty or interest, the task for the court is not to consider whether the communication is for the common convenience and welfare of society, but rather to "consider all the circumstances and ask whether *this* publisher had a duty to publish or an interest in publishing *this* defamatory communication to *this* recipient." McCallum J in this case observed what McHugh J had said in this regard and drew from it that the "common convenience and welfare of society" is to be understood as the result of conferring the protection of the defence, but not the determinant of whether the occasion is privileged[81].

50 It is commonplace in judgments to find reference made to what was said in *Toogood v Spyring*, concerning the basis for the privilege, by way of conclusion and confirmation that those purposes have been met in a particular case. As was explained in *Aktas v Westpac Banking Corporation*[82] and in *Cush v Dillon*[83], notions of public policy are the foundation of the privilege. The policy of the law is that freedom of communication may in some circumstances assume more importance than an individual's right to the protection of his or her reputation. But this may not suggest as necessary a separate test of whether what is said in a particular case is a benefit or disbenefit to society. In any event, this case does not involve the application of some wider test concerning the welfare of society.

51 The sole proposition upon which the appellant's grounds of appeal depend is that the law requires the respondent not only to prove that both he and the recipients of his letter had an interest in the matters of which he spoke, but also to justify the publication of the letter by reference to there being some pressing need to protect his interests. The appellant has failed to identify any such requirement of the law.

52 The appeal should be dismissed with costs.

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80 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 389 [63].

81 *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903 at [42].

82 (2010) 241 CLR 79 at 89 [22], 108-109 [89]-[94].

83 (2011) 243 CLR 298 at 305 [12].

53 HEYDON J. Modern defamation statutes typically include a provision capping damages for non-economic loss, a provision making malice irrelevant to damages and a provision preventing the grant of exemplary and punitive damages. They also provide for many defences. Cui bono? Whom does the modern law of defamation assist? Not people in the position of the appellant in this appeal – the plaintiff at trial. It is rarely commercially wise for a poor plaintiff to sue a rich defendant over defamatory material published to a small number of people only. That is so even if, as here, the defamatory material alleges deceit and corruption, the defendant admits that the defamatory material is untrue, and the defendant makes no attempt to establish that the publication was reasonable. The appellant has lost this appeal and lost the case. But even if he had won the case, it is highly questionable whether he would have been financially better off than if he had never sued at all.

Background

54 *The dramatis personae*. The dramatis personae in the dispute underlying this lamentable litigation are as follows. In 2005, the respondent – the defendant at trial – was engaged, with a business partner, in a campaign to restructure the South Sydney District Rugby League Football Club ("the Football Club"). This proposed restructuring was sometimes called "the privatisation proposal". The proposal was to be considered at an Extraordinary General Meeting of the Football Club's members on Sunday 19 March 2006. It was a highly controversial proposal. For example, the celebrated Mr George Piggins, who had been associated with the Football Club for a very long time, was against it. So was the appellant. The appellant was a director of South Sydney Leagues Club, which was associated with the Football Club. He had become a director at Mr Piggins's invitation. The appellant was also an employee of the Construction, Forestry, Mining and Energy Union ("the CFMEU"). Between 1 July 2003 and 17 September 2004, the Football Club had employed the appellant's son as an assistant coach. The appellant's immediate supervisor at the CFMEU was Mr Brian Parker. Mr Andrew Ferguson was the State Secretary of the CFMEU. Ms Jennifer Glass was Mr Ferguson's personal assistant. And Mr Nicholas Pappas was a former Chairman of the Football Club.

55 *The 17 March 2006 letter*. At 2.29pm on Friday 17 March 2006, two days before the Extraordinary General Meeting, the respondent faxed a letter to Mr Ferguson. The letter was also published to Mr Parker, Ms Glass and Mr Pappas. The trial judge found that the letter contained three imputations defamatory of the appellant. The first imputation was that the appellant "repeated information he knew to be misleading about the [privatisation] proposal". The second imputation was that the appellant "was reasonably suspected by the [respondent] of corruptly arranging for funds meant for the … Football Club to be channelled to himself." The third imputation was that the

appellant "was reasonably suspected by the [respondent] of corruptly channelling overpayments by the … Football Club to the CFMEU."[84]

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84 There were other parts of the letter which criticised the CFMEU, but the parts of the letter relevant to the imputations are:

> "Pursuant to our conversations recently, I would like to formally complain about the behaviour of an official of the CFMEU, [the appellant].
>
> I have spoken to you *previously* about my concerns about [the appellant's] use of the … Football Club for his own advancement and I am afraid I am under the impression that it has continued.
>
> As *recently* as last weekend, half an hour before the kick off …, [the appellant] called at least one voting [Football Club] Member to repeat misleading information about the proposal which is being put to Members.
>
> I am, frankly, at a loss to understand why [the appellant] has *worked so hard* to spread misinformation about our proposal.
>
> …
>
> Perhaps most seriously, I am concerned that [the appellant] has personally benefited from funds meant for the Football Club through the employment of his son … in an assistant coaching staff position. [His son] was employed by the club by Mr George Piggins in an assistant coaching position and his employment was terminated by [the Chief Executive Officer] when [he] became aware of the overpayments.
>
> … Specifically, [the son] was paid a salary of approximately $60,000 when the going rate for the role he was performing was closer to $4,000. I do not know whether these funds that were paid to [the son] at a premium were a reward for other activities, or a method of channelling funds to the CFMEU, or indeed to [the appellant].
>
> I am concerned that this chapter of Souths history is going to continue, partially, as a result of [the appellant's] *efforts and well funded campaign* to spread misinformation.
>
> I am seeking your assistance in checking the facts that I have presented, which are based on our very extensive due diligence of the Football Club's records collaborated with [sic] statements and telephone records of voting members (which I can supply at the appropriate time).
>
> …

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Some aspects of the respondent's position

56 Five preliminary matters may be noted about the respondent's position.

57 *No justification defence.* First, the respondent found the task of justifying what he had said too daunting. Section 25 of the *Defamation Act* 2005 (NSW) ("the Act") provides: "It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true." Although initially the respondent pleaded this defence of justification, he abandoned it. As discussed below[85], the respondent published an apology on the Football Club's website nearly nine months after the letter of 17 March 2006. In it, he admitted that the three imputations were false. However, the formal abandonment of the justification defence only took place when the respondent filed an Amended Defence in court on the first day of the trial, 17 February 2009. In his letter of 17 March 2006, the respondent had referred to the "very extensive due diligence of the Football Club's records collaborated with [sic] statements and telephone records of voting members". Evidently that "very extensive due diligence" had not been extensive enough to identify information capable of proving the abandoned plea of justification. Thus by the time of the trial, the respondent had conceded that he had published untrue material.

58 *No statutory qualified privilege.* Secondly, the respondent declined to plead the defence of qualified privilege that s 30 of the Act confers. Section 30(1) provides:

> "There is a defence of qualified privilege for the publication of defamatory matter to a person (the ***recipient***) if the defendant proves that:
>
> (a) the recipient has an interest or apparent interest in having information on some subject, and
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
>
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances." (emphasis in original)

Section 30(3) lists matters which the court may take into account when assessing whether a defendant's conduct in publishing defamatory matter about a person was reasonable in the circumstances. Some matters would have created problems

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I would respectfully request that I hear from you today." (emphasis added)

85 See below at [61].

for the respondent. For example, the matter raised by s 30(3)(e) is "whether it was in the public interest in the circumstances for the matter published to be published expeditiously". And the matter raised by s 30(3)(h) is "whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person". Hence not only had the respondent conceded that he had published untrue material, he had conceded that his conduct in doing so could not be defended as reasonable.

59 *No contact between the respondent and Mr Ferguson.* Thirdly, the respondent's letter of 17 March 2006 was written on corporate letterhead. It bore a telephone number. It ended: "I would respectfully request that I hear from you today." Mr Ferguson endeavoured to comply with that respectful request. On 17 March 2006, he left numerous telephone messages for the respondent marked urgent. He left his telephone on all weekend. The respondent did not return these calls. The respondent did not speak to Mr Ferguson about the letter until some days later. After a telephone conversation, a face-to-face meeting was arranged. In that meeting, Mr Ferguson repeated his earlier requests for evidence of the corruption imputations in the 17 March 2006 letter. He did not receive any. The respondent submitted that it was for the appellant to prove that the respondent had received and ignored Mr Ferguson's messages on 17 March 2006. That is not so. The respondent asked for Mr Ferguson's response that day.

60 Mr Ferguson's evidence in chief was that he responded to the letter on 17 March 2006 by leaving messages for the respondent's urgent attention. Mr Ferguson was not cross-examined to suggest that he had not done so. And Mr Ferguson was not cross-examined to suggest that he had received some indication that his messages would not come to the respondent's attention. The respondent did not deal with Mr Ferguson's attempts to contact him at all in his evidence. In the ordinary course of human affairs when a senior executive in a business like the respondent has requested that a person contact him, and that person leaves messages on the executive's telephone, it may be inferred that the executive received them. It was for the respondent to explain whether the messages came to his attention; if not, why not; and, if so, why he did not reply. The respondent did not do so.

61 *The late apology.* Fourthly, s 38(1)(a) of the Act provides that evidence that "the defendant has made an apology to the plaintiff" is admissible in mitigation of damages. On or about 7 December 2006, the respondent published an apology on the Football Club's website. That apology contained the passage: "I now accept that there was no substance to any of [the] allegations [in the 17 March 2006 letter against the appellant] and unreservedly withdraw them." Whatever this apology showed, it did not show a sudden attack of remorse. The apology was published nearly nine months after the letter. It was published nearly two months after the appellant had instituted proceedings. The apology did not show a spontaneous attack of remorse either. The apology was

apparently published after the respondent had filed a defence containing a plea of justification. That plea was not formally withdrawn until the defence was amended on the first day of the trial, 17 February 2009. And the apology was only provided after repeated requests by the appellant from 20 March 2006 right up until the time of publication.

62 *"Triviality".* Fifthly, the Amended Defence pleaded that the circumstances in which the publication was made meant that it was attended by "triviality". This is a surprising way to characterise the publication of one imputation alleging deceit and two imputations alleging corruption. Although the members of the audience to whom it was published were few in number, three of them were important – Messrs Ferguson, Parker and Pappas.

Qualified privilege at common law

63 Although the respondent did not plead the statutory defence of qualified privilege, he pleaded that the letter was published on an occasion of qualified privilege at common law.

64 *Parke B's test.* In *Toogood v Spyring*, Parke B said that the common law defence of qualified privilege applied to statements "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 this case that raised an "interest" issue. His Lordship also said: "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society"[86]. In this case that raised a "fairly warranted" issue. There is authority in this Court, not overruled by the Court of Appeal of the Supreme Court of New South Wales, that to satisfy the test for qualified privilege it is not necessary to prove that the publication advanced "the common convenience and welfare of society"[87]. As the trial judge said, "the common convenience and welfare of society" is the result of the defence, not the determinant of whether it applies. But the other expressions Parke B used remain part of the relevant test. They are abstract and general. But legal tests sometimes are. Parke B's expressions have been repeated many times[88]. They are not to be discounted. Nor are they to be

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86 (1834) 1 CM & R 181 at 193 [149 ER 1044 at 1049-1050].

87 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 389 [63]; [2004] HCA 5.

88 See, for example, *Macintosh v Dun* (1908) 6 CLR 303 at 305; [1908] AC 390 at 398-399; *Howe & McColough v Lees* (1910) 11 CLR 361 at 368, 372, 377 and 394; [1910] HCA 67; *Guise v Kouvelis* (1947) 74 CLR 102 at 109, 124 and 126; [1947] HCA 13; *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR

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read down so as not to overlap with other defences. Overlap is not here a sign of legal incoherence.

65 *The respondent's "interest" as found by the trial judge.* Initially, the respondent pleaded that he had "a social and/or moral duty" to publish the letter. But eventually he eschewed any reliance on the words "the discharge of some public or private duty" in Parke B's formulation. He contended that the publication was "in the conduct of his own affairs, in matters where his interest [was] concerned." That interest was to ensure the success of his campaign to privatise the Football Club.

66 The trial judge found that two recipients of the letter, Mr Ferguson and Mr Parker, had an interest in receiving the information because they were officials in the CFMEU. She said:

> "[The appellant] was an official of the CFMEU. As its name suggests, that is the union for workers in the construction industry. The information uncovered by [the respondent] was that [the appellant's son] was being paid a salary well in excess of the usual salary for coaches in the lower divisions at the … Football Club. Further, [the] Chief Executive Officer of the Football Club … had told [the respondent] that, when he first learned about the salary being paid, and questioned it, he was told not to worry because the salary was to be met by sponsors of the club. The sponsors were construction companies, who may be assumed to have a motive for keeping the construction workers' union happy. In my view, those facts were inherently suspicious."

However, the trial judge found it difficult to accept that the respondent had an interest in publishing information about misuse of the Football Club's funds at the time he did. Her Honour said:

> "I do not think there was a pressing need for [the respondent] to protect his interests … by volunteering the defamatory information about the events surrounding the employment of [the appellant's son] several years earlier".

She continued:

> "the information obtained as a result of the due diligence conducted by [the respondent] was, on its face, highly suspicious. However, those were events which had emerged, and been dealt with by the club, some time earlier. The premise of [the respondent's] communication of those events

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366 at 373 [9]; *Cush v Dillon* (2011) 243 CLR 298 at 307-308 [18]; [2011] HCA 30.

> to Mr Ferguson was that, in his mind, they afforded the explanation for [the appellant's] vigorous opposition to the proposal and the misinformation that [the appellant] had been spreading about it (according to [the respondent]). That, in my view, was a tenuous connection that afforded no basis for volunteering information on the subject to Mr Ferguson. I do not accept that [the appellant's] campaign against the bid, even if he was spreading what was perceived by [the respondent] as misleading information, was 'inexplicable' unless one considered the circumstances surrounding the employment of [the appellant's son]. An objective bystander, with no personal investment in the bid, would readily have accepted that the two camps simply had vastly different perspectives as to the merits of the bid and the best interests of [the Football Club].
>
> Further, I do not accept that the publication of those defamatory statements was warranted in furtherance or protection of [the respondent's] interest. The letter sought Mr Ferguson's 'assistance in checking the facts' presented, but there was no practicable opportunity for that to occur between receipt of the letter on the Friday before the vote and the Sunday when the vote occurred.
>
> Accordingly, adopting the words of Parke B …, I do not think the publication of the defamatory statements as to [the respondent's] concerns about misuse of funds was fairly warranted by any reasonable occasion or exigency. For those reasons, I am not satisfied that the letter was published on an occasion of qualified privilege."

67 The Court of Appeal read the trial judge as denying that the respondent had an interest to protect.

68 *Allsop P's approach to the "interest" question.* One approach to the "interest" question in the Court of Appeal was that of Allsop P (Beazley JA concurring). Their Honours disagreed with the trial judge's denial. Allsop P said[89]:

> "[The respondent] had a clear interest in the vote at the coming Extraordinary General Meeting. What was in effect an election or vote at that meeting concerned control of the affairs of an important social and community sporting institution. [The appellant] was an active opponent of [the respondent's] interests. The interest in the sending of the matter complained of was the real possibility or expectation that doing so would bring about the intervention of Mr Ferguson, or create circumstances to

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89 *Holmes a Court v Papaconstuntinos* (2011) Aust Torts Reports ¶82-081 at 64,671 [9].

> make it more likely that the intervention of Mr Ferguson would be brought about, in order to stop [the appellant] ringing and contacting people. Mr Ferguson had previously said that the affairs of the [Football Club] were not union business. The letter might reasonably be seen to make them so and cause Mr Ferguson to attempt to bring [the appellant] to heel. That the matter complained of was sent two days before the vote at the meeting did not deprive it of possible effect. Any intervention by Mr Ferguson in those two days may well have had some effect; in a close vote, some effect might be decisive."

69 This reasoning is not convincing in all respects.

70 First, the evidence did not show the appellant to be like some dog, which, though misbehaving, was capable of being brought to heel by a more senior official in the CFMEU.

71 Secondly, the respondent testified that in his letter he was "trying to get Mr Ferguson to investigate this to hopefully stop these calls that were taking place that were spreading, in our opinion, false information to the detriment of members." The issue is not what the respondent personally thought could or would happen. An inquiry into what was "*fairly warranted*" by any "*reasonable* occasion or exigency" is not limited to what defendants think. It depends on criteria beyond their mental states. "It may be said to involve an objective assessment."[90] An objective assessment of the relevant circumstances precludes a conclusion that the publication of the defamatory material was fairly warranted by any reasonable occasion or exigency. "It is not what [the] defendant says or believes that constitutes the privilege, but the proven facts and circumstances which, if sufficient, constitute in law the privilege."[91] Hence although this testimony about the respondent's mental state, given years after the event, was not challenged in cross-examination, it was not of central relevance to the present issue. In any event, it is difficult to reconcile with the respondent's unexplained failure to deal with any of the messages Mr Ferguson left in response to the respondent's request to Mr Ferguson to contact the respondent that day.

72 Thirdly, the letter does not indicate how the respondent thought Mr Ferguson would be able to stop the appellant calling members. Even if the appellant were capable of being brought to heel by Mr Ferguson, it does not follow that Mr Ferguson would have acted against the appellant at once. Mr Ferguson actually did three things. Mr Ferguson raised the letter with the appellant and others. Mr Ferguson sought, unsuccessfully, to comply with the

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90 *Cush v Dillon* (2011) 243 CLR 298 at 310 [25] per French CJ, Crennan and Kiefel JJ.

91 *Kinney v Fisher* (1921) 62 SCR 546 at 551 per Idington J.

concluding request in the letter – to contact the respondent that day. And Mr Ferguson sent a measured and thoughtful letter. The letter is dated 17 March 2006. In oral evidence, Mr Ferguson said that it was sent on that day after he had discussed the respondent's letter with the appellant. However, the terms of that letter suggest that while much of it was written on 17 March 2006, it was not sent until after the weekend. Mr Ferguson's letter made a number of specific and detailed refutations of the respondent's letter, which he described as "inappropriate and defamatory". Mr Ferguson's letter asked for an apology. Mr Ferguson accused the respondent of saying what he knew not to be true. This was not a light accusation, whether one views it in the light of the man who made it or in the light of the man it was made against. The accusation was not the response of a man likely to cave in to the respondent. Mr Ferguson's letter also pointed out that the CFMEU was neutral about the privatisation proposal, and that the appellant was free to express an opinion and campaign for or against it as he chose. In short, Mr Ferguson may be described as a very wicked animal. When someone attacked his union he defended it. This was not the letter of a man who would have responded instantly to the respondent's letter by preventing the appellant from drumming up a few more votes against the privatisation proposal. The respondent knew Mr Ferguson. People who hold the office of New South Wales State Secretary in trade unions like the CFMEU do not readily submit at once to the will of people like the respondent on the strength of unsupported insinuations. Whatever the respondent's hopes, he can have had no reasonable expectation that Mr Ferguson's reaction to his letter would have been to bring the appellant to heel at once.

73 *McColl JA's approach to the "interest" question.* Another approach to the "interest" question in the Court of Appeal was put thus. McColl JA (Allsop P, Beazley, Giles and Tobias JJA concurring) said[92]:

> "The [respondent] had a tangible interest in his takeover bid … succeeding. He had *recently* discovered that it was the [appellant] who was spreading what he regarded as misleading information about the bid. He formed the belief that the [appellant's] action was influenced by a concern to prevent new blood taking control of [the Football Club] and investigation [sic] the circumstances of the payments to his son. It was in those circumstances that he wrote the matter complained of. In my view the 'great mass of right-minded [people] in the position of the [respondent] would have considered' he had an interest, in the circumstances, to communicate with Mr Ferguson (and the CFMEU) in the terms he did". (emphasis added)

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92 *Holmes a Court v Papaconstuntinos* (2011) Aust Torts Reports ¶82-081 at 64,696 [141].

Neither the respondent's letter nor any other evidence supports the view that the respondent had only "recently discovered" that the appellant was spreading "misleading" information. It is true that one incident was described in the letter as happening "recently". But as a whole the letter implied that the spreading of misinformation had, to the respondent's knowledge, been happening for some time. That implication arises particularly from the words emphasised above[93]. The respondent's mention of the appellant's "efforts" and of the "well funded" misinformation campaign suggests knowledge going back into the past for a longer time than "recently". In examination in chief, the respondent said that he had been told by staff who had called members about the privatisation campaign that the appellant had been telling some members that the respondent might close the Football Club. The respondent said he had discussed this with Mr Ferguson. Mr Ferguson did testify that in early 2006 he and the respondent had met and discussed the respondent's concern about the appellant's involvement in the anti-privatisation campaign. He had had other conversations with the respondent, by telephone or face-to-face, on that subject. Mr Ferguson was not asked specifically about these matters. However, nothing in the respondent's testimony supports the view that the events were all recent or that he had only heard of them recently. The respondent testified that he had decided to send the 17 March 2006 letter the day before "when we kept getting information about this highly coordinated telephone campaign which was going on and that [the appellant] continued to make calls that were upsetting members." That shows that the supposed campaign was continuing, and that it was not learned of "recently".

74 *"Fairly warranted": the test.* But even if the respondent did have an interest to protect, as the Court of Appeal said he did, so that the first part of Parke B's test was satisfied, the respondent also had to show that the second part of Parke B's test was satisfied – that the publication of the defamatory material was "fairly warranted by any reasonable occasion or exigency". In this Court, the appellant directed his efforts to establishing the proposition that in cases involving "a volunteered communication to defend interest" there must be "a pressing need for the communication to be made". It is not necessary to consider whether that proposition is correct. It is sufficient to concentrate on Parke B's test. In that test the words "fairly warranted" mean "fairly grounded" or "fairly rendered allowable" or "fairly authorised" or "fairly sanctioned" or "fairly justified". Was there something fairly grounding the respondent's action in publishing the imputations? Was the publication fairly allowable? Was there fair authority for it? Was there anything fairly to sanction it? Can it fairly be said that there was some justifying ground or reason for it? In short, it is necessary to assess, in the light of a fairness criterion, whether the respondent

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93 See above at [55] n 84.

could give any satisfactory answer to the question: "By what warrant did you make those imputations?".

75 These inquiries are not directed to the question whether any qualified privilege which would otherwise exist would not arise because of malice, which the appellant failed to make out in this case. The inquiries assume that there was no malice. They are directed to whether a particular defendant can rely on the defence of qualified privilege. Establishing that defence is a lesser task than the task faced by a plaintiff seeking to establish malice. A plaintiff can fail to establish malice but nonetheless avoid the defence of qualified privilege. Parke B's statement relates to two interrelated inquiries. One is whether there is a privileged occasion at all. A second is whether the legitimate purposes of the occasion were exceeded. The Court of Appeal treated the trial judge as concentrating on the first. It may be that her Honour was concentrating on the second. Certainly, the factual analysis in relation to each issue can overlap. But both inquiries are to be distinguished from the question of malice. Thus in *Andreyevich v Kosovich*[94], Jordan CJ said:

> "If, at the trial of a defamation action, facts are established which satisfy the Judge that the *occasion* of the publication complained of was one of qualified privilege, the defendant is entitled to a verdict, save to the extent to which it appears to the Judge that the defamatory matter exceeded what was *reasonably incidental to the legitimate purposes of the occasion, or that its publication was wider than was reasonably proper to serve those purposes*, or (if, in the opinion of the Judge, there is evidence of express *malice*) unless it is established by the plaintiff to the satisfaction of the jury that the defamatory statement was animated by express malice." (emphasis added)

By the words "occasion", "reasonably incidental" and "malice", Jordan CJ separated out three inquiries. The first two are raised by Parke B's statement. An example of what is not "reasonably incidental to the legitimate purposes of the occasion" arises where the defamatory material is extraneous to the occasion because it is irrelevant or not germane. "'[R]elevance' is a question of judgment and degree"[95]. Brennan CJ said in *Bellino v Australian Broadcasting Corporation*[96]:

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94 (1947) 47 SR (NSW) 357 at 361-362.

95 *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 246 per Gaudron J; [1996] HCA 47.

96 (1996) 185 CLR 183 at 202.

> "The 'extraneous matter' may fail to gain protection for either of two reasons: the publication of the defamatory matter may be held to fall outside the occasion of qualified privilege … or the defamatory matter may show, in the context of the whole publication, express malice so as to destroy the privilege".

In this case the appellant's failure in relation to the third inquiry identified by Jordan CJ does not preclude success in relation to the first or second inquiries.

76 The distinction between the question whether an occasion was privileged and the question whether what happened on that occasion was reasonably incidental to its legitimate purposes can be drawn as follows. A privileged occasion is an occasion on which the defendant has an interest in making or a duty to make a defamatory statement[97]. The requirement that what was stated must have been reasonably incidental to the legitimate purposes of the occasion goes to how that privileged occasion was used. The latter requirement is different from malice[98], though the evidence going to that requirement can also go to the malice issue[99].

77 Further, contrary to what is sometimes said, the terms of the defamatory material are relevant to the question whether the occasion was privileged and to the question whether the defamatory matter exceeded what was reasonably incidental to the legitimate purposes of the occasion. In *Mowlds v Fergusson*[100], Dixon J quoted the following words of Earl Loreburn with approval[101]:

> "In considering the question whether the occasion was an occasion of privilege the Court will *regard the alleged libel*, and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published". (emphasis added)

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

98 See *Adam v Ward* [1917] AC 309 at 321; *Nevill v Fine Arts and General Insurance Co* [1895] 2 QB 156 at 170; *Watt v Longsdon* [1930] 1 KB 130 at 142; Brown, *The Law of Defamation in Canada*, 2nd ed (1994), vol 1 at 851 [13.7](1), n 1435.

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

100 (1940) 64 CLR 206 at 214; [1940] HCA 38.

101 *Baird v Wallace-James* (1916) 85 LJ PC 193 at 198 (also reported sub nom *James v Baird* 1916 SC (HL) 158 at 163-164). See also *Dundas v Livingstone & Co* (1900) 3 F 37 at 41 ("the nature of the words used") per Lord Moncreiff.

78 *"Fairly warranted": the facts.* The publication of the imputations in the 17 March 2006 letter was not fairly warranted by any reasonable occasion or exigency for the following reasons.

79 First, the corruption imputations related to events that had ended 18 months earlier. The respondent knew about those events from August 2005. As the letter itself acknowledges, the Football Club dealt with the problem in 2004 when the Chief Executive Officer of the Football Club terminated the employment of the appellant's son. To assert of the salary paid to the appellant's son, as the respondent did, "I do not know whether these funds … were … a method of channelling funds to the CFMEU, or indeed to [the appellant]" was not fairly warranted by the respondent's protection of his own interests. To call this assertion speculative is to pay it an exaggerated compliment. It is much weaker than speculative.

80 Secondly, the respondent's testimonial account of his motivation for sending the letter is inconsistent with the terms of the letter. In evidence the respondent said that the appellant was desperate to defeat the respondent's privatisation proposal in order to prevent control changing hands and past misdeeds being found out. The letter does not say that. It says something else. It says that if the appellant's misinformation campaign succeeded and the privatisation proposal failed, the corrupt activities of the past would continue. This is, incidentally, defamatory of the Chief Executive Officer and other officers of the Football Club having responsibilities to prevent corruption.

81 Thirdly, both the theory propounded in the respondent's testimony and the theory propounded by his letter rest on the proposition that there actually had been corruption in the past. Neither the testimony nor the letter positively asserted that there actually had been corruption in the past. Instead, they hinted at it. A direct assertion of corruption, backed by some evidence, might be fairly warranted by the occasion on which the respondent was seeking to press through his privatisation proposal by his letter, or by the exigency that he do so. But there was no direct assertion backed by evidence. There were instead snide expressions of what the respondent did "not know". Those expressions were not supported by any evidence which the respondent pointed to. They were not supported by any evidence which Mr Ferguson possessed before or found out after he received the letter. They were not supported by any attempt by the respondent at the trial to tender evidence. They were not fairly warranted by the need for the respondent to advance his interest in prosecuting the privatisation proposal. For example, the letter hinted that the corruption arising out of the large salary paid to the appellant's son had not been dealt with. That hint assumes that there had been corruption. Establishing that there had been corruption was not a task which the respondent ever attempted. If the respondent thought he had material supporting the corruption imputations arising out of his "very extensive due diligence", his legitimate interest lay in taking the matter to the police. Indeed, his interest lay in doing so well before 17 March 2006, not in

attacking his opponent and his opponent's family on that day. This lack of urgency is corroborated by the respondent's failure to respond to the attempts Mr Ferguson made to contact him despite having requested that Mr Ferguson make them. A sneering innuendo put by way of a claimed lack of knowledge as to whether there had been corruption in the past is far too "tenuous", to use the trial judge's expression, to explain either the appellant's opposition to the privatisation proposal or his supposed employment of misinformation to defeat it.

82 Fourthly, the letter demanded an immediate response from Mr Ferguson. There is no evidence to raise any question that Mr Ferguson was other than a man of blameless character. It must be accepted that Mr Ferguson did not know that the corruption imputations were correct. Within a short time he could do only what he actually did – ask the appellant and others about the letter. He could not possibly have conducted an exhaustive check of the "facts" asserted or insinuated by the respondent between 2.29pm and the close of business on Friday 17 March 2006. The respondent boasted in his letter of his organisation's "very extensive due diligence", which had been taking place for several months. It would be impossible for Mr Ferguson to match the respondent's efforts in a couple of hours, or even the couple of non-working days left before the Extraordinary General Meeting. That is particularly so since the respondent had given Mr Ferguson nothing concrete to work with. He had given Mr Ferguson no leads to follow. He had supplied no documents. He had not referred to what particular witnesses had said. The respondent testified that he had thought that Mr Ferguson's inquiries would cause Mr Ferguson to stop the appellant's misinformation campaign. But it is absurd to suppose that that goal could be achieved before the Extraordinary General Meeting by an inquiry which must inevitably have taken much longer than that period of time to complete.

83 As the trial judge said:

> "I confess that I have some difficulty understanding what basis [the respondent] had for expecting Mr Ferguson to intervene to 'stop the calls' within the short time frame between the sending of the letter and the Extraordinary General Meeting."

And as the trial judge also said:

> "Although he ostensibly sought Mr Ferguson's assistance in 'checking the facts' that he had presented, [the respondent] did not provide any of the material he had uncovered to Mr Ferguson. He offered to provide copies of some documents 'at the appropriate time', but requested a response 'today'. In those circumstances, there was little likelihood of Mr Ferguson's being able to provide the assistance sought."

84 Allsop P said that "the occasion fairly warranted the statement" because the "letter was not out of proportion to the importance of the interests of

Mr Ferguson and [the respondent]"[102]. Assuming that this "proportion" analysis is material, an absurd demand for the impossible to be achieved does take the letter out of all proportion. The fact that the respondent may have thought it could be achieved does not matter.

85 *Conclusion.* In short, even if it is assumed that the relations of the parties may have made some communication from the respondent to Mr Ferguson one which was published on an occasion of qualified privilege, the imputations actually communicated were not reasonably incidental to the legitimate purpose of the occasion. The privilege is defeated where the defendant "has published something beyond what was germane and reasonably appropriate to the occasion"[103]. The imputations here dealt "with matter not in any reasonable sense germane to the subject-matter of the occasion", and hence "the protection" which the privileged occasion would otherwise have afforded "is gone"[104]. They were not pertinent to the occasion. Nor were they "reasonably appropriate" to the occasion. This is demonstrated by the exaggerated and gratuitous character of the imputations, the lack of relationship between the imputations and any asserted support for them, the lack of relationship between the imputations and what the letter requested, and the unreality of what the letter requested. In *Bellino v Australian Broadcasting Corporation*, Dawson, McHugh and Gummow JJ said[105]:

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

That does not assist the respondent in this appeal. The three imputations in the letter were inextricably interlinked. The letter purported to advance the respondent's interests by stopping the appellant's misinformation campaign through an argument that if the campaign succeeded, the son's corruption would continue. The occasion was the respondent's protection of his interests in advancing the privatisation proposal. It was not germane or relevant or pertinent to that occasion to insinuate corruption, without directly asserting it and without indicating evidence for it, on the strength of a stale allegation which had been

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102 *Holmes a Court v Papaconstuntinos* (2011) Aust Torts Reports ¶82-081 at 64,671 [10].

103 *Adam v Ward* [1917] AC 309 at 321 per Earl Loreburn, cited in *O'Sullivan v Schubert* [1963] VR 143 at 149.

104 *Adam v Ward* [1917] AC 309 at 348 per Lord Shaw of Dunfermline.

105 (1996) 185 CLR 183 at 228.

dealt with by the Football Club authorities. And it was not germane or relevant or pertinent to the occasion to couple that insinuation with a request for an immediate response which was incapable of being given, which was very unlikely to have stopped the appellant's campaign, and which was very unlikely to confer any benefit on the respondent in relation to the privatisation proposal. The respondent did not merely make "excessive" statements having reference to the privileged occasion. He made statements which in a practical sense had no reference to the privileged occasion – no relationship with it, no relevance to it[106]. Hence the publication was not fairly warranted by any reasonable occasion or exigency.

Orders

86 The appeal should be allowed with costs, the orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside, and in lieu thereof there should be an order that the respondent's appeal to that Court be dismissed with costs.

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106 *Nevill v Fine Arts and General Insurance Co* [1895] 2 QB 156 at 170 per Lord Esher MR, approved in *Adam v Ward* [1917] AC 309 at 327-328 per Lord Dunedin.