SUPREME COURT OF QUEENSLAND

CITATION:	*Erglis v Buckley & Ors* [2003] QSC 440
PARTIES:	**WENDY ERGLIS** (plaintiff / respondent) **v** **MELISSA BUCKLEY** (first defendant / first applicant) **RACHAEL CRAWLEY** (second defendant) **LISA SHEARMAN** (third defendant / second applicant) **ALLISON LOVELL** (fourth defendant) **JUDY CUMMINGS** (fifth defendant / third applicant) **REBECCA MANNING** (sixth defendant) **JANINE GIBSON** (seventh defendant) **KYLIE ASH** (eighth defendant / fourth applicant) **JACQUI BOE** (ninth defendant) **RON MIDDLETON** (tenth defendant / fifth applicant) **MADONNA FUERY** (eleventh defendant) **STATE OF QUEENSLAND** (twelfth defendant / sixth applicant)
FILE NO:	SC No 2867 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	24 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2003
JUDGE:	Philippides J
ORDER:	**1. The particulars of knowledge and approval of hospital management in paragraphs 8(c)(iii), 8(c)(iv) and 8(d) of the Further Amended Statement of Claim be struck out.** **2. Paragraphs 12(a) and 13(a) of the Further**

Amended Statement of Claim be struck out.

3. **Particular (b) of paragraph 7 of the Amended Reply be struck out.**
4. **The words "public good, public interest and public benefit" in paragraph 9(b)(i) and (ii) of the Amended Reply be struck out.**
5. **Paragraph 10(a) of the Amended Reply be struck out.**
6. **The words "in the public interest or public benefit" in paragraph 10(c) of the Amended Reply be struck out.**
7. **Further particulars be provided of paragraph 12(b) of the Amended Reply.**

DEFAMATION – PRIVILEGE – PARLIAMENTARY PRIVILEGE – where plaintiff pleaded that a Minister tabled and read a document in Parliament thereby republishing defamatory matter – where such matter relied on as going to the scope of damages recoverable against the defendants in respect of the original publication – whether ss 8 and 9 of the *Parliament of Queensland Act* 2001 (Qld) breached by such pleading – whether pleading amounted to impeaching or questioning freedom of speech and debates or proceedings in the Assembly

PRACTICE – STRIKING OUT – *Uniform Civil Procedure Rules*, r 171 – whether reasonable cause of action disclosed – whether pleading unnecessary or had a tendency to prejudice or delay the fair trial of the proceeding – defamation proceedings

Bill of Rights 1688, Art 9
Parliamentary Privileges Act 1987 (Cth), s 16, s 16(3)

Defamation Act 1889 (Qld), s 6, s 7, s 10, s 16
Parliament of Queensland Act 2001 (Qld), s 8, s 9
Uniform Civil Procedure Rules, r 171

A J Grassby (1991) 55 A Crim R 419
Amann Aviation Pty Ltd v The Commonwealth (1988) 19 FCR 223
Australian Broadcastng Corporation v Chatterton (1986) 46 SASR 1
Bellino v Australian Broadcasting Corporation (1995-1996) 185 CLR 183
Blackshaw v Lord [1984] QB 1
Church of Scientology of California v Johnson-Smith [1972] 1 QB 522
Comalco Ltd v Australian Broadcasting Corporation (1983) 50 ACTR 1
Crampton v Nugawela (1996) 41 NSWLR 176
Cutler v McPhail [1962] 2 QB 292
Hamilton v Al Fayed [2001] 1 AC 395

Henning v Australia Consolidated Press Ltd [1982] 2 NSWLR 374
John v MGN Ltd [1997] QB 586
Koenig v Ritchie (1862) 3 F&F 413
Laurance v Katter [2000] 1 Qd R 147
Muller v Hatton [1952] St R Qd 150
Mundey v Askin [1982] 2 NSWLR 369
Penton v Calwell (1945) 70 CLR 219
Pepper v Hart [1993] AC 593
Prebble v Television New Zealand Ltd [1995] 1 AC 321
R v Jackson (1987) 8 NSWR 116
R v Murphy (1986) 5 NSWLR 18
Rost v Eswards [1990] 2 QB 460
Rowley v O'Chee [2000] 1 Qd R 207
Sims v Wran [1984] 1 NSWLR 317
Slipper v BBC [1991] 1 QB 283
Stockdale v Hansard (1839) 9 Ad & El 1
Thomson v Broadley [2000] QSC 100
Timms v Clift [1998] 2 Qd R 100
Uren v John Fairfax & Sons Ltd [1979] 2 NSWLR 287

COUNSEL: R V Hanson QC with P A Freeburn for the applicants
P J Favell with R J Anderson for the respondent

SOLICITORS: Crown Law for the applicants
Messrs Drakopoulos Black for the respondent

PHILIPPIDES J:

The application

[1] This is an application brought by the defendants to strike out parts of the Further Amended Statement of Claim ("the Statement of Claim") and the Amended Reply ("the Reply") pursuant to r 171 of the *Uniform Civil Procedure Rules*. The plaintiff, Ms Erglis, was employed as a nurse in the Bone Marrow Transplant Unit (Ward 9D) of the Royal Brisbane Hospital. She claims damages for defamation of her by the defendants, being the twelfth defendant, who owned and operated the hospital, and the remaining defendants, who were nursing staff working in Ward 9D and employees of the twelfth defendant ("the nursing defendants"). The plaintiff bases her claim on the publication of defamatory imputations concerning her contained in a document dated 5 December 2001, signed by the nursing defendants and addressed to the Minister for Health, the Honourable Wendy Edmond, on Queensland Health letterhead.

[2] It is alleged that the publication of the defamatory imputations by the nursing defendants occurred by the document of 5 December 2001 being sent by facsimile to the Minister and by the nursing defendants causing:

(a) the document to be given to senior medical and nursing staff of the hospital;

(b) the document and reproductions thereof (which differed in that they were not signed, nor on Queensland Health letterhead) to be brought to the attention of other Ward 9D staff; and

(c) the imputations to be brought to the attention of others entering Ward 9D, as a result of affixing a reproduction of the document to a bench top within the ward for several weeks after 5 December 2001.

[3] The twelfth defendant is sued on the basis that, through its officers, it also engaged in publication of the imputations, and on the basis of vicarious liability for the conduct of the nursing staff.

[4] The defendants admit most of the defamatory imputations, but raise defences of qualified privilege pursuant to s 16 of the *Defamation Act* 1889 and additionally allege that the plaintiff's action was not maintainable because of the application of the *Parliament of Queensland Act* 2001.

Paragraphs 12(a) and 13(a) of the Statement of Claim: The re-publication in Parliament

The submissions

[5] It is pleaded (in paragraph 13(a) of the Statement of Claim) that the facsimile copy of the document which was sent to the Minister was tabled and read in the Queensland Legislative Assembly by the Minister on 5 December 2001. The plaintiff claims (in paragraph 13(b)) that as a consequence, the imputations contained in the document became known to the public at large. The plaintiff also alleges (in paragraph 12(a)) that the defendants knew that the document or the facsimile copy of it would be republished by the Minister in a public forum and that as a consequence the defamatory imputations would become known to the public at large.

[6] Counsel for the plaintiff indicated that the re-publication by the Minister referred to in paragraph 13(a) is not intended to be relied upon as a further instance of defamation giving rise to a separate cause of action. Rather, it was indicated that paragraphs 12(a) and 13(a) are only relied upon as going to the extent of the publication of the original defamation and thus as relevant to the question of damages in respect of the original publication by the nursing defendants to the Minister. It was submitted that since a plaintiff is entitled to be compensated for damage to her reputation commensurate with the number of people to whom the publication was conveyed,[1] it is permissible for a plaintiff to prove the extent of communication of the defamatory matter. It was submitted that these matters also concern the issues of aggravated and exemplary damages.

[7] In pleading the re-publication in Parliament as going to the scope of damages recoverable against the defendants in respect of the original publication to the Minister, the plaintiff relied on authorities such as *Cutler v McPhail,*[2] *Sims v Wran,*[3]

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1 See *John v MGN Ltd* [1997] QB 586 at 607. See also *Crampton v Nugawela* (1996) 41 NSWLR 176 as to the "grapevine effect".

2 [1962] 2 QB 292 at 298, 299.

3 [1984] 1 NSWLR 317 at 320.

Slipper v BBC,[4] and *Timms v Clift.*[5] The effect of those authorities is outlined in *Gatley on Libel and Slander* 9th ed. at p154 as follows:

> "Where a defendant's defamatory statement is voluntarily republished by the person to whom he published it or by some other person the question arises whether the defendant is liable for the damage caused by that further publication. In such a case the plaintiff may have a choice: he may (a) sue the defendant both for the original publication and for the republication as two separate causes of action, or (b) sue the defendant in respect of the original publication only, but seek to recover as a consequence of that original publication the damage which he has suffered by reason of its repetition, so long as such damage is not too remote."

[8] The defendants acknowledged that the law dealing with the liability of an original publisher for a republication may have enabled the plaintiff to sue on the original publication, but seek damages for the subsequent republication.[6] However, it was contended that in this case, because the republication occurred in Parliament, the law dealing with the privilege, not of the defendants, but of Parliament will prevent the plaintiff from doing so. The issue raised by the defendants is not whether they are entitled to argue that the republication was protected under s 10 of the *Defamation Act* 1889. Rather, the defendants argue that paragraphs 12(a) and 13(a) of the Statement of Claim should be struck out on the basis that the plaintiff by those paragraphs seeks to impeach or question the freedom of speech, debates or proceedings in the Assembly, contrary to sections 8 and 9 of the *Parliament of Queensland Act* 2001. It was thus contended by the defendants that the plaintiff cannot present that part of her case the subject of paragraphs 12(a) and 13(a) without offending against s 8 of the *Parliament of Queensland Act* 2001.

[9] Sections 8 and 9 of the *Parliament of Queensland Act* 2001 relevantly provide:

> "**8 Assembly proceedings cannot be impeached or questioned**
>
> (1) The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.
>
> (2) To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection.
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> **9 Meaning of "proceedings in the Assembly"**
>
> (1) **"Proceedings in the Assembly"** include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.

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4 [1991] 1 QB 283 at 300.

5 [1998] 2 Qd R 100 at 106.

6 Although the defendants asserted that this is not certain referring to *"Australian Defamation Law and Practice"* at [52,055] and *Smith v Harris* there cited.

> (2) Without limiting subsection (1), **"proceedings in the Assembly"** include –
> …
> (c) presenting or submitting a document to the Assembly, a committee or an inquiry; and
> (d) a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry; …"

[10] It was said by the defendants that the plaintiff is seeking to impeach or question the freedom of speech during the debate in which the Minister read the letter, contrary to s 8 of the Act. It was further argued that the plaintiff's complaint about the publication in Parliament offends against that part of s 8 of the Act dealing with "proceedings in the Assembly", as defined in s 9 of the Act, because the plaintiff "complains about the words spoken by the Minister in the course of transacting business of the Assembly and she complains about the act of presenting and tabling the letter in the Assembly". The defendants argued that by claiming damages for what was said in Parliament, and republication of that in the press, the plaintiff seeks to criticise what was said in Parliament, seeks to criticise the Minister for defaming her in Parliament and "claims that what the Minister said about her in Parliament was unlawful and an actionable wrong (*Defamation Act* s 6, s 7)".

[11] Counsel for the plaintiff pointed to *Thomson v Broadley*[7] as authority that a pleading of this kind is maintainable. However, it is clear that that case did not determine the issue raised here concerning the effect of s 8 of the *Parliament of Queensland Act* 2001. Counsel for the plaintiff contended that the purpose of the pleading was not to impeach or question anything said or done in the Assembly, rather in pleading the matters in paragraph 13(a) it was intended merely to prove, as a historical fact, the republication in the Assembly, that being relevant to the claim for damages. Further, it was said that the plaintiff is not impeaching or questioning the words spoken or acts done in the Assembly or the documents tabled, but rather the imputations arising from the words spoken and contained in the document.

Should paragraphs 12(a) and 13(a) of the Statement of Claim be struck out?

[12] It is clear that no proceedings for defamation can be brought against the Minister in respect of the publication of any defamatory matter in the Assembly.[8] The evidence of the republication is not sought to be relied upon as a basis for proceedings against the Minister, nor in support of the cause of action against the defendants arising out of the original publication to the Minister.

[13] The issue which arises on this application is whether parliamentary privilege, the subject of s 8 of the *Parliament of Queensland Act,* operates so as to preclude reliance by the plaintiff on evidence of republication in the Assembly in seeking to recover, as a consequence of that original publication by the defendants, the damage suffered by reason of the republication in Parliament. In *Blackshaw v Lord*[9] a plaintiff was awarded damages which included damages in relation to the mention of the offending article in Parliament. The judge's direction, which included

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7 [2000] QSC 100.

8 See s 10 of the *Defamation Act* 1889, sections 8 and 9 of the *Parliament of Queensland Act* 2001; *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 at 529; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 338; *Hamilton v Al Fayed* [2001] 1 AC 395 at 404.

9 [1984] QB 1. See *Rost v Edwards* [1990] 2 QB 460 at 474.

reference to the evidence of the mention in Parliament, was approved on appeal. However, that case is of no real assistance since the issue of parliamentary privilege was not raised and there was thus no consideration of the issue of whether the direction involved an impeaching or questioning in breach of Article 9.

[14] The meaning of the word "impeached" was considered in *Rowley v O'Chee.*[10] McPherson JA, with whose judgement on this issue the other members of the Court agreed, held[11] that "impeach" had the meaning "impede, hinder or prevent," being the first meaning ascribed to the word in the Oxford Dictionary or the second meaning there ascribed, which although now obsolete was in current usage at the time the *Bill of Rights* 1688 was enacted. That is, to affect detrimentally or prejudicially or impair. "Impair" was the meaning adopted by Davies JA in *Laurance v Katter.*[12] Article 9 of the *Bill of Rights* and hence s 8 of the *Parliament of Queensland Act* 2001 prevents freedom of speech and debates or proceedings in the Assembly from being hindered, impeded or impaired in a court.[13]

[15] In *Church of Scientology of California v Johnson-Smith,*[14] Browne J observed that so far as the authorities are concerned, the words used in Article 9 of the *Bill of Rights* 1688 that freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament are very wide. His Honour noted that Blackstone in his *Commentaries on the Laws of England* interpreted the words as meaning that freedom of speech, and debates or proceedings in Parliament "ought to be examined, discussed or adjudged in that House to which it relates, and not elsewhere"[15] and that Lord Denman CJ in *Stockdale v Hansard* explained the words as meaning that "whatever is done within the walls of either assembly must pass without question in any other place,"[16] while Patterson J said "that whatever is said or done in either House should not be liable to examination elsewhere."[17] Browne J held that:[18]

> "… the scope of Parliamentary privilege extends beyond excluding any cause of action in respect of what is said and done in the House itself. … what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House."

[16] A contrary and narrower view of Article 9 was taken in *R v Murphy,*[19] that is, one that sought to limit parliamentary privilege so as to cover only cases where the maker of a statement in Parliament was sought to be made legally liable.

[17] At a Commonwealth level, the approach in *R v Murphy* as to the ambit of Article 9 of the *Bill of Rights* has been overridden by s 16 of the *Parliamentary Privileges Act*

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10 [2000] 1 Qd R 207.
11 [2000] 1 Qd R 207 at 222-223.
12 [2000] 1 Qd R 147 at 204.
13 *Rowley v O'Chee* [2000] 1 Qd R 207, per McPherson JA at 227.
14 [1972] 1 QB 522.
15 17th ed., (1830) vol 1, p 163.
16 (1839) 9 Ad & El 1 at 114.
17 (1839) 9 Ad & El 1 at 209.
18 [1972] 1 QB 522 at 529.
19 (1986) 5 NSWLR 18.

1987 (Cth), particularly s 16(3) of that Act. The *Parliament of Queensland Act* 2001 does not contain a provision such as s 16(3) of the Commonwealth legislation. However, it has been held that s 16(3) is merely declaratory of the effect of Article 9 of the *Bill of Rights* 1688 and that s 16 (3) contains the true principle to be applied,[20] although this proposition was questioned in *Laurance v Katter.* [21]

[18] Whatever be the position as to s 16(3) of the Commonwealth Act, I consider that the wide approach to Article 9 taken in *Church of Scientology* indicates the correct principle to be applied in respect of s 8 of the *Parliament of Queensland Act* 2001. The approach taken in *Church of Scientology* has been approved in a number of decisions in Australia in preference to the view in *R v Murphy*[22] and by the Privy Council in *Prebble v Television New Zealand*[23] and the House of Lords in *Pepper v Hart*[24]and *Hamilton v Al Fayed.*[25]

[19] In *Prebble v Television New Zealand*, Lord Browne-Wilkinson, who delivered the principal judgment, in confirming the approach taken in *Church of Scientology*, stated:[26]

> "In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: *Burdett v Abbot* (1811) 14 East 1; *Stockdale v Hansard* (1839) 9 Ad & El 1; *Bradlaugh v Gossett* (1884) 12 QBD 271; *Pickin v British Railways Board* [1974] AC 765; *Pepper v Hart* [1993] AC 593. As Blackstone said in his *Commentaries on the Laws of England*, 17th ed (1830) vol 1 p 163:
>
> > "the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere'."

[20] For those reasons, it was held:[27]

> "that parties to litigation by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting

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20 See *Prebble v Television New Zealand* [1995] 1 AC 321 at 333-334; *Hamilton v Al Fayed* [2001] 1 AC 395 at 403; *Amann Aviation Pty Ltd v The Commonwealth* (1988) 19 FCR 223 at 231.

21 [2000] 1 Qd R 147 per Fitzgerald P at 195, who doubted the proposition and Pincus JA at 198, who rejected it and held, at 200, that s 16 did not apply to defamation suits.

22 See *Australian Broadcastng Corporation v Chatterton* (1986) 46 SASR 1 at 18, 35-36; *R v Jackson* (1987) 8 NSWR 116 at 121; *A J Grassby* (1991) 55 A Crim R 419 at 430-432. See also *Amann Aviation Pty Ltd v The Commonwealth* (1988) 19 FCR 223 and *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1 at 5.

23 [1995] 1 AC 321 at 333.

24 [1993] AC 593.

25 [2001] 1 AC 395 at 407.

26 [1995] 1 AC 321 at 332; see also *Hamilton v Al Fayed* [2001] 1 AC 395 at 407.

27 *Prebble v Television New Zealand* [1995] 1 AC 321 at 337.

> (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading."

[21] In *Hamilton v Al Fayed,*[28] the House of Lords held, following the same approach, that:

> "The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submissions which challenge the veracity or propriety of anything done in the course of parliamentary proceedings".

[22] While Article 9 of the *Bill of Rights* should be construed widely,[29] it is clear that there is no absolute prohibition imposed on the use in court of anything said in Parliament. Evidence of debates or proceedings in Parliament may be used, consistently with Article 9, to prove what was said and done in Parliament as a matter of historical fact, provided that there is no questioning or impeaching of what was said or done.[30]

[23] In *Comalco Ltd v Australian Broadcasting Corporation*[31] Blackburn CJ held that:

> "the way in which the court complies with Art 9 of the Bill of Rights 1689, and with the law of the privileges of Parliament, is not by refusing to admit evidence of what was said in Parliament, but by refusing to allow the substance of what is said in Parliament to be the subject of any submission or inference. The court upholds the privileges of Parliament … by its control over the pleadings and the proceedings in court. "

[24] In *Church of Scientology*, Browne J[32] stated the general principle as being that extracts from *Hansard* must not be used in a way which might involve questioning, in a wide sense, what was said in the House as recorded in *Hansard*. It had been submitted by the Attorney-General in that case that:[33]

> "The court should in any event strictly limit the use of *Hansard* to prove the fact that a particular person at a particular date had referred to particular matters in the House of Commons. The extracts should be used solely to prove these facts and they should not be used to prove inferences which would reflect on the maker of any statement in the House."

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28 [2001] 1 AC 395 at 407.

29 See *Pepper v Hart* [1993] AC 593 at 638.

30 See *Mundey v Askin* [1982] 2 NSWLR 369 at 373; *Henning v Australia Consolidated Press Ltd* [1982] 2 NSWLR 374; *Uren v John Fairfax & Sons Ltd* [1979] 2 NSWLR 287; *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 at 527, 531; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337, where it was observed that some authorities on the scope of Article 9 betray confusion between the right to prove the occurrence of Parliamentary events and the embargo on questioning their propriety.

31 (1983) 50 ACTR 1 at 5.

32 *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 at 531.

33 [1972] 1 QB 522 at 527-528.

[25] What the plaintiff seeks to argue is that the republication in the Assembly was an intended consequence of the original publication and resulted in further damage to her in respect of which the defendants are responsible. The plaintiff thus seeks to adduce evidence of what was said and done by the Minister in the Assembly, namely the republication, in order to argue (either by direct evidence, cross-examination, inference or submission) that that conduct resulted in the plaintiff's reputation being damaged in a public forum. It forms the basis of complaint as to the broader extent of the damage to the plaintiff's reputation.

[26] The plaintiff does not seek to question the motives or intention of the Minister in republishing the imputations. However, it is apparent on the pleadings as they presently stand, that the plaintiff intends to rely on what was said and done in the Assembly, in order to ask that inferences be drawn and to make submissions concerning the adverse consequences for the plaintiff flowing from the Minister's conduct. The plaintiff thus seeks to prove inferences which reflect on the propriety of the Minister's conduct in that it is sought to be asserted that the plaintiff was adversely affected by that conduct because it exacerbated the damage to her reputation (albeit that compensation for such damage is sought against the defendants, rather than the Minister). The plaintiff's intended use of the evidence is thus not merely confined to proof of the republication as a matter of historical record. Furthermore, what the plaintiff seeks to do is no less a "questioning" of the Minister's conduct in the Assembly because the plaintiff seeks to sheet home liability for that conduct to the defendants as the original publishers, being precluded from suing the Minister.

[27] Moreover, in relying on the republication as a matter which it is argued ought to be reflected in greater damages against the defendants, the plaintiff seeks to impeach the freedom of speech and debates or proceedings in the Assembly. A Member must not be inhibited from speaking freely in the Assembly and taking part in proceedings in the Assembly because of the risk that such conduct may result in an increased award of damages against another. The freedom of speech, debate and proceedings in the Assembly would be hindered, impeded and impaired and detrimentally or prejudicially affected if such considerations influenced what was said and done in Parliament.

[28] Of course, where complaint is made that a person has been adversely affected by conduct in the Assembly, recourse is available through a right of reply,[34] which may be published in *Hansard*. Such a right of reply, it is asserted in the Defence, was exercised by the plaintiff and published in *Hansard* on 16 April 2002.

[29] I conclude that the plaintiff seeks to rely on the republication in the Assembly not as a historical fact, but in order to question and impeach what was said and done by the Minister. In those circumstances, I am of the view that the plaintiff is seeking to rely on the republication in a manner contrary to s 8 of the *Parliament of Queensland Act* 2001. It follows that paragraphs 12(a) and 13(a) of the Statement of Claim should be struck out.

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[34] See Resolution of the Queensland Legislative Assembly on 18 October 1995, reintroduced on 11 October 1996.

Paragraphs 8 and 9 of the Statement of Claim

[30] In paragraph 8 of the Statement of Claim, the plaintiff sets out the allegations of publication of the imputations by the nursing defendants. It is alleged that the publication occurred by the nursing defendants:

(a) causing a facsimile copy of the original document to be delivered to the Minister;

(b) causing the original document to be given to senior medical and nursing staff of the hospital for their comment or signature;

(c) causing the original document and reproductions to be brought to the attention of other Ward 9D staff; and

(d) causing a reproduction to be brought to the attention of other hospital employees, medical staff, patients, visitors and other invitees entering Ward 9D.

[31] In paragraph 9 of the Statement of Claim, the plaintiff pleads that the imputations were published by the nursing defendants with the knowledge, approval and assistance of "senior management staff from the hospital". The alleged involvement of the "hospital management" (who are identified) are particularised in paragraphs (a) to (i) of paragraph 9 as follows:

- Particulars (a), (b) and (d) detail their involvement in respect of the original document.

- Particular (c) details their involvement in respect of the faxing of the original document to the Minister.

- Particular (e) details their involvement in publishing the original document to senior medical and nursing staff.

- Particular (f) details their involvement in the circulation of the original document and the reproductions among Ward 9D staff.

- Particular (g) details their involvement in the insertion of a reproduction in the Ward 9D Communications Book.

- Particular (h) details their involvement in the placement of the original document on a bench in Ward 9D.

- Particular (h) details their involvement in the affixing of a reproduction to a nurses' station within Ward 9D.

[32] By paragraph 10, it is alleged that, by virtue of the matters set out in paragraphs 8 and 9 of the pleading, the twelfth defendant published the imputations in the original document, the facsimile copy and the reproductions. Alternatively, by paragraph 11, it is alleged that the twelfth defendant is vicariously liable for the actions of the nursing defendants and the hospital management in their publication of the original document, the facsimile copy and the reproductions.

[33] The first objection taken by the defendants concerned the particulars in paragraphs 8(c)(iii), 8(c)(iv) and 8(d) relating to the words "with the knowledge and approval of hospital management". It was said that those references are irrelevant,

unnecessary and repetitive of a like allegation in paragraph 9. I accept those submissions. The particulars of knowledge and approval of hospital management add nothing to paragraph 8 and with the exception of paragraph 8(d), are a repetition[35] of what is more appropriately contained in paragraph 9, which concerns the allegations as to the twelfth defendant's publication of the imputations. In so far as such matters are pleaded, they should be raised in paragraph 9. The particulars of knowledge and approval of hospital management in paragraphs 8(c)(iii), 8(c)(iv) and 8(d) should be struck out.

[34] Secondly, it was submitted by the defendants that, if the purpose of the allegations in paragraphs 8 and 9 is to allege that the Crown is responsible for the tort of those who signed the letter, all that is necessary is to plead that the nursing defendants were employees of the Crown (which is alleged in paragraph 3), that the letter was sent to the Minister of their department (which is alleged in paragraph 8(a)), and that the Crown is responsible for the publications (which is alleged in paragraphs 10 and 11). The allegations about "approval" and "knowledge" of other employees of the Crown, it was asserted, add nothing, are confusing and irrelevant and should be struck out. However, that argument fails to take into account that the plaintiff seeks to make the twelfth defendant liable not only vicariously, but also as a principal.

[35] The third complaint made was that the "senior medical and nursing staff" referred to in paragraph 8(b) seem to be the same as or include the "hospital management" or "senior administrative staff" referred to in paragraphs 8 and 9. As to this objection raised by the defendants, particulars should be provided of the persons referred to in paragraph 8(b). This raises a related matter of whether the plaintiff is alleging publication to individuals who are also in paragraph 9 said to be tortfeasors and if so whether that is maintainable. Consideration of that issue should await the provision of the particulars of paragraph 8(b).

Paragraph 7 of the Reply

[36] The defendants submitted that particular (b) of paragraph 7 of the Reply should be struck out as it pleads evidence. Paragraph 7 of the Reply responds to paragraph 14(f) of the Defence and alleges that the defendants were not invited by the Minister to put their response to the allegations raised in the Assembly by Mr Horan, the then leader of the Opposition, but instead that the letter was sent to the Minister at the instigation of the defendants.

[37] As a particular it is pleaded that:

> "The Clinical Nurse Consultant and the tenth defendant in a letter dated 10 December 2001 entitled 'Response to Ministerial Question Ward 9D visit to Minister' said "*The Health Minister, after discussions with the staff, asked what she could do to show and provide support for the unit. The nursing staff at the meeting asked if they could write a letter in response to these previous conferences and questions…*"

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35 The particulars in paragraph 8(c)(iii) are repeated in paragraph 9(h) and the particulars in paragraph 8(c)(iv) are repeated in paragraph 9(i).

[38] I accept the defendants' contention that what has been pleaded in the particular is a matter of evidence and should be struck out.

Paragraph 9 of the Reply – the defences of qualified privilege

[39] Paragraph 9 of the Reply is pleaded in response to paragraph 15 of the Defence which pleads a number of defences of qualified privilege. Paragraph 9 appears to be directed to putting in issue whether the defences are raised. (It is not directed to the question of good faith, as the defendants initially understood to be the case and as is therefore reflected in the defendants' written submissions).

[40] Thus, paragraph 9(a) of the Reply responds to paragraph 15(a) of the Amended Defence (which raises the defence in s 16(1)(c) of the *Defamation Act*) and puts in issue that the publication was for the purpose of the protection of the defendants' interests, (namely their reputation) or for the public good. Paragraph 9(a) of the Reply does require amendment in that that paragraph refers to "the public good requiring protection". Leaving aside that matter, I do not consider that there is any basis for this paragraph to be struck out at this stage of the proceedings.

[41] Paragraph 9(b) of the Reply responds to paragraph 15(ii) of the Defence (which raises the defence in s 16(1)(e) of the *Defamation Act*) and puts in issue the reasonableness of the defendants' conduct. In so far as the particulars in paragraphs 9(b)(i) and (ii) refer to "public good, public interest and public benefit" they raise false issues which have no relevance to the question of whether a defence under s 16(1)(e) of the *Defamation Act* 1889 can be made out. The reference to those words in paragraphs 9(b)(i) and (ii) should be struck out.

[42] Paragraph 9(c) of the Reply responds to paragraph 15(iv) of the Defence (which raises the defence in s 16(1)(d) of the *Defamation Act*) and puts in issue that the publication was made responsive to an invitation from the Minister. Paragraph 9(d) responds to paragraph 15(v) of the Defence, which raises the defence in s 16(1)(g) of the *Defamation Act*. I do not consider that it is appropriate that these paragraphs be struck out at this stage of the proceedings, without evidence as to the disputed matter.

Paragraphs 9A, 10, 11 and 12 of the Reply – absence of good faith

[43] Paragraphs 9A, 10, 11 and 12 of the Reply all deal with the matters concerning absence of good faith. Paragraph 9A alleges that the defendants were actuated by ill will towards the plaintiff. Paragraph 10 raises the issue of relevance. Paragraph 11 alleges that the manner and extent of the publication exceeded what was reasonably sufficient and paragraph 12 alleges that the defendants believed the imputations to be untrue.

Paragraph 9A – actuated by ill will

[44] As to paragraph 9A, the only complaint made concerned paragraph 9A(d)(iv), which alleges that the publication was actuated by ill will towards the plaintiff or for some other improper motive in that the publication was made in the belief that "the plaintiff would be discredited in the eyes of her nursing peers, the opposition, the media and the public in general".

[45] The defendants contended that such a plea is not capable of proving absence of good faith. Reliance was placed on the following passages of Dixon J (as he then was) in *Penton v Calwell* which were not questioned on appeal:[36]

> "The defence of qualified privilege means that, in the absence of malice, the existence of which of course the defendant denies, the libel is not actionable, whether the charge it contains be true or untrue. … When the privilege of the occasion arises from the making by the plaintiff of some public attack upon the reputation or conduct of the defendant or upon some interest which he is entitled to protect, 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 or before whom the plaintiff has attacked the defendant. The privilege is given to him so that he may with impunity bring to the minds of those before whom the attack was made any bona fide answer or retort by way of vindication which appears fairly warranted for the occasion. In *Koenig v Ritchie* … Cockburn CJ used the expressions: "Bona fide for the purpose of the [defendant's] defence and in order to prevent the charges operating to [his] prejudice", expressions which have been taken into the forms of pleading. … 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 agreement 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)

[46] In *Koenig v Ritchie*,[37] a policy holder in the course of a dispute with an insurance company published a pamphlet accusing the directors of fraud. The directors published a pamphlet in response. Cockburn CJ directed the jury that if they were of the opinion that the defamatory matter had been "published bona fide for the purpose of the defence of the company, and in order to prevent these charges from operating to their prejudice, and with a view to vindicate the character of the directors, and not with a view to injure or lower the character of the plaintiff" they ought to find for the defendants.

[47] Thus it may, depending on the circumstances of a case, be shown that an attack on a plaintiff's character and credibility is such that it was actuated by ill will. I do not consider it appropriate at this stage of the proceeding to strike out paragraph 9A(d)(iv).

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36 (1945) 70 CLR 219 at 233-234.

37 (1862) 3 F&F 413 at 420; 176 ER 185 at 188.

Paragraph 10 - relevance

[48] In paragraph 10(a) of the Reply, it is alleged that the publication of the imputations was not relevant to any of the matters the existence of which may excuse the publication in good faith of the defamatory matter, in that "the defamation was not published in response to an invitation to the [nursing defendants] by the Minister, but rather the letter was sent to the Minister at the instigation of the defendants", particulars of which are given in paragraph 7.

[49] This paragraph appears to be directed to the plea in paragraph 15(iv) of the Defence that the publication was made in good faith in answer to an inquiry made of the nursing defendants, being the invitation of the Minister pleaded in paragraph 14(f) of the Defence. Paragraph 10(a) of the Reply seeks to allege an absence of good faith by asserting that the defamatory imputations were not relevant to the matters going to the defence under s 16(1)(d) of the *Defamation Act* 1889, by putting in issue whether the publication was made in answer to an inquiry by an interested person for the purposes of s 16(1)(d) of the *Defamation Act* 1889.

[50] Whether the publication was made in answer to an inquiry of the nature referred to in s 16(1)(d) is raised in paragraph 9(c) of the Reply, which puts in issue the existence of the elements needed for the defence under s 16(1)(d). It confuses matters to raise that issue again in paragraph 10(a) as one going to relevance. In particular, it confuses the question of relevance with the question of whether the other elements necessary for a defence under s 16(1)(d) are satisfied.[38] I therefore consider that paragraph 10(a) should be struck out.

[51] As to paragraph 10(b), it alleges that the defamatory imputations pleaded in paragraph 5 of the Statement of Claim were not relevant to the matters raised in the Assembly. That is a matter for the jury to determine and it is not appropriate that the paragraph be struck out at this stage of the proceedings.

[52] As to paragraph 10(c), counsel for the plaintiff conceded that the words "in the public interest or public benefit" ought to be deleted as they raise false issues, and indicated that the paragraph would be amended accordingly. Those words should be struck out. Otherwise the paragraph raises questions of fact for the jury. The question of whether the matter raised ought to be left to the jury should be determined after the evidence is given. The paragraph ought not be struck out at this stage.

[53] Paragraph 10(d) alleges that several of the signatories and authors of the original letter had signed an earlier letter responding to the allegations which adequately dealt with the issues in dispute and which had already been read out in Parliament as indicating that the publication of the defamatory imputations was not relevant. That raises a matter for the jury. The question of whether the matter raised ought to be left to the jury should be determined after the evidence is given. The paragraph ought not be struck out at this stage.

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[38] See *Bellino v Australian Broadcasting Corporation* (1995-1996) 185 CLR 183 at 230.

Paragraph 11 – manner and extent

[54] Paragraph 11 alleges that the manner and extent of the publication of the imputations exceeded what was reasonably sufficient for the occasion and that the publication should not have been made at all in that:

(a) The defamatory matter attacked the character of the plaintiff and as such far exceeded what was required to respond to the matters raised by Mr Horan;
(b) The language used in the defamatory matter was extravagant and went beyond what was reasonably required to respond to the allegations. Particulars are given of the use of emotive language said to demonstrate ill will towards the plaintiff and to have been unnecessary in the context of the discourse regarding Ward 9D.

[55] The defendants contended that it was legitimate for them to counter attack by impugning the general veracity of the plaintiff, relying on *Penton v Calwell*.[39] In addition, it was submitted that the Court should be slow to find the absence of good faith in an excess of language and that the language complained of was not capable, in the circumstances of this case, of proving absence of good faith.[40]

[56] While it may be a proper exercise of the qualified privilege available to the defendants that they by counter attack impugn the credibility and general veracity of the attacker, in considering whether the privilege is available, regard is to be had as to whether what was done was commensurate with the occasion.[41] Accordingly, notwithstanding the latitude generally given on such occasions, I do not consider that it is appropriate at this stage, without evidence as to the circumstances of the case, to make a determination as to whether these paragraphs ought to be struck out.

Paragraph 12 – belief as to untruth

[57] Paragraph 12(a) pleads that certain of the nursing defendants had worked in Ward 9D with the plaintiff and that they knew from their experience of the plaintiff that the defamatory imputations and the allegations in the original document which gave rise to them were untrue. That paragraph simply alleges that, by reason of the experience of those defendants in working with the plaintiff, they knew the imputations to be untrue. I do not consider that that paragraph should be struck out at this stage.

[58] As to paragraph 12(b), it alleges that the twelfth defendant, being the plaintiff's employer and as such, from its experience of the plaintiff, knew that the defamatory imputations and the allegations in the original letter which gave rise to them were untrue. The defendants correctly contended that this paragraph is deficient in that it fails to identify the employees, whose state of mind is to be attributed to the twelfth defendant. Accordingly, particulars as to the identity of those employees should be given.

[59] As to paragraph 12(c), it pleads that the fifth defendant was employed by the twelfth defendant as the Bone Marrow Transplant Coordinator and worked primarily in the

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39 (1945) 70 CLR 219 at 233-234.

40 See *Bellino v Australian Broadcasting Corporation* (1995-1996) 185 CLR 183 at 205.

41 *Gatley on Libel and Slander* 9th ed. at paras 16.10, 14.49, 14.64; *Muller v Hatton* [1952] St R Qd 150 at 164-165, 182.

Ward 9E Outpatients Department, and as such had no direct experience in working with the plaintiff and accordingly could not have formed a reasonable belief as to the accuracy of the defamatory imputations and the allegations in the original letter which gave rise to them. The defendants complained that the paragraph did not correctly identify the element of belief as to untruth required to be shown by s 16(2) of the *Defamation Act* 1889. Counsel for the plaintiff indicated that this paragraph would be amended to allege that by reason of the matters mentioned the fifth defendant believed the defamatory matter to be untrue. I can see no difficulty with such a plea.

[60] As to paragraph 12(d), it is unnecessary to deal with this paragraph at this stage, as counsel for the plaintiff indicated that this paragraph would be amended to address the complaint made of it by the defendants.

[61] I shall hear submissions as to costs.