SUPREME COURT OF QUEENSLAND

CITATION:	*Erglis v Buckley & Ors* [2004] QCA 223
PARTIES:	**WENDY ERGLIS** (plaintiff/appellant) **v** **MELISSA BUCKLEY** (first defendant/first respondent) **RACHAEL CRAWLEY** (second defendant/second respondent) **LISA SHEARMAN** (third defendant/third respondent) **ALLISON LOVELL** (fourth defendant/fourth respondent) **JUDY CUMMINGS** (fifth defendant/fifth respondent) **REBECCA MANNING** (sixth defendant/sixth respondent) **JANINE GIBSON** (seventh defendant/seventh respondent) **KYLIE ASH** (eighth defendant/eighth respondent) **JACQUI BOE** (ninth defendant/ninth respondent) **RON MIDDLETON** (tenth defendant/tenth respondent) **MADONNA FUERY** (eleventh defendant/eleventh respondent) **STATE Of QUEENSLAND** (twelfth defendant/twelfth respondent)
FILE NO/S:	Appeal No 747 of 2004 SC No 2867 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from interlocutory decision
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 March 2004
JUDGES:	McPherson JA, Jerrard JA and Fryberg J Separate reasons for judgment of each member of the Court, McPherson JA and Fryberg J concurring as to the orders

made, Jerrard JA dissenting

ORDERS:

1. **Appeal allowed with costs assessed on the standard basis against the respondent defendants.**
2. **Set aside so much of the order made on 24 December 2003 as ordered that paragraphs 12(a) and 13(a) of the further amended statement of claim be struck out.**
3. **Set aside paragraph 3 of the order made on 15 March 2004, and reserve the costs under that paragraph for further consideration.**

CATCHWORDS: CONSTITUTIONAL LAW – THE LEGISLATURE – PRIVILEGES - PARLIAMENTARY DEBATES AND PROCEEDINGS - in defamation action the plaintiff pleaded that an allegedly defamatory letter sent by defendants to Minister was tabled and read in parliament – whether by relying on republication in parliament for the purpose of increasing the amount of damages claimed the plaintiff impeached or questioned the freedom of speech and debates or proceedings in parliament, contrary to s 8 of the *Parliament of Queensland Act* 2001

Parliament of Queensland Act 2001, s 8, s 9
Bill of Rights Act 1688, art 9

Buchanan v Jennings [2002] 3 NZLR 145, cited
Church of Scientology of California v Johnson-Smith [1972] 1 QB 522, cited
Commissioner for Stamps v Telegraph Investment Company (1995) 184 CLR 453, considered
Commonwealth v Colonial Combing Spinning and Weaving Co Ltd (1922-23) 31 CLR 421, considered
Criminal Justice Commission v Nationwide News Pty Ltd [1996] 2 Qd R 444, approved
Criminal Justice Commission v Parliamentary Criminal Justice Commissioner [2002] Qd R 8, approved
Cutler v McPhail [1962] 2 QB 292, cited
Egan v Willis (1998-1999) 195 CLR 424, considered
Hamilton v Al Fayed [2001] 1 AC 395, cited
Laurance v Katter [2000] 1 Qd R 147, considered
Prebble v Television New Zealand Ltd [1995] 1 AC 321, considered
Quan Yick v Hinds (1904-05) 2 CLR 345, considered
R v Grassby (1991) 55 ACrimR 419, considered
Rann v Olsen (2000) 172 ALR 395, considered
Rowley v O'Chee [2000] 1 Qd R 207, considered
Slipper v British Broadcasting Corporation [1991] 1 QB 283, cited
Stockdale v Hansard (1839) 112 ER 1112, considered
Timms v Clift [1998] 2 Qd R 100, cited
United States v Brewster (1972) 408 US 501, cited

United States v Johnson (1966) 383 US 169, cited

COUNSEL: P J Favell and R J Anderson for the appellant
R V Hanson QC and P A Freeburn SC for the respondents
H B Fraser QC for the Speaker

SOLICITORS: Drakopoulos Black for the appellant
Crown Law for the respondents
Office of the Clerk, Queensland Parliament for the Speaker

[1] **McPHERSON JA**: In and before October 2001 the plaintiff was a registered nurse employed by the Royal Brisbane Hospital, which was operated by the 12th defendant, the State of Queensland. On or about 5 December 2001 the first 11 named defendants, who were nurses employed in Ward 9D of the Hospital, are alleged to have published to various people, including the then State Minister for Health, Hon Wendy Edmond MLA, a letter or a facsimile copy of it containing statements that are alleged to be defamatory of the plaintiff. The State is claimed to be legally liable either originally or vicariously for publication of these statements.

[2] The plaintiff instituted proceedings in the Supreme Court claiming damages against the defendants for defamation. In paragraph 12(a) of the amended statement of claim it is alleged that, at the time certain imputations set out in the pleading:

> "… were published in the manner set out in paragraph 8 herein, the named defendants and the Hospital Management knew:
>
> (a) the original document or the facsimile copy would be republished by the Minister in a public forum and that as a consequence the words and thereby the imputations would become known to the public at large."

It was accepted by Mr Favell for the plaintiff on appeal that the expression "public forum" in para (a) was to be understood as referring to the Legislative Assembly, and not any other place. Paragraph 13(a) of that pleading is in the following terms:

> "13. It transpired that:
>
> (a) the facsimile copy was tabled and read in the Queensland Legislative Assembly by the Minister shortly after 4.44 pm on the afternoon of 5 December 2001 and as a consequence the words and thereby the imputations then became known to the public at large;"

A defence, since amended, was delivered by the defendants, in which they admitted that, at the time the letter was published to the Minister, they knew it was likely that the Minister would re-publish the letter in Parliament: para 11(a); and that the letter was tabled and read in Parliament: para 12. In para 14(a), they allege that, before the letter (or document) was composed, there was an "on-going" debate in the Queensland Parliament about Ward 9D, of which particulars are given. This allegation is admitted in the plaintiff's reply to the defence. In addition, a series of extracts from Hansard, including one that records the tabling and reading of the document by the Minister, is exhibited to an affidavit before us that was filed by the defendants. In para 14(i) of the defence it is alleged that the presentation and reading of the letter by the

Minister, and (ii) was done in exercise of the freedom of speech and debates and as part of the proceedings of the Assembly, within the meaning of s 8 of the *Parliament of Queensland Act 2001*; and *(iii)* pursuant to s 9 of that Act.

[3] On 31 October 2003 the defendants applied to the Supreme Court for relief, including, so far as relevant, the following:

> "2. That the plaintiff's action herein be struck out on the grounds that litigation of the claim will impeach or question the freedom of speech and debates and/or proceedings in the Legislative Assembly of Queensland, contrary to sections 8 and 9 of the *Parliament of Queensland Act 2001*.
>
> 3. There be summary judgment for the defendants against the plaintiff."

The defendants were unsuccessful in that part of the application seeking summary judgment. They did, however, succeed on the application which they made to strike out paras 12(a) and 13(a) of the statement of claim, and it is against that order that the plaintiff now appeals. On the appeal, Mr Hugh Fraser QC appeared by leave on behalf of Hon the Speaker of the Legislative Assembly.

[4] Sections 8 and 9 of the Act of 2001, so far as material provide:

> "**8 Assembly proceedings can not 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.
>
> **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.
>
> **(2)** Without limiting subsection (1), **"proceedings in the Assembly"** include -
>
> (a) giving evidence before the Assembly, a committee or an inquiry; and
> (b) evidence given before the Assembly, a committee or an inquiry; and
> (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; and

(e) preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c); and
(f) preparing, making or publishing a document (including a report) under the authority of the Assembly or a committee; and
(g) a document (including a report) prepared, made or published under the authority of the Assembly or a committee."

[5] The present appeal is concerned with the effect, principally if not exclusively, of s 8(1) and (2), and s 9(1), and not with any of the particular paragraphs of s 9(2) of the Act. At first instance, the defendants sought to have the whole of the action struck out on the ground that the privilege of Parliament extended to informants, meaning those who informed Parliamentary members of matters that are, it may be assumed, later published in the House. By para 14(i)*(i)*, it was alleged that the composition, etc of the letter or facsimile and the submission of it to the Minister were acts done in transacting business of the Assembly within the meaning of s 9 of the Act. The same or a similar argument was considered and rejected by Jones J in *Rowley v Armstrong* [2000] QSC 088, and, in refusing to strike out the whole action, it was also rejected by her Honour in the present case. See also *Grassby* (1991) 55 ACrimR 419. There was no cross-appeal against that decision of her Honour, and the question therefore does not fall to be considered by us on this occasion. The result is that the only issue now before this Court is whether, by her claim for damages and her pleadings in these proceedings, the plaintiff will, within the meaning of s 8(1) of the Act, be impeaching or questioning the freedom of speech and debates or proceedings in the Assembly. It was because her Honour concluded that the plaintiff would be doing so that she struck out paras 12(a) and 13(a) of the statement of claim.

[6] The words "impeached or questioned" in s 8(1) of the Act are taken from art 9 of the original Bill of Rights 1688 (or 1689), and s 8(2) declares them to be intended to have the same effect. In *Rowley v O'Chee* [2000] 1 Qd R 207, 222, "impeach" was said to mean "impede, hinder, prevent", or affect detrimentally or prejudicially, or to "impair". In *Laurance v Katter* [2000] 1 Qd R 147, 204, Davies JA chose the shorter meaning of "impairing" freedom of speech in Parliament. The Minister was not impeded from tabling or reading out the subject letter in Parliament, and her freedom to do so was not impaired or questioned. Of course, at the time she did so, no claim for damages had yet been instituted by the plaintiff. What is submitted by the defendants and the Hon Speaker is, however, that litigating this claim in the Supreme Court will have the effect, either now or hereafter, of contravening s 8(1), and that the plaintiff ought not to be permitted to allege or prove the matters asserted in paras 12(a) and 13(a) of the statement of claim.

[7] It is, of course, clear that the plaintiff makes no claim for damages or otherwise against the Minister Hon Wendy Edmond MLA for her action in tabling or reading out the letter in Parliament as she did on 5 December 2001. If the plaintiff had done so, there is no doubt that her claim to that effect would be peremptorily struck out. Her more limited object, it is plain, is to increase the amount of damages she hopes to recover for the defamation she is claiming and hopes to be awarded against the defendants arising out of publication of the letter to the Minister, knowing when

they did so that (as is admitted) the Minister would be likely to read it to Parliament, with all the consequential publicity in the media that would follow. This aspect of her claim is founded on a series of decisions referred to in *Gatley on Libel and Slander* (of which *Cutler v McPhail* [1962] 2 QB 292, *Slipper v British Broadcasting Corporation* [1991] 1 QB 283 and, in Queensland, *Timms v Clift* [1998] 2 Qd R 100, are examples) holding a defendant legally liable for damages arising out of republication of defamatory material which it was or ought to have been foreseen was likely to ensue. The question is whether, in making that claim in this action, the plaintiff is impeaching or questioning freedom of speech and debates or proceedings in the Assembly.

[8] There appears to be no authority in which the precise point has previously been considered in Queensland or elsewhere. In *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8, 21-22, it was held to amount to a questioning of a proceeding in Parliament to claim a declaration that the report of a Parliamentary Commissioner was beyond power and that the Commissioner was not authorised to make it. See also *Hamilton v Al Fayed* [2001] 1 AC 395. In a somewhat different category are cases in which questions have arisen about the honesty or state of mind with which members of Parliament or witnesses before it or parliamentary committees have made statements that were later the subject of challenge in litigation. See *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522; *Rann v Olsen* (2000) 76 SASR 450; and *R v Theophanous* (2003) 141 ACrimR 216, which, together with many other decisions, are collected and ably analysed in Professor Enid Campbell's text on *Parliamentary Privilege* (2003). Not all of these decisions have received approval in higher courts; but it now seems to be accepted that there is "no objection to the use of Hansard to prove what was done and said in Parliament as a matter of history": *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 337; or, as Cooke P said in the Court of Appeal in that case, "to prove material facts, such as the fact that a statement was made in Parliament at a particular time or that it refers to a particular person": *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513, 518. See also *Pepper v Hart* [1993] AC 593, 638-639; and *Buchanan v Jennings* [2002] 3 NZLR 145, 158-159, to which reference will be made again later in these reasons.

[9] This is, or so the plaintiff claims, no more than what is alleged here to have been done and said in Parliament by the Minister; or, in other words, that in paras 12(a) and 13(a) of the statement of claim, the tabling and reading of the letter on 5 December 2001 is alleged and is sought to be proved at trial simply "as a matter of history". The defendants, on the other hand, submit that the plaintiff must necessarily be questioning the propriety of Ms Edmond's action in Parliament because the plaintiff is alleging that damages followed from it as a consequence of its foreseeably subsequent publication in the media. The plaintiff's claim, it is argued, involves allowing "the substance of what was said in Parliament to be the subject of … submission or inference": *Comalco Ltd v Australian Broadcasting Corporation* (1983) 50 ACTR 1, 5; or involves suggesting, "whether by direct evidence, cross-examination, inference or submission", that the actions or words of the Minister were inspired by improper motives: *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 337; or that it does or will involve "entertaining … evidence, cross-examination or submissions which challenge the veracity or propriety of anything done in the course of parliamentary proceedings": *Hamilton v Al Fayed* [2001] 1 AC 395, 407. Extracts from Hansard are, it is contended, not to be used in

a way that goes beyond proving as a fact that "a particular person at a particular date had referred to particular matters" in Parliament. Such extracts, as Browne J also explained in *Church of Scientology v Johnson-Smith* [1972] 1 QB 522, 527-528:

> "… should not be used to prove inferences which would reflect on the maker of any statement in the House."

[10] Her Honour adopted and applied these statements of legal principle in reaching the conclusion that the plaintiff was, within s 8(1) of the Act, questioning freedom of speech in the Assembly. The learned Judge said it was apparent from the pleadings that the plaintiff intended 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 …".

Moreover, in relying on republication as a matter which ought to be reflected in substantially greater damages, the plaintiff, her Honour concluded, was "seeking to impeach the freedom of speech and debates or proceedings in the Assembly" because:

> "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."

To do so would, her Honour considered, be to detrimentally or prejudicially affect what was said and done in Parliament.

[11] I am with respect unable to agree with these conclusions. The plaintiff's statement of claim contains no allegation that the motives of the Minister in publishing the letter were improper or that suggests it is intended to reflect on her or on her actions or words in any way, whether in the course of submissions at the trial or otherwise. Doing so would not only be unnecessary for the purpose or object the plaintiff has in mind but irrelevant to any issue in those proceedings. The adverse consequences that are asserted are not alleged against the Minister but against the defendants as being a foreseeable result of their having placed the letter in the Minister's hands in the expectation that the defamatory matter or imputations it is alleged to contain would become known to the public at large. That does not reflect, nor is it intended to reflect, on the Minister, who was simply informing Parliament of what the letter said. Nor do I consider that she was or would have been inhibited in any way by the risk, if she had contemplated it, that, by doing so, the defendants might, if the plaintiff later brought these proceedings for defamation, be likely to incur liability for larger damages by reason of the potential for greater publicity following the Minister's action. Parliamentary democracy in Australia is, in my opinion, sufficiently vigorous not to be threatened by considerations like those, more especially as s 8(1) itself guarantees freedom of speech and debate in the Assembly, while s 10(1) of the *Defamation Act* 1889 expressly provides that a member of the Assembly incurs no liability as for defamation by publishing defamatory matter in the course of a speech in Parliament. At this point, it seems to

me to be the defendants rather than the plaintiff who are making submissions about, or drawing inferences from, what was said or done in Parliament, or might be said or done on some future occasion.

[12] The opinion of the Privy Council in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 332 does, however, contain a passage which states in considerably broader terms what is said or ought to be the attitude of courts to matters of parliamentary privilege. Lord Browne-Wilkinson expressed it as follows:

> "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'."

If the test to be applied in determining whether s 8(1) of the Act or art 9 is being contravened is whether, in Blackstone's phrase, something said in the course of a speech or debate in Parliament is being examined, discussed or adjudged elsewhere, it would quickly put paid to a large segment of political discourse and comment throughout the State and, indeed, in the broader frame throughout the nation. That is no doubt why his Lordship was careful to confine his remarks to any "challenge" in the courts to what is said or done in Parliament. No such challenge is being made or contemplated by the plaintiff here. Indeed, the relevant allegation in the pleading takes as its foundation the fact that the letter in question was presented and read in Parliament, which is where the immunity prevails.

[13] As the learned primary Judge observed, the statement in *Prebble v Television New Zealand* can be traced to the judgment of Browne J in *Church of Scientology v Johnson-Smith* [1972] 1 QB 522, 530, which was specifically approved by Lord Browne-Wilkinson in *Prebble v Television New Zealand*. There are, however, several reasons for doubting the continuing relevance today of much of the extract from Blackstone's *Commentaries* which it contains. At least that is so, if it is to be understood as meaning literally that a matter arising in Parliament ought not to be discussed in court or elsewhere. It is clear from the authorities already cited that it is no longer the law that evidence of what was done and said in Parliament will not be admitted in court proceedings.

[14] That is the first thing that may be said. Another is that the extract from the 17th edition of Blackstone's *Commentaries* reflects a state of affairs which had probably

ceased to prevail even at the time that edition was published in 1830, and, if not, it certainly ceased to do so not long after its publication. No one doubts for a moment the proposition that the Parliament of Queensland has the exclusive right to determine the regularity of its own proceedings; but, in the present context, it must be borne in mind that the 17th edition of *Commentaries* was published before the great decision in *Stockdale v Hansard* (1839) 9 Ad & E 1; 112 ER 1112, which led to the enactment of the Parliamentary Papers Act 1840 (UK) conferring statutory authority and protection on the publication of Hansard's reports of debates in Parliament. It is true that the Commons never formally gave up their claim to a wider privilege of controlling such publications; but what is more important was that they joined in passing the legislation in question. In Queensland, it is now contained in modern form in Part 3: Parliamentary Papers, of the *Parliament of Queensland Act 2001*.

[15] Another reason why the extract from Blackstone has lost most of its current relevance is that, although taken from the 17th edition of *Commentaries* published in 1830, precisely the same statement about not discussing matters in Parliament also appeared in the first edition of *Commentaries* which was published in 1765 (1 Bl Com 158-159). Reference to it shows that it was in fact originally a quotation from Coke's *Fourth Institutes* (4 Co Inst 50), which were written in the early part of the 17th century. Then and for a long time afterwards the privileges of Parliament were "not certainly known to any but Parliament itself", a state of affairs which, Blackstone said (1 Bl Com 159), was "in great measure" maintained in order to enable the two Houses of Parliament to preserve themselves from interference by the Crown. In discussing the more "notorious" of those privileges, Blackstone includes the privilege of free speech "as declared by the statute 1 W & M St 2, c 2", which is the Bill of Rights. It was and is, however, more than a Parliamentary claim to privilege, but a statute of the realm, which in more than one way has become part of the law of Queensland.

[16] As Maitland reminds us, during the whole of the 18th century, which was when Blackstone wrote his *Commentaries*, both Houses of Parliament in Britain insisted that "no one was entitled to publish reports of their proceedings, and [they] committed to prison those who broke the rule": *Constitutional History of England*, at 376 (1908). It ought also to be borne in mind that what both Coke and Blackstone were discussing was the law and custom of Parliament (the *lex et consuetudino parliamenti*). During the 19th century, it was repeatedly held by the Privy Council that the law and custom, including privileges, claimed by the British Parliament formed no part of the laws of England that, as such, were carried abroad as a birthright to the colonies or their legislative assemblies. See *Kieley v Carson* (1842) 4 Moo PC 63; 13 ER 225; *Fenton v Hampton* (1858) 11 Moo PC 347, 397; 14 ER 727, 745; *Doyle v Falconer* (1866) LR 1 PC 328, 329. Until the passing of s 5 of the Colonial Laws Validity Act 1865, the privileges and standing orders of the Commons in England were therefore not available to colonial assemblies unless locally enacted under specific imperial authority: *Barton v Taylor* (1886) 11 AppCas 197, 203-205. In Queensland, the relevant statutory provisions are now contained in s 9 of the *Constitution of Queensland 2001*, which in s 9(1)(b) declares that, until otherwise defined, the Assembly has the powers, rights and immunities of the House of Commons and its members at the time of federation in 1901. See also s 39 of the *Parliament of Queensland Act 2001*, concerning the Assembly's power to deal with persons for contempt. Whatever those powers were in 1901, they were

certainly not the same as when Blackstone wrote his *Commentaries* in 1765, or as they were before the Parliamentary Papers Act 1840 (UK).

[17] This is not to suggest that in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 332, Lord Browne-Wilkinson was mistaken in saying that the courts and Parliament are both astute to recognise their respective constitutional roles. Which is not to say that everything that Parliament or the House of Commons claims as a privilege without enacting it in a statute will necessarily be recognised and enforced as the law of the land. Such an assumption would be contrary to the decision in *Stockdale v Hansard* (1839) 9 Ad & E 1. It remains true that, as his Lordship said, the courts 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. It may also be true, as the same learned Law Lord said in *Hamilton v Al Fayed* [2001] 1 AC 395, 402, that art 9 of the Bill of Rights does not of itself provide a comprehensive definition of parliamentary privilege, and that in the context the wider privileges conferred by s 9 of the *Constitution of Queensland Act 2001* may also need to be considered. In the present case, however, and in the many other decisions that have recently been given on art 9 of the Bill of Rights or its locally enacted counterparts in Australian jurisdictions, it is the words of that statute imprecise (and deliberately so) though they may be, that have fallen for consideration and must be given primary effect.

[18] Having reached these conclusions, I am encouraged to find that in *Buchanan v Jennings* [2002] 3 NZLR 145, 151-163, the Court of Appeal in New Zealand undertook a similar but more detailed analysis, and with comparable results, of the history and authorities leading to the statement by Blackstone about "discussion" of matters outside parliament that was approved in *Prebble v Television New Zealand* [1995] 1 AC 321, 332. Mr Fraser QC, who, after the hearing of this appeal, provided us with a copy of the reasons in *Buchanan v Jennings* which he had mentioned in argument, pointed out that the decision there has been the subject of critical comment in [2004] *New Zealand Law Journal* 84-88 by Mr David McGee QC, who is the Clerk of the House of Representatives in that country. It is, however, not necessary here to consider whether the precise decision in that case, which concerned the repetition outside Parliament of defamatory matter first uttered in the course of debate in the House, might be made the subject of litigation without contravening art 9 of the Bill of Rights. That is not a matter that falls to be considered on this occasion. It is enough to say that the reasoning of the majority of the learned judges in *Buchanan v Jennings* supports the conclusion I have reached in this appeal.

[19] In my opinion the course which the plaintiff has taken in paras 12(a) and 13(a) of her pleadings of relying on the tabling and reading out of the letter in the Legislative Assembly, for the limited purpose for which she is using it in these proceedings, involves no impeachment, questioning or impairment of the freedom of speech or debates or proceedings in the Assembly within the meaning of s 8 of the *Parliament of Queensland Act 2001*; and it will not do so if her purpose continues to be confined to establishing at trial that, in consequence, the letter or the defamatory imputations it is alleged to contain reached a wider audience than would or might otherwise have been the case had it not been tabled or read out in Parliament, with the result that the damages sustained and recoverable from the defendants may conceivably be greater than if those things had not taken place.

[20] In saying this, I should not be taken to be implying in any way that the plaintiff is likely to succeed in her claim in these proceedings. The defendants' defence relies on pleas of qualified protection under several of the paragraphs of s 16(1) of the *Defamation Act 1889* in relation to their publication of the letter to the Minister. That defence is the first hurdle which the plaintiff needs to surmount before any question of damages or their amount will arise in relation to her claim in these proceedings.

[21] In the result, I would allow the appeal, with costs to be assessed on the standard basis against the respondent defendants. Mr Hugh Fraser QC on being given leave to appear on behalf of the Speaker at the hearing announced that no costs would be sought on behalf of his client; and accordingly no costs will be ordered by virtue of that appearance on the appeal. The orders I would make will therefore be:

1. Appeal allowed, with costs assessed on the standard basis against the respondent defendants.

2. Set aside so much of the order made on 24 December 2003 as ordered that paragraphs 12(a) and 13(a) of the further amended statement of claim be struck out.

3. Set aside paragraph 3 of the order made on 15 March 2004, and reserve the costs under that paragraph for further consideration.

There will be leave to the parties to make submissions, not to exceed two pages in length, on those costs.

[22] **JERRARD JA:** In this appeal I have had the advantage of reading the reasons for judgment of McPherson JA and I am indebted to His Honour for the careful description therein of the relevant matters of fact and principle. Despite the considerable authority his judgments carry and his careful and extensive review of statutory, case law, and textbook authorities I respectfully differ as to the appropriate outcome.

The Pleadings

[23] I now set out those portions of the pleadings I consider immediately relevant:

> "12. At the (time) the imputations were published in the manner set out in paragraph 8 herein the named Defendants and the Hospital management knew:-
>
> a. that the original document or the facsimile copy would be republished by the Minister in a public forum and that as a consequence the words and thereby the imputations would become known to the public at large
>
> …
>
> 13. It transpired that:-
>
> a. the facsimile copy was tabled and read in the Queensland Legislative Assembly by the Minister shortly after 4.44 pm on the afternoon of 5 December 2001 and as a consequence the words and thereby the imputations then became known to the public at large; and

b. the words and thereby the imputations became known to the wider nursing community

…

15. By reason of the publication of the words and thereby the imputations the Plaintiff:-

a. has been injured in her personal reputation;

…

c. has been hurt by the knowledge that the defamatory matter referred to herein has continued to be a matter of public discussion.

16. The publication of the words and thereby the imputations were a reprisal against the Plaintiff:

a. for pursuing a formal grievance process against the former CNC Warren Bennett;

b. for previously making an allegations of staff bullying, professional misconduct and theft from patients within Ward 9D;

c. giving evidence at an independent inquiry into the allegations referred to in this paragraph and into the death of Jason Haddad;

d. giving information to the Queensland opposition leader Mr Horan about the matters referred to in this paragraph;

e. speaking to the media about the matters referred to in this paragraph

17. The publication of the words and thereby the imputations were;

a. to discourage the Plaintiff from providing material to the media and the Opposition Leader about the inefficient operation of Ward 9D;

b. to discredit the Plaintiff to her nursing peers, the opposition the media and public

18. The conduct of the defendants referred to in paragraphs 4-17 and the publication of the defamation is lacking in bona fides, improper and unjustifiable.

19. As a consequence of the publication of the defamatory matter set out herein, the plaintiff claims compensatory damages in the amount of $300,000.00 to:

…

c. reflect the extent of the publication and that the defamation may be spread, and;

…

20. As a consequence of:

a. the defendants' knowledge of and intent as to the extent of the publications referred to in paragraphs 8, 9, 10, 11, 12 and 14 herein;

b. the defendants' choice of forum of publication and choice of words referred to in paragraphs 4, 8, 9 and 12 herein;

…

d. the extent of the publication referred to in paragraph 13 herein;

…

the plaintiff's hurt has been aggravated and in respect of which the plaintiff claims aggravated damages in the amount of $100,000.00.

21. As a consequence of;

a. the defendants' knowledge of and intent as to the extent of the publications referred to in paragraphs 8, 9, 10, 11, 12 and 14 herein;

b. the defendants' choice of forum of publication and choice of words referred to in paragraphs 4, 8, 9 and 12 herein;

…

the defendants' conduct is warranting of an order for exemplary damages in the amount of $100,000.00."

The plaintiff's argument

[24] It is an attractive one, namely that she relies on authoritative decisions cited by the learned trial judge, establishing that she is entitled to do what she contends she is doing, namely simply proving as a fact what was said in proceedings in the Parliament as part of a foreseeable and intended chain of events causing damage to her. As McPherson JA observes in paragraph [8] of his reasons, there is clear authority for the view that what was said and done in Parliament can be proven simply as a matter of historical fact, provided that there is no questioning or impeaching of what was said or done. Those authorities permit the relevant Hansard reports to be tendered to prove that a particular statement was made by a particular member. They include *Uren v John Fairfax & Sons Ltd* [1979] 2 NSWLR 287 at 289 (citing from Browne J in *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 at 531), *Mundey v Askin* [1982] 2 NSWLR 369 at 373, *Henning v Australian Consolidated Press Ltd* [1982] 2 NSWLR 374 at 375, as well as *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337 and the other cases cited by McPherson JA.

The proceedings in the Assembly

[25] Accepting those statements of principle, I respectfully consider there is a certain unreality in the proposition that the plaintiff can extract one small portion of what were more extensive and on going proceedings in the Parliament, and that she can then complain of the consequences to her of that part of the proceedings, without any attempt to put the publication of the letter read in the Parliament in its context in those proceedings. The appeal record contains extracts from some pages of the Queensland Parliament Hansard of 4 December and 5 December 2001. These pages record proceedings, in which there was discussion of the bone marrow transplant

surgery unit, Ward 9D in the Royal Brisbane Hospital. Those proceedings included Private Members' Statements, Questions without notice and their answers, Matters of Public Interest and Ministerial Statements. There are a number of instances of discussion of this topic in the Parliament in each of those forms of proceeding over those two days, and it was in the course of making a second Ministerial Statement that the Minister read the facsimile copy of the letter.

[26] I consider that to put the Minister's act of tabling and reading the facsimile copy of the letter in the Parliament in its context in those debates would almost always involve some judgment or assessment by the court of the Minister's conduct and motive in so doing. Judged by her pleadings, the plaintiff is both impeaching and questioning the conduct and motives of the Minister in reading the letter, and I accordingly differ from the view expressed by McPherson JA in the first part of paragraph [11] of his reasons.

Impeaching those proceedings

[27] I do this because paragraph 13a. of those pleadings alleges the facsimile copy was read to the Legislative Assembly and that as a consequence the words and imputations became known to the public. Paragraph 16 pleads that the publication of the words and imputations was a reprisal against the plaintiff for the reasons therein alleged, and paragraph 17 imputes improper motives to that publication. Paragraph 20d. alleges that as a consequence of the extent of the publication referred to in paragraph 13 the plaintiff's hurt was aggravated, and paragraph 20b. pleads the like aggravation as a consequence of the defendants' choice of forum of publication referred to in paragraph 12 of the pleadings. Paragraph 13 of course is the pleaded fact of publication by the Minister by reading the facsimile copy in the Parliament, and paragraph 12 the defendants' knowledge that the original document or facsimile copy would be "republished" by the Minister in a public forum.

[28] I consider that the term "publication" appearing in pleadings 20d. must be publication to the Legislative Assembly and the intended republication described in paragraph 12 of the pleading. If the term "publication" is used consistently in the pleadings, then the allegations in paragraphs 16, 17 and 18 include allegations specifically attacking the bona fides of the Minister in reading the facsimile copy in the Parliament and attributing improper motives to her for doing so, including that of discouraging the plaintiff from providing material to the Opposition Leader. I respectfully consider that the effect of the portions of the pleading quoted in this judgment, taken as a whole, is that they clearly offend against the provisions of s 8(1) of the *Parliament of Queensland Act*. They do so by attacking the propriety of the Minister's conduct in the Assembly, in the prohibited sense described in the cases cited by McPherson JA in paragraph [9].

The specific issues under appeal

[29] I recognise however that only paragraphs 12a. and 13a. are in issue in this appeal. Restricting my comments to those paragraphs, and focusing only on the portion of the parliamentary proceedings referred to in those pleadings, namely the occasion on which the facsimile copy was read to the Parliament, the result is that the plaintiff is seeking damages for the consequences to her of the publication (as intended by the defendant) in the Parliament of a facsimile copy of that letter. That is what she pleads, alleging serious consequences to her from that publication. If she may properly do that then all persons whose reputations are injured in

proceedings in Parliament, by the (intended or foreseen) republication verbatim of information given by a third person to a member of the Parliament, could plead in an action against that third person and as a basis for the vast bulk of the damages they would seek, the consequences to those plaintiffs of the publication in the Parliament.

[30] I readily accept the position declared in *R v Grassby*[1], that while it is appropriate that a Parliamentarian has absolute immunity in respect of what is done in the exercise of Parliamentary duties in the course of proceedings in a House of Parliament there is no warrant to give such an absolute immunity to a third person seeking to persuade the member to say something in the House. Allen J held in *R v Grassby* that the proper immunity given to that third person is the recognition that the occasion on which the information is given is one of qualified privilege only. My respectful agreement with that view[2] – which was not challenged by the appellant in this appeal – does not mean acceptance of the view that the person defamed can have her or his damages against the third party increased by pleading and proving what the Parliamentarian said in Parliament when repeating the information supplied.

[31] When what is pleaded to prove a damaging publication is simply the fact of verbatim reproduction, with no other comment or statement in the Parliament being pleaded, that pleading disguises the fact that the court is nevertheless being asked to examine the proceedings in Parliament. That examination will show that there was merely a republication and in this case that the defendants, as the plaintiff pleaded, were the source of the statements repeated. Even where those conclusions are established by admissions in the pleadings, there has been an examination in the court proceedings of what happened in the Parliament, and of necessity an examination of what was said, by whom, and why. The plaintiff here seeks to prove that the Minister said what she did in Parliament because that was what the defendants told the Minister, knowing that she would repeat it. Proving that the Minister was the medium for the defendants' message means that a sufficient reason for the Minister's making the statement to Parliament is established to the court's satisfaction. If the plaintiff failed to prove that reason – namely the intended but mere republication of information supplied by the defendants – the plaintiff would fail.

[32] The Oxford English Dictionary online includes in the definition of "question" the following two meanings:

> "1b To examine judicially; hence to call to account, challenge, accuse (of). Now *rare*.
>
> 6. to ask or inquire about, to investigate (a thing) *Obs. rare*".

Examples from the 17th Century of both ways of using "question" are supplied. In *Rowley v O'Chee* [2000] 1 Qd R 207 at 222 McPherson JA was assisted by reference to 17th Century usage when providing an authorative definition of

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1. (1991) 55 A Crim R 419 at 428.
2. I acknowledge this may be at odds with the obiter dictum in *Belbin v McLean & Anor* [2004] QCA 181 at [37]-[39]; and with the logic of the common law rule as to absolute privilege applying when proofing witnesses who then give evidence in a court, articulated in *Watson v McEwan* [1905] AC 480 at 487-88.

"impeach". Applying to the same principles and in the absence of other or clear authority on the meaning of "question", I am satisfied the examination of the Legislative Assembly proceedings to the extent intrinsically required by the plaintiff's pleadings 12a and 13a involve questioning those proceedings and debates.

[33] Accordingly, I respectfully consider that where proof of the publication of words in Parliament is relied on to increase a plaintiff's damages, then the proceedings in the Parliament in which those words were said are being called into question, even though the action is brought against the third party informant and not the Parliamentarian repeating the information; and this is so whether there was simply a verbatim republication or otherwise. I consider this accords with the construction the Supreme Court of the United States placed on "question" in *United States v Brewster* (1972) 408 US 501, 92 S. Ct 2531. There the court said of the provision in Article 1 s 6 of the US Constitution (that Senators and Representatives "for any Speech or Debate in either House, they shall not be questioned in any other Place") that it was beyond doubt that it protected against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts (At [7]).

[34] One foreseeable consequence of holding to the contrary would be the potential detrimental effect on the willingness of citizens to provide possibly important and possibly defamatory information to members of Parliament. An equally important and likely consequence of so holding would be the effect on proceedings in the Parliament such as those involved in this matter. A Member of Parliament who is exposing a source of information to the risk of increased damages by merely publishing verbatim the information given, thus enabling civil proceedings to occur of the kind brought here in which it is pleaded that republication in Parliament was intended and happened, may be able to avoid that consequence to her or his informants by adding comment and observation from other asserted or actual sources and thus providing a bowdlerized or fragmented version of the information given. If the Member takes the latter steps it will be difficult for any person to tender the relevant Hansard extract without it being held that the plaintiff is requiring the court to examine what the Member said and the extent to which it was a republication. Such an examination would be very open to the complaint that it was questioning the speeches in Parliament and proceedings to determine why various statements were made and upon what they were based. To me all of that would be plainly forbidden by s 8, and that conduct by Members would be a potential result of allowing this plaintiff's claim based on publication in Parliament.

[35] I am satisfied that the plaintiff is not entitled to plead the aggravation of her damages by the consequence to her of the publication or republication of the facsimile letter when it was tabled and read in the Queensland Legislative Assembly. I respectfully consider that conclusion is consistent with the result in *Laurance v Katter* [2000] 1 Qd R 147, in which the plaintiff sued the defendant member of the Commonwealth Parliament, for defamation allegedly occurring when the defendant made statements outside the Parliament which the plaintiff alleged adopted and reaffirmed what the defendant had said in the Parliament. The plaintiff proposed to prove what was said in Parliament as a step to proving that the plaintiff had been defamed by the adoption and reaffirmation of those statements on a subsequent occasion outside the Parliament.

[36] In that decision all three members of this court gave differing reasons. I respectfully observe that I prefer those of Davies JA. I acknowledge that His Honour's construction of s 16(3) of the *Parliamentary Privileges Act* 1987-1988 (Cth) was not endorsed by a five member court of the South Australian Supreme Court in *Rann v Olsen* (2000) 76 SASR 450. That judgment nevertheless contained statements in support of the conclusions Davies JA reached in *Laurance v Katter*. His Honour had held that no impropriety was alleged against the defendant in respect of what he said in Parliament, and that what was alleged against him in the Statement of Claim was that what he said outside Parliament was false and defamatory of the plaintiff. His Honour held that while it was true that proof that what the defendant said outside Parliament was false would also prove that what he said in Parliament was false, that was because the defendant had incorporated the latter in his statements outside the Parliament. The privilege given by Article 9 (of the Bill of Rights 1688, relevantly identical to s 8 of the *Parliament of Queensland Act*) applied to the statement in Parliament but not the statement made out of it, even though they incorporated by reference the statements made in the Parliament.[3] The same reasoning is apparent in the judgment of Doyle CJ in *Rann v Olsen* at [56], where the learned Chief Justice said of the facts in that case that it was not "a case in which, by establishing that Mr Rann told a lie outside Parliament, Mr Olsen will incidentally prove that a statement to the same effect made by Mr Rann in proceedings in Parliament is also a lie." Mullighan J agreed (at [283]) with the reasons of Doyle CJ. Those reasons at [56] necessarily agree with the remarks quoted by Davies JA in *Laurance v Katter*.

[37] While it is difficult to establish any consistent ratio from the three judgments in that decision, the difference in facts between that case and this one is that in that case what had been earlier published in proceedings in Parliament would be established by the Plaintiff to prove what it was that was later republished outside the Parliament. In that case the publication occurring in the proceedings in the Parliament was not pleaded as the source of the damage. That was pleaded to be from the republication outside the Parliament. I consider that a real difference between the two cases, and that there was no question of the plaintiff examining what was said in the Parliament to establish its source.

[38] In *Buchanan v Jennings* [2002] 3 NZLR 145 the New Zealand Court of Appeal held that defamation proceedings, where the facts resembled those in *Laurance v Katter*, did not question the freedom of speech in Parliament; it was the later, unprivileged statement made out of Parliament, affirming what had been said earlier in Parliament, that was being "questioned" (at 164). That analysis does not help the plaintiff argue here that she is not questioning the proceeding in which the defendants' letter was read.

Does s 8 apply?

[39] The parties were content to have the application determined by s 8 of the *Parliament of Queensland Act* 2001, that Act (No 81 of 2001) having come into force on 6 June 2002, six months after the pleaded publications. The provisions of s 8 have a retrospective operation, as provided for in s 154. It is declared therein that that section applies to 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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3. See [2000] 1 Qd R at 204-205.

before the commencement of s 9 that would have been proceedings in the Assembly if they had happened after the commencement of s 9. It then declares that the protection provided by s 8 in relation to proceedings in the Assembly extends to all the words and acts. I respectfully agree with the supplementary submission of Mr H Fraser QC, Senior Counsel for the Speaker, that in this case the relevant acts and words are the tabling of the facsimile copy of the letter received by the Minister and her explanation recorded in the Hansard for so doing. Accordingly, s 8(1) of the *Parliament of Queensland Act* 2001 would apply retrospectively to those acts and words.

[40] I also consider that absent s 154 the provisions of s 8 would not have a retrospective operation. It deals with a matter of too much importance to be considered legislation relating to procedure, and is drafted on the assumption that prior to its enactment Article 9 of the Bill of Rights of 1688 applied to proceedings in the Assembly, and indeed still applied, although s 8(1) was intended to have the same effect as Article 9.[4]

[41] I am indebted to Fryberg J for drawing to my attention the reference to 6 June 2002, the date when the *Parliament of Queensland Act* 2001 came into force, in the earlier judgment of the learned trial judge published on 11 November 2003, in which that learned judge had declined to give summary judgment to the defendant. I note that s 9(3) of that Act describes one situation in which the provisions of s 8 do not apply. That subsection reads as follows:

> **"(3)** Despite subsection (2)(d), section 8 does not apply to a document mentioned in subsection 2(d) –
>
> (a) in relation to a purpose for which it was brought into existence other than for the purpose of being tabled in, or presented or submitted to, the Assembly or a committee or an inquiry; and
>
> (b) if the document has been authorised by the Assembly or the committee to be published."

The plaintiff's pleadings allege that an original document, a letter signed by certain of the defendants, was published by those defendants in various ways, including bringing the original documents to the attention of staff in Ward 9D, giving the original document to senior medical and nursing staff of that hospital, and causing a facsimile copy of it to be delivered to the Minister. The pleading in paragraph 12a. cited in [23] above leaves room for the plaintiff to argue that s 9(3) of the Act could be relied on in the future to exclude the original letter from the protection given by s 8; and an argument may be available that the same consequence applies to a facsimile copy of it. The plaintiff submitted to that effect in her supplementary submission. For that reason it is relevant to consider the applicable position, on the assumption that s 8 does not apply. The court has received written submission on this, by invitation. I agree with those of Mr H Fraser QC, but express my own reasons.

Article 9 of the Bill of Rights

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4. The explanatory note to the *Parliament of Queensland Bill* 2001 advises that clause 8 codifies Article 9 in Queensland; and see further below.

[42] The explanatory note to the Parliament of Queensland Bill 2001 (in 2001 Volume 3 at page 2666) advises that:

> "Currently, article 9 of the *Bill of Rights* 1688 applies in Queensland by virtue of section 40A of the *Constitution Act* 1867 (Powers, privileges and immunities of Legislative Assembly), and section 5 and schedule 1 of the *Imperial Acts Application Act* 1984.
>
> Article 9 of the *Bill of Rights* 1688, expressed in modern language, provides:
>
> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."[5]

[43] Section 5 of the *Imperial Acts Application Act* 1984 (Qld) provides that each Imperial enactment specified in schedule 1 to that Act shall, from the commencement of that Act, continue to have the same force and effect (if any) as it had in Queensland immediately prior to the commencement to that Act. Schedule 1 includes the Bill of Rights (1688) 1 William & Mary Sess. 2 ch 2. That 1984 Act did not of its own force cause the Bill of Rights to apply, if it had not before. Section 40A of the *Constitution Act* 1867, inserted in 1978, declared that the powers, privileges and immunities to be held, enjoyed and exercised by the Legislative Assembly and the members and committees thereof should be such as were defined by any Act or Acts so far as those powers, privileges and immunities were not inconsistent with (the *Constitution Act* 1867) or any other Act and until so defined should be those powers, privileges and immunities, enjoyed and exercised for the time being by the Common House of Parliament of the United Kingdom and its members and committees so far as those powers, privileges and immunities were not inconsistent with that Act or any other Act whether held, possessed or enjoyed by custom, statute or otherwise. In *Criminal Justice Commission v Nationwide News Pty Ltd* [1996] 2 Qd R 444 Davies JA held (at 460) that it might be accepted that Article 9 of the Bill of Rights was part of the law of Queensland, citing s 40A of the *Constitution Act* 1867, s 5 of the *Imperial Acts Application Act* 1984, and s 3(1)(a) of the *Parliamentary Papers Act* 1992. In that same case Pincus JA clearly assumed that Article 9 of the Bill of Rights 1688 applied as part of the law of Queensland, (at pages 457-458), and Fitzgerald P was prepared to assume (at 449–450) that Article 9 applied in relation to the Queensland Parliament, by reason of s 5 of the *Imperial Acts Application Act* 1984.

[44] I am indebted to Fryberg J for the further observation that s 40A of the *Constitution Act* 1867 gave the Legislative Assembly the privileges of the House of Commons "for the time being" and did not specifically bring the Bill of Rights into force as part of the law of Queensland, and that its application was at best assumed by the *Imperial Acts Application Act* 1984. There is however a strong body of authority, in addition to the judgments in *CJC v Nationwide News*, which I respectfully consider binds this court to the view that Article 9, and other articles of the Bill of Rights, are part of the law applicable in this State. It includes the decision of this court in *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8 in which McPherson JA wrote at [21] that:-

> "There is no doubt that art. 9 of the *Bill of Rights* has always formed part of the law of Queensland. Unlike some other Australian States,

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5. It was so expressed by Davies JA in *Laurance v Katter* [2000] 1 Qd R 147 at 202.

> Queensland came into existence as a separate entity in 1859 with a representative form of Parliamentary government to which the Bill of Rights was immediately capable of being attracted. The privileges conferred by art. 9 are, in any event, now comprehended by s 40A of the *Constitution Act* 1867 and its application to Queensland is expressly recognised in s 3(1) of the 1992 Act." (The 1992 Act referred to is the *Parliamentary Papers Act* 1992).

Williams JA also held in that case that there was no doubt that Article 9 of the Bill of Rights formed part of the law of Queensland and applied to the Queensland Parliament (at [29]). Chesterman J clearly assumed that it did, at [38] and [47]. There is thus express acceptance of its application as part of Queensland law by a majority of this court in that decision.

[45] I respectfully observe that the reference by McPherson JA to the capacity of the representative form of Government, established for the Colony of Queensland by the letters patent constituting it on 6 June 1859[6], to attract the Bill of Rights should be understood as a reference to s 24 of the *Australian Courts Act* 1828 9 Geo 4, c. 83 (Imp) ("the *Australian Courts Act*"). That Act empowered the British Monarch by letters patent to erect and establish courts of judicature in New South Wales and Van Diemen's Land.[7] Section 24 of the 1828 Act provided that all laws and statutes in force within the realm of England at the time of passing of that Act (not being inconsistent therewith, or with any charter or letters patent or order in council which might be issued in pursuance thereof), should be applied in the administration of justice of the courts of New South Wales and Van Diemen's Land respectively, so far as the same could be applied within those colonies.

[46] There is also s 20 of the *Supreme Court Act* 1867, which read:

> "Provided and be it declared and enacted that all laws and statutes in force within the realm of England at the time of the passing of the [*Australian Courts Act* 1828] (not being inconsistent herewith or with any law or statute now in force in this Colony) shall be applied in the administration of justice in the Courts of Queensland so far as the same can be applied within the said colony
>
> **Proviso not to extend to Queensland Imperial Acts not now in force there.** But nothing herein shall have the effect of extending to Queensland the operation of any Imperial Act not now extending to Queensland or of diminishing the present jurisdiction power or authority of the said Supreme Court or of the judges or any judge thereof."

[47] The proviso to s 20 restricted the continued application of Imperial legislation to that then extending to Queensland. Section 33[8] of the *Constitution Act* 1867-1987 (Qld) (assented to on the same date as the *Supreme Court Act* 1867) contained the more general provision that:

> "All laws statutes and ordinances which at the time when this Act shall come into operation shall be in force within the said Colony

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6. Issued pursued to powers granted by the *New South Wales Constitution Act* 1855 (Imp).
7. In fact constituted pursuant to the *New South Wales Act* 1823 (Imp).
8. Repealed by s 16 of the *Constitution (Office of Governor) Act* 1987.

> shall remain and continue to be of the same authority as if this Act had not been made except in so far as the same are repealed or varied hereby."

For either of those Acts of the Queensland Parliament to have continued in force the Bill of Rights of 1688 had to be applicable to the Colony when it came into being separate from New South Wales in 1859. The wording of the Letters Patent dated 6 June 1859 constituting the new Colony command the Governor-in-Chief Sir George Bowen, appointed by those Letters Patent, to "execute all things that shall belong to your said command" according to the powers and directions granted by the commission then given to him and to such instructions as he might from time to time thereafter be given and "according to such laws and ordinances as are now in force in our said Colony of New South Wales and its dependencies and as shall hereafter be in force in our Colony of Queensland." Those Letters Patent, and the terms of Article 20 of the Order in Council of 6 June 1859 accompanying those Letters Patent,[9] would have applied the Bill of Rights in the new Colony to the extent it then applied in New South Wales.

[48] New South Wales, from which the Colony of Queensland was then being separated, had had a system of responsible government conferred on it by the *New South Wales Constitution Act* 1855 (Imp). Provision for a Legislative Council, part elected and part appointed, had been made in the *Australian Constitutions Act* 1842 5 & 6 Vic. c. 76 (Imperial). There had been at least since that year a deliberative body with legislative powers to which the provisions of Article 9 could apply. By 1842 the situation in the Colony had already changed considerably from that applying in 1828.

[49] In *Quan Yick v Hinds* (1905) 2 CLR 345 the High Court construed s 24 of the *Australian Courts Act* 1828 to hold that the question whether an Imperial Act was suitable or unsuitable in its nature to the needs of the Colony was to be determined by a consideration of the conditions in it in 1828. Griffith CJ wrote at 356:

> "If the provisions of the Statute were intrinsically incapable of application owing to the condition of the laws and institutions of the Colony, its applicability would be negatived on another and quite independent ground."

Barton J wrote (at 367) that unless a statutory provision extended to New South Wales immediately on the passing of the *Australian Courts Act*, in his opinion it never came into force in Australia at all. His Honour adopted with approval comments by Stephen J in *Ex parte Lyons, In re Wilson*[10] that the question whether a particular Statute was in force might be determined by reference to the date (of the *Australian Courts Act*) alone, and that:

> "I cannot conceive that we are to determine the question by nice inquiries from time to time, as to the progress made by the Colony, in wealth or otherwise …"

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9. The terms of Article 20 are quoted in "The Supreme Court of Queensland" by BH McPherson (Butterworths) at page 19.
10. 1 Legge, 140.

[50] If that view had continued to apply the possibility is that the provisions of the Bill of Rights would not have applied; at least not Article 9. However, it has not, at least with respect to the common law. Gibbs J (as he then was) approved a view in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 590, which adopted a view earlier expressed in *Cooper v Stuart* (1889) 14 App. Cas. 286 at 291 that "as the population, wealth and commerce of the Colony increase, many rules and principles of English law which were unsuitable to its infancy, will gradually be attracted to it." Gibbs J explained that view as being that part of the common law which is suited to a more advanced state lies dormant, until occasion arises for enforcing it. His Honour observed that it would be indeed a poor birthright if the common law inherited by the settlers of New South Wales was only that applicable to the conditions of persons living in an open penitentiary. He expressly rejected an argument that only the law applicable to the primitive state of society in New South Wales in 1828 became part of the law of the colony.

[51] In *State Government Insurance Commission v Trigwell* (also reported in Vol 142 CLR at 617) Gibbs J suggested that a rather more liberal approach is taken when determining whether the adoption of a rule of the common law is under consideration, than when deciding whether a particular Statute was introduced into the law of a Colony. Even so, McHugh and Gummow JJ wrote in *Commissioner of Stamps (South Australia) v Telegraph Investment Company Pty Limited and Another* (1995) 184 CLR 453) at 466:

> "In the eastern colonies of Australia where s 24 of the *Australian Courts Act* 1828 (Imp) applied, the Bill of Rights was a statute in force "within the realm of England" in 1828, and, as such, applied except so far as later altered by local statute. In 1828, what became the colonies of Victoria and Queensland formed part of New South Wales and the *Australian Courts Act* applied directly to what was then Van Diemen's Land. On the other hand, in South Australia and Western Australia, it appears simply to have been regarded as axiomatic from the beginnings of European occupation that a statute such as the Bill of Rights would apply under the common law principles on the reception of law in settled colonies."

[52] Their Honours added, in apparent anticipation of an objection based on a strict application of the construction in *Quan Yick v Hinds* that:

> "However, in 1828, and at the later establishment of the colonies of Western Australia and South Australia, Art 4 of the *Bill of Rights* could apply to those colonies only proleptically. Its full effect would await the development of local parliamentary institutions." (At 467).

Those observations about Article 4, which prohibited the levying of money for the use of the Crown without the authority of Parliament, are equally applicable to Article 9.

[53] In *Egan v Willis* (1998) 195 CLR 424 Gaudron, Gummow and Hayne JJ considered (at 444-445) s 6 of the *Imperial Acts Application Act* 1969 (NSW), and the provision therein declaring that the *Bill of Rights* and various other Imperial statutes, so far as those Acts were in force in England on 25 July 1828, were in force in New South Wales on that day. Their Honours wrote of that section that it "restates the effect of the Imperial Act known as the *Australian Courts Act*." On

that view of that latter Act it clearly applied the Bill of Rights in New South Wales in 1828. They acknowledged that applying it in New South Wales presented some textual problems, if only because it is a statute that, when enacted, was directed to the English Courts and Parliament; but cited with apparent approval the observations by McHugh and Gummow JJ in *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* that in South Australia and Western Australia, two states where the *Australian Courts Act* never applied, it had been regarded as axiomatic that the Bill of Rights would apply under the common law principles.

[54] As long ago as 1922 very strong opinions were expressed by both Isaacs J and Higgins J in their judgments in the *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421. In that matter the High Court was considering the validity of agreements entered into between the executive government of the Commonwealth with that company, which company was engaged in the manufacture and sale of wool tops, which agreements consented to the sale of those tops in return for a share for the Commonwealth of the profits of the transaction or else an agreement by the company that the business would be carried on as an agent for the Commonwealth, in consideration for the Commonwealth paying the company an annual sum. The High Court heard argument before a bench of six Justices, which held that apart from any authority conferred by an Act of the Parliament or by a regulation thereunder, the executive government had no power to make or ratify any of those agreements; and arguments before a bench of three Justices, which held that neither the *War Precautions Act* 1914-1916 (Cth) nor the *War Precautions (Wool) Regulations* 1916 conferred any authority for the making of those agreements.

[55] Isaacs J and Higgins J sat on both benches. Isaacs J's judgment in the first includes the following passage, at 433,

> "With respect to the first three agreements, the vitiating cause is that, however formally expressed and however their constitutional effect may be disguised, they amount at bedrock to "taxation" of the individual; and, without parliamentary warrant, that is forbidden ground. Partly anticipating my reasons given later, I may quote a passage from a judgment of Lord *Parker* (then *Parker* J.) in *Bowles v Bank of England*, a passage which exemplifies this to a very remarkable degree. He said:- "By the statute figure 1 W. & M., usually known as the *Bill of Rights*, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament"…. A *fortiori* is the present case, where there has not been even a resolution of either House to support the claim."

[56] In his judgment as a member of the three person bench His Honour wrote as follows (at 463):

> "The ordinary meaning of "taxation," which is not altered by the Commonwealth Constitution, is the same in Australia as in England. In addition, the *Bill of Rights* is an Imperial statute in force in Australia by virtue of the Act 9 Geo. IV. c. 83, sec 24. That Act is a definite law which, though, as *May* says in his *Parliamentary Practice* (10th ed., at p. 4), it "was but a declaration of the ancient law of England," stands nevertheless as an unrepealed enactment operating of its own force as a law and as part of the Constitution of

> England (see per *Parker* J. in *Bowles v Bank of England*). And, except so far as altered by local statute, it is part also of the Constitution under which every Australian, whether as a member of a State or of the Commonwealth, lives and moves."[11]

[57] Isaacs J went on to hold (at 466), that the agreements amounted to the imposition of taxation not authorised by the *War Precautions Act* or those *Regulations*. Higgins J also held (at 475) that the relevant agreement was invalid on grounds which included transgression of the principles of the Bill of Rights without the express authority of Parliament. Those judgments express the majority view of that bench of the High Court constituted to hear that part of the matter, and are therefore an authoritative and binding judgment on the applicability of the provisions of the Bill of Rights as part of the constitutional law of the Commonwealth and each State.

[58] In *Cam and Sons Pty Limited v Ramsay* (1960) 104 CLR 247 at 258 Dixon CJ treated as settled by the 4th declaration in the Bill of Rights the constitutional principle that there cannot be any taxation of the subject without an Act of Parliament. Dixon CJ's acceptance of the application of the Bill of Rights as the source of that law and as part of the fabric of applicable constitutional law is as clear as was that of Isaacs J. The latter sourced that in the *Australian Courts Act*, as did Gaudron, Gummow and Hayne JJ in *Egan v Willis*; in the latter case Kirby J also wrote (at 489) that:-

> "When the Bill of Rights was enacted by the Parliament at Westminster, the only "Parlyament" referred to was the enacting one. However, the Bill of Rights is part of the constitutional heritage of Australia. It came with those who established the colonies. It applied in the colonies by the medium of imperial law…"

His Honour cited the *Australian Courts Act* for that proposition. Since Article 9 of the Bill of Rights appears to have been relevantly unaltered by any New South Wales legislation prior to 1859 or Queensland legislation since, I am satisfied it was in force as part of the law in this State in December 2001. To hold otherwise is to ignore both persuasive and binding authority, and what has been consistently described as part of our legal heritage.

[59] The provisions of Article 9 are relevantly identical with s 8(1) of the *Parliament of Queensland Act* 2001, for which it is the source. In addition to Article 9 it contains other declarations of matters of great principle declared and enacted by that English Parliament in 1688, and established only after great struggles, events and suffering. Some of those events are described in the judgment of McPherson JA in *Rowley v O'Chee* [2000] 1 Qd R 207 at 223. The significance of them in English and Australian constitutional history explains why courts have always been at pains to obey the injunction in Article 9, and not impede, hinder, prevent, detrimentally or

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11. The poetry of expression adds to the clarity and persuasiveness of the idea; as in his joint judgment with Rich J in *R v Boston* (1923) 33 CLR 386 at 404, explaining why it is no answer to a charge of corruptly receiving a secret payment for the recipient to say he or she would have thereafter acted the same way in carrying out their public duties in any event: "he has fastened upon himself golden fetters which preclude his freedom of action."

prejudicially affect, impair[12] or question the freedom of speech and debates or proceedings in the Parliament.

[60] I would dismiss the appeal and order the appellant pay the respondents' costs, assessed on the standard basis.

[61] **FRYBERG J:** At first instance Philippides J refused the respondents/defendants' application for summary judgment.[13] She acceded to their alternative application to strike out a number of paragraphs in the statement of claim and the reply.[14] After hearing submissions on costs, her Honour ordered that the plaintiff's costs of and incidental to the part of the application seeking an order for summary judgment be paid by the defendants, and that the defendants' costs of and incidental to the balance of the application to strike out be paid by the plaintiff.[15] The appellant/plaintiff now seeks to set aside part of the second of those orders, namely the order that paragraphs 12(a) and 13(a) of the further amended statement of claim ("the impugned paragraphs") be struck out. The respondents have not appealed or cross-appealed against the refusal of the other orders sought. Neither side has appealed against the costs order. The point now in issue in the proceedings is a narrow but nonetheless important one. Leave was granted to the Speaker of the Legislative Assembly to intervene.

[62] The impugned paragraphs have been set out in the reasons for judgment of McPherson JA. The order below was founded on s 8(1) of the *Parliament of Queensland Act 2001*, and that section formed the central plank of the respondents' argument, and that of the Speaker, in this appeal. No party placed any reliance upon any wider principle of mutual respect or comity such as was referred to by Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd*[16]. It was not argued by the appellant that the apparently wide effect of s 8(1) was in any way cut down by s 8(2); nor was it suggested that the differences between the wording of s 8(1) and art 9 of the Bill of Rights were of any significance.

[63] I confess to having had some difficulty in coming to grips with precisely what was in issue in the appeal. Read in isolation, the impugned paragraphs do not at first sight appear to infringe s 8(1). It is, I suppose, possible to imagine a pleading which would directly run foul of the section. Perhaps an express assertion that a Member of Parliament had lied to the Assembly would be an example. The existence on the Court record of a pleading which contravened the section might lead the Court to make a striking out order without more being shown. The pleading itself might offend against the section. The Speaker submitted that when the statement of claim was looked at as a whole, this was just such a case. The respondents adopted a different approach. They relied on r 171 of the *Uniform Civil Procedure Rules* 1999. They submitted (putting it broadly) that it was inevitable if the impugned paragraphs remained in the pleading that a breach of the section would occur at the trial. The appellant seemed to accept that if this were so, it would constitute grounds for striking out under r 171. However, that docility cannot relieve the

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12. These are the meanings attributed to "impeach" by McPherson JA in *Rowley v O'Chee*, repeating and relying on 17th Century usage.
13. *Erglis v Buckley & Ors* [2003] QSC 394 (11 November 2003).
14. *Erglis v Buckley & Ors* [2003] QSC 440 (24 December 2003).
15. *Erglis v Buckley & Ors* [2004] QSC 62 (15 March 2004).
16. [1995] 1 AC 321 at p 332; see also *Pickin v British Railways Board* [1974] AC 765 at p 799.

respondents from the need to demonstrate a clear case. The burdens which lie upon litigants seeking summarily to strike out an opponent's pleading are well known.[17]

[64] The question whether the existing pleadings will necessarily produce a breach of s 8 at the trial can be answered only when the issues raised by the pleadings are identified. Unfortunately, as is so often the case with defamation pleadings, there are a number of deficiencies in the pleadings on both sides. It seems that in this Division there is not even a common understanding of what the pleadings mean. I very much doubt that they will remain unchanged by the time of trial. It is regrettable that the issues raised in this appeal should be decided in such a context.

The pleadings

[65] The following facts are admitted. The appellant was a registered nurse with substantial experience in oncology nursing. She was employed as a nurse in ward 9D of the Royal Brisbane Hospital from about August 1989 to October 2001. The hospital was owned and operated by the State of Queensland, which employed the other defendants ("the nursing defendants") in that ward. On 5 December 2001, those defendants sent a letter by facsimile to the Minister for Health. It contained words which, in their natural and ordinary meaning, meant and were understood to mean, that the appellant (among other things):

(a) was unhelpful to fellow nurses;
(b) was an obstructive influence in the workplace;
(c) was a person who had a negative impact on staff morale in the workplace;
(d) was a manipulative person;
(e) was a malicious person.

These imputations were defamatory.

[66] The appellant alleges that the words had a number of other defamatory meanings:

(a) she was a dishonest person;
(b) she caused staff to move because of a campaign she waged to undermine the clinical nurse consultant and the ward;
(c) she was a nurse of questionable clinical ability;
(d) she was prone to waging vexatious campaigns in the workplace;
(e) she was of bad character;
(f) she lacked ethical standards and was unethical;
(g) she was a liar;
(h) she was vexatious;
(i) she untruthfully claimed to be a senior nurse.

The respondents admit that these meanings would be defamatory but deny that they can be understood from the terms of the letter, and deny that they were about the appellant.

[67] The following facts are admitted or are deemed to be admitted[18]. Before the letter was composed, there was an ongoing debate in the Queensland Parliament about ward 9D. In that debate, a number of serious allegations about the operation of the

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17. *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.
18. *Uniform Civil Procedure Rules*, r 166(1) and, in relation to the general denial in para 17 of the defence, r 166(5).

ward had been made. Those allegations, or most of them, reflected statements made to the leader of the opposition by the appellant and were widely published in the media. At the time the letter was sent, the nursing defendants knew it was likely to be republished in Parliament. It was a likely consequence of that republication that the contents of the letter would become known to some other members of the hospital's nursing staff and some other members of the nursing profession. It transpired that the letter was read out and tabled in the Legislative Assembly by the Minister on the afternoon it was sent.[19] As a consequence, the words and imputations then became known to the public at large and the wider nursing community. It will be necessary to revert to that last point later in these reasons.[20]

[68] The appellant alleges and the respondents deny that the nursing defendants knew that as a consequence of the republication, the words and the imputations would become known to the public at large. She alleges[21], and the respondents deny, that her reputation has been damaged by the publication (ie, so far as is presently relevant, the sending of the facsimile letter). She also pleads[22] that "it can be inferred" from specified matters that in publishing the words the respondents acted (to express a number of detailed assertions compendiously) deliberately, knowingly and with contumelious disregard for her rights. That paragraph is defective: the words "it can be inferred from" make it so. What is stated as the inferences is what should have been pleaded, not that those facts can be inferred. That is fortunate for the respondents since they have, perhaps by oversight, omitted to deny this paragraph.

[69] The appellant alleges that the publication was a reprisal against her for certain innocent and proper conduct and was to discourage her from providing material to the media and the leader of the opposition and was to discredit her. The defendants plead a general denial of these allegations "for the reasons pleaded herein", but there are no reasons for that denial pleaded anywhere in the defence. Consequently they are deemed to have been admitted.[23]

[70] Finally the appellant pleads in para 19(d), apparently in order to comply with r 155(2)(c) of the *Uniform Civil Procedure Rules*, that her claim for compensatory damages[24] is (among other things) to convince a person to whom the defamation was published or republished of the baselessness of it. That might have been objected to because she has not expressly pleaded that the defamation was in fact baseless. However, that point has not been taken and, for present purposes, we should proceed on the basis that there is an assertion in this paragraph of the falsity of the imputations published or republished. Paragraph 19(d) also is deemed to have been admitted.[25]

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19. That is, 5 December 2001. Although the *Parliament of Queensland Act 2001* did not commence until 6 June 2002, s 8 has retrospective effect: see s 154. The tabling and reading of the letter were part of proceedings in the Assembly: see para [82] below.
20. Below, para [74].
21. Statement of claim, para 15.
22. Statement of claim, para 14.
23. *Uniform Civil Procedure Rules*, r 166(5).
24. She makes separate claims for compensatory and aggravated damages. It would seem to follow from *Timms v Clift* [1998] 2 Qd R 100 that it is wrong to proceed in this way.
25. *Uniform Civil Procedure Rules*, r 166(5).

[71] The respondents plead that the letter was produced for the very purpose of republication in Parliament. They also claim that it was written at the invitation of the Minister to respond to the allegations in Parliament. They rely on s 8 and s 9 of the *Parliament of Queensland Act 2001*. The appellant denies these claims.

[72] The respondents plead qualified privilege, namely that the publication was made in good faith:

(a) for the protection of their interests, namely their reputation, or for the public good (*Defamation Act 1889* s 16(1)(c));
(b) with respect to a subject as to which the Minister had such an interest in knowing the truth as to make their conduct in making the publication reasonable in the circumstances (*Defamation Act 1889* s 16(1)(e));
(c) in the course of or for the purposes of the discussion on a subject of public interest, the public discussion of which was for the public benefit and so far as the defamatory manner consisted of comment, the comment was fair (*Defamation Act 1889* s 16(1)(h));
(d) in answer to an inquiry made of the nursing defendants by the Minister relating to a subject as to which the Minister had an interest in knowing the truth (*Defamation Act 1889* s 16(1)(d));
(e) in order to answer or refute defamatory manner published by the plaintiff concerning the defendants (*Defamation Act 1889* s 16(1)(g)).

They no longer allege truth and public benefit. Perhaps surprisingly, they do not allege that they are entitled to the benefit of any privilege attaching to the republication.[26]

[73] Two particular features of that description of the pleadings should be noticed. First, there is no issue in the appeal regarding the possible application of s 8 to the pleas of qualified privilege. That is not to say that there will not be such issues at trial. Second, of the impugned paragraphs, para 13(a) is admitted (albeit that additional circumstances of publication are pleaded); and para 12(a) is admitted save as to the state of the nursing defendants' knowledge.

[74] I now return to the allegation that as a consequence of the tabling and reading of the facsimile letter, "the words and thereby the imputations then became known to the public at large".[27] Most discussions of liability in defamation for republication begin with a citation from *Gatley on Libel and Slander*:

> "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

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26. Compare T K Tobin and M G Sexton: *Australian Defamation Law and Practice*, vol 1, p 3105, also *Belbin v McLean & Anor* [2004] QCA 181.
27. Above, para [67].

> publication the damage which he has suffered by reason of its repetition, so long as such damage is not too remote."[28]

In respect of the publication by the facsimile letter, the appellant has adopted the latter course.

[75] To succeed in her action the appellant must on this approach demonstrate a causal link between the original publication and the damage to her reputation. She may do this by proving that most of her damage derived from the republication. We were told that that is what she intends to do. I am, for present purposes, prepared to assume that the wider the audience the greater the damage to her reputation. She must also prove that the republication was caused by the original publication. I use "caused" in this context to refer to legal causation; the damage must not be too remote. Putting it another way, the appellant must demonstrate a chain of causation between the original wrongful act and the damage suffered. A plaintiff may prove that republication was in this sense caused by the original publication by demonstrating either that the original publisher foresaw that further publication (with consequentially increased damages) would probably take place, or that a reasonable person in his or her position ought to have so foreseen.[29]

[76] In the present case, the appellant relies upon republication in Parliament as a step in proving causation. She has secured admissions that the nursing defendants knew that such republication was likely when they sent the facsimile letter. It would not be difficult for a jury to infer that damage to her reputation caused by the reading and tabling of the letter was damage caused by its original publication. The real issue at this point relates to the extent of that damage. That must depend upon the number of persons to whom the republication "then" (as the pleading alleges) occurred. The appellant has not condescended to particularise this. Doubtless, a number of members would have been in the Assembly when the Minister read the letter. Perhaps some members of the public might have been present in the visitor's gallery or in the Speaker's gallery. A few parliamentary staff would have been present. In addition there may be people who have read the letter by referring to the document tabled in the Assembly. There may be a few others. The appellant does not rely on republication to any of these as an identified group. She alleges (and alleges only) that as a consequence of the republication in the Assembly, the imputations became known to the public at large. That is elliptical to the point of embarrassment. There is no allegation of fact specifying how the reading and tabling of the letter caused the imputations "then" to become known to the public at large. Common sense suggests that the appellant might wish to prove a further republication. She might wish to rely upon republication in Hansard, in newspapers or on television or radio. She might wish to rely on further republications not of the whole letter, but of extracts or precis of, or comments upon, it. One does not know because no further republication has been pleaded. What is clear is that, despite the use of "then", she cannot be alleging that the republication in the Assembly was to the public at large. She must be alleging that their knowledge of the imputations was acquired indirectly.

[77] However the respondents make no complaint about this. They are deemed to have admitted that the imputations did become known to the public at large, and as a

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28. 9th ed (1998), p 154.
29. *McManus v Beckham* [2002] 4 All ER 497 at pp 504, 514.

consequence of the letter being read and tabled in the Assembly. The appellant alleges that the nursing respondents knew that this would happen. In other words she seeks to prove causation by reference to actual knowledge on the part of the nursing respondents, not by reference to what a reasonable person in their position ought to have foreseen. The respondents deny such knowledge. In that state of the pleadings, the appellant could lead evidence going directly to the nursing respondents' state of mind, but could not lead evidence of any further republication, or the nursing respondents' knowledge of the likelihood of any such republication.[30] Neither could she lead evidence of what a reasonable person would have foreseen in relation to further republication. As the pleading stands all the damage resulting from publication of the letter is alleged as a consequence of the reading and tabling of the letter.[31] None is alleged as a consequence of further republication.

[78] To summarise this mess, the appellant does not allege, and on the present pleading cannot lead evidence to prove, damage by republication of the Minister's speech or the tabled letter. She alleges, and the respondents are deemed to admit, that the imputations became known to the public at large as a consequence of the Minister's conduct. Despite the use of "then" in para 13(a), that must be understood as meaning that this was an indirect consequence of that conduct; the possibility of the public at large all hearing the speech or reading the tabled letter is absurd.

The parties' submissions summarised

[79] The respondents made the following submissions:

(a) "In presenting her claim to the court for damages for the publication in Parliament, the appellant must necessarily criticize and complain about what was there said about her. She must argue that what was said was untrue, or unfair, or unjustified, or is tainted by the bad faith of those providing the information to the Minister. The court is thereby being asked to say that what occurred in Parliament should not have occurred, and the persons responsible must pay damages."

(b) "(i) the appellant seeks damages for what was said in Parliament;
(ii) the quantum of those damages will depend on, as the appellant's outline makes clear, 'the extent of the republication' ie what the Minister said, to which members of Parliament, the extent to which it was reported, and with what adverse effect on the appellant's reputation;
(iii) the appellant will seek to demonstrate that the republication in Parliament was a 'natural and probable consequence of it having been sent to the Minister'."

(c) "As her Honour found, by seeking damages for the republication in Parliament, the appellant will inevitably have to make submissions on 'the adverse consequences for the plaintiff flowing from the Minister's conduct in Parliament."

(d) "[T]he prospect that a member of Parliament's informant may be liable for increased damages by reason of the member's republication in Parliament could deter the member from using that information in a debate and would

30. *Uniform Civil Procedure Rules*, r 149.
31. Except perhaps any damage to her reputation in the mind of the Minister personally.

> thereby plainly hinder, impede or impair the freedom of speech, debate and proceedings in Parliament."

They asked rhetorically whether counsel for the appellant would say to the jury things which the appellant herself said to the Assembly when exercising her citizen's right of reply.

[80] The appellant submitted that the impugned paragraphs did no more than set out the historical fact of the republication of the sting of the document by a third party. A plaintiff is permitted to prove the extent of the publication of defamatory matter. He or she is entitled to be compensated for the damage to reputation commensurate with the number of people to whom the defamation was conveyed. The appellant seeks only to prove the extent of publication. Proceedings in Parliament are not impeached or questioned in the relevant sense. The other parties did not challenge the proposition that there was no breach of s 8 merely by proof of what happened in Parliament as historical fact. They submitted that the impugned paragraphs did more than prove what happened.

[81] The primary submission on behalf of the Speaker was that the statement of claim itself questions the proceedings in Parliament in a way which is impermissible under s 8. The Speaker also adopted the submissions made on behalf of the respondents. The primary submission took as its starting point the proposition that the statement by the Minister was a proceeding in the Assembly. The Speaker submitted that the pleading alleges that the statement was defamatory and that its publication in Parliament caused damage to the appellant's reputation by itself, and by republication of what was said in Parliament. In it, the appellant seeks to hold the respondents liable in damages on account of the publication of the defamatory imputations in Parliament. At least the allegation that what was published was defamatory of the appellant and the allegation that the publication of that defamation caused damage to the appellant's reputation amounting to a contravention of the prohibition in s 8(1), in that they involve questioning the freedom of speech and debates or proceedings in the Assembly. That was cured by the order made below.

Section 8(1) of the *Parliament of Queensland Act 2001*

[82] It is convenient at this point to set out the words of s 8(1):

> "**(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."

It was accepted on all sides that the tabling and reading of the letter were part of proceedings in the Assembly.

[83] "Impeached" and "questioned" are not in this context words of precise denotation. In *Erskine May's Treatise*, attention is drawn to the use of "impeached" in the Commons Protestation of 1621 "where it appears in a very broad context along with 'imprisonment … molestation … censure'"[32]. In *Rowley v O'Chee*, McPherson JA said:

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32. *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed (1997), p 93, citing J R Tanner: *Constitutional Documents of the Reign of James I* (1952), p 289.

> "In modern parlance 'impeach' is often used to mean 'to bring a charge or accusation against', which is the fourth of the meanings ascribed to it in the *Oxford Dictionary* …. The first is 'to impede, hinder, prevent', and the second:
>
> > 'to hinder the action, progress, or well-being of; to affect detrimentally or prejudicially; to hurt, harm, injure, endamage, impair.'
>
> According to the *Oxford Dictionary*, the second meaning is now obsolete; but, from the examples given in that work, both it and the first meaning were in current use at the time the Bill of Rights was enacted in 1688. It is therefore to those meanings that resort should be made in interpreting the word 'impeach' in art. 9 of the Bill of Rights. 'The best and surest mode of construing an instrument', said Brennan J. (as he then was) in *Corporate Affairs Commission (N.S.W) v. Yuill* (1991) 172 C.L.R. 319, 322-323, 'is to read it in the sense which would have been applied when it was drawn up'.
>
> Adopting that course with respect to art. 9 has the consequence that, when read with s. 16(2) of the 1987 Act, it means that preparation of a document for purposes of or incidental to the transacting of the business of a House is not to be impeded, hindered or prevented (first meaning); or is not to be detrimentally or prejudicially affected, or impaired (second meaning). 'Impair' was the meaning adopted by Davies J.A. in *Laurance v. Katter* (1996) 141 A.L.R. 447, 490; and either it or any of the other meanings mentioned first and second in the *Oxford Dictionary* may be used in interpreting art. 9."

I respectfully agree with his Honour. To the meanings which he cites I would add the third which appears in the *Oxford English Dictionary*: "To challenge, call in question, cast an imputation upon, attack; to discredit, disparage." The examples given for this meaning are from 1590, 1600, 1612, 1743, 1767 and 1888, and it is still in use. I would not infer that it had dropped out of use in 1688 merely from the absence of an example from around that time.

[84] The same mode of construction should be adopted in respect of "questioned". The *OED* arranges the definitions of "question" under six sense numbers, parts of three of which are presently relevant. The first is, "To examine judicially; hence, to call to account, challenge, accuse *(of)*." The second is, "To call in question, dispute, oppose." The third is, "To ask or inquire about, to investigate (a thing)." The first usage is now rare and the last both obsolete and rare, the latest example of its use being in 1655. Usage of the first and second definitions brackets the time of the passage of the Bill of Rights.

[85] Identifying possible meanings of words is but one part of the process of statutory interpretation. The interpretation of s 8 is not simply a process of substituting the identified meanings for the words of the section. It remains necessary to give the section a purposive construction.[33] Article 9 may have been the product of a struggle between the Crown and the houses of Parliament, but the immediate

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33. *Acts Interpretation Act 1954*, s 14A.

objects of its attention were the courts. The Supreme Court of the United States has observed that the article was born primarily

> "to prevent intimidation by the executive and accountability before a possibly hostile judiciary. In the notorious proceedings of King Charles I against Eliot, Hollis, and Valentine, 3 How St Tr 294 (1629), the Crown was able to imprison members of Commons on charges of seditious libel and conspiracy to detain the Speaker in the chair to prevent adjournment. Even after the Restoration, as Holdsworth noted, '(t)he law of seditious libel was interpreted with the utmost harshness against those whose political or religious tenets were distasteful to the government.' VI Holdsworth, A History of English Law 214 (1927). It was not only fear of the executive that caused concern in Parliament but of the judiciary as well, for the judges were often lackeys of the Stuart monarchs, levying punishment more 'to the wishes of the crown than to the gravity of the offence.' Id., at 214--215. There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England …."[34]

On the other hand the constitutional changes of the late 17th and early 18th centuries laid the foundations for a truly independent judiciary and for the supremacy of the rule of law. The latter was not something which was forefront in the mind of the Parliament when the Bill of Rights was enacted. Holdsworth wrote:

> "After the Restoration the privileges of both the Houses of Parliament were for the most part unquestioned. We have seen that certain proceedings in the courts against Speaker Williams, and some other officials of the House, gave rise to a clause in the Bill of Rights. But we shall see that there was something to be said for the action of the judges in those cases. There are no such flagrant and indefensible violations of privilege as occurred in the earlier part of the century. On the contrary, what was to be feared was, not that the crown would encroach on the privilege of Parliament, but that either individual members of the Houses of Lords or Commons, or one or other House collectively, would, under cover of privilege, encroach upon the rights and liberties of the subject, and the supremacy of the law.
>
> …
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> More important from the point of view of public law are the extensions of privilege, which both the Houses collectively sometimes sought to establish. … Privilege, in fact, in the eyes of the House of Lords and the House of Commons, comprised a set of powers almost as vague and elastic as those comprised in the prerogative. Like prerogative, its relations to the law had never been accurately ascertained. … It was not till after the Revolution, when the Bench had been purged, and when the judges' tenure of office had been made secure, that any sort of settlement of the law upon

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34. *United States v Johnson* (1966) 383 US 169. McPherson JA referred to the events of 1629 in somewhat more detail in *Rowley v O'Chee* [2000] 1 Qd R 207 at pp 223.

> this topic could be made. Even then its settlement has been extremely slow and difficult. Assemblies, whether representative or otherwise, are as indulgent to their own claims to exercise arbitrary powers as they are severe upon the claims of others to exercise such powers. They are as impatient of the control of the law as they are indignant at any one else's attempts to evade this control."[35]

In construing art 9, the courts have been as much concerned to protect the rights of citizens as to preserve the liberties of Parliament.

The primary submission of the Speaker

[86] Does the statement of claim, simply by its presence on the record of the court in its present terms, contravene s 8? The Speaker's submissions were directed only at striking out para 13(a) of the statement of claim.[36] Striking out that paragraph would effectively destroy the whole of the claim based on publication of the facsimile letter. The Speaker sought no order in relation to other parts of that claim, eg para 19(d) which refers to the baselessness of the defamation. The Speaker submitted that the pleading alleges publication of defamatory matter in Parliament; and damage to the appellant's reputation caused by publication in Parliament and by republication of what was said in Parliament.

[87] For the reasons set out above, I do not accept that the statement of claim is alleging that the republication in the Assembly was directly to the public at large.[37] No claim is made in respect of persons who heard the Minister in the Assembly or read the tabled document. The statement of claim alleges that by some unspecified process, which must have occurred outside the Assembly, the imputations became known to the public at large. That knowledge was the direct cause of the alleged damage to the appellant's reputation. The Minister's conduct is not alleged to have caused the damage directly. It is alleged simply as one step in the chain of events which led ultimately to the damage. The happening of that step, and an indirect consequence of it (public knowledge of the imputations), are admitted. The first question is whether the existence on the Court record of a statement of claim containing an assertion of damage caused indirectly and in the circumstances alleged contravenes s 8.

[88] The second question is whether the existence on the Court record of a statement of claim containing an allegation that a member published defamatory matter in the course of a speech in the Assembly contravenes s 8. It must be the case that members frequently publish defamatory matter in their speeches. Often they may have a duty to do so. That is why, even apart from s 8, they have absolute privilege (ie exemption from liability "as for defamation"[38]) for their speeches. The law recognises their right to publish defamatory matter in speeches in the Assembly because the right is seen as inhering for the public benefit. Is the mere existence on the Court record of a pleading asserting the exercise of this right a contravention of s 8?

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35. A *History of English Law*, vol VI, pp 256-8.
36. The submission challenged the continued relevance of para 12(a) if para 13(a) were struck out; but left that issue to the parties.
37. Paragraph [76].
38. *Defamation Act 1889*, s 10.

[89] In my judgment neither the allegation of indirect damage nor that of publication of defamatory matter in the House causes the presence of the statement of claim on the record of the Court to constitute an impeaching or questioning of freedom of speech and debate or proceedings in the Assembly. The pleading does not, by reason of those allegations, impede, hinder or prevent any of those matters. It does not hinder their action, progress or well-being. It does not affect them detrimentally or prejudicially. It does not hurt, harm, injure, endamage or impair them. It does not challenge them, call them in question, cast any imputation upon them, attack them, discredit them or disparage them. It does not require any examination of them judicially, nor call them to account. It does not dispute or oppose them. It does not ask about or inquire of or investigate them. In my judgment the primary submission of the Speaker should be rejected.

The submissions of the respondents

[90] A preliminary question arises in relation to the first three of the respondents' submissions referred to above: is it true that the appellant will inevitably lead evidence, cross-examine and make submissions of the nature and in the manner the respondents assert? It is convenient to deal with that question first in relation to each submission.

[91] The generality of some of the assertions in the first submission[39] makes it impossible to say that the predicted conduct must occur. The respondents do not specify what form the criticising and complaining referred to would take. It does not seem to me inevitable that the appellant must criticise or complain about the Minister's speech as such. There may be some criticism or complaint about the content of the facsimile letter, but that will be in relation to the publication to the Minister. The subsequent reading of the letter in the Assembly cannot prevent that. As observed above, there is no claim for any damage to the appellant's reputation in the mind of anyone who heard the speech or read the Parliamentary papers.[40] As to the particular matters in that submission, it does not seem to me that the court is being asked to say that what occurred in Parliament should not have occurred; far less does it seem to me that it is inevitable that such a submission must be made. I do not see how it is inevitable that by reason of the impugned paragraphs, the appellant must argue what was said was unfair. If there is to be any argument about unfairness, it will arise from the respondents' plea of qualified privilege. The same would be true of any argument to the effect that what was said was not justified; and in any event, the respondents have withdrawn their plea of justification. There is no assertion that what the Minister said was "tainted by the bad faith of those providing the information" and I see no reason why evidence or submissions to this effect would be inevitable.

[92] The one matter referred to in the respondents' first submission which must arise is the truth of what was in the letter. The appellant intends to prove not only the baselessness of the original publication (which was outside Parliament), but also the baselessness of the republication in the Assembly. That question goes to damages. While the allegation remains in the pleading, it must be assumed that the appellant will lead evidence, cross-examine and make submissions to support it.

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39. Paragraph [79] (a) above.
40. Paragraph [76].

[93] The respondents' second submission may be disposed of quickly. The appellant does not seek damages for what was said in Parliament. The quantum of those damages will not depend on what the Minister said as such (although it will no doubt be affected by what was in the original facsimile letter). It will be irrelevant to establish to which members of Parliament the Minister spoke. It is not open to the appellant on the present pleading to lead evidence of the extent to which the Minister's speech was reported. Even if it were, evidence of the "adverse effect on the appellant's reputation" would relate only to the effect of the reporting (ie the further republication). That is covered by the respondents' third submission.

[94] The reference in the third submission to the adverse consequences flowing from the Minister's conduct in Parliament is ambiguous. The appellant makes no claim for damage caused by publication to those who heard the speech in Parliament or read the Parliamentary papers. However, she does claim for damage to her reputation among the public at large. That is damage which flowed indirectly from the Minister's conduct in Parliament.

[95] In summary, it seems to me that on the present pleading the only matters referred to by the respondents which must inevitably arise at trial are the truth of the imputations and the damage flowing indirectly from the reading and tabling of the letter.

[96] The question whether leading evidence, cross-examining and making submissions about the truth of the imputations will inevitably contravene s 8 is embarrassed by the form of the pleading. If the claim alleged (and alleged only) that the Minister's speech was heard by (say) certain reporters for (say) certain media outlets and Hansard; that as a result of hearing the speech those reporters caused it, or extracts from it, or a precis of it or a commentary upon it to be published in certain ways to the public at large; and that thereby the appellant's reputation was damaged, it would not be possible to say that it was inevitable at trial that s 8 would be contravened. In those circumstances, the evidence led, the cross examination and the submissions would be directed toward the truth or otherwise of the content of the ultimate publication (which might or might not be identical to the original letter), and the damage caused by it. It is true that as a matter of logic, it might be deduced that what was true of the ultimate publication was also true of what was said and done by the Minister in Parliament. Such a deduction would be drawn by an observer. It would not be an issue in court, and hence would not be the subject of evidence, cross examination or submission. It would be otherwise if there were issues about what precisely the Minister said or which reporters were present when she spoke. In my judgment the impeachment or questioning arising under s 8 must impinge directly on the freedom of speech, the freedom of debate or the proceedings in the Assembly.

[97] The present statement of claim does not focus only on events subsequent to the Minister's speech. It asserts that the republication (ie by the Minister) was baseless. It claims damages to convince a person to whom that republication occurred that it was baseless, yet it claims damages only for republication to the public at large, who could not have heard the speech. Taken literally para 19(d) of the statement of claim presages evidence directly pointing to the untruth of what the Minister said. Such evidence would in my view satisfy the meaning of "impeach" and "question" by a comfortable margin.

[98] Had the respondents mounted an attack on that paragraph, it would as it presently stands have been vulnerable. They have not done so. They seek simply to uphold the order below. I do not think that any difficulties which may be anticipated at trial as a result of the presence of para 19(d) are cured by striking out either paras 12(a) and 13(a). Consequently, whatever validity there may be in the respondents' argument on this point, it does not support the order made below.

[99] As to damage flowing indirectly from the Minister's conduct in Parliament, it seems to me that the case is covered by the appellant's submission: the impugned paragraphs did no more than set out the historical fact of the republication. I respectfully agree with McPherson JA that it now seems to be accepted that there is no objection to this course.

[100] The respondents' fourth submission is the one which has given me the most concern. It embodies the principal ground of the decision below. It seems to me that there is something to be said for the view that a member's freedom of speech might be impaired if there were a risk that by making a speech he or she would cause an informant to become liable for increased damages. Moreover such an outcome might cause the flow of information from outsiders to dry up. I do not think these concerns are overcome by reference to the member's immunity from action. They may depend upon how robust an approach members of the Legislative Assembly take to such matters. A robust approach is easier when one's own liability is unaffected. It may be that these are matters upon which evidence should be taken; I am not sure that I am in a position in its absence to form a view. More importantly, I do not think that the question should be determined in isolation from a determination of whether s 8 applied to the original publication by the nursing defendants to the Minister. That question was at the heart of the respondents' application for summary judgment. It will not be resolved until trial. The scope of protection which s 8 provides for communications to members from informants is an important factor in assessing the issue of impeachment by reason of exposing an informant to increased damages. I have therefore come to the conclusion that the striking out cannot be supported by this argument.

[101] The rhetorical question asked by counsel for the respondents did not advance the position.[41] The evidence and submissions at trial will be governed by the pleadings, not by what the appellant said in the exercise of her citizen's right of reply.

[102] In summary, neither the respondents nor the Speaker has shown that this was an appropriate case for striking out the impugned paragraphs.

Supplementary submissions

[103] After I wrote most of the foregoing reasons the Court received submissions requested from the parties on the question whether art 9 of the Bill of Rights applied in Queensland before 6 June 2002, when the *Parliament of Queensland Act 2001* came into force. It is not necessary to resolve that question in this appeal if s 8 of that Act applies to the case. In my judgment it does apply.[42] That is reason enough not to consider the question.

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41. Paragraph [79] above.
42 See note 19 above.

[104] If further reasons were needed, they exist. First, all parties submitted that art 9 did so apply. We received no submission against the proposition. It is undesirable to decide important questions in the absence of a contradictor. Second, the question is in my opinion a difficult and complex one. There appears to be no binding authority on it, ie no decision the ratio decidendi of which includes the question. Article 9 is unlikely to have applied unless it was received into New South Wales under s 24 of the *Australian Courts Act 1828.* In my opinion it is far from obvious that it was so received, at least on orthodox interpretations of that Act. On the other hand there are powerful dicta supporting the applicability of art 9, dicta which cannot be ignored.[43] Third, given the retrospective effect of s 8, the question may never have to be decided, except perhaps in the moots and journals of the Universities.

[105] The appellant and the respondents referred to other matters in their supplementary submissions. The appellant submitted that the "document" was not a proceeding in the Assembly within the meaning of s 9(2)(d) or (e) of the *Parliament of Queensland Act 2001*. Because this was said to be repeating a submission made earlier, it must relate to the original letter signed by the nursing defendants, not the facsimile used by the Minister in Parliament (the appellant did not submit that the tabling and reading of the facsimile did not occur in the course of proceedings in the Assembly). The question whether the original letter in any way attracted the protection of s 8 is not raised in the appeal[44]; it was not within the ambit of the Court's request for further submissions; and it has not been further addressed by the other parties. We should not consider it. The respondents submitted that s 8 regulates the conduct of proceedings after 6 June 2002 by its terms, and independently of s 154. It is unnecessary to decide that question, and it has not been addressed on behalf of the Speaker. We should not consider it either. These questions may arise in the course of the trial. If they do, they can be decided then.

Costs

[106] The appeal should be allowed with costs against the respondents. The position regarding costs below is a little more complicated.

[107] Only one application was before the court at first instance. In it the respondents sought summary judgment and in the alternative applied to strike out a number of paragraphs in the statement of claim and the reply. It came before Philippides J on 3, 5 and 6 November 2003. On the first day it was adjourned because of late amendments to the reply. On the second and third days argument on the question of summary judgment was heard. On 11 November 2003 her Honour delivered a reserved decision dismissing the application for summary judgment. The application came before her again on 13 November 2003 when the balance of the application was heard. She reserved her decision and delivered it on 24 December 2003. Her order contained six paragraphs striking out parts of the statement of claim and reply and ordering further particulars. Only para 2 of the order dealt with the impugned paragraphs. She agreed to receive written submission on costs and reserved her decision. That decision was delivered on 15 March 2004. In her order she disposed of costs of the adjournment on 3 November 2003; she ordered that the

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43. One is reminded of Salmon LJ's riposte to Ungoed-Thomas J in *Re Grosvenor Hotel London (No 2)* [1965] Ch 1210 at p 1257.
44. Although it was important in the application for summary judgment; see [2003] QSC 394.

appellant's costs of and incidental to that part of the application seeking an order for summary judgment be paid by the respondents; and she ordered that the respondents' costs of and incidental to the balance of the application to strike out be paid by the appellant. In this appeal, the notice of appeal seeks an order that the respondents pay the appellant the costs of the application before Philippides J.

[108] In her reasons for judgment on costs, her Honour observed that although there was only one application, it was comprised of two quite distinct parts and was in effect treated as two applications. There could be no objection to that approach. As regards the costs of the application to strike out, her Honour noted that the respondents had failed in respect of a number of other paragraphs. She held however that they were "largely successful … particularly with respect to the significant issue of republication dealt with in paras 12(a) and 13(a)" of the statement of claim. Accordingly, she held that they should have their costs of the application to strike out.

[109] In these circumstances I do not think it is possible for us to assess the respondents' ultimate level of success in relation to the strike out portion of the application. Prima facie they should pay so much of the costs of the strike out application as related to the impugned paragraphs.

[110] We should allow the parties to make written submissions on the question of costs at first instance.

Order

[111] I agree with the orders proposed by McPherson JA.